



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 11 Juna 2018
Ref. No.: RK 1270/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI37/18

Applicant

Naser Avdyli

**Request for constitutional review of
Judgment PML. No. 225/2017 of the Supreme Court
of 18 December 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 Naser Avdyli, village Kuk, municipality of Dragash (hereinafter, the Applicant), who is represented by Hazer Susuri, a lawyer from Prizren.

Challenged decision

2. The Applicant challenges Judgment PML. No. 225/2017 of the Supreme Court of 18 December 2017, which rejected as ungrounded the Applicant's request for protection of legality against Judgment PAKR. No. 518/2016 of the Court of Appeals of 4 May 2017, in connection with Judgment PKR. No. 263/15 of the Basic Court of 29 April 2016.

Subject matter

3. The subject matter is the constitutional review of the abovementioned challenged decision, which allegedly violate the Applicant's rights and freedoms guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to Fair and Impartial Trial], Article 33 [The Principle of Legality and Proportionality in Criminal Cases], of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), and Article 6 (Right to a fair trial) and Article 7 (No punishment without law) of the European Convention on Human Rights (hereinafter, the ECHR).

Legal basis

4. The Referral is based on Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Court (hereinafter, the Rules of Procedure).

Proceedings before the Court

5. On 9 March 2018, the Applicant submitted the Referral to the Court.
6. On 13 March 2018, in accordance with Rule 37 (1) of the Rules of Procedure, the President ordered the joinder of that KI37/18 with the Referral KI34/18.
7. On 14 March 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 22 March 2018, in accordance with Rule 37 (3) of the Rules of Procedure and under the request of the Applicant, the President ordered the severance of that Referral KI37/18 from the Referral KI34/18.
9. On the same date, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Ivan Čukalović (Presiding), Arta Rama-Hajrizi and Selvete Gërxhaliu-Krasniqi.
10. On 30 May 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. In August 2014, the Kosovo Police Service (hereinafter, the KPS) detained the Applicant of his liberty due to grounded suspicion that he committed the criminal offense „*Organization and participation in a terrorist group*“, under Article 143 (2) of the Criminal Code of Kosovo (hereinafter, the CCK).
12. On 27 August 2014, the Applicant, in the presence of the defense counsel assigned to him *ex officio*, was interrogated in the police office and stated: “[...] *I entered the territory of Syria illegally, and from that moment I was deployed in a military camp, there I have completed all weapon use training, including Ak47 and anti-aircraft weapons, and then I realized that it was the army of Al Nusra, I expressed my willingness to train because I did not know about weapons. [...]*”
13. On 7 May 2015, the Special Prosecutor submitted to the Basic Court in Prishtina - Department for Serious Crimes the Indictment PPS. No. 26/2015 against the Applicant and other members of the group, for the commission of the criminal offense „*Organization and participation in a terrorist group*”.
14. During the hearing before the Basic Court, the Applicant stated that the purpose of his trip to Syria was to obtain certain documents from the University of Damascus, where he studied until 2004, in order to continue his studies in Egypt. However, during his trip through Syria, quite accidentally, he ended up with the soldiers of “Al Nusra” movement, who then forced him to finish trainings for handling various types of weapons.
15. The Applicant's defense counsel before the Basic Court stated in his closing statement that the purpose of his trip was not to join the terrorist organization “Al Nusra”, but obtaining secondary school documents in order to continue the studies of theology in Egypt and thus it was not established that his client has committed the criminal offense he was charged with.
16. The Prosecutor stated in closing arguments that “[...] *some of the accused pleaded guilty to the criminal offences they were accused of, therefore, he did not engage in the assessment of evidence for these accused, but only assessed the evidence for the accused who did not plead guilty*”.
17. On 29 April 2015, the Basic Court (Judgment PKR. No. 263/15) found the Applicant guilty and sentenced him to 4 (four) years and 6 (six) months, because “*it can be clearly seen that the purpose of the departure of the accused (the Applicant) in Jordan and later in Syria was not to enroll at the faculty, because he did not provide any document or evidence that would testify to that, but all this was aimed at joining the terrorist group “Al Nusra”, and the fight against the Assad regime in Syria*”.
18. The Applicant filed with the Court of Appeals an appeal against Judgment of the Basic Court, alleging:
 - a) *essential violation of the provisions of the criminal procedure and erroneously determined factual situation (...) and*

- b) *violation of criminal law and decision on criminal sanction*".
19. On 4 May 2016, the Court of Appeals (Judgment PAKR. No. 518/2016) rejected as ungrounded the Applicant's appealing allegations.
20. Judgment of the Court of Appeals reads what follows.
- a) *"As regards the Applicant's appealing allegations of violation of the provisions of the criminal procedure, the Court finds that the enacting clause of the challenged judgment is clear and is not contradictory with the reasoning. The first instance court gave a clear reasoning of the existence of the criminal offense and the criminal liability of the accused for the criminal offense he was charged with. In the reasoning of the challenged judgment, the first instance court described the factual situation which it determined and gave a clear reasoning of such a finding of facts. It described the result of the evidence procedure explaining why it takes some facts as proven and others as unproven, as well as why the accused allegations regarding the evidence are ungrounded.*
- b) *As for the level of punishment, the Court notes that the determination of the punishment against the accused was made in accordance with the general rules for the calculation of punishment, in accordance with Article 73 of the CCK, so that sentences were imposed against them are proportionate to the social danger of the committed criminal offense*".
21. The Applicant filed with the Supreme Court a request for protection of legality against Judgment of the Court of Appeals, alleging that *"the challenged judgments contain essential violations of the provisions of the criminal procedure, which consist of the fact that in the enacting clause of the judgment all the data and circumstances containing the nature of the criminal offence for which the convict was found guilty are not included, and that the judgment relies on inadmissible and irrelevant evidence"*.
22. On 18 December 2017, the Supreme Court (Judgment PML. No. 225/2017) rejected as ungrounded the Applicant's request for protection of legality was, considering that *"the enacting clause of the judgment of the first instance court in relation to the accused is clear and contains all information about the time, place, manner of execution of the criminal offense, as well as other data that represent the essential elements of the committed criminal offense. In this criminal case, it was not disputed that in the critical time, as described in the enacting clause of the first instance court, the Applicant was in Syria, and the fact that he was there to join the terrorist formation"*.

Applicant's allegations

23. The Applicant alleges that the challenged Decision violated Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR, because they did not consider the evidence for which during the entire criminal proceedings he claimed to be inadmissible and unreliable.

24. The Applicant further alleges that the challenged Decision violated Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution, because, pursuant to the provisions of Article 143 (2) of the CCRK, it is prescribed that the criminal offense of the organization and participation in a terrorist group constitutes a criminal offense if committed in the territory of the Republic of Kosovo, and not in the territory of Syria or Jordan, which are not under the jurisdiction of the Kosovo legal system.
25. The Applicant also claims violation of Article 7 (No punishment without law) of the ECHR, which establishes that *“no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law (...) at the time when it was committed”*.
26. Finally, the Applicant requests the Court that the judgments: PML. No. 225/2017 of the Supreme Court, of 18 December 2017; PAKR. No. 518/2016 of the Court of Appeals, of 4 May 2017; and PKR. No. 263/15 of the Basic Court, of 29 April 2016, be declared unconstitutional.

Admissibility of Referral

27. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and as further provided in the Law and foreseen in the Rules of Procedure.
28. In this respect, the Court refers to §§ 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.*
29. The Court also 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.
30. In this regard, the Court considers that the Applicant is an authorized party, that he exhausted all legal remedies and filed his Referral within the prescribed deadline.
31. 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.

32. In addition, the Court takes into account Rule 36 [Admissibility Criteria] 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:

d) the Applicant does not sufficiently substantiate his claim.

33. The Court first indicates that the proceedings in question relate to the determination of the merits of the criminal charge and thus the Applicant enjoys the guarantees of the right to a fair trial under Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR. Therefore, the Court will examine whether the proceedings in question were fair as required by Article 6 (1) of the ECHR.

34. In this regard, the Court recalls Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

[...]”

35. Article 6 (Right to a fair trial) of the ECHR also establishes:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[...]“

36. The Applicant considers that the Basic Court has erroneously determined the factual situation and did not give proper reasons regarding the assessment of the evidence presented in that regard, leading to the erroneous conclusion that he committed the criminal offense “*Organization and participation in a terrorist group*”. Such actions of the Basic Court, according to the Applicant, resulted in a violation of his right to a fair trial.

37. The Court at the outset 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*”.

38. The Court reiterates that it is not its role to consider the erroneously determined factual situation or the erroneous application of the substantive

law, unless it put into question the rights and freedoms protected by the Constitution and the ECHR. Therefore, it cannot act as a “*fourth-instance court*”. (See ECtHR case *Akdivar v. Turkey*, No. 21893/93, judgment of 16 September 1996, § 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

39. In fact, the Court is not competent to replace the regular courts in assessing the facts and evidence; in general, it is the task of the regular courts to assess the facts and evidence presented. (See ECtHR case *Thomas v. United Kingdom*, application no. 19354/02, judgment of 10 May 2005).
40. The role of the Court is to examine whether the individual constitutional rights were violated or neglected, and whether the establishment of the facts and application of the law were possibly arbitrary or discriminatory.
41. Therefore, the Court will exceptionally enter the examination of the manner in which the regular courts have established the facts and applied the law to the established facts, only when it is obvious that in the particular proceedings there has been an arbitrary treatment by the regular courts, both in the procedure of establishing the facts and the application of relevant law.
42. Bearing in mind the above, the Court will examine whether the challenged decisions are based on an erroneously determined factual situation and the arbitrary application of substantive law.
43. The Court further recalls that it is beyond its jurisdiction to assess the quality of the conclusions of the regular courts, unless it is manifestly arbitrary. The Court shall also not interfere in the way the courts have admitted the evidence as evidentiary material and will not interfere with the discretion of the court when the regular courts trust the evidence of one party to the proceedings. It is the exclusive role of the regular courts. (See ECtHR case *Doorson v. the Netherlands*, Application no. 20524/92, Judgment of 26 March 1996, § 78).
44. The Court notes that the Basic Court fully described the process of assessment of evidence, bringing them into mutual connection, and the conclusion that the Applicant had committed a criminal offence which he was charged with.
45. Moreover, the Court points out that the Basic Court indicated the evidence on which it had based its conviction, which, in a complete and satisfactory manner, was interpreted in the reasoning of its decision.
46. In addition, the Court notes that in his statement during the main hearing before the Basic Court, the Applicant confirmed his earlier statement given to the police “*that during his stay in Syria with the soldiers of the Free Syrian Army, which he later found out to be members of the Al Nusra group, participated in military training, handling various types of weapons*”.
47. In this regard, the Court notes that the Basic Court gave a detailed reasoning from which it follows why it accepted the evidence of the Prosecution. Moreover, the Court notes that the Basic Court gave a detailed reasoning as to the conclusion that the Applicant's criminal actions had the characteristics of

the criminal offense he was charged with. The Court considers that the Basic Court reasoning is justified and fair.

48. Furthermore, the Court considers that the Court of Appeals responded to all the Applicant's allegations, both *regarding the violation of the provisions of the criminal procedure and the length of the imposed sentence.*
49. In addition, the Court notes that the Court of Appeals responded to the Applicant's appealing allegation as to why the certain evidence is acceptable, despite his claims on *that such evidence is unacceptable and unreliable.*
50. In fact, the Court of Appeals considered that *"the material evidence, such as the UON_SC / 11019 file and the file QEJ 115.04 AL QAIDA, are not the evidence that establish the guilt of the accused, but it cannot be concluded that they are inadmissible because, first, in accordance with the legal provisions - Article 257 of the CPC it is determined that when one evidence is deemed inadmissible, the court cannot base a judgment on it. Secondly, these files confirm the fact that the front "Al Nusrai Islamic State of the Shamai and Levan (ISIS) are terrorist organizations declared by the United Nations Organization, in these facts, is established a significant element of this criminal offence because the groups in which the accused participated are terrorist organizations".*
51. The Court also notes that the Applicant repeated mainly the same appealing allegations before the Supreme Court, to which the court responded in its Judgment. In that respect, the Supreme Court assessed that *"the enacting clauses of the first instance judgment in relation to the convict are clear and contain all information on the time, place, manner of execution of the criminal offense, as well as other data that constitute essential elements of the committed criminal offense. In the reasoning of the two judgments, the legal reasons for all the items of the Judgment were provided".*
52. In fact, the Court notes that the Supreme Court examined each and every ground of appeal of the Applicant, namely the arguments of inadmissible evidence; lack of legal certainty; contradictory decisions and lack of reasoning in judgments; the lack of reasons presented with regard to decisive facts.
53. In addition, the Court notes that the Supreme Court responded to the Applicant's allegation that the *"criminal offense of organization and participation in a terrorist group prescribed by Article 143, paragraph 2 of the CCK refers exclusively to the offense committed in the territory of Kosovo and not in the territory of another state".*
54. In this respect, the Supreme Court considered that allegation as ungrounded *"because of the fact that the convict in the present case was found guilty of the criminal offense under Article 143, paragraph 2 of the CCK, which provision states that for the existence of this criminal offense, the place of the incriminating activity is not relevant but, as it was said above, the participation in the activities of the terrorist group, which in this case has been established".*

55. Furthermore, as regards the Applicant's allegation of violation of Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution and Article 7 (No punishment without law) of ECHR, the Court recalls that Article 7 of the ECHR must be interpreted and applied in a manner which ensures effective judicial protection from *arbitrary prosecution, conviction or punishment*. The Court also recalls that Article 7 (1) of the ECHR does not guarantee only *the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law*. (See ECtHR case *Scoppola v. Italy* (No. 2), Application no. 10249/03, Judgment of 17 September 2009, § 109).
56. Bringing the aforementioned in connection with the Applicant's case, the Court considers that the criminal proceedings against the Applicant were conducted due to grounded suspicion of having committed the criminal offense of "*Organization and participation in a terrorist group*" under Article 143 (2) of the CCK, which was applicable in the time of the commission of the criminal offense. The Applicant was found guilty by a final judgment and was sentenced to imprisonment.
57. Thus, the Court concludes that there was no arbitrary decision on the commencement of the criminal proceedings against the Applicant, and also there was no retroactive application of the law to his detriment. It results that the allegations on violation of Article 33 of the Constitution and Article 7 of the ECHR are ungrounded.
58. Bearing in mind the above, the Court considers that the Applicant has not proved and substantiated any arbitrariness in the establishment of facts and application of the substantive law in the challenged decision.
59. Moreover, it is the Applicant's obligation to submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR and to substantiate his constitutional allegations. That assessment is in compliance with the jurisprudence of the Court. (See case of the Constitutional Court No. KI19/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, Resolution on Inadmissibility of 5 December 2013).
60. Therefore, the Court finds that the Applicant has not proved that the proceedings before the regular courts were unfair or arbitrary in order for the Constitutional Court to be satisfied that the core of the right to fair and impartial trial had been infringed or that the Applicant was denied any procedural guarantee, which would result in a violation of Articles 31 and 33 of the Constitution or Article 6 and 7 of the ECHR.
61. In sum, the Applicant's Referral is manifestly ill-founded on constitutional basis and is inadmissible in accordance with Rule 36 (1) (d) and (2) (d) 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) (d) of the Rules of Procedure, in the session held on 30 May 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



Almiro Rodrigues



President of the Constitutional Court



Arta Rama-Hajrizi