



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

Prishtina, on 15 October 2018
Ref. no.: RK1279/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI112/17

Applicant

Deno Denović

**Constitutional review of Judgment ARJ. No. 7/2017 of the Supreme Court
of Kosovo, of 16 May 2017**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Deno Denović, with residence in Mitrovica (hereinafter: the Applicant), who is represented by Zyhdi Axhemi, a lawyer from Prishtina.

Challenged decision

2. The challenged decision is Judgment [ARJ. No. 7/2017] of 16 May 2017 of the Supreme Court of the Republic of Kosovo, which was served on the Applicant on 5 June 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, 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).

Legal basis

4. 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], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 31 May 2018, in an administrative session the Court adopted amendments and supplementation to the Rules of Procedure which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 days after its publication. Consequently, in reviewing the Referral the Court refers to the legal provision of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 18 September 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 19 September 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 23 October 2017, the Court notified the Applicant and the Supreme Court about the registration of the Referral.
9. On 14 February 2018, the Court requested the Applicant's representative to submit the power of attorney proving that he was authorized to represent the Applicant before the Court. The Court also requested the Applicant and the Basic Court in Prishtina (hereinafter: the Basic Court) to submit the acknowledgment of receipt indicating when the Applicant was served with the challenged decision.
10. On 22 February 2018, the Applicant's representative submitted the power of attorney requested by the Court.

11. On 24 April 2018, the Basic Court submitted the acknowledgment of receipt indicating that the Applicant was served with the challenged decision on 5 June 2017.
12. On 2 July 2018, the Applicant requested the Court that his case be resolved with an urgency.
13. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues was terminated. On 26 June 2018, the mandate of judges Altay Suroy and Ivan Čukalović was terminated.
14. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.
15. On 12 September 2018, the President of the Court appointed a new Review Panel composed of the Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
16. On 26 September 2018, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

17. On 25 February 2014, the Applicant was caught by the Kosovo Police in the village of Krajкова, Municipality of Leposaviq, while transporting 4 (four) cans of oil in the amount of 3999.00 euro (hereinafter: the disputed goods). In this regard, Kosovo Police initiated a case suspected of unauthorized trade against the Applicant and instructed that the disputed goods be sent to the Customs Terminal in Mitrovica for storage.
18. On 15 April 2014, the Regional Directorate in Mitrovica (hereinafter: the Regional Directorate) of the Customs of the Republic of Kosovo (hereinafter: the Kosovo Customs) by Decision [08.05.2/394], declared the Applicant responsible for the customs offense established by Article 8 of Law No. 04/L-099 on Amending and Supplementing Customs and Excise Code in Kosovo No. 03/L-109, sentenced him with a fine in the amount of 3822.00 euro and ordered the confiscation of the disputed goods. The Regional Directorate reasoned the Decision in question, *inter alia*, by the fact that the invoice through which the Applicant justified the goods was not confirmed to be valid.
19. On an unspecified date, the Applicant requested the Kosovo Customs to reconsider the Decision [08.05.2/394] of the Regional Directorate, claiming *“essential violation of the provisions of the Customs Code, violation of substantive provisions and fundamental rights guaranteed by Constitution”*.
20. On 19 June 2014, the Kosovo Customs by Decision [07.03/497] rejected as ungrounded the request for reconsideration of Decision [08.05.2/394] of the Regional Directorate.

21. On 22 July 2014, the Applicant filed a lawsuit with the Basic Court in Prishtina - Department for Administrative Matters (hereinafter: the Basic Court) against Kosovo Customs, requesting the annulment of Decision [07.03/497] or to remand his case for reconsideration to Kosovo Customs. In his appeal, the Applicant alleges that the Kosovo Customs did not prove the facts, in particular, as to the validity of the invoice through which allegedly was made the purchase of the goods and challenges the qualification of the offense by claiming that the latter cannot be qualified as "smuggling of goods".
22. On 13 April 2016, the Basic Court, by the Judgment [A. No. 1247/14] rejected the Applicant's statement of claim as ungrounded and upheld the Decision [07.03/497] of Kosovo Customs.
23. On an unspecified date, against the Judgment of the Basic Court, the Applicant filed an appeal with the Court of Appeals, claiming "*a violation of the principle of equality of the parties to the proceeding*" and "*non-objective examination of evidence*". The Applicant requested the annulment of the Judgment of the Basic Court or to remand his case for retrial and the restitution of the disputed goods.
24. On 14 October 2016, the Court of Appeals, by Judgment [AA. No. 226/2016], addressing the Applicant's allegations, rejected as ungrounded his appeal and upheld the Judgment of the Basic Court.
25. Against the Judgment of the Court of Appeals, the Applicant filed with the Supreme Court a request for extraordinary review of the court decision, on the grounds of erroneous determination of facts and the violation of the substantive and procedural provisions, claiming again that the facts related to the validity of the invoice for the disputed goods have not been established and requesting that the relevant Judgments of the Basic Court and the Court of Appeals be annulled and that his case be remanded for retrial.
26. On 16 May 2017, the Supreme Court, by the Judgment [ARJ. No. 7/2017], rejected as ungrounded the Applicant's request for extraordinary review of the Judgment of the Court of Appeals.

Applicant's allegations

27. The Applicant alleges that Judgment [ARJ. No. 7/2017] of 16 May 2017 of the Supreme Court violates his rights to fair and impartial trial guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution.
28. The Applicant builds his allegations of violation of his rights to fair and impartial trial through the following two arguments: a) rejection of his request to hold a hearing session by the Kosovo Customs Review Division; and b) that the Decisions of the Kosovo Customs and the judgments of the regular courts are arbitrary because they consider that the invoice based on which he justified the disputed goods is not valid and that none of the administrative and judicial instances have substantiated the elements of the offense for which he was declared responsible and sentenced.

29. Finally, the Applicant requests the Court to declare his Referral admissible; to hold a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and to declare invalid the Judgment [ARJ. No. 7/2017] of the Supreme Court of 16 May 2017 in conjunction with Judgment [AA. No. 226/2016] of the Court of Appeals of 14 October 2016 and Judgment [A. No. 1247/14] of the Basic Court of 13 April 2016, by remanding his case for reconsideration.

Assessment of the admissibility of Referral

30. The Court first examines whether the Applicant's Referral has fulfilled the admissibility requirements established by the Constitution, and as further specified by the Law and the Rules of Procedure.
31. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes:

"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".

32. The Court further examines whether the Applicant fulfilled the admissibility requirements, as prescribed in the Law. In this respect, the Court first refers to Article 48 [Accuracy of the Referral] and Article 49 [Deadlines] of the Law, which establish:

Article 48 [Accuracy of the 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..."

33. As to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, who challenges an act of a public authority, namely Judgment [ARJ. No. 7/2017] of the Supreme Court of 16 May 2017 after having exhausted all legal remedies provided by law. The Applicant has also clarified the rights and freedoms that have allegedly been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

34. In addition, the Court examines whether the Applicant has met the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure sets out the criteria based on which the Court may consider the Referral, including the criterion that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:

“(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim”.

35. In this regard, the Court first recalls that by the Decision [08.05.2/394] of the Regional Directorate, the Applicant was declared responsible for the commission of the customs offense and has been imposed the respective punishment. This Decision was confirmed by Kosovo Customs by the Decision [07.3/497] and the Judgments of the three judicial instances in the Republic of Kosovo. The Applicant alleges that the decisions in the administrative and judicial proceedings violated his rights to fair and impartial trial because they did not allow to hold a hearing before the administrative authorities and that they did not prove the facts, especially as to the validity of the invoice, related to the offence for which he was declared responsible.
36. The Court first notes that the Applicant's essential allegations concerning the alleged violations of the procedural safeguards guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been interpreted in detail through the case law of the ECtHR, in accordance with which the Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Accordingly, in interpreting allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECtHR.
37. The Court also notes that the ECtHR consistent case law notes that the fairness of a proceeding is assessed based on the proceeding as a whole. [See ECtHR Judgment of 6 December 1988, *Barbera, Messeque and Jabardo v. Spain*, no. 10590/83, para. 68]. Therefore, when assessing the Applicants' allegations, the Court shall also adhere to this principle. (See also case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38; and case KI143/16, Applicant *Muharrem Blaku and Others*, Resolution on Inadmissibility of 13 June 2018, paragraph 31).
38. In this respect, the Court will first examine the Applicants' allegations as to the alleged violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the alleged violation of procedural guarantees for a hearing before the administrative authorities based on the ECtHR case law.

Regarding the allegation of a violation of the right to a hearing before the administrative authorities

39. Initially, referring to the ECtHR case law and its case law, the Court notes that the right to a fair trial, in principle, implies the right of the parties to be present in person at the trial and that this right is closely linked to the right to a hearing and

the right to follow the proceedings in person. (see ECtHR Judgment of 23 February 1994, *Fredin v. Sweden*, Application no. 18928/91, page 10 and 11; and ECtHR Judgment of 26 May 1988, *Ekbatani v. Sweden*, Application no. 10563/83, ECtHR, Judgment of 26 May 1988, paragraph 25; and case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 40; and KI143/16, Applicant *Muharrem Blaku and Others*, Resolution on Inadmissibility of 13 June 2018, paragraph 37).

40. The Court reiterates that, although not expressly mentioned in the text of Article 6 of the ECHR, an oral hearing constitutes a fundamental principle foreseen through this Article. (See: *Jussila v Finland*, the ECtHR Judgment of 23 November 2006, and case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 42).
41. However, the ECtHR through its case law, also defines the limits of application of this rule and the relevant exemptions. The same was ruled by the case law of the Court, *inter alia*, through cases KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017 and KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018.
42. Moreover, in applying those principles and respective limitations in the circumstances of the present case, the Court notes that the Applicant alleges a violation of his rights guaranteed by Article 31 of the Constitution as a result of rejection of holding a hearing before the administrative authorities, namely Kosovo Customs and not judicial authorities. The limits of the application of procedural safeguards enshrined in Article 31 of the Constitution in conjunction with Article 6 of the ECHR before the administrative authorities are also well defined in the case law of the ECtHR and the Court. (See, KO12/17, Applicant *The Ombudsperson*, Judgment of 30 May 2017).
43. In its Judgment KO12/17, the Court, based on the ECtHR case law, had ascertained that the decisions taken by administrative authorities, must be subject to subsequent control by a “*judicial authority that has full jurisdiction*”, including the power of the latter to quash in all respects, on questions of fact and law, the decisions of the administrative authorities. (See the case of the Constitutional Court, KO12/17, The Ombudsperson, Judgment of 30 May 2017, paras. 77 and 101. See also, *mutatis mutandis*, the following ECHR decisions: *Albert and Le Compte v. Belgium*, Applications no. 7299/75, 7496/76, paragraph 29, and the ECtHR Judgment of 26 April 1995, *Fischer v. Austria*, Application no. 16922/90, para. 28).
44. Accordingly, the case law of the ECtHR and of the Court establishes that for the fairness of a procedure as a whole, the decisions of the administrative authorities will fulfill the procedural guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as long as the decisions of such administrative authorities are subject to subsequent control by a “*judicial body having full jurisdiction*”, including the power to annul such decisions in all respects - both on questions of fact and law. (See the Judgment of the ECtHR of 10 February 1983, *Albert and Le Compte v. Belgium*, Applications No. 7299/75, 7496/76, paragraph 29, and ECHR Judgment of 23 October 1995, *Gradinger v.*

Austria, Application No. 15963/90, paragraph 42, see also the case of the Court, KO12/17, Applicant the Ombudsperson, Judgment of 30 May 2017).

45. Accordingly, the Constitution and the ECHR, based on relevant case-law, incorporate in themselves the following alternatives: either that the administrative authorities themselves meet the requirements of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, or in the event that they do not fulfill these criteria, be subject to judicial control having full jurisdiction and which contains guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see *mutatis mutandis*, case *Albert and Le Compte v. Belgium*, cited above, paragraph 29.)
46. In applying these principles in the circumstances of the present case, the Court notes that the Applicant's arguments for violation of Article 31 of the Constitution as a result of not holding a hearing at the level of administrative authorities do not sufficiently substantiate his allegation of constitutional violation, because the respective decisions of the administrative authorities were subjected to subsequent control by a "judicial authority having full jurisdiction" with the competence to annul such decisions both in questions of fact and law. In this regard, the Court recalls that both decisions of the Kosovo Customs were upheld by three judicial instances, the Basic Court, the Court of Appeals and the Supreme Court. In the three judicial instances the facts and evidence were examined and a main public hearing was held in the Basic Court.
47. Therefore, having regard to the particular characteristics of the case, the allegations raised by the Applicant and the facts presented by him, the Court, also based on the standards established in its case law and the case law of the ECtHR, does not find that there has been a violation of the right to a hearing as an integral element of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
48. The Court will further examine the Applicant's allegations of incorrect determination of the facts by the administrative and judicial authorities, and in particular with regard to the validity of the invoice for the disputed goods.

Regarding the allegation of incorrect determination of facts

49. The Applicant alleges that the administrative authorities and regular courts have declared the Applicant responsible without confirming the relevant evidence and facts, namely by not properly assessing the validity of the invoice in relation to the disputed goods and by imposing on him the burden of proof to prove that the disputed goods have gone through the regular clearance procedures.
50. The Court considers that this allegation of the Applicant raises issues of legality relating to the application of the legal provisions and the assessment of the evidence based on which the Applicant was found responsible for the customs offense related to the disputed goods. 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 considered by the Court.

51. In this respect, the Court reiterates that it is not its role to deal with errors of facts or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that lead a regular court to issue one decision instead of another. If it were different, the Court would act as a “*fourth instance court*”, which would result in exceeding the limitations provided for by its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See case *Garcia Ruiz v. Spain*, ECtHR, no. 30544/96, of 21 January 1999, paragraph 28; and see also case: KI70/11, Applicants: *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
52. In addition, the Court notes that after the request for extraordinary review of the court decision, the Supreme Court rejected the Applicant's allegations of violation of the substantive and procedural provisions by the Basic Court and the Court of Appeals. The Supreme Court responded to all allegations of legal violation raised by the Applicant.
53. In this regard, the Court notes that when addressing the Applicant's allegations, the Supreme Court reasoned that the invoice submitted by the Applicant cannot be accepted as valid because the currency expressed in the invoice is not in use in the territory of Kosovo and economic transactions cannot be carried out. On the other hand, the Applicant did not provide evidence to prove that the disputed goods were subject to customs clearance procedures as required by Article 81. F of Law No. 03/L-222 on Tax Administration and Procedure, amended and supplemented by Law 04/L-102.
54. In this regard, the Supreme Court, *inter alia*, reasoned:

“[The invoice submitted by the [Applicant] No. 107/014 dated 25.02.2014 also according to the assessment of this panel cannot be accepted as valid because the currency expressed in the invoice (in dinars) is not in use in the territory of Kosovo and economic transactions cannot be carried out, while on the other hand the claimant has not provided evidence that proves that the goods were subject to customs clearance procedures. Based on the provision of Article 81.F of Law 04/L-102 it is foreseen that the taxpayer shall bear the burden of proof of the facts supporting his/her requests, therefore to treat the disputed goods as domestic goods, as the claimant alleges, the claim must possess respective regular documentation to harmonize the invoice of goods with no. of the business registration - the seller in this case who has issued the invoice, then the fiscal coupon or the payment that would confirm the internal sale of the goods.

From the abovementioned, the Supreme Court found that the first and second instance courts in this administrative-judicial matter, have correctly applied the provisions of the substantive law, so that the allegations of the claimant in the request for extraordinary review of the court decision are ungrounded because they are not influential in other determination of the factual situation from what was determined by the lower instance courts”.

55. The Court further considers that the Applicant did not substantiate that the proceedings before the Supreme Court were unfair or arbitrary, or that his fundamental rights and freedoms protected by the Constitution were violated as a result of erroneous interpretation of the law and assessment of evidence and facts in his case. The Court reiterates that the interpretation of the law is a duty of the regular courts and is a matter of legality. No constitutional issue has been proven by the Applicant. (See: 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 Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku and Sami Lushtaku*, Resolution on Inadmissibility of 15 November 2016, paragraph 62).
56. The Court further notes that the Applicant does not agree with the outcome of the proceedings before the regular courts. 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, paragraph 21; see also case KI56/17, Applicant *Lumturije Murtezaj*, Resolution of Inadmissibility of 18 December 2017, paragraph 42).
57. 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).
58. In sum, in accordance with Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, the Referral is manifestly ill-founded on constitutional basis and, therefore, inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, on 26 September 2018, unanimously

DECIDES

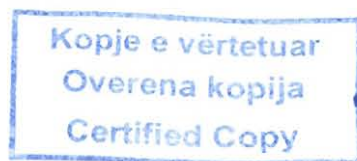
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

Gresa Caka-Nimani

President of the Constitutional Court

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.