



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 27 December 2018
Ref. no.:RK 1310/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI68/18

Applicant

Asllan Veseli

Constitutional review of Judgment Pml. No. 175/2017 of the Supreme Court of 29 January 2017, Judgment PAKR. No. 22/ 2017 of the Court of Appeals of 23 February 2018, and Judgment P. No. 230/2015 of the Basic Court of 3 November 2016

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 Asllan Veseli, from village Greme, Municipality of Ferizaj (hereinafter: the Applicant), who is represented by Fehmiye Gashi-Bytyqi, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Judgment Pml. No. 175/2017 of the Supreme Court of 29 January 2018, Judgment PAKR. No. 22/2017 of the Court of Appeals of 23 February 2017 and Judgment P. No. 230/2015 of the Basic Court of 3 November 2016.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgments which allegedly violate the Applicant's rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 31 paragraph 4 [Right to Fair and Impartial Trial], Article 53 [Interpretation of Human Rights Provisions] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).
5. On 31 May 2018, the Constitutional Court adopted in an administrative session the 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 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 10 May 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 18 May 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.
8. On 8 June 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 16 June 2018, the mandate of judges: Almiro Rodrigues and Snezhana Botusharova ended. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Čukalović ended.
10. 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 for a nine-year mandate.

11. On 11 September 2018, the President of the Court appointed a new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
12. On 29 October 2018, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

13. On 15 December 2015, the State Prosecution Office in Prizren- Serious Crimes Department (hereinafter: the State Prosecution) filed an indictment [PP. No. 206/15] against the Applicant with the Basic Court-Serious Crimes Department (hereinafter: the Basic Court) for the criminal offense of usury, under Article 343, paragraph 3, in conjunction with paragraph 1 of the Criminal Code (hereinafter: CC), the criminal offense of threat under Article 185, paragraph 2 of the CC, and the criminal offense of extortion under Article 340 paragraph 2 in conjunction with paragraph 1 of the CC.
14. On 3 November 2016, the Basic Court rendered Judgment P. No. 230/15, which found the Applicant guilty of the commission of all criminal offenses in the indictment, and sentenced him with an aggregate imprisonment sentence in duration of seven (7) years, as well as a fine in the amount of 8,500 Euro.
15. The reasoning of the Basic Court reads;

„In accordance with Article 343 of CC, whoever on behalf of himself, herself or another person, accepts or negotiates an evidently disproportionate amount of property in return for a service to another person, by taking advantage of such person's difficult financial circumstances, difficult housing circumstances, hardship, inexperience or inability to make judgments shall be punished by a fine and by imprisonment of six (6) months to five (5) years.

[...]

In the present case, here the accused (the Applicant) took advantage of the difficult personal situation of the injured party, borrows the amount of money with the interest rate of 10% and 12%.

[...]

Therefore, having in mind the aforementioned facts, the Court confirmed that in the actions of the accused (the Applicant), the relevant elements of the criminal offense referred to in Article 343, para.3, in conjunction with paragraph 1 of the CC are established, ... under Article 185 para. 2 of the CC, ... under Article 340, paragraph 2, in conjunction with para. 1 of the CC [...].“

16. The Applicant filed an appeal with the Court of Appeals against Judgment of the Basic Court on the grounds of „[...] essential violations of the provisions of the criminal procedure, under Article 384, paragraph 1, item 1.8, with the reasoning that the latter is based on inadmissible evidence because it relies on the testimony of the injured parties, whereas the court did not allow the examination of the lawyer N.E. from Prizren proposed by the injured party“.

17. The State Prosecution also filed an appeal with the Court of Appeals against the Judgment of the Basic Court.
18. On 23 February 2017, the Court of Appeals rendered Judgment PAKR. No. 22/17, which partially approved the Applicant's appeal regarding legal qualification of the criminal offenses and the decision on sentence, reducing the Applicant's imprisonment sentence from seven years to 5 years, while reducing the fine from 8,500 Euro to 8.000 Euro.
19. The reasoning of the Judgment of the Court of Appeals reads:

„The Court of Appeals of Kosovo, considering the appealing allegations of the defense party of the accused in connection with essential violations of the provisions of the criminal proceedings, concludes that the abovementioned appealing allegations do not stand. The appealed judgment of the first instance court is clear and concise.

With regard to the appealing allegations in relation to the breach of the principle of equality of parties under Article 7 paragraph 2 of the CCRK, this appealing allegations are not grounded because the first instance court did not find it reasonable to examine the lawyer Nexhat Elshani in a capacity of a witness because, he was only the drafter of the agreement dated 08.07.2015, signed between the injured party and the accused. The agreement was adduced by the first instance court as evidence, which read its content, in which the compiler of the agreement only wrote the words of the accused (the Applicant) and the injured party.“

20. The Applicant submitted a request for protection of legality to the Supreme Court against the judgments of the Basic Court and the Court of Appeals, claiming that the challenged judgments were rendered with essential violations of the provisions of the criminal procedure under Article 384, paragraph 1, in conjunction with Article 370 of the CPCK, because:
 - i) *“the enacting clauses of the judgments are unclear and in contradiction with itself and with the reasoning,*
 - ii) *the first instance judgment is based on the statements of witnesses L. Sh and L. B, which differ from those given in the pre-trial proceedings,*
 - iii) *because Article 7 paragraph 2 of the CPCK has been violated, due to the fact that the court has given decisive importance to the evidence provided by the prosecutor, while refusing the defense party's evidence for hearing the witness the lawyer. N.E., which violated the equality of the parties to the proceedings.“*
21. On 18 July 2017, the State Prosecution by submission KMLP. II. No. 122/2017 responded to the Applicant's request for protection of legality and proposed that the Applicant's request be rejected as ungrounded.

22. On 29 January 2018, the Supreme Court rendered Judgment Pml. No. 175/2017, which rejected the Applicant's request for protection of legality as ungrounded, reasoning that:

i) *„The enacting clause of the judgment of the first instance court is clear and concrete, the latter includes all elements prescribed by law, time, manner and place of commission of criminal offenses. There is no contradiction with itself and the reasoning. In the reasoning of the two challenged judgments, detailed, legal and factual reasons were given, while in that of the second instance the reasons with regard to the legal requalification of the criminal offenses were provided.*

ii) *The second allegation of to the Applicant is considered by the Court as ungrounded because the statements of the witnesses were taken in a lawful manner, while the fact that they vary in different stages of the proceeding, do not make it inadmissible. [...], they are assessed in accordance with law, so that the defense could object the credibility of these testimonies but not the admissibility.*

iii) *The Applicant's allegation that in the present case the Court violated the principle of equality of the parties to the proceedings is ungrounded, when the defense proposal for the examination of the witness, the lawyer N.E. was denied. This court considers that the first instance court acted fairly when it rejected the abovementioned proposal due to the fact that in this case in the criminal procedure, the testimony of this witness was irrelevant, ... because he merely wrote a written document.“*

Applicant's allegations

23. The Applicant alleges that the challenged judgments violated his rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 31 paragraph 4 [Right to Fair and Impartial Trial], Article 53 [Interpretation of Human Rights Provisions] and Article 54 [Judicial Protection of Rights] of the Constitution, as well as Article 6 [Right to a fair trial] of the ECHR.
24. The Applicant mainly alleges a violation of the rights guaranteed by Article 31.4 [Right to Fair and Impartial Trial], as the regular courts did not allow the examination of the witness proposed by the defense, which, according to his allegations, violates the right to equality of the parties to the proceedings.
25. The Applicant requests the Court to annul the judgments of the regular courts and to remand the case for retrial.

Admissibility of Referral

26. 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.
27. 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.”

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

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...”

29. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (2) of the Rules of Procedure, which stipulates:

“(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.”

30. As to the fulfillment of these requirements, the Court finds that the Applicant filed the Referral in a capacity of an authorized party, who challenges an act of a public authority, namely Judgment Pml. No. 175/2017 of the Supreme Court, after exhausting all legal remedies. The Applicant has also clarified the rights and freedoms that he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.
31. The Court first of all notes that the Applicant brought an alleged violation of Article 31 paragraph 4 of the Constitution and Article 6 of the ECHR, in connection with the fact that the regular courts did not accept his request to examine the person he proposed as a witness.
32. In this regard, the Court states that Article 31 paragraph 4 [Right to Fair and Impartial Trial] of the Constitution, states:

*“4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
[...].”*

33. Furthermore, the Court notes that the Applicant also referred to Article 6 of the ECHR, but that his allegation essentially implies that he considers that he did not have a fair hearing because the guarantees were not respected within the meaning of Article 6 paragraph 3 item (d) of the ECHR.

34. In this respect, the Court states that Article 6.1 3 d) (Right to a fair trial) of the ECHR also states:

1. “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.

[...]

3. Everyone charged with a criminal offence has the following minimum rights:

[...]

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[...].“

35. With regard to the Applicant's allegations indicating that his right to a fair trial has been violated due to the refusal of his proposal to hear the witness, the Court emphasizes that Article 6 of the ECHR does not guarantee the right to have all evidence proposed by the panel admitted. Also, the right to a fair trial does not require that any specific rules in the assessment of evidence before the criminal courts be followed (see, *inter alia*, the ECtHR judgment, *Barbera, Messeque and Jabardo v. Spain*, of 6 December 1988, series A, number 146, item 68).

36. The Court further recalls the ECtHR case law, according to which Article 6. paragraph 3 of the ECHR only requires the court to state the reasons why it has decided not to adduce the proposed evidence, which the accused (the Applicant) explicitly requested (see: ECtHR Judgment *Vidal v. Belgium*, of 22 April 1992, series A, number 235, item 34).

37. Bringing the above-mentioned paragraphs in relation to the facts of the present case, the Court notes that the Basic Court and the Court of Appeals regarding the Applicant's proposal for examination of a person, namely the lawyer as a witness, clearly and reasonably stated that they exclude the possibility that the proposed witness with his testimony could change the facts which relate to the very act of committing a criminal offense, because his role was merely the drafting of a document, which he made at the request of the Applicant, by which his testimony would not have influenced and would not change the factual situation regarding the decisive facts about the existence of the criminal

offense, which were established in the evidentiary proceedings, both in the evidence and in the hearing of the injured party.

38. Moreover, the Court notes that the Supreme Court, in the request for protection of legality, dealt with the issue of equality of the parties to the proceedings, and concluded that “*the presentation of the abovementioned evidence is not necessary*”, while providing a comprehensive legal reasoning for such an attitude, which this Court has not found irregular, arbitrary or discriminatory, which would be to the detriment of the Applicant.
39. Based on the above, the Court considers that the equality of the parties was not called into question in the present case, as from the challenged judgments it results that the courts dealt with a question which the Applicant considers to have caused the violation of the principle of equality of the parties to the proceedings, for which they gave sufficient reasoning in their judgments.
40. Accordingly, the Court considers that the regular courts have complied with their obligation under Article 31 paragraph 4 of the Constitution and Article 6. paragraph 3 item d) of the ECHR, whereby the Applicant's allegations that the challenged decisions violated his right to fair trial in that component are ungrounded.
41. In these circumstances, the Court considers that nothing in the case presented by the Applicant does show that the proceedings before the regular courts were unfair or arbitrary in order for the Constitutional Court to be satisfied that the Applicant was denied any procedural guarantees which would lead to a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.
42. As to the other allegations of the Applicant relating to a violation of the rights and freedoms guaranteed by Article 24 [Equality Before the Law], and Article 54 [Judicial Protection of Rights] of the Constitution, the Court finds these allegations as ungrounded, and only because the Applicant did not sufficiently prove and substantiate the claim.
43. The Court reiterates that it is the Applicant's obligation to substantiate his constitutional allegations and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see: case of the Constitutional Court No. KI19/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Sylja*, of 5 December 2013).
44. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 47 of the Law and Rule 39 (2) of the Rules of Procedure, in its session held on 29 October 2018, unanimously

DECIDES

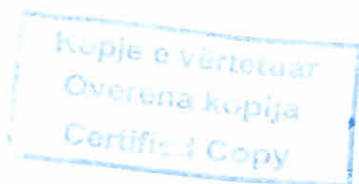
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bekim Sejdiu

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.