



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

Prishtina, on 22 January 2019
Ref. no.:RK 1316/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI92/18

Applicant

Abaz Gashi

**Constitutional review of Decision [Pzd. No. 47/2018] of the Supreme
Court of Kosovo of 30 April 2018**

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 Abaz Gashi, from Klina (hereinafter: the Applicant), who is represented by lawyer Fisnik Mërlaku.

Challenged decision

2. The Applicant challenges Decision [Pzd. No. 47/2018] of the Supreme Court of Kosovo of 30 April 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged decision which allegedly violates 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) in conjunction with 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 [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 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).

Proceedings before the Constitutional Court

5. On 10 July 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 16 August 2018, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.
7. On 7 September 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.
8. On 11 December 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

9. On 18 September 2015, the Basic Court in Peja - Juvenile Department (hereinafter: the Basic Court), by Judgment P. No. 212/12, found the Applicant guilty of committing the criminal offense "*Trafficking in Persons*" under Article 139, paragraph 2, in conjunction with Article 1 of the Criminal Code of Kosovo, and sentenced him to 3 years imprisonment.
10. The Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court, alleging that the Judgment of the Basic Court was rendered with essential violations of the criminal procedure provisions, violation of the criminal law, erroneous and incomplete determination of factual situation and the decision on punishment.

11. On 30 December 2015, the Appellate Prosecutor by submission PPAM/I. No. 98/2015, proposed that the Applicant's appeal be rejected as ungrounded.
12. On 24 March 2016, the Court of Appeals by Judgment PAKR. No. 624/2016, approved the Applicant's appeal with respect to the decision on punishment and modified the Judgment of the Basic Court.
13. The Court of Appeals reduced the Applicant's sentence from 3 (three) years of imprisonment to 2 (two) years and 6 (six) months. As to the other allegations of the Applicant, the Court rejected as ungrounded with the reasoning that the Judgment of the Basic Court was clear and concrete, based on the facts and correctly administered evidence.
14. The Applicant filed a request for protection of legality with the Supreme Court against the Judgment of the Court of Appeals.
15. On 30 November 2016, the Supreme Court of Kosovo, by Judgment PML. No. 165/2016, rejected as ungrounded the request for protection of legality.

Proceedings regarding the request for extraordinary mitigation of punishment

16. On an unspecified date, the Applicant's defense counsel filed a request for extraordinary mitigation of the sentence with the Supreme Court of Kosovo, with a proposal to impose a more lenient punishment against the Applicant, stating, *inter alia*, the difficult economic situation of his family and other personal reasons.
17. On 21 November 2017, the Basic Prosecution in Peja, by submission PP. No. 329/2010, requested that the Applicant's request for extraordinary mitigation of punishment be rejected.
18. On 27 November 2017, the Basic Court in Peja, by letter PK. No. 477/2017, requested that the Applicant's request for extraordinary mitigation of the punishment be rejected.
19. On 28 December 2017, the State Prosecutor by submission KZJD. No. 169/2017 requested that the Applicant's request for extraordinary mitigation of the punishment be rejected.
20. On 15 January 2018, the Supreme Court of Kosovo, by Decision Pzd. No. 168/2017, rejected as ungrounded the Applicant's request for extraordinary mitigation of punishment, reasoning that *"from the case file it appears that the court, when deciding on the type and amount of the sentence, assessed the circumstances which existed at the time of rendering the decision. The new circumstances presented in the Referral do not have such intensity to affect the mitigation of punishment nor can they be characterized as the circumstances justifying the imposition of the more lenient punishment"*.

21. On 19 March 2018, the Applicant's defense counsel again submitted a (second) request for extraordinary mitigation of punishment to the Supreme Court of Kosovo, with a proposal that the request be approved as grounded and the Applicant be sentenced to a more lenient punishment, due to difficult economic situation in which his family is and, claiming that the Applicant's health condition has recently deteriorated.
22. On 30 April 2018, the Supreme Court of Kosovo, by Decision (Pzd. No. 47/2018), rejected as ungrounded the Applicant's request for extraordinary mitigation of punishment, arguing that *"the circumstances invoked by the defense counsel in the request do not have weight and impact on the extraordinary mitigation of the punishment because they have been taken into account when rendering the decision on punishment by the court of first instance"*.

Applicant's allegations

23. The Applicant alleges that the challenged decision violated the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 of the ECHR.
24. The Applicant first alleges that the challenged decision is *"unfair, ungrounded, unsubstantiated, unreasonable and illogical, due to the fact that this court did not take the appropriate measures, the relief sought regarding the present case [...]"*.
25. The Applicant further considers that the Supreme Court of Kosovo *"had all the legal possibilities to mitigate the sentence"* and that it did not take into account the new circumstances which according to the Applicant have occurred after Judgment PAKR. No. 624/2016 of the Court of Appeals of 24 March 2016 became final.
26. In essence, the Applicant complains that the Supreme Court did not take into account the mitigating circumstances for extraordinary mitigation of the punishment, which allegedly *"are foreseen by legal provisions of Article 74, paragraph 3, the personal circumstances and the character of the convict has played a relatively small role in the criminal offense [...]"*.
27. Finally, the Applicant requests the Court:

"...to declare invalid Decision Pzd. No. 47/2018 of the Supreme Court, of 30.04.2018, which violates Article 31 of the Constitution and Article 6 of the ECHR".

Admissibility of the Referral

28. The Court first will examine whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and the Rules of Procedure.

29. 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”.

[...]

30. The Court further examines whether the Applicant has fulfilled the admissibility requirements as provided by Law. In this respect, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide:

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 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”.

31. As regards the fulfillment of these requirements, the Court finds that the Applicant is an authorized party; he exhausted all available legal remedies; has specified the act of the public authority, which he challenges before the Court and filed the Referral in time.

32. However, the Court examines whether the Applicant fulfilled the admissibility requirements foreseen in Rule 39 (3) (b) of the Rules of Procedure, which stipulates:

“(3) The Court may also consider a referral inadmissible if any of the following conditions are present:

[...]

(b) the Referral is incompatible ratione materiae with the Constitution;

[...]”.

33. The Court recalls that the Applicant requests the constitutional review of Decision Pzd. No. 47/2018 of the Supreme Court of 30 April 2018, which allegedly violated the rights guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.
34. Furthermore, the Court notes that the Applicant essentially bases his allegations on erroneous determination of the new evidence and erroneous interpretation of the legal norms in the decision of the Supreme Court regarding the extraordinary mitigation of the punishment, which according to the Applicant, violated Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR.
35. Initially, the Court reiterates 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”*.
36. The Court recalls that, in accordance with the long-standing and consistent case-law, Article 31 of the Constitution and Article 6 of the ECHR are applicable throughout the entirety of proceedings for the determination of any “criminal charge”, including the sentencing process: (see, *Phillips v. the United Kingdom*, ECtHR Judgment No. 41087/98 of 5 July 2001, para. 39).
37. Likewise, Article 6 of the ECHR and Article 31 of the Constitution are not applicable to the procedure concerning the execution of sentencing decisions, such as the procedure for the application of an amnesty (*Montcornet de Caumont v. France* ECtHR Decision No. 59290/00 of 13 May 2003), parole proceedings (*Aldrian v. Austria*, Commission Decision No 16266/90 of 7 May 1990, see also *Macedo da Costa v. Luxemburg*, ECtHR Decision No. 26619/07 of 5 June 2012).
38. The extraordinary legal remedies seeking the extraordinary mitigation of punishment do not normally involve the determination of „civil rights and obligations“ or the grounds of „any criminal charge“ and therefore, Article 6 is deemed inapplicable to them (see, *inter alia*, *X v. Austria*, 7761/77, Commission Decision of 8 May 1978, DR 14, p.171, *Zawadzki v. Poland* (Decision) No 34158/96 of 6 July 1999, *Hurter v. Switzerland* (Decision), No. 48111/07, May 15, 2012; *Dybeku v. Albania* (Decision) No. 557/12, paragraph 30 of 11 March 2014).

39. Therefore, the Court considers that Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 of the Convention, is not applicable to the Applicant's request for extraordinary mitigation of the sentence when assessing the constitutionality of the challenged decision of the Supreme Court [Pzd. No. 47/2018, of 30 April 2018].
40. The Court emphasizes that the compatibility *ratione materiae* of a Referral with the Constitution derives from the Court's substantive jurisdiction. The right relied on by the Applicant must be protected by the Constitution in order for a constitutional complaint to be compatible *ratione materiae* with the Constitution. However, the Constitution does not guarantee to the Applicant a right to extraordinary mitigation of the sentence (See: case of the Constitutional Court No. KI80/15, KI81/15, KI82/15, *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, paragraphs 31-34).
41. In addition, the Court considers that the Applicant's appeals against the rejection of the regular courts to reopen the criminal proceedings, make a new assessment of the evidence and extraordinary mitigation of the sentence, as such, are incompatible *ratione materiae* with the Constitution.
42. Therefore, the Court further considers that the Applicant did not meet the admissibility requirements established by the Constitution and as further specified by the Law and the Rules of Procedure.
43. Therefore, the Court concludes that the Applicant's Referral is inadmissible, *ratione materiae*.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, and in accordance with Rule 39 (3) (b) of the Rules of Procedure, on 11 December 2018, unanimously

DECIDES

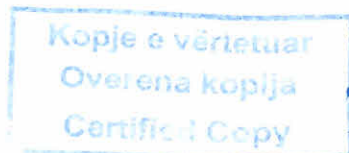
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Radomir Laban

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.