



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

Prishtina, on 23 September 2019
Ref. no.: RK 1427/19

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI205/18

Applicant

Elmi Dragusha

Constitutional review of Decisions of the Supreme Court of the Republic of Kosovo, Pml. No. 197/18, of 1 October 2018 and Pml. No. 261/2018, of 16 October 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 Elmi Dragusha (hereinafter: the Applicant), residing in the village Prugoc, municipality of Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Decisions of the Supreme Court, Pml. No. 197/18, of 1 October 2018 and Pml. No. 261/2018, of 16 October 2018 (hereinafter: the challenged Decisions).

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Decision, which allegedly violated the Applicant's rights 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] and 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 Court

5. On 28 December 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 8 January 2019, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci (member) and Nexhmi Rexhepi (member).
7. On 17 January 2019, the Court notified the Applicant about the registration of the Referral and requested the latter to sign the Referral Form. A copy of the Referral was sent to the Supreme Court.
8. On 23 January 2019, the Applicant submitted the signed Referral Form to the Court.
9. On 5 September 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. On 27 February 2017, the Basic Court in Prishtina, by Judgment P. No. 294/2017, found the Applicant guilty of committing the criminal offense provided for in Article 320 paragraph 2 of the Criminal Code of the Republic of Kosovo (CCRK) and sentenced him with a suspended sentence of 1 (one) year, if the latter does not commit another criminal offense within the time of his conviction, as well as a fine of up to 200 euro, which he had to pay within 30 days, after the Judgment becomes final.

11. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against Judgment P. No. 294/2017 of the Basic Court in Prishtina, of 27 February 2017, on the grounds of essential violations of the provisions of the criminal procedure, incomplete determination of factual situation and erroneous application of substantive law.
12. On 9 January 2018, the Court of Appeals by Judgment PA1. No. 483/2017 rejected as ungrounded the Applicant's appeal and upheld Judgment P. No. 294/2017 of the Basic Court in Prishtina of 27 February 2017.
13. On 23 February 2018, the Applicant filed a request for reopening of the criminal proceedings with the Basic Court in Prishtina against Judgment P. No. 294/2015 of the Basic Court in Prishtina of 27 February 2017 and Judgment PA1. No. 483/20 of the Court of Appeals of 9 January 2018.
14. On 13 April 2018, the Basic Court in Prishtina, by Decision KP. No. 365/2018, rejected as ungrounded the Applicant's request for reopening of criminal proceedings, reasoning that the request did not meet the legal requirements for reopening because there were no new facts and evidence that would allow a reopening.
15. Against Decision KP. No. 365/2018 of the Basic Court in Prishtina of 13 April 2018, the Applicant filed appeal with the Court of Appeals, on the grounds of essential violations of the provisions of criminal procedure, incomplete determination of factual situation and violation of the substantive law.
16. On 12 June 2018, the Court of Appeals, by Decision PN. No. 5217/18, rejected as ungrounded the Applicant's appeal and upheld Decision KP. No. 365/2018 of the Basic Court in Prishtina of 13 April. 2018.
17. On 1 August 2018, the Applicant filed a request for protection of legality with the Supreme Court, against Judgment P. No. 294/15 of the Basic Court in Prishtina of 27 February 2017 and Judgment PA1. No. 483/18 of the Court of Appeals of 9 January 2018.
18. The Applicant also filed a request for protection of legality against Decision KP. No. 365/2018 of the Basic Court in Prishtina, of 13 April 2018 and Decision PN. No. 5217/18 of the Court of Appeals of 12 June 2018, which rejected his request for reopening of criminal proceedings.
19. On 1 October 2018, the Supreme Court, by Decision Pml. No. 197/18, dismissed as out of time the request for protection of legality, filed against Judgment P. No. 294/15 of the Basic Court in Prishtina of 27 February 2017, which found him guilty and sentenced to 1 (one) year of suspended sentence and a fine of up to 200 euro, and Judgment PA1. No. 483/of the Court of Appeals of 9 January 2018, which upheld the judgment of the first instance.
20. On 16 October 2018, the Supreme Court, by Decision Pml. No. 261/2018, also rejected as ungrounded the Applicant's request for protection of legality, filed

against the decisions of the lower instances, which rejected his request for reopening of criminal proceedings.

21. In addition, the Supreme Court justified the rejection the Applicant's request for protection of legality: *"In this criminal legal case, the enacting clause of the challenged decision is clear, concrete, it does not contradict itself nor its reasoning. In the reasoning of the first instance decision, were given sufficient reasons for rejecting the request, which were also approved by the Court of Appeals, so that the evidence provided by the convicted person was previously subject to review during the earlier proceedings, and which were assessed, therefore, according to the assessment of this court, in the request submitted by the convict for the reopening of criminal proceedings, no new fact or evidence was presented which was unknown to the court at the time of rendering the aforementioned judgment, which alone or together with other previous evidence would justify the innocence of the convict, thus, the proposed evidence cannot be presented as a reason for reopening of the proceedings within the meaning of Article 423 par 1 and 2 of the CPCK"*.

Applicant's allegations

22. The Applicant alleges that the regular courts violated his rights guaranteed by Article 31 of the Constitution, as a result of a violation of the substantive law, the filing of an indictment and conviction without sufficient facts and evidence, and the prejudice of the case by the judge of the first instance court.
23. Finally, the Applicant requests the Court to quash all the decisions of the regular courts and to find him not guilty or retrial of the case.

Admissibility of the Referral

24. The Court examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, further specified in the Law and foreseen in the Rules of Procedure.
25. 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.

[...]."

26. The Court also refers to Articles: 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

[...]

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... ”.

27. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party; he exhausted available legal remedies; has specified the act of the public authority challenged by him before the Court and the constitutional rights which have allegedly been violated, and has submitted the Referral in time.
28. However, the Court also takes into account the admissibility requirements established in the Rules of Procedure, and in the present case refers to sub-Rules (2) and (3) (b) of Rule 39 [Admissibility Criteria] of the Rules of Procedure, which foresee:

“(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.”

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

[...]

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

[...]

29. The Court recalls that the Applicant alleges that the regular courts violated his right to fair and impartial trial guaranteed by Article 31 of the Constitution, which, in his view, is the result of a violation of the substantive law, the filing of an indictment against him without sufficient facts and evidence, and the prejudice of his case by the judge of the Basic Court.

30. Initially, the Court notes that we are dealing with two types of the court proceedings, the regular one (trial on guilt), in which the Applicant was found guilty of committing the criminal offense in violation of Article 320 of the CCRK and the request for reopening of criminal proceedings filed against Judgments which found him guilty and sentenced.

The Court's assessment regarding the regular criminal proceedings

31. With regard to this procedure, the Court notes that the final decision under the last legal remedy filed by the Applicant is Decision KP. No. 365/2018 No. 197/18 of the Supreme Court of 1 October 2018, which dismissed as out of time his request for protection of legality, which was filed against Judgment P. No. 294/15 of the Basic Court in Prishtina of 27 February 2017 and Judgment PA1. No. 483/18 of the Court of Appeals of 9 January 2018.
32. In this regard, the Court notes that the Supreme Court reasoned the dismissal of the Applicant's request for protection of legality as out of time, as follows: "*From the case file and the acknowledgment of receipt of Judgment PA1. No. 483/17 of the Court of Appeals of Kosovo of 09.01.2018, it follows that the acknowledgment of receipt was signed by the defendant on 24.01.2018, whereas the convict filed a request for protection of legality on 01.08.2018, which appears on the stamp of receipt of the request in the first instance court. Therefore, the request for protection of legality was filed after the expiry of the 3 (three) month deadline, as required by the aforementioned legal provision*".
33. In this context, the Court reiterates that it is the domain of the regular courts to administer the relevant facts and evidence before them, as it did in the present case, the Supreme Court, which assessed only the procedural aspects of the Applicant's request, finding that the Applicant had missed the deadline to challenge in substance the judgment of the first instance court and the second instance court, which found him guilty and sentenced him.
34. The Court recalls that it is not its task to deal with errors of fact 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 rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (see, *mutatis mutandis*, Judgment of the European Court of Human Rights (hereinafter: ECtHR) of 21 January 1999, *Garcia Ruiz v. Spain*, no. 30544/96, par. 28
35. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as "a fourth-instance court" (See, *mutatis mutandis* Constitutional Court, case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
36. Therefore, the Court notes that the Applicant merely does not agree with the outcome of the proceedings. However, his dissatisfaction with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim of violation of the right to fair and impartial trial (see, *mutatis mutandis*, case

Mezotur – Tiszazugi Tarsulat v. Hungary, 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).

37. In the light of the above, the Court considers that the Applicant's allegations of violation of his right to a fair and impartial trial are manifestly ill-founded, as the Court cannot in any way find that the Decision of the Supreme Court, which dismissed his request for procedural reasons, violates in any way his right to fair and impartial trial, guaranteed by Article 31 of the Constitution.

The Court's assessment of the request for reopening of criminal proceedings

38. In this regard, the Court notes that the final decision under the last legal remedy filed by the Applicant is Decision Pml. No. 261/2018 of the Supreme Court of 16 October 2018, which rejected his request for protection of legality filed against the decisions of the lower instance courts, which decided regarding his request for reopening of criminal proceedings.
39. In this connection, the Court initially notes that the Applicant's request for reopening of the criminal proceedings was rejected by the regular courts as unfounded on the grounds that it did not meet the procedural criteria provided for by law, because the Applicant did not provide new facts and evidence that would call into question the legality and constitutionality of the judgments in relation to the regular criminal procedure.
40. In this regard, the Court considers that the compatibility *ratione materiae* of a Referral with the Constitution derives from the Court's substantive jurisdiction. The rights relied on by the Applicants must be protected by the Constitution in order for a constitutional complaint to be compatible *ratione materiae* with the Constitution, and accordingly, within the jurisdiction of the Constitutional Court (see, the Constitutional Court, case KI07/17 Applicant *Pashk Mirashi*, Resolution on Inadmissibility of 29 May 2017, paragraph 66).
41. The Court, recalls the case law of the European Court on Human Rights (hereinafter: the ECtHR) and its case law, which states that Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 paragraph 1 [Right to a fair trial] of the Convention do not apply to requests for reopening or repetition of proceedings (see: analogously, cases of the Constitutional Court: KI159/15, with Applicant *Sabri Ferati*, Resolution on Inadmissibility, of 13 June 2016, paragraph 37, KI80/15, 81/15 and 82/15, with Applicant *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016; see: *inter alia*, *Zawadzki v. Poland*, application no. 34158/96, of 6 July 1999; *Sablon v. Belgium*, no. 36445/97, of 10 April; and *Steck-Risch and Others v. Liechtenstein* (dec.), no. 29061/08, of 11 May 2010; *Nistler v. Austria*, no. 24912/08, ECtHR, Decision of 19 November 2013; *Dichev v. Bulgaria*, no. 1355/04, Judgment of 27 January 2011).
42. In the present case, the Court specifically refers to the case of ECtHR *Franz Fischer v. Austria*, application no. 27569/02, decision of 6 May 2003, where it was found that Article 6 of the Convention does not apply to the proceedings for

the reopening of a case because a person whose sentence has become final and who applies for his case to be reopened is not “*charged with a criminal offence*”.

43. Therefore, the Court reiterates its position that in all cases where the request for reopening of criminal proceedings is rejected as ungrounded, or dismissed for procedural reasons by all regular court instances, Article 31 of the Constitution in the light of the interpretation of Article 6 of the European Convention on Human Rights, is not applicable.
44. Accordingly, the Court considers that the Applicant’s allegations pertaining to the rejection by the regular courts of his request for reopening of the criminal proceedings are incompatible *ratione materiae* with the Constitution.
45. In sum, the Court concludes that the Applicant’s Referral regarding the constitutional review of the regular proceedings is to be declared inadmissible, as manifestly ill-founded, in accordance with Rule 39 (2) of the Rules of Procedure, and the Referral for the constitutional review of a request for reopening of criminal proceedings is also to be declared inadmissible in accordance with Rule 39 (3) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2), (3) (b) and 59 (2) of the Rules of Procedure, on 5 September 2019, 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

Safet Hoxha

Arta Rama-Hajrizi



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