



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

Prishtina, on 31 December 2020
Ref.No.:RK1681/20

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI18/20

Applicant

Fatmir Hoti

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 Fatmir Hoti, residing in Gjakova (hereinafter: the Applicant), represented by Teki Bokshi, lawyer.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment [PML. no. 316/2019] of the Supreme Court, of 22 November 2019 (hereinafter: the challenged Judgment), in conjunction with the Decision PN.no. 794/2019 of the Court of Appeals, of 23 July 2019 and Decision KP.no. 278/19 of the Basic Court in Gjakova, of 3 July 2019.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which as alleged by the Applicant has violated his rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial] and 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 [Right to a fair trial] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).

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 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).

Proceedings before the Constitutional Court

5. On 27 January 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 30 January 2020, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (presiding), Bajram Ljatifi and Radomir Laban (members).
7. On 7 February 2020, the Court notified the Applicant about the registration of the Referral.
8. On 25 February 2020, the Applicant submitted the documents requested by the Court.
9. On 17 December 2020, the Review Panel considered the Report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of case facts

Regular criminal proceedings

10. On 16 May 2016, by Judgment PKR. no. 23/2014 of the Basic Court in Gjakova, the Applicant was found guilty of committing the criminal offence under Article 270 of the Criminal Code of the Republic of Kosovo and was sentenced to imprisonment of 1 (one) year and 6 (six) months, in which shall be included the time spent in house arrest, from 30 August 2013 to 12 September 2013 and in detention on remand, from 13 September 2013 to 25 September 2013.
11. Acting within the legal deadlines, the Applicant filed an appeal with the Court of Appeals, against the Judgment of the Basic Court in Gjakova, due to violations of criminal and procedural law.
12. On 9 September 2016, the Court of Appeals by Judgment PAKR.no. 421/2016 rejected the Applicant's appeal filed against the Judgment PKR. no. 23/2014 of the Basic Court in Gjakova, by upholding the latter. As of this date, the Judgment PKR. no. 23/2014 of the Basic Court in Gjakova was final.
13. Once the Judgment PKR. no. 23/2014, of the Basic Court in Gjakova became final, the injured party initiated a civil claim at the Basic Court in Gjakova for compensation of the damage caused. According to the case file, the judge assigned to the case, had requested his exclusion from the trial, because the injured party E.H. was family related to the legal secretary working with the case judge. On this occasion, by decision AGJ.I.no.165 / 19, of the Basic Court in Gjakova – Branch in Rahovec , the case judge was substituted and the case was assigned to another judge as per the ordinal number.

Request for reopening of criminal proceedings

14. Based on the decision of the Basic Court in Gjakova – Branch in Rahovec AGJ.I.no.165/19, of 25 March 2019, the Applicant filed a request for reopening of criminal proceedings, against the final Judgment PKR. no. 23/2014 of the Basic Court in Gjakova, claiming that *there are new facts which make possible the reopening of the said Judgment, because “this court should have acted in identical manner in the criminal case, which should have not been tried in this court and had to be delegated to any of the other courts”*
15. On 3 July 2019, the Basic Court in Gjakova, by Decision PK. no. 278/19, dismisses the Applicant's request for reopening the criminal proceedings, filed against the final Judgment PKR. no. 23/2014, on the grounds that the Referral had no legal basis, because based on the Applicant's allegations, it results that there have not been discovered any new facts or evidence, which would justify the approval of the request for reopening of criminal proceedings.
16. Acting within the legal deadline, the Applicant filed an appeal with the Court of Appeals against the Decision KP. no. 278/19 of the court of first instance, due to essential violations of the provisions of the criminal procedure.

17. On 23 July 2019, the Court of Appeals, through Decision PN. no. 794/2019, rejected the appeal filed by the Applicant and upheld the Decision [KP. no. 278/19] of the Basic Court in Gjakova, of 3 July 2019, by reasoning that the court of first instance: *"... has provided sufficient reasons that in the present case the legal requirements for reopening of proceedings against the convict Fatmir Hoti have not been met, despite the allegations of the convict's defence counsel set out in the request, as there is no legal basis for reopening the proceedings concluded by a final judgment as provided for by Article 423 para.1 of the CPC."*
18. The Applicant, acting within the legal deadline, filed a request for protection of legality with the Supreme Court, alleging that the decisions of the lower courts contained legal and constitutional violations, respectively violations of the right to fair and impartial trial.
19. On 22 November 2019, the Supreme Court, by Judgment [PML. no. 316/2019], rejects as unfounded the Applicant's request for protection of legality, on the grounds that: *"... according to the assessment of this Court, the facts and evidence to which the defence counsel refers in the request do not constitute a legal basis for the exercise of this legal remedy, respectively they are not new facts or new evidence which alone or in connection with previous evidence are likely to justify the acquittal of the convicted person or his conviction under a less severe criminal provision (subpara.1.3 of Article 423) and also there are no new facts or evidence showing that the convicted person did not commit the act included in the offence for which he has been convicted and the existence of such facts would have critically influenced the determination of punishment (sub-paragraph 1.5 of the CPC), on which legal basis the request has been submitted by the defence counsel"*.

Applicant's allegations

20. The Applicant alleges that the decisions of the regular courts, in particular the challenged Judgment, have violated his rights guaranteed by Articles 22, 31 and 53 of the Constitution and Article 6 of the ECHR, because:

"In the Judgment of the Supreme Court of Kosovo, PML. no. 316/2019 of 22.11.2019, the court expresses doubt as to why did Mr. Fatmir Hoti not request the exclusion of the court during the regular court proceedings. Neither Mr. Fatmir Hoti, nor his defence have been aware of the fact that the Basic Court in Gjakova, has reason to believe in its objectivity. We became aware of this fact became only on 25.05.2019, whilst this fact can be understood and creates direct doubts about the objectivity of the Court, and since during the criminal proceedings in case PKR.no.23/14 there have existed conditions for exclusion of the Court, we consider that this fact is a new fact which has influenced the decision of the court, hence the legal requirements regarding the reopening of the criminal proceedings are met pursuant to Article 423 par. 1 point 1.3 and 1.5. in conjunction with Article 419 of the CPCRK. These facts and evidence are of such importance and quality that they call into question the final Judgment, respectively they can cause its modification. In fact, if the judgment, the reopening of which is requested was adjudicated by a judge who should

have been excluded, this constitutes a fundamental and absolute violation. Such a judgment is in contradiction with Article 52 of the Criminal Procedure Code, because such a trial cannot be considered as fair and impartial trial and is contrary to Articles 22, 31 and 53 of the Constitution of the Republic of Kosovo.”

21. Finally, the Applicant requests from the Court: *“I. TO DECLARE the Referral admissible; II. TO FIND that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights III. TO DECLARE INVALID: the Decision of the Basic Court in Gjakova, KP. No.278/19 of 03.07.2019, the Decision of the Court of Appeals of Kosovo, PN. No.794/2019 of 23.07.2019 as well as the Judgment PML. no. 316/2019 of the Supreme Court of Kosovo, of 11/22/2019.”*

Admissibility of the Referral

22. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.
23. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which provide:

“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”.

[...].”

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

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... ”.

25. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party, who has exhausted all legal remedies prescribed by law in accordance with the requirements of Article 113.7 of the Constitution; has specified the act of the public authority which he is challenging before the Court and the rights which allegedly have been violated, pursuant to Article 48 of the Law and has submitted the Referral in accordance with the deadline established in Article 49 of the Law.
26. However, in addition, the Court examines whether the Applicant has fulfilled the admissibility criteria established in the Rules of Procedure, by referring in the concrete case to Rule 39 [Admissibility Criteria], sub-rule (3) (b) of the Rules of Procedure which establishes:

(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;
[...].”*

27. The Court recalls that the Applicant alleges that the challenged Judgment of the Supreme Court violates his rights guaranteed by Articles 22, 31 and 53 of the Constitution in conjunction with Article 6.1 of the ECHR, for the reasons set out in the part referring to the allegations.
28. On the basis of the case file, the Court notes that the essence of the Applicant's allegations for violation of his rights guaranteed by the Constitution falls within the scope of Article 31 of the Constitution and Article 6.1 of the ECHR, respectively the alleged violation relates to the objective impartiality of the trial.
29. In this regard, the Court initially notes that the Applicant's request for reopening of criminal proceedings was rejected by the regular courts 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.
30. In this respect, the Court notes that the compatibility *ratione materiae* of a Referral with the Constitution derives from the Court's substantive jurisdiction. The rights 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, 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).

31. The Court further recalls the case law of the European Court of 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 ECHR, do not apply to requests for reopening or repetition of proceedings(see, analogically, the cases of the Constitutional Court: KI159/15, Applicant *Sabri Ferati*, Resolution on Inadmissibility, of 13 June 2016; KI80/15, 81/15 and 82/15, 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*, Application no. 3445/97, of 10 April 2001; 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, ECtHR Judgment, of 27 January 2011).
32. In the present case, the Court specifically refers to the ECtHR case *Franz Fischer v. Austria*, Application no. 27569/02, Decision of 6 May 2003, where it was found that Article 6 of the ECHR does not apply to the procedures for the reopening of a case, namely when a person whose sentence has become final, and who applies for his case to be reopened during this procedure is not “charged with a criminal offence”.
33. Therefore, the Court reiterates its position that in all cases when the request for reopening of criminal proceedings is dismissed or rejected, for procedural reasons, by all regular court instances, Article 31 of the Constitution, in the light of the interpretation of Article 6.1 of the ECHR, is not applicable, as the courts have not reopened the adjudicated case and we do not have a repetition of the proceedings where the application of these provisions would later come into play.
34. 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.
35. In sum, the Court finds that the Applicant's Referral in relation to the request for reopening of criminal proceedings must also be declared inadmissible, pursuant to 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 (3) (b) and 59 (2) of the Rules of Procedure, on 17 December 2020, 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

Kopje e vërtetuar
Overena kopija
Certified Copy

Arta Rama-Hajrizi

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