



REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, 26 August 2024
Ref. no.: AGJ 2520/24

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JUDGMENT

in

Case No. KI272/23

Applicant

Ali Tahiri

**Request for constitutional review of Decision [AKPA. II. no. 163/23] of the
Appellate Prosecution Office, of 1 November 2023**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge
Nexhmi Rexhepi, Judge
Enver Peci, Judge, and
Jeton Bytyqi, Judge

Applicant

1. The Referral was submitted by Ali Tahiri, residing in Gjakova, represented by Ilir Hoxhaj, lawyer (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Decision [AKPA. II. no. 163/23] of the Appellate Prosecution Office in Prishtina (hereinafter: the Appellate Prosecution Office), of 1 November 2023.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged act of the Appellate Prosecution Office, which allegedly violates the Applicant's rights guaranteed by Articles: 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 13 (Right to an effective remedy) of the European Convention on Human Rights (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 Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 25 [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 12 December 2023, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 27 December 2023, the Court informed the Applicant of the registration of the Referral. On the same day, the Court also informed the Appellate Prosecution Office of the registration of the Referral and notified it of the possibility of submitting comments related to the Referral.
7. On 28 December 2023, the President of the Court, by Decision [No. GJR. KI272/23], appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and by Decision [KSH. KI272/23], appointed the members of the Review Panel, composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci, and Enver Peci (members).
8. On 9 January 2024, the Appellate Prosecution Office submitted comments to the Court regarding the Referral.
9. On 11 March 2024, Judge Jeton Bytyqi took the oath before the President of the Republic of Kosovo, thereby commencing his mandate at the Court.
10. On 30 April 2024, the Court reviewed the report of the Judge Rapporteur and unanimously recommended that the review of the Referral be postponed for the next session pending additional supplementations.
11. On 16 July 2024, the Review Panel reviewed the report of the Judge Rapporteur and unanimously recommended to the court the admissibility of Referral. On the same day, the Court decided unanimously to (i) declare the Referral admissible; (ii) hold that the Decision [AKAP. II. No.136/23] of the Appellate Prosecution Office, of 1 November 2023, is not compatible with Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo; and (iii) declare the Decision [AKAP.II.No.136/23] of the

Appellate Prosecution Office, of November 2023, null and void and remand the case for reconsideration to the Appellate Prosecution Office, in accordance with the findings of this Judgment.

Summary of facts

12. On 21 August 2023, the Applicant filed a criminal report with the Basic Prosecution in Gjakova (hereinafter: the Basic Prosecution) against suspects A.T. and T.K., alleging that they had committed the criminal offense of “Fraud” under Article 261, paragraph 2 of the Provisional Criminal Code of Kosovo [UNMIK/REG/2003/25] (hereinafter: the Provisional Criminal Code). In the criminal report submitted, the Applicant claimed that on 22 May 2009, he had entered into a property purchase agreement with A.T. and T.K., in the amount of 40,000 (forty thousand) euros, despite the fact that the latter were not legitimate owners of the immovable property.
13. On 3 October 2023, the Basic Prosecution, through Decision [P/II. No. 1162/23], dismissed the criminal report against suspects A.T. and T.K., reasoning that the criminal offense for which they were accused had reached the absolute statute of limitations for criminal prosecution. The purchase agreement between the Applicant and the suspects was entered into on 22 May 2009, at the time when the Provisional Criminal Code was in force. According to this Code, the criminal offense for which the suspects were accused provided for sentence of 6 months to 5 years of imprisonment. The Basic Prosecution reasoned: *“The legislator, in Article 90, paragraph 1, subparagraph 1.4 of the PCC, has provided that criminal prosecution cannot be undertaken in cases where five years have passed since the commission of an offense punishable by more than three years of imprisonment, while according to Article 91, paragraph 6 of the PCC, criminal prosecution is interrupted in any case after twice the time of the statute of limitations has passed. Therefore, based on the fact that the foreseen sentence for this criminal offense is 6 months to 5 years and from the time when this criminal offense is alleged to have been committed, 22.05.2009, until the filing of the criminal report, more than fourteen (14) years have passed”*.
14. On 23 October 2023, the Applicant filed an appeal with the Appellate Prosecution Office against the decision of the Basic Prosecution. The Applicant highlighted that the contract concluded between him and the suspects was of the year 2016 and differed from the contract concluded in 2009. Consequently, according to him, the provisions of the Criminal Code No. 04/L-82 of the Republic of Kosovo (hereinafter: CCK) should have been applied. According to the Applicant: *“the factual situation has not been correctly assessed, specifically the situation of facts; the victim has described in detail how and when he was deceived, and material evidence has been attached, the prosecution has incorrectly assessed the factual situation, specifically the contract of 2016, for which it found that there is a technical error therein...”*.
15. On 1 November 2023, the Appellate Prosecution Office, through Decision [AKAP. II. No. 136/23], dismissed the Applicant’s appeal as out of time.
16. The Appellate Prosecution Office reasoned that based on paragraph 5 of Article 84 (Dismissal of Criminal Complaints) of the Criminal Procedure Code No. 08/L-032 (hereinafter: the CPC), *“the victim, or the injured party may file a complaint against the dismissal of the criminal report within eight (8) days of the receipt of the notification under paragraph 4. of this Article.”*

17. The Appellate Prosecution Office emphasized that “referring to the case files, specifically the acknowledgment of receipt, it results that the authorized representative of the injured party received Decision PP/II.No.1162/23, dated 03.10.2023, on 16.10.2023, while the appeal was submitted to the Basic Prosecution on 25.10.2023, respectively 2 days late, which is why it was dismissed as out of time”.

Applicant’s allegations

18. The Applicant claims that the Appellate Prosecution Office, through its decision, violated his constitutional rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], and 54 [Judicial Protection of Rights] of the Constitution.
19. The Applicant emphasizes that his appeal to the Appellate Prosecution Office was not addressed at all and was erroneously found out of time. The Applicant claims that he submitted the appeal to the Appellate Prosecution Office via mail, with tracking number [5404254], on 23 October 2023, and not on 25 October 2023, as claimed by the Appellate Prosecution Office. Consequently, according to the Applicant, the appeal was submitted within the legal eight (8) day deadline.
20. The Applicant refers to Article 444 (Prescribed Periods of Time), paragraph 3 of the CPK, which stipulates: “When a submission is sent by post, registered mail or electronic mail or telegram, or by other means, such as telex, telefax, or similar means, the date of mailing or sending shall be considered as the date of the service on the person to whom it has been sent.”

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 32 [Right to Legal Remedies]

“Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.”

European Convention on Human Rights

Article 13 (Right to an effective remedy)

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

CODE No. 08/L-032 OF CRIMINAL PROCEDURE

Article 84 Dismissal of Criminal Report

[...]

5. If the state prosecutor dismisses the criminal report, the victim, or the injured party may file a complaint against the dismissal of the criminal report within eight (8) days of the receipt of the notification under paragraph 4. of this Article. The complaint shall be submitted with the Basic Prosecution Office to the Appellate

Prosecution Office. The complaint shall contain the facts and the reasons for the complaint.
[...]

CHAPTER XXIII PRESCRIBED PERIODS OF TIME

Article 444

Prescribed Periods of Time

2. When a submission is related to a prescribed period of time, it shall be deemed to have been made in due time if it has been served on the authorized recipient before the lapse of the prescribed period of time.

3. When a submission is sent by post, registered mail or electronic mail or telegram, or by other means, such as telex, telefax, or similar means, the date of mailing or sending shall be considered as the date of the service on the person to whom it has been sent. It is considered that the sender of the submission has not exceeded the prescribed period of time when the person who is intended to receive the submission has not received it on time because of mistakes in the means of service, of which the sender was unaware.

[...]

Admissibility of the Referral

21. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.
22. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties], in conjunction with paragraph 4 of Article 21 [General Principles] of the Constitution, which establish:

Article 113 [Jurisdiction and Authorized Parties]

“(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.”

[...]

Article 21 [General principles]

[...]

4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

23. The Court further examines whether the Applicant has fulfilled the admissibility criteria, as further prescribed in the Law, namely in Articles 47, 48 and 49 of the Law, which stipulate:

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. 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced...”

24. Regarding the fulfillment of the above-mentioned criteria, the Court assesses that the Applicant is an authorized party, within the meaning of Article 113.7 of the Constitution; he challenges the constitutionality of an act of a public authority, specifically Decision [AKPA. II. No. 163/23] of the Appellate Prosecution Office, of 1 November 2023, after having exhausted all available legal remedies, in accordance with Article 113.7 of the Constitution and Article 47.2 of the Law; he has specified the rights guaranteed by the Constitution, which he claims have been violated, in accordance with the requirements of Article 48 of the Law; and he has submitted the Referral within the legal deadline of four (4) months, as stipulated by Article 49 of the Law.
25. The Court recalls that the essence of the present case is related to the fact that the criminal report submitted by the Applicant to the Basic Prosecution was dismissed by the latter due to the expiration of the absolute statute of limitations of the criminal offense. As a result of the Applicant’s appeal against the Decision of the Basic Prosecution to the Appellate Prosecution Office, the latter dismissed his appeal as out of time. The Applicant claims before the Court a violation of his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, and his right to legal remedies, guaranteed by Article 32, in conjunction with Article 54 of the Constitution.
26. The Court reiterates that in the present case, the Applicant submitted a criminal report to the Basic Prosecution against two individuals, A.T. and T.K., which was rejected by the Basic Prosecution. Based on the fact that the Applicant at this stage of the procedure considers himself to be an injured party by the actions of the two other individuals against whom he filed a criminal report with the competent prosecution, and his appeal to the Appellate Prosecution Office was dismissed as out of time due to the calculation of the deadline by the latter, the Court considers that in the present case, the Applicant’s allegations encompass elements of his right to a legal remedy, guaranteed by Article 32 of the Constitution, in conjunction with Article 13 of the ECHR.
27. The Court considers that this Referral is not manifestly ill-founded as stipulated by paragraph (2) of Rule 34 of the Rules of Procedure, and consequently, it must be declared admissible and its merits examined.

Merits of the Referral

28. The Applicant claims that the challenged Decision of the Appellate Prosecution Office, whereby his appeal against the Decision of the Basic Prosecution was dismissed as out of time, denied him the use of a legal remedy.

(i) General principles regarding the right to legal remedy

29. The Court reiterates that each person has the right to use legal remedies against the judicial and administrative decisions, which violate his rights or interests as provided by law. Based on Article 32 of the Constitution, in conjunction with Article 13 of the ECHR, legal systems must provide effective legal remedies to address the essence of claims of violations of the Constitution and the ECHR (see Court cases, [KI193/18](#), Applicant *Agron Vula*, Judgment of 22 April 2020, paragraphs 129-132; [KI94/16](#), Applicants *Avni Doli, Mustafa Doli, Zija Doli, and Xhemile Osmanaj*, Judgment of 24 March 2014, paragraph 90; and [KI47/12](#), Applicant *Islam Thaçi*, Judgment of 11 July 2012, paragraph 45).
30. The Court, based on the case law of the ECtHR, has emphasized that Article 32 of the Constitution, in conjunction with Article 13 of the ECHR, guarantees access to legal remedies to address claims of violations of rights and freedoms, regardless of the form in which they may have occurred (see Court cases, [KI86/18](#), Applicant *Slavica Đorđević*, Judgment of 3 February 2021, paragraphs 124-125; see also ECtHR cases, [Boyle and Rice v. the United Kingdom](#), nos. 9659/82, 9658/82, Judgment of 27 April 1988, paragraph 52).
31. The ECtHR, through its case law, has emphasized that the “Authority” mentioned in Article 13 of the ECHR does not necessarily have to be, in all cases, a judicial institution in the strict sense or a court within the meaning of paragraph 1 of Article 6 and paragraph 4 of Article 5 of the ECHR (see ECtHR cases *Golder v. the United Kingdom*, no. 4451/70, Judgment of 21 February 1975, paragraph 33; *Klass and Others v. Germany*, no. 5029/71, Judgment of 6 September 1978, paragraph 67; *Rotaru v. Romania* [GC], no. 28341/95, Judgment of 4 May 2000, paragraph 69; *Driza v. Albania*, no. 33771/02, Judgment of 13 November 2007, paragraph 116). In this context, the ECtHR has also emphasized that a non-judicial body should, in principle, have the competence to issue a legally binding decision. However, the ECtHR also considers whether (i) the powers of the authority and the procedural safeguards (i) it offers are taken into account in determining whether the legal remedy is effective (*Klass and Others v. Germany*, cited above, paragraph 67; *Silver and Others v. the United Kingdom*, no. 5947/72; and 7 others, Judgment of 25 March 1983, paragraph 13); and (ii) to verify whether non-judicial “authorities” are independent (see *Leander v. Sweden*, no. 9248/81, Judgment of 26 March 1987, paragraph 77; and *Khan v. the United Kingdom*, no. 35394/97, Judgment of 12 May 2000, paragraphs 44-47).
32. The Court, affirming the general principles developed through the case law of the ECtHR, reiterates that Article 32 [Right to Legal Remedies] of the Constitution guarantees (i) the right to pursue legal remedies against judicial and administrative decisions that infringe guaranteed rights in the manner provided by law; (ii) the right to effective legal remedies if a right is found to have been violated; and (iii) the right to an effective resolution if a right guaranteed by the Constitution has been violated (see, analogously, the ECtHR case *Boyle and Rice vs the United Kingdom*, Judgment of 27 April 1998, paragraph 52). Furthermore, the Court, referring to the stance of the ECtHR, notes that the latter has highlighted that Article 13 must be “effective” both in practice and in law (see ECtHR cases, *Ilhan v. Turkey*, Judgment of 27 June 2000).

(ii) Assessment of the Court regarding the allegation of violation of the right to legal remedy

33. The Court recalls that the Applicant filed a criminal report with the Basic Prosecution against two persons, suspecting that they had committed the criminal offense of “Fraud”, under paragraph 2, of Article 261 of the Provisional Criminal Code of Kosovo. The Basic Prosecution dismissed the Applicant’s criminal report, reasoning that the criminal offense for which the aforementioned persons were suspected had reached the absolute statute of limitations for prosecution.
34. The Applicant filed an appeal with the Appellate Prosecution Office against the Decision of the Basic Prosecution dismissing the criminal report. According to the Applicant, the criminal offense had not yet reached the statute of limitations, and the Basic Prosecution should have addressed the criminal report.
35. The Court notes that the Appellate Prosecution Office, as the competent authority to review the appeal against the Decision of the Basic Prosecution, as provided in Article 84 [Dismissal of Criminal Report] of the CPCK, dismissed the Applicant’s appeal reasoning that, based on the acknowledgment of receipt it possessed, the Applicant received the Decision of the Basic Prosecution on 16 October 2023, while he submitted his appeal to the Appellate Prosecution Office on 25 October 2023, namely two (2) days after the deadline prescribed by paragraph 5 of Article 84 (Dismissal of Criminal Report) of the CPCK.
36. The Applicant does not challenge *per se* the eight (8) day deadline for submitting the appeal, a deadline prescribed by law; nor does he challenge the date of receipt of the Decision of the Basic Prosecution, namely the date from which the eight (8) day legal deadline for submitting the appeal begins to run. The Applicant emphasizes that he submitted his appeal against the Decision of the Basic Prosecution via mail on 23 October 2023, and not on 25 October 2023, as claimed by the Appellate Prosecution Office. According to the Applicant, Article 444 (Prescribed Periods of Time) of the CPCK provides that when a submission is sent by mail, registered mail, or electronic mail, the day of posting or sending is considered the day of submission for the person to whom it is addressed. On the other hand, the Appellate Prosecution Office, in the comments it submitted to the Court, claims that there was no evidence in the case file justifying the submission of the appeal by mail, while in the case registration management system (CRMS) is ascertained that the appeal was submitted on 25 October 2023.
37. In the case files submitted to the Court, the Applicant attached evidence proving that he had submitted to the post the appeal to the Appellate Prosecution Office on 23 October 2023. As a result, the Court notes that based on paragraph 3 of Article 444 (Prescribed Periods of Time) of the CPCK, when a submission is sent by post, registered mail or electronic mail or telegram, or similar means such as telex, telefax, or other similar means, the date of mailing or sending shall be considered as the date of the service on the person to whom it has been sent. In this context and based on the case file, the Court recalls that the Applicant received the Decision of the Basic Prosecution on 16 October 2023, while he submitted his appeal via post to the Appellate Prosecution Office on 23 October 2023, namely within the legal deadline of eight (8) days provided by paragraph 5 of Article 84 of the CPCK.
38. The Court considers that the method of receiving and registering submissions is an internal matter of the Appellate Prosecution Office. However, it recalls that any potential errors related to the registration of submissions and the incorrect calculation of their receipt deadlines cannot be to the detriment of the parties and, consequently, may result in violation of their constitutional rights to the use of legal remedies.

39. The Court reiterates that Article 32 [Right to Legal Remedies] of the Constitution provides that every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law. In the present case, the Applicant used a legal remedy guaranteed by paragraph 5 of Article 84 (Dismissal of Criminal Report) of the CPCCK, which provides that if the injured party is not satisfied with the dismissal of the criminal report, he/she may file an appeal against that decision with the Appellate Prosecution Office through the Basic Prosecution within eight (8) days. However, the Applicant was denied the right to effectively use the legal remedy because the Appellate Prosecution Office did not address the merits of the Applicant's claims due to the incorrect calculation of the legal deadline for submitting the appeal.
40. Following this, the Court wishes to highlight that the Appellate Prosecution Office has full jurisdiction to decide on the merits of the Applicant's appeal, and in this context, does not prejudice its decision-making.
41. As a result, in light of the elaboration made above, the Court finds that the Decision [AKPA. II. No. 163/23] of the Appellate Prosecution Office, of 1 November 2023 – dismissing the appeal as out of time, has violated the Applicant's right to the use of legal remedy, guaranteed by Article 32 [Right to Legal Remedies] of the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with paragraphs 1 and 7 of Article 113 of the Constitution, Articles 20 and 47 of the Law and Rule 48 (1) (a) of the Rules of Procedure, on 16 July 2024, unanimously

DECIDES

- I. TO DECLARE the referral admissible;
- II. TO HOLD that the Decision [AKAP. II. No.136/23] of the Appellate Prosecution Office, of 1 November 2023, is not in compliance with Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo;
- III. TO DECLARE the Decision [AKAP.II.No.136/23] of the Appellate Prosecution Office, of 1 November 2023, invalid, and remand the case for reconsideration to the Appellate Prosecution Office, in accordance with the findings of this Judgment;
- IV. TO ORDER the Appellate Prosecution Office to inform the Court, in accordance with paragraph 5 of Rule 60 (Enforcement of decisions) of the Rules of Procedure, by 17 July 2025, about the measures taken to enforce this Judgment;
- V. TO NOTIFY this Judgment to the parties;
- VI. TO PUBLISH this Judgment in the Official Gazette in accordance with paragraph 4 of Article 20 of the Law;
- VII. TO HOLD that this Judgment is effective as of the date of its publication in the Official Gazette of the Republic of Kosovo, in accordance with paragraph 5 of Article 20 of the Law.

Judge Rapporteur

President of the Constitutional Court

Selvete Gërxhaliu-Krasniqi

Gresa Caka-Nimani

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