



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

Prishtina, 3 July 2017
Ref. No.: RK 1098/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI134/16

Applicant

Dedë Hasani

Constitutional review of Judgment PAKR. No. 379/16 of the Court of Appeals of Kosovo, of 21 September 2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral is submitted by Dedë Hasani (hereinafter: the Applicant) from village of Mejë, Municipality of Gjakovë represented by Teki Bokshi, attorney at law.

Challenged decisions

2. The Applicant challenges Judgment PAKR. No. 379/16 of the Court of Appeals of Kosovo, of 21 September 2016, in connection with Judgment Pkr. No. 174/14 of the Basic Court in Gjakova, of 26 April 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment of the Court of Appeals of Kosovo.
4. The Applicant alleges violation of Articles 21 [General Principles], 22 [Direct Applicability of International Agreements], 31 [Right to Fair and Impartial Trial] of Constitution in connection with Article 1 of Protocol No. 1 (Protection of property) of the European Convention of Human Rights.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Articles 22 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 23 November 2016, the Applicant submitted a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On 14 December 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (presiding), Ivan Čukalović and Bekim Sejdiu.
8. On 2 February 2017, the Court notified the Applicant about the registration of the referral and asked him to fill in the referral form in addition to providing all relevant documents as required by Article 22.4 of the Law and Rule 29 of the Rules of Procedure.
9. On 1 March 2017, the Applicant submitted the relevant documents as required by Article 22.4 of the Law and Rule 29 of the Rules of Procedure. A copy of the referral was sent to the Court of Appeals.
10. On 7 March 2017, the Court in compliance with Rule 29 (c) of the Rules of Procedure asked the Applicant to provide a power of attorney for Teki Bokshi within five (5) days.
11. On 15 March 2017, the Applicant provided the power of attorney for Teki Bokshi.

12. On 3 May 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. According to the submitted documents on 20 June 2007 the Applicant was assailed by and sustained heavy body injuries from M.C.
14. On 17 July 2007, the Public Prosecutor in Gjakova filed Indictment PP. No. 300/2007 against M.C. for criminal offence Grievous Bodily Harm under Article 154 paragraph 1 of the then Provisional Criminal Code of Kosovo (hereinafter, the PCPK) .
15. On 20 July 2007, the Public Prosecutor in Gjakova changed his indictment against M.C. for the same criminal offence, but under Article 154 paragraph 2, sub-paragraph 4 in connection with paragraph 1 of the PCCK.
16. From 2009 until 2014 several court instances dealt with case. They dealt with different issues such as the accuracy of the legal qualification of the criminal offence committed by M.C., the severity of the injuries sustained by the Applicant through relevant medical expertise, as well with the request of the Public Prosecutor to transfer the matter to the Department for Serious Crimes.
17. On 26 April 2016, the Basic Court in Gjakova by Judgment Pkr. No. 174/14 found M.C. guilty for committing the criminal offence Grievous Bodily Harm and sentenced him with imprisonment of seven (7) months. The Basic Court advised Applicant to initiate civil proceedings for pecuniary damages. From the documents is seen that the representative of the Applicant has stated before the Basic Court that the Applicant will seek pecuniary compensation in civil proceedings.
18. The Judgment of the Basic Court was challenged by the Applicant, the State Prosecutor and the representative of the accused M.C. before the Court of Appeal. The Applicant and the State Prosecutor asked for a more severe sentence for the accused M. C. as well the latter to pay the procedural expenses incurred for the Applicant. The representative of the accused M.C. complained about violation of the procedural law and erroneous and incomplete determination of the factual situation. He challenged the criminal sentence and the decision on the expenses of the criminal proceedings. He asked M.C. to be acquitted from the criminal charge or to remand the case to the Basic Court for a new consideration.
19. On 21 September 2016, by Judgment PAKR. No. 379/16 the Court of Appeals of Kosovo partially granted the appeal of M.C. and commuted his sentence to six (6) months imprisonment. The Applicant's appeal was refused as ungrounded. As to the severity of the sentence of the accused M.C. the Court of Appeal, inter alia, stated as there was a requalification of the criminal offence which necessitated a different sentence. Thus the commuted sentence was proportionate with the intensity of the social dangerousness of the criminal offence and the level of criminal liability of the accused.

Applicant's allegations

20. The Applicant alleges violation of Articles 21 [General Principles], 22 [Direct Applicability of International Agreements], 31 [Right to Fair and Impartial Trial] of Constitution in connection with Article 1 of Protocol No. 1 (Protection of property) of the European Convention of Human Rights.
21. The Applicant complains that his fundamental rights were violated by the two courts because: (i) M.C. assaulted and caused him severe bodily injuries, for which, he was not punished in proportion to the committed offence; (ii) he was unjustly deprived of his right to indemnity; and, (iii) his right to a trial within a reasonable time was violated.
22. With respect to Judgment PAKR. No. 379/16 of the Court of Appeal, the Applicant alleges that: *"... the Court of Appeals has modified the Judgment of the first instance, has declared the Accused person guilty for a more lenient criminal offence, even though it had been proven that he has committed a more severe offence; it has declared him guilty for a criminal offence that impends a punishment by imprisonment for 6 months up to 5 years, and when it has punished him, it has pronounced a sentence against him with a legal minimum"*.

Assessment of admissibility

23. The Court will examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
24. In this respect, the Court refers to Article 113.7 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

"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."

25. The Court also refers to Article 48 of the Law, which provides:

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".

26. The Court further takes into account Rule 36 (2) (a) and (c) of the Rules of Procedure which specify:

"(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

(a) the referral is not prima facie justified, or

[...]

(c) the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution".

27. The Court notes as far as the Applicant complains that his right to a fair and impartial trial and the right to property were violated he uses different arguments. On the first place, that the person who assailed him was not punished in proportion to the committed offence. On the second place, that the trial proceedings went beyond the reasonable time, and thirdly, that he was unjustly deprived of his right to indemnity as the injured party in criminal proceedings.
28. As to the Applicant's allegation on the severity of punishment of M.C., the Court notes that the court of appeal explained that: (i) there was a requalification of the criminal offence which necessitated a different sentence; (ii) the commuted sentence was proportionate with the intensity of the social dangerousness of the criminal offence and the level of criminal liability of the accused; and (iii) there were mitigating circumstances in favor of M.C., because of his young age at the time he committed the offence, that he has to support a family and his good demeanor since the time he committed the offence.
29. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). (See, for example, Case No. KI89/15, Applicant *Fatmir Koci*, Resolution on Inadmissibility of 22 March 2016, paragraph 38).
30. The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of regular courts. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court" (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also mutatis mutandis see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
31. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *Garcia Ruiz v. Spain*, and also see mutatis mutandis Constitutional Court of the Republic of Kosovo: Case No. KI156/15, Resolution on Inadmissibility, of 23 December 2016, paragraph 42).
32. It should be borne in mind - since this is a very common source of misunderstandings on the part of applicants - that the "fairness" required by Article 31 of the Constitution and Article 6 of the Convention is not "substantive" fairness (a concept which is part-legal, part-ethical and can only be applied by the trial judge), but "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (See the case of *Star Cate - Epilekta Gevmata and Others v. Greece*, application no. 54111/07, ECtHR, Decision of 6 July 2010).

33. In the light of the foregoing considerations, the Court notes that the Applicant had the benefit of adversarial proceedings; that he was able, at various stages of those proceedings, to adduce the arguments and evidence he considered relevant to his case; that he had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; that all his arguments which, viewed objectively, were relevant to the resolution of the case were duly heard and examined by the courts; that the factual and legal reasons for the impugned decisions were set out at length; and that, accordingly, the proceedings taken as a whole were fair. (See the Case of *Garcia Ruiz v. Spain*, application no. 30544/96, [GC], Judgment of 21 January 1999, paragraph 29).
34. The fact that the Applicant disagrees with the outcome of the case it cannot serve him as a right to raise an arguable claim on the violation of rights and freedoms guaranteed by the Constitution and the Convention (See Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 May 2012, paragraph 28).
35. As to the Applicant's allegation about the excessive length of proceedings, the Court notes that Article 31 of the Constitution and Article 6 (1) of the Convention oblige the competent authorities to organize the judicial system in such a way that the courts meet all the criteria set out in Articles concerned. (See Case *Abdoella v. the Netherlands*, ECtHR, Application no. 12728/87, Judgment of 25 November 1992, paragraph 24).
36. In the case at issue, the Court notes that the Applicant's allegation about violation of reasonable time limit of the proceedings is not justified. The courts were active in each instance - trial and appeal instance, and the length of time it took to conclude the proceedings is more due to their considerations for proper administration of justice.
37. Moreover, the Court notes that in the case at issue, the proceedings took a while to be concluded because: (i) the applicant, the accused and the State Prosecutor all made use of remedies to their avail in order to challenge the rulings of the courts; (ii) there were changes made to the criminal law, the law on criminal procedure and the law on courts which were implemented in 2013; and (iii) the courts had to reply to the many allegations set forth in this criminal case by different actors. Thus the alleged delay of proceedings cannot be attributable to the courts or at the very least the Applicant did not substantiate that allegation (see Constitutional Court of the Republic of Kosovo: Case No. KI07/15, Resolution on Inadmissibility of 8 December 2016).
38. As to the Applicant's allegation on being unjustly deprived of his right to indemnity as an injured party in a criminal case, the Court notes that the applicable law in Kosovo provides for the injured parties the right to claim compensation in civil proceedings.
39. The Applicant however has not submitted before the Court any decision pertinent to his claim for compensation in civil proceedings, and that therefore, that allegation is manifestly ill-founded.

40. Finally, the Court considers that the Applicant only enumerates and generally describes the content of constitutional provisions without substantiating exactly how those provisions were violated in his case as is required by Article 48 of the Law.
41. Therefore, the Referral upon global assessment of all allegations is to be declared inadmissible, as manifestly ill-founded, in accordance with the Rule 36 (2) (a) and (c) of the Rules of Procedure, because the Applicant is not a victim of violation of the rights guaranteed by the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (2) (a) and (c) of the Rules of Procedure, on 3 May 2017, 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Snezhana Botusharova



President of the Constitutional Court



Arta Rama-Hajrizi