



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

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Prishtina, 2 June 2017  
Ref. No.:RK 1074/17

## RESOLUTION ON INADMISSIBILITY

in

**Case No. KI138/16**

Applicant

**Gani Gërbeshi**

**Constitutional review of  
Judgment Pml. Kzz 136/16 of the Supreme Court  
of 14 July 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 was submitted by Gani Gërbeshi, from village Ropicë, Municipality of Vushtrri (hereinafter, the Applicant), who is represented by Mahmut Halimi, a lawyer from Prishtina.

## **Challenged decision**

2. The Applicant challenges Judgment Pml. kzz 136/16 of the Supreme Court, of 14 July 2016, which refused as unfounded the Applicant's request for protection of legality against Judgement P. 132/14 of the Basic Court of Mitrovicë/Mitrovica of 30 July 2015 and Judgement PAKR 474/15 of the Court of Appeals of 14 January 2016.
3. The challenged Judgment was served on the Applicant on 8 August 2016.

## **Subject matter**

4. The subject matter of Referral is the constitutional review of the challenged Judgment, which allegedly violated the Applicant's rights and freedoms guaranteed by paragraph 5 of Article 31 (Right to Fair and Impartial Trial) of the Constitution of the Republic of Kosovo (hereinafter, the Constitution) as well as by paragraph 1.2 of Article 6 (Right to Fair trial) of the European Convention on Human Rights (hereinafter, ECHR).

## **Legal basis**

5. The referral is based on Article 113 (7) of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

## **Proceedings before the Constitutional Court**

6. On 29 November 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On 14 December 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Gresa Caka-Nimani.
8. On 20 December 2016, the Court notified the Applicant about the registration of the Referral and sent a copy to the Supreme Court.
9. 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**

10. On 17 December 2014, the Prosecutor in Mitrovica filed with the Basic Court the Indictment PP. no. 179/14 due to reasonable suspicion that the Applicant committed the criminal offense of aggravated murder.
11. On 30 July 2015, the Basic Court (Judgment P. no. 132/14) found the Applicant guilty of the criminal offence of aggravated murder and sentenced him to imprisonment.

12. On 27 August 2015, the Applicant filed an appeal with the Court of Appeal “*on the grounds of: Essential violation of the provisions of criminal procedure law; Erroneous and incomplete determination of factual situation; Violation of the criminal law and Determination of the punishment*”.
13. On 14 January 2016, the Court of Appeal (Judgment PAKR. No. 474/15) partially granted the appeal of the Applicant, modifying the judgment of the Basic Court in its sentencing part, and refused as unfounded the remaining part of the appeal, upholding the impugned judgment.
14. On 10 May 2016, the Applicant filed with the Supreme Court a request for protection of legality, alleging erroneous or incomplete determination of the factual situation, incomprehensible and contradictory enacting clause, violation of Article 394 (1) of the CPC, violation of principles *in dubio pro reo* and the independence of the courts and erroneous qualification of the criminal offence .
15. On 14 July 2016, the Supreme Court refused as unfounded the Applicant’s request for protection of legality and upheld the Judgment of the Court of Appeal of 14 January 2016. The enacting clause of the judgment reads:

*“... The Panel of the Supreme Court finds that the first and second instance courts correctly determined the elements of crime and considers that the defence failed to prove the violation of the criminal law. The Panel notes that the Court of Appeal carefully analyzed the jurisprudence presented by the defence, the criminal offence is qualified in the correct manner as aggravated murder under Article 179 (1) (5) of CCK.”*

### **Applicant’s allegations**

16. The Applicant claims that his right to fair and impartial trial and the principles of presumption of innocence and *in dubio pro reo* were violated in the proceedings conducted before the regular courts.
17. The Applicant alleges that “*the three Courts have seriously violated the principle in dubio pro reo to the detriment of the Convicted – Gani, because it is a fact that the Defense Counsel has presented an opposite interpretation from that which is shown in the video recording, which does not imply that the real description of that is shown is distorted, therefore a different interpretation to the explanation of the evidence has been provided*”.
18. The Applicant requests the Court “*(...) to hold violation of Applicant’s individual rights, guaranteed by Article 31, paragraph 5 of the Constitution of the Republic of Kosovo, Article 6, paragraph 1 and 2 of ECHR and Article 3, paragraph 1 and 2 of CPCRK; (...) to declare the Judgments of the Basic Court in Mitrovica, Court of Appeal of Kosovo and the Supreme Court of Kosovo challenged by this Referral invalid; and to order that this case be remanded for retrial and reconsideration (...)*”.

## Admissibility of Referral

19. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and as further provided by the the Law and foreseen by the Rules of Procedure.
20. 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.”*
21. The Court also refers to Article 49 [Deadlines], which provides that “*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”*.
22. The Court observes that the Applicant is an authorized party; the Referral was submitted in accordance with the provided deadline and the Applicant has exhausted all legal remedies.
23. However, the Court also refers to Article 48 of the Law [Accuracy of the Referral], which foresees:

*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.*
24. The Court further refers to Rule 36 [Admissibility Criteria] (1) (d) and (2) (b) of the Rules of Procedure, which provides:
  - (1) *The Court may consider a referral if:*  
[...]  
*(d) the referral is prima facie justified or not manifestly ill-founded.”*
  - (2) *The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*  
[...]  
*(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights.*
25. In that respect, the Court recalls that the Applicant claims mainly a violation of his right to fair and impartial trial. Notwithstanding, the Court considers that the Applicant has not accurately clarified how and why his right to fair and impartial trial has been allegedly violated.

26. The Court recalls 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”*.
27. In this regard, the Court reiterates that the European Court of Human Rights (hereinafter, the ECtHR) found that *“the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law”*. See: *mutatis mutandis*, ECtHR case *García Ruiz v. Spain*, no. 30544/96, 21 January 1999, paragraph 28.
28. The Court also reiterates that the complete determination of the factual situation is within the jurisdiction of regular courts, and that 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 ECtHR case *Akdivar v. Turkey*, No. 21893/93, 16 September 1996, para. 65; see also, *mutatis mutandis* Constitutional Court case KI86/11, Applicant *Milaim Berisha*, 5 April 2012.
29. In that respect, the Court notes that the Court of Appeals thoroughly reviewed the evidence and the analysis made by the Basic Court.
30. In fact, the Court observes that the Court of Appeals could not see *“any blatant contradiction or inconsistency between the findings of the Trial Panel and the evidence adduced at trial such as the video footage or the pictures and records from the crime scene”*. The Court of Appeals considered that *“the defence has failed to substantiate or identify any specific contradiction in this respect”*. It concluded that *“the Basic Court completely and correctly established the factual situation and that the arguments raised in the appeal filed on behalf of Gani Gerbeshi do not undermine these findings”*.
31. The Court further observes that the Supreme Court thoroughly reviewed the Applicant’s allegations on erroneous or incomplete determination of the factual situation, incomprehensible and contradictory enacting clause, violation of Article 394 (1) of the CPC, violation of principles *in dubio pro reo* and the independence of the courts, qualification of the offence as Aggravated Murder pursuant to Article 179 (1) (5) of the CCK, and co-perpetration and eventual intent. Then the Supreme Court found that *“the first and the second instance court correctly determined the elements of the crime and considers that the defence failed to prove the violation of criminal law”*.
32. The Court notes that the regular courts extensive and comprehensively took into account and analysed all the allegations made by the Applicant in his appeals. In addition, the regular courts fully described and assessed the evidence individually and in its mutual connection.
33. Moreover, the Court observes that the Supreme Court noted that *“a big part of the request for protection of legality challenges the evaluation of evidence by the Basic Court and the Court of Appeals”*.

34. The Applicant claims before the Court a violation of his right to fair and impartial trial, because of “*a different interpretation to the explanation of the evidence*”. The same allegation was presented before the Court of Appeals and the Supreme Court and it was fully considered and reasonably answered by them.
35. The Court notes that the Applicant repeats before it the same arguments as he had filed in the proceedings before the regular courts, in particular, regarding the evaluation of evidence and consequent establishment of the factual situation
36. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of facts allegedly committed by the regular courts when assessing the evidence (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
37. The Court reiterates that it is beyond its jurisdiction to assess the quality of the conclusions of the courts regarding the evaluation and assessment of evidence, unless it is manifestly arbitrary. The Court has already noted that the regular courts conducted an extensive and comprehensive evidentiary procedure in which the evidence presented by the defence and prosecution was administered.
38. Moreover, the Court reiterates that the task of the Court is to assess whether the regular courts’ relevant proceedings were in any way unfair or tainted by arbitrariness (matter of constitutionality). See, *mutatis mutandis*, ECtHR cases *Shub v. Lithuania*, Decision on Admissibility of Application of 30 June 2009, paragraph 16; *Edwards v. United Kingdom*, Judgment of 16 December 1992, paragraph 34; *Barbera, and Messeque Jabardo against Spain*, Judgment of 6 December 1988, paragraph 68.
39. Furthermore, the Court considers that nothing in the case presented by the Applicant indicates that the regular court proceedings were unfair or arbitrary in order to the Constitutional Court be satisfied that the very essence of the right to fair and impartial trial was violated or that that the Applicant has been deprived of any procedural guarantees which could lead to a violation of that right under Article 31 of the Constitution or paragraph 1 of Article 6 of the ECHR.
40. The Court considers that it is the Applicant’s obligation to substantiate his constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR. That consideration is also in conformity with the jurisprudence of the Court. See Constitutional Court cases No. KI19/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Sylja*, 5 December 2013
41. However, the Court considers that the Applicant has neither substantiated his allegation nor he has submitted *prima facie* evidence indicating that there was a violation of his rights guaranteed by the Constitution and the ECHR.

42. The Court further considers that it cannot act as a “fourth instance court”.
43. Therefore, the Court finds that the Applicant’s Referral is manifestly ill-founded on a constitutional basis and is inadmissible in accordance with Article 48 of the Law and Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

**FOR THESE REASONS**

Pursuant to Article 113 (7) of the Constitution, Article 48 of the Law and Rules 36 (1) (d), (2) (b) and 56 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; and
- IV. TO DECLARE this Decision effective immediately;

**Judge Rapporteur**



Almiro Rodrigues



**President of the Constitutional Court**



Arta Rama Hajrizi