



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

Prishtina, on 2 June 2016
Ref. no.:RK944/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI01/15

Applicant

Fahredin Gashi

**Constitutional Review of Judgment no. PML.KZZ 157/2014 of the
Supreme Court of Kosovo, of 2 October 2014**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
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 Mr. Fahredin Gashi (hereinafter: the Applicant), represented by Mr. Tahir Rrecaj, a lawyer and advocate in Prishtina, Kosovo.

Challenged Decision

2. The Applicant challenges Decision PML. KZZ 157/2014, of the Supreme Court of Kosovo, of 02 October 2014, and impliedly the Judgment of the Court of Appeals of Kosovo, Decision PAKR 1175/12 of 10 March 2014, and the Judgment of the District Court of Prishtina, Decision P. Nr. 371/10, dated 23 November 2011.
3. The challenged decision was served on the Applicant on 03 November 2014.

Subject Matter

4. The subject matter is the constitutional review of the Decision PML.KZZ 157/2014, of the Supreme Court of Kosovo, of 02 October 2014.
5. The Applicant claims that the challenged Decision is contrary to, Article 24 [Equality Before the Law] and Article 31 [Right to Fair Trial and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 [Right to a fair trial] and Article 2 of Protocol VII to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), and Article 10 of the Universal Declaration of Human Rights, and Article 14 of the International Covenant on Civil and Political Rights and its Protocols (hereinafter: ICCPR).

Legal Basis

6. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 54, 55 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 09 January 2015, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 13 January 2015, the President of the Court, by Decision GJR. KI01/15, appointed Judge Robert Carolan as Judge Rapporteur. On the same date, the President of the Court by Decision KSH. KI01/15, appointed the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.
9. On 27 March 2015 the Court notified the Applicant of the registration of the Referral and requested the Applicant to submit a power of attorney.
10. On the same date, the Court submitted a copy of the Referral to the Supreme Court of Kosovo, the State Prosecutor of Kosovo and the Special Prosecution of Kosovo.

11. On 01 April 2015 the Applicant submitted a power of attorney.
12. On 05 May 2015 the Chief State Prosecutor for the Republic of Kosovo submitted a response with the Constitutional Court to the referral of the Applicant.
13. On 06 May 2015 the Court provided a copy of the submission of the Chief State Prosecutor to the Applicant.
14. On 01 July 2015, by Decision KSH. KIO1/15, the President of the Court appointed Judge Ivan Čukalović as a member of the Review Panel replacing Judge Kadri Kryeziu, whose mandate in the Constitutional Court had ended on 26 June 2015.
15. On 15 March 2016 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

16. On 15 June 1999, in Vorigovc Village, in the Municipality of Lipjan, S. G. was murdered while he was sleeping in his home. The Applicant, while accompanied by N. B., was charged with the crime of War Crimes against a Civilian Population for the murder of S.G..
17. On 23 November 2011 the Applicant was convicted by the District Court of Prishtina (Judgment P. No. 371/10) of the crime of War Crimes against the Civilian Population, under Articles 22 and 142 of the Criminal Code of SFRY, Common Article 3 of the Geneva Conventions of 12 August 1949, and Article 4 of Protocol II of 8 June 1977 additional to the Geneva Conventions. The Court sentenced the Applicant to 18 years of imprisonment, in which the time spent in house detention from 14 July 2010 until 18 August 2010 and in detention on remand since 19 August 2010 was to be credited in the sentence.
18. With respect to the testimony of the Applicant's co-defendant, the cooperative witness N.B., the District Trial Court made detailed and explicit findings.
19. On 16 May 2012, defense counsel of the Applicant filed an appeal against the Judgment with the then competent second instance Court, the Supreme Court of Kosovo on the grounds of (i) substantial violations of the provisions of the criminal procedure (Article 403 paragraph (1) subparagraph 12) and paragraph (2) of the Kosovo Criminal Code of Procedure -2004 (hereinafter: KCCP)), (ii) erroneous or incomplete determination of the factual situation (Article 405 paragraph (3) of the KCCP), (iii) violation of the criminal law (Article 404 paragraph (1) subparagraph 4) of the KCCP in conjunction with article 2 paragraph (2) of the Criminal Code of Kosovo -2004 (hereinafter: CCK)) and (iv) decision on the criminal sanction (the appeal does not refer to any Articles of the KCCP). Against this background the defence counsel proposed that the appeal is granted, the impugned Judgment is modified in the form that the

Applicant is acquitted from all charges, or in the alternative the Judgment is annulled and the case is returned for re-trial to the court of first instance.

20. On 10 February 2014 the Court of Appeals – now the competent second-instance court – held a session to hear the arguments of defense counsel, the Applicant and the prosecutor regarding the appeal against the Judgment.
21. Thereafter, the Court of Appeals partially granted the appeal filed in favor of the Applicant, and reduced the punishment from 18 years to 14 years of imprisonment.
22. In reviewing the District Court verdict and judgment, the Court of Appeals made detailed and explicit findings with respect to the credibility of the cooperative witness N. B. and the sufficiency of the evidence in this trial.
23. On 5 June 2014 the Applicant’s defense counsel filed a request for protection of legality with the Supreme Court against the Judgment of the Court of Appeals and that of the District Court of Prishtina on the grounds of (i) violation of the criminal law (Article 404 paragraph (1) subparagraph (4) of the KCCP in conjunction with Articles 22 and 142 of the CCK) and (ii) substantial violation of the provisions of the criminal procedure Article 403 paragraph (1) subparagraphs (3), (8) and (12) and paragraph (2) of the KCCP).
24. On 2 October 2014 the Supreme Court, by Judgment Pml. Kzz 157/2014, upheld the Applicant’s conviction for War Crimes Against a Civilian Population but modified the Judgment of the Court of Appeals in order to include in the enacting clause that the time spent in house detention from 14 July 2010 until 18 August 2010 and in detention on remand since 19 August 2010 by the Applicant is to be credited in the sentence.
25. The Supreme Court, in reviewing the Applicant’s request for protection of legality, carefully reviewed the fairness of the trial proceedings and the handling of evidence and found that there had been substantial evidence to support the verdict and that the trial proceedings had been fair.

Applicant’s Allegations

26. The Applicant alleges that his rights pursuant to Articles 24 and 31 of the Constitution, Article 6 and Protocol VII of Article 2 of the ECHR, and Article 14 of the ICCPR were violated by the regular courts of Kosovo in the judgment finding him guilty on 23 November 2011 of the crime of war crimes against a civilian population.
27. He specifically alleges that he was denied a fair and impartial trial because:
 - a. Confirmation of the Indictment was made without the court ever holding a formal hearing to confirm the indictment;
 - b. The court’s verdict and judgment lacked reasoning;
 - c. Violation of the principle of “the contradictory”;
 - d. Violation of essential provisions of the Criminal Procedure Code;

- e. Presence of the other accused while the Applicant was interviewed in the Procedure;
- f. Violation of the principle of equality of arms;
- g. Violation of the principle *in dubio pro reo*;
- h. Non-administration of submitted evidence;
- i. Holding of the session despite the health/mental condition of the Applicant;
- j. Lack of the review in entirety of the Appeal;
- k. Grounding the Judgment only on the statements of the cooperative witness; and
- l. He did not receive the written verdict within a reasonable period of time.

28. The Applicant requests the Court to:

- a. grant the Applicant's Referral as grounded;
- b. order the hearing session, pursuant to Rule 39 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo; and
- c. ascertain that the Applicant's individual rights, guaranteed by Articles 24 and 31 of the Constitution of the Republic of Kosovo, Article 6 of the European Convention on Human Rights, Article 10 of the Universal Declaration of Human Rights, and Article 14 of the International Covenant on Civil and Political Rights, have been violated by the Special Prosecution of the Republic of Kosovo, District Court in Prishtina, Court of Appeals of Kosovo, and Supreme Court of Kosovo.

Response of the Chief State Prosecutor

29. *"The State Prosecutor submits that the Referral of the Applicant does not meet the requirements set forth by Article 48 of the Law on Constitutional Court and Rule 29 paragraph (2) items (e), (f) and (g) of the Rules of Procedure. It is entirely unclear which judicial decision the Applicant challenges before the Constitutional Court. The Referral is silent on the constitutional rights and freedoms which the Applicant alleges that had been violated. The Applicant fails to provide clear and concise details of the underlying facts and demonstrate the correlation between these facts and the alleged violation. Finally, there is no relief specified in the Referral."*

Admissibility of the Referral

30. The Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution, and further specified in the Law and the Rules of Procedure.

31. In this respect, the Court refers to Article 113.7 of the Constitution, which provides:

"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”.

32. The Court also recalls Article 48 of the Law, which states that:

“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”.

33. In addition, the Court takes into account Rules 36 (1) (d) and 36 (2) of the Rules of Procedure, which provide that:

“(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:

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

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

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

(d) the Applicant does not sufficiently substantiate his claim.”

34. The Court notes that the Applicant’s allegations primarily relate to the manner in which the evidence presented by the cooperative witness, N.B., was handled. The Applicant considers that the cooperative witness was not credible and that there was not sufficient other evidence to corroborate this testimony. The Applicant alleges that the courts did not adequately examine the credibility of the cooperative witness in reaching their judgments, and did not take his arguments as to this credibility into account.

35. The Court recalls Article 31 of the Constitution, which states, *inter alia*, that:

“1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial hearing as to the determination of one’s rights and obligations or as to any criminal

charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

4. Everyone charged with a criminal offence has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.

5. Everyone charged with a criminal offence is presumed innocent until proven guilty according to law.

[...]"

36. The Court also recalls Article 6 of the ECHR, which states, *inter alia*, that:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...].

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

[...]

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[...]"

37. The Court recalls that Article 31 of the Constitution and Article 6 of the ECHR pertaining to the right to a fair trial are essentially concerned with whether an applicant was afforded ample opportunities to state his case and contest the evidence that he considered false. The right to a fair trial enshrined in the Constitution and the ECHR are not concerned with the question whether the domestic courts reached a right or wrong decision with respect to the established facts or law.

38. The Court considers that to find that the Applicant did not receive a fair trial pursuant to Article 31 of the Constitution or Article 6 of the ECHR, this Court would have to find that the verdict and judgment of the Supreme Court and the lower courts were not reasoned. In addition, the Court would have to find that there was not sufficient corroboration of the testimony of the cooperative witness so as to make his testimony credible enough to support beyond a reasonable doubt the verdict and judgment of guilt.

39. The Court recalls that if a judgment of conviction is not reasoned, there is a presumption that a defendant did not receive a fair trial. The Court also notes that a judgment of conviction cannot be based solely on the uncorroborated testimony of a cooperative witness.
40. However, the Court cannot substitute its judgment for that of the District Court with respect to what the evidence did or did not prove in the Applicant's case. To find that there was a constitutional violation of the right to a fair trial in this case with respect to the sufficiency of the evidence, this Court would have to find that not only the reasoning of the District Court, but the reasoning of the Court of Appeals and the Supreme Court with respect to the corroboration of the cooperative witness' testimony was so flawed that there was no corroboration and that their judgments were not reasoned.
41. This Court cannot make that finding in this case. Indeed, the District Court, the Court of Appeals and the Supreme Court made detailed factual findings with respect to the credibility of the cooperative witness and the additional corroborating evidence to support the verdict that the Applicant was proven guilty beyond a reasonable doubt of the crime of committing a War Crime Against the Civilian Population.
42. Therefore, the Court concludes that this allegation should be rejected as inadmissible.
43. With respect to whether alleged violations of the Criminal Procedure Code, the principle of equality of arms and the alleged failure of the District Court to admit certain proposed evidence as well as the Court's rejection of the Applicant's alibi defense, his not receiving the written verdict of guilty within the time prescribed by the Criminal Procedure Code, the Applicant has failed to demonstrate how any of these alleged violations, if they did occur, resulted in a violation of his constitutional right to a fair trial. Therefore, those allegations also must be rejected as inadmissible.
44. With respect to whether the Applicant's alleged health problems may have denied him the right to effectively assist his lawyer in his defense during his trial, the Court notes that there is no evidence that the Applicant or his lawyer ever formally raised that issue in a timely manner with the District Court before or during the trial. Nor is there any evidence that the Applicant suffered from a health condition to such an extent that he could not assist his own lawyer in preparing an adequate defense during his trial.
45. The Court reiterates that it does not act as a court of fourth instance, in respect of the decisions taken by the Supreme Court. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. It is the role of the Constitutional Court to determine whether the regular courts' proceedings were fair in their entirety, including the way the evidence was taken (see Case: *Edwards v. United Kingdom*, no. 13071/87, Report of the European Commission of Human Rights, of 10 July 1991).

46. In the present case, the Court did not find that the pertinent proceedings before the regular courts were in any way unfair or arbitrary (see, *mutatis mutandis*, *Shub v. Lithuania*, ECHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).
47. Therefore, the Court concludes that the Applicant did not substantiate his claim on constitutional grounds and did not provide evidence indicating how and why his rights and freedoms, as protected by the Constitution, were violated by the challenged decision.
48. The Court concludes that the Applicant's Referral is, on a constitutional basis, manifestly ill-founded, in accordance with Article 48 of the Law and Rules 36 (1) (d) and 36 (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49 of the Law and Rules 36 (1) (d) and 36 (2)(d) of the Rules of Procedure, in the session held on 15 March 2016,

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for a public hearing;
- III. TO NOTIFY the Parties of this Decision;
- IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- V. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Robert Carolan

President of the Constitutional Court

Arta Rama-Hajrizi

