



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

Prishtina, 26 August 2016
Ref. no.: RK 975/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI06/15

Applicant

Sadik Abazi

**Request for constitutional review of Judgment Pml. Kzz 98/2014 of the
Supreme Court of 3 September 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 Gërzhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral is submitted by Mr. Sadik Abazi from village Davidovc, Municipality of Shtimje (hereinafter: the Applicant), represented by Mr. Naim Qelaj, a lawyer from Prizren.

Challenged decision

2. The Applicant challenges Judgment Pml. Kzz 98/2014, of the Supreme Court, of 3 September 2014, which was served on him on 26 October 2014.

Subject matter

3. The subject matter of the Referral, is the constitutional review of the challenged judgment, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Articles 6 and 13 of the European Convention on Human Rights (hereinafter: ECHR).
4. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely to suspend the execution of the decision on serving the sentence until the Court renders a decision on the Referral.

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 Rules 29, 55 and 56 of the Rules of Procedure.

Proceedings before the Constitutional Court

6. On 14 January 2015, the Applicant submitted the Referral Court (hereinafter: Court).
7. On 9 February 2015, the President of the Court appointed Judge Kadri Kryeziu as Judge Rapporteur and appointed the Review Panel, composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Ivan Čukalović.
8. On 27 March 2015, the Court informed the Applicant, the Supreme Court and the Office of Special State Prosecutor (hereinafter: SSP) about the registration of the Referral.
9. On 14 May 2015, the SSP provided its comments on Referral.
10. On 1 July 2015, the President replaced Judge Kadri Kryeziu, whose mandate had ended, as Judge Rapporteur, with Judge Robert Carolan.
11. On the same date, the President rendered a decision to replace Judge Robert Carolan, who became Judge Rapporteur, in the Review Panel with Judge Arta Rama-Hajrizi.

12. On 11 July 2016, the President replaced Judge Robert Carolan as Judge Rapporteur, with Judge Snezhana Botusharova.
13. On 14 July 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court to declare the Referral inadmissible and to reject the request for an interim measure.

Summary of facts

14. On 29 July 2011, the SSP filed an indictment with the District Court in Prishtina [PPS no. 460/09] against the Applicant for allegedly committing several criminal offences.
15. On 17 December 2012, the District Court in Prishtina [Judgment P592/11] found the Applicant guilty of the criminal offence of aggravated murder.
16. On 28 March 2013, the Applicant filed an appeal with the Court of Appeal, alleging violations of the criminal procedure provisions, violation of the Criminal Code and erroneous and incomplete determination of the factual situation.
17. The SSP filed a response within the legal deadline on the allegations in the Applicant's appeal, claiming *"that the challenged judgment is fully comprehensible, clear and precise"*.
18. On 12 December 2013, the Court of Appeal [Judgment PAKR 102/13] upheld in its entirety the Judgment of the District Court, and found the Applicant guilty of aggravated murder.
19. On 30 April 2014, the Applicant filed a request for protection of legality with the Supreme Court, alleging violations of the relevant provisions of the Law on Criminal Procedure and violations of the criminal law.
20. The SSP filed a response to the request for protection of legality, alleging that *"A request for the protection of legality cannot be filed grounded on the erroneous and incomplete determination of the factual situation"* and that *"the arguments are identical to the ones filed in the appeal against the Judgment of the District Court. They have already been addressed and rejected by the Court of Appeal."*
21. On 3 September 2014, the Supreme Court [Judgment Pml. Kzz 98/2014] rejected as ungrounded the request for protection of legality, because it could *"neither identify any contradiction between the enacting clause and the reasoning of any of the Judgments"* and *"there was not violation of the criminal law provisions"*.

Applicant's allegations

22. The Applicant states that the decisions of the regular courts violated his rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 31

[Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution as well as Articles 6 and 13 of the ECHR.

23. The Applicant considers that the regular courts violated the principle of *in dubio pro reo*. The Applicant alleges that the regular courts based their finding of guilt exclusively on the testimony of one cooperative witness, whereas the veracity of this testimony was not sufficiently proven, while the testimony of other witnesses was found to be false. Furthermore, the regular courts rejected the Applicant's request to conduct a psychological evaluation of the cooperative witness.
24. The Applicant alleges that the regular courts also did not take into account the alibi evidence proposed by the Applicant. The Applicant argues that the criminal courts should have given the Applicant the benefit of the doubts raised by the lack of credibility of the evidence and not declared him guilty. The Applicant alleges that this constitutes a violation of the right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.
25. The Applicant also alleges that the regular courts were politically biased against him in violation of the right to equality before the law, as guaranteed by Article 24 of the Constitution. Furthermore, the Applicant alleges that the Court of Appeal denied him the right to a public hearing when it decided to reject his request to present new evidence in open court. The Applicant alleges that this constitutes a violation of the right to a legal remedy as guaranteed by Article 32 of the Constitution.
26. The Applicant requests the Court:
 - a) *To declare the Referral admissible*
 - b) *To hold that Judgment P. no. 592/11, of the District Court in Prishtina, of 17 December 2012, Judgment PAKR. no. 102/13, of the Court of Appeal, of 12 December 2013 and Judgment Pml. Kzz. 98/14 of the Supreme Court of Kosovo of 03 September 2014 violated the rights and fundamental freedoms of the Applicant, because the actions of the courts have violated Article 31 [Right to Fair and Impartial Trial] of the Constitution, Article 32 [Right to Legal Remedies], and Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution, and Articles 6 and 13 of the ECHR.*
 - c) *To declare invalid (annul) the Judgment P. no. 592/11 of the District Court in Prishtina of 17 December 2012, Judgment PAKR. no. 102/13 of the Court of Appeal of 12 December 2013 and Judgment Pml. Kzz. 98/14 of the Supreme Court of Kosovo of 03 September 2014.*
 - d) *In accordance with Article 52 of Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo, suspend all the actions before the regular courts, until the decision of the Court is rendered.*

Admissibility of the Referral

27. 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.

28. 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”.

29. 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”.

30. 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.”

31. 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.

32. 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.

[...]”

33. 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;

[...]”

34. 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. Moreover, it is not within the scope of jurisdiction of the Court to substitute its own assessment of the facts for that of the regular courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see, *mutatis mutandis*, ECtHR Judgment of 16 December 1992, *Edwards v. United Kingdom*, Application No. 13071/87, para. 34).

35. 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.
36. 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 (see, *mutatis mutandis*, Constitutional Court Resolution of 2 June 2016, *Constitutional Review of Judgment no. PML. KZZ 157/2014 of the Supreme Court of Kosovo of 2 October 2014*, para. 39).
37. 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.
38. 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.
39. Therefore, the Court concludes that this allegation of a violation of the right to a fair trial must be rejected as inadmissible.
40. With respect to the alleged failure of the Court of Appeals to order a psychological evaluation of the cooperative witness, the regular courts' rejection of the Applicant's alibi defense, the allegation that the trial was political and that the Applicant was denied a hearing before the Court of Appeals, the Applicant has failed to substantiate his claim as to 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.

41. 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).
42. 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).
43. 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.
44. 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.

Request to impose an interim measure

45. The Applicant requested the Court to impose an interim measure, "*namely to suspend execution of the decision on serving the sentence until the Constitutional Court renders a decision on the request for constitutional review of the Judgment of the Supreme Court.*"
46. In order for the Court to decide on an interim measure, pursuant to Rule 55 (4) and (5) of the Rules of Procedure, it is necessary that:
 - "(a) the party requesting interim measures has shown (...), if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
 - (b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*

[...]

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application."
47. As emphasized above, the Applicant has not shown a *prima facie* case on the admissibility of the Referral. Therefore, the request for interim measure is to be rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 27 and 48 of the Law and Rule 36 (1) and (2), b) and d), and Rule 64 of the Rules of Procedure on 14 July 2016, unanimously:

DECIDES

- I. TO DECLARE the Referral as Inadmissible;
- II. TO REJECT the request for an interim measure;
- III. TO NOTIFY this Decision to the Parties;
- 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



Snezhana Botusharova



President of the Constitutional Court



Arta Rama-Hajrizi