



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

Prishtina, 12 June 2017
Ref. No.:RK 1091/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI07/17

Applicant

Pashk Mirashi

**Constitutional Review of the Judgment Pml. No. 228/2016 of the
Supreme Court of Kosovo, of 20 October 2016 and Judgment PAKR No.
231/2015 of the Court of Appeals, of 6 August 2015**

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 Pashk Mirashi, with residence in Gjakova (hereinafter: the Applicant), represented by Alexander Borg Olivier, lawyer from Prishtina.

Challenged Decisions

2. The challenged Decisions are the Judgment, Pml. No. 228/2016 dated 20 October 2016 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), which rejected the Applicant's request for protection of legality against the Decision of the Court of Appeals (Decision, PN. No. 523/2016 of 20 July 2016) and the Decision of the Basic Court in Prishtina (Decision, KP. No. 603/2015 of 16 December 2016) as ungrounded and the Judgment, Pakr No. 231/2015 dated 6 August 2015 of the Court of Appeals.
3. The challenged Judgment of the Supreme Court was served on the Applicant on 27 October 2016, whereas the challenged Judgment of the Court of Appeals of 6 August 2015 was served on the Applicant on an unspecified date.

Subject Matter

4. The subject matter is the constitutional review of the challenged decisions which have allegedly violated the Applicant's right guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 53 [Interpretation of Human Rights] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 [Right to a fair trial] and Article 13 [Right to an Effective Remedy] of the European Convention on Human Rights (hereinafter: ECHR).
5. In addition, after filing the Referral before the Constitutional Court (hereinafter: the Court), the Applicant submitted a request for interim measure requesting the Court to order the Applicant's release from imprisonment.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 27 and 47 of Law No. 03/L-121 on the 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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 1 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 8 March 2017 the Applicant submitted additional documents to the Court.
9. On 20 March 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (presiding), Ivan Čukalović and Gresa Caka- Nimani.
10. On 29 March 2017, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.

11. On 4 April 2017, the legal representative of the Applicant informed the Court that the Applicant *“has just been taken into police custody in consequence of an order issued by the President of Basic Court of Prishtina”*. At the same time, he submitted a request for interim measure requesting the Applicant’s release.
12. On 18 April 2017, the Applicant informed the Court that the Basic Court in Prishtina (Decision, ED. 1624/15 dated 11 April 2017) rejected the Applicant’s request to suspend the execution of imprisonment sentence until the Court issues a final decision. The Applicant in his letter, requests the Court to impose an interim measure and to order the release of the Applicant from imprisonment.
13. On 29 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

14. On 27 August 2009, the Applicant, was appointed as Liquidator for the Credit Bank of Prishtina (hereinafter: CBP). Previous to this, he served as an acting director for the CBP branch in Gjakova.
15. On 29 April 2010, the Applicant was dismissed from his position as Liquidator because he had signed agreements on liquidation of loans without prior consultation with CBP.
16. On 16 August 2010, the Acting Liquidator of the CPB filed criminal charges against the Applicant before the District Prosecutor’s Office in Prishtina.
17. Subsequently, the abovementioned request for criminal charges was transferred to the Special Prosecution of the Republic of Kosovo (hereinafter: SPRK).
18. On 24 February 2011, the SPRK (Decision, PPS No. 87/2010) initiated an investigative procedure against the Applicant. The investigation regarding the Applicant’s case were led by Special Prosecutor N.M.
19. On 10 August 2011, the SPRK filed an indictment against the Applicant for committing the following criminal offences: abuse of the official position and authority; fraud; and falsification of official documents or authorization as foreseen by the provisions of the Criminal Code of Kosovo (hereinafter: CCK).
20. On 5 July 2012, the District Court in Prishtina (KA. 556/11) confirmed the indictment filed against the Applicant.

Indictment and trial of the Special Prosecutor

21. On 31 July 2012, EULEX Prosecutor filed an indictment against N.M, the Special Prosecutor, who was representing the SPRK during the investigation phase and filing of the indictment against the Applicant. N.M, following a

criminal charge filed by the Applicant, was accused of undertaking a series of actions of corruption during the investigation and indictment procedure against the Applicant. The Applicant was declared as cooperative witness in the procedure against N.M..

22. On 6 June 2014, the Court of Appeals (Judgment, PAKR 413/2013) amended the Judgment of the Basic Court in Peja (Judgment, 346/12 of 23 May 2013) and found the Special Prosecutor guilty for abuse of official position or authority and sentenced him to imprisonment.

The amended indictment and trial procedure against the Applicant

23. On 17 November 2014, the SPRK amended the indictment filed against the Applicant applying the provisions of the new CCK more favorable for the Applicant.
24. On 18 November 2014, the SPRK filed the amended indictment before the Basic Court in Prishtina.
25. On 16 June 2014 the trial proceedings against the Applicant started.
26. During the court trial, the SPRK was represented by a replaced Special Prosecutor.
27. On 21 January 2015, the Basic Court (Judgment, P. No. 516/2012) found the Applicant guilty for three criminal offences of fraud, abuse of official position or authority and falsification of official documents and authority and sentenced him to imprisonment.
28. On an unspecified date, against the Judgment of the Basic Court, the Applicant filed an appeal before the Court of Appeals. In his appeal, the Applicant alleged substantial violations of provisions of criminal law and criminal proceedings, erroneous and incomplete determination of the factual situation, and appealed the decision on criminal sanction.
29. On 6 August 2015, the Court of Appeals (Judgment, PAKR. No. 231/2015) rejected the Applicant's appeal and upheld the Judgment of the Basic Court in Prishtina.
30. In its Judgment, the Court of Appeal held that: *"In this criminal matter it is not disputable that the indictment PPS Nr. 87/10 on 10.08.2011 was filed by the former special prosecutor N.M. During the main trial the indictment of the Special Prosecution has been represented by the special prosecutor R.M. who also amended the indictment. In the appeal of the accused Mirashi and his defense is stressed that with the decision of the chief prosecutor from the special prosecution it was rejected the request for disqualification of the prosecutor R.M., therefore, from that stage the accused and the defense have used their legal rights and the representative of charge during the court trial has had a merit decision. The representative of charge during the court hearing has acted entirely in accordance with provisions of Criminal Procedure Code of Kosovo"*

31. The Court of Appeals further held: *“As for the allegations by the accused and his defense counsel, that the accused with the order by the District Court in Peje, PP. nr. 43/12 dated 01.06.2012, was pronounced as a cooperative witness, therefore against him may not be conducted any criminal procedure are ungrounded allegations. The first instance court has not provided its reasons, which are approved by this court that Pashk Mirashi was pronounced as a cooperative witness for criminal offenses which are related with the accused N.M, And [...] and that for criminal offenses of giving bribe from article 344, par. 1 of CCK, trading in influence from article 345, par. 2 of CCK, incitement in contradiction with article 24 of CCK, to commit criminal offense of misuse of official position or authority from article 399 of CCK. So, the accused was pronounced as a cooperative witness only as for offenses and persons mentioned above and his actions who are related with these accused, but not also with their work during the time of being director and later on a liquidator of the credit bank – Branch in Gjakova, therefore, the order for Pashk Mirashi to be pronounced as a cooperative witness does not have to do with the activity of Pashk Mirashi at the same time a director and afterwards a liquidator of the Credit Bank – Branch in Gjakova, and that criminal procedure initiated against Pashk Mirashi is based on the law entirely.”*

Request for reopening the criminal procedure

32. On 7 September 2015, the Applicant submitted a request for reopening of the criminal procedure before the Basic Court in Prishtina.
33. In his request for reopening the criminal procedure, the Applicant claimed that the investigations were conducted by a former Special Prosecutor, who for the same case was found guilty and sentenced to imprisonment with a final Judgment of the Court of Appeals of 23 May 2013 and also requested a hearing of two other witnesses. The Applicant concluded that in his capacity as a cooperative witness during the investigation and trial of the former Special Prosecutor cannot be found guilty for the criminal offences that he was accused of.
34. On 16 December 2015, the Basic Court in Prishtina (Decision, KP. No. 603/2015) rejected as ungrounded the Applicant’s request for reopening of the criminal procedure.
35. The Basic Court reasoned that *‘The claims on reopening of the criminal procedure are based on the provisions of Article 423 of CPCRK, a provision which provides that the procedures completed by a final decision can be reviewed when is proved that the Decision is a consequence of the criminal case committed by the Judge or the person who participated in the investigative activities while in this criminal case the investigative activities were done by [N.M.], former prosecutor of the Special Prosecution of Kosovo, who was found guilty for the same case and sentenced with a final decision. This allegation of the Defense of the convicted Pashk Mirashi, does not stand because the indictment filed by [N.M.], former prosecutor, was amended and represented by the Special Prosecutor, [R.M.]’*

36. On an unspecified date, against the Decision of the Basic Court, the Applicant filed an appeal with the Court of Appeals.
37. On 20 July 2016, the Court of Appeals (Decision, PN. No. 523/2016) rejected the Applicant's appeal as ungrounded and upheld the Decision of the Basic Court.
38. The Court of Appeals in its Decision held that: *"[...]Therefore, also according to the assessment of this Court, in the present case, the legal conditions for allowing the reconsideration of the criminal procedure, have not been fulfilled pursuant to the provisions of Article 423, paragraph 1, item 1.3 of the CPC because from the case files it follows that new facts or evidence which would reason the allowance of the reconsideration of the criminal procedure against the convicted Pashk Mirashi, have not been offered."*
39. On an unspecified date, against the aforementioned Decisions of the Basic Court in Prishtina of 16 December 2015 and the Court of Appeals of 20 July 2016, the Applicant filed a request for protection of legality before the Supreme Court.
40. In his request for protection of legality, the Applicant alleged substantial violation of the provisions of the criminal law and criminal procedure. At the same time he proposed to the Supreme Court to remand the case to the Court of the first instance for reconsideration and postpone the execution of the punishment.
41. On 20 October 2016, the Supreme Court (Judgment, PML.nr. 228/16) rejected the Applicant's request for protection of legality as ungrounded.
42. The Supreme Court concluded that the Applicant's allegations presented in the legal remedy are only repetition of those presented in the appeal *"[...] against the Judgment of the first instance [Judgment of the Basic Court of 21 January 2015] and in the last appeal against the Decision of the Court of the first instance [Decision of Basic Court of 16 December 2015] which dismissed the request for reopening of the criminal procedure [...]"*

Execution of imprisonment sentence

43. On 4 April 2017, the Applicant informed the Court that based on a Court order he was arrested and sent to a correction facility to serve his imprisonment sentence.
44. On 11 April 2017, the Basic Court in Prishtina (Decision ED. No. 1624/15) rejected the Applicant's request to suspend the execution of imprisonment sentence as ungrounded. According to the Basic Court the fact that the Applicant submitted a Referral for assessment of constitutionality of *"criminal procedure against [the Applicant] and request for interim measure [...] before the Court are considered as grounds for postponement of the execution of his imprisonment sentence."*

45. The Applicant informed the Court that against the aforementioned Decision of the Basic Court in Prishtina of 11 April 2017 he filed an appeal before the Court of Appeals. To this date, the Court is not informed of a Decision of the Court of Appeals.

Applicant's allegations

46. The Applicant alleges that the courts have violated his rights guaranteed by Article 31 [Right to a Fair and Impartial trial] and Article 32 [Rights to Legal Remedies], Article 53 [Interpretation of Human Rights] and Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 6 [Right to a fair trial] and Article 13 [Right to Effective Legal Remedy] of the ECHR.
47. The Applicant also considers that: "*Basic Court of Pristina, Court of Appeal of Kosovo and the Supreme Court of Kosovo have violated the right of [the Applicant] for a fair and impartial trial.*" In this regard, the Applicant alleges that: "*From the circumstances of the case it is evident that through the Special Prosecution of Republic of Kosovo, the Special Prosecutor N.M. has initiated investigative criminal proceedings against [the Applicant] and the same Special Prosecutor abused the official position and was found guilty and conducted with a final judgment for the criminal offence of abusing his official position during investigations.*"
48. The Applicant specifically requests the Court to declare that: "*[...] all the proceedings against him which commenced with the criminal charges in the indictment in case number PPS 87/10 and subsequent procedures including inter alia the decision of the Court of Appeal of the 20th July 2016 number PN 523.2016, and the decision of the Basic Court in Pristina KP 603/2015 delivered on the 16th December 2015, both of which were finally decided by the Supreme Court dismissing the request for protection of legality by its decision PMLl228/16, dated 20th October 2016, be declared null and void as being in breach of the Constitutional right of Applicant to a fair trial under Article 31 of the Constitution of Kosovo and Article 6 of the European Convention on Human Rights.*"
49. The Applicant concludes by requesting the Court that it:
- i) *Declares the Referral admissible and grounded.*
 - ii) *Declares as null and void the Decision of the Supreme Court of Kosovo number PML 228/2016 dated 20.10.2016, Judgment of the Basic Court of Pristina number P. 516/12 (PPS No. 87/10) dated 21.01.2015; and the Judgment of the Court of Appeal of Kosovo number PAKR. 231/2015 dated 08.06.2015, which violate Articles 31 and 32 of the Constitution of Republic of Kosovo and Articles 6 and 13 of the ECHR.*
50. After filing his Referral before the Court, the legal representative of the Applicant informed the Court that Applicant based on the order of the Basic Court in Prishtina was detained and put in a correctional facility to serve his imprisonment sentence.

51. In this regard, the Applicant, on 4 April and 18 April 2017 submitted requests to the Court to impose an interim measure and order the Applicant's release from imprisonment until the Court issues a final decision.

Assessment of the admissibility of the Referral

52. The Court first examines whether the Applicant has met the requirements of the admissibility of the Referral which are established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

53. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes:

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.

54. The Court also refers to Article 49 [Deadlines] of the Law which provides:

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. [...]

55. The Court further refers to paragraph Rule 36 [Admissibility Criteria] of the Rules of Procedure which foresees:

(1) The Court may consider a referral if:

[...]

(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or

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

[...]

(d) the Applicant does not sufficiently substantiate his claim;

(3) A referral may also be deemed inadmissible in any of the following cases:

[...]

*(e) the Referral is incompatible *ratione materiae* with the Constitution*

[...].

56. The Court recalls that the Applicant in his Referral alleges that the regular courts during the criminal proceedings and the reopening of the criminal proceedings violated his rights guaranteed by the Constitution and the ECHR.
57. The Applicant specifically requests the Court to declare that all criminal proceedings, including the indictment procedure, criminal procedure, which found him guilty and sentenced him to imprisonment and the reopening of the criminal procedure to “[...] *be declared null and void as being in breach of the Constitutional right of Applicant to a fair trial under Article 31 of the Constitution of Kosovo and Article 6 of the European Convention on Human Rights.*”

As to the criminal procedure

58. As to the criminal procedure, the Court notes that the last and final decision in the criminal procedure against the Applicant is the Judgment of the Court of Appeals (Judgment PAKR. No. 231/2015 of 6 August 2015) which found the Applicant guilty and sentenced him to imprisonment. In this regard the Court refers to Article 49 [Deadlines] of the Law providing: *“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.”*
59. Although the Applicant did not indicate the date on which the Judgment of the Court of Appeals was served on the Applicant, it is obvious that the period between the date of this decision, i.e. 6 August 2015 and the date of the submission of his Referral to the Court, i.e. 1 February 2017, has passed the legal time limit prescribed in Article 49 [Deadlines] of the Law and Rule 36 (1) (c) of the Rules of Procedure.
60. Consequently, the Court considers that the Referral concerning the Applicant’s allegations of violation of Article 31, 32 and 54 of the Constitution, in conjunction with Article 6 and 13 of the ECHR during the criminal procedure are inadmissible for being out of time.

As to the reopening procedure

61. As to the reopening of the criminal procedure, the Court notes that the last decision regarding the reopening of the procedure is the Judgment of the Supreme Court, PML. No. 228/2016 of 20 October 2016, which rejected the Applicant’s request for protection of legality against the Decision of the Court of Appeals (Decision, PN. No. 523/2016 of 20 July 2016) and the Decision of the Basic Court in Prishtina (Decision, KP. No. 603/2015 of 16 December 2016).
62. The Court notes that in this procedure, the regular courts decided solely on the fulfillment of the procedural requirements for the reopening of the criminal procedure, and not on the merits of the case.
63. The Court reiterates 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”.

64. With regard to the Applicant’s allegation of a violation of his right to a fair and impartial trial, the Court, referring to the jurisprudence of the ECtHR and its own jurisprudence, reiterates that Article 31 of the Constitution and Article 6 of the ECHR do not apply to requests for the reopening or repeating of proceedings. (See, by analogy Constitutional Court Cases: KI159/15, Sabri Ferati, Resolution on Inadmissibility of 13 June 2016, par. 37; KI80/15, 81/15 and 82/15, Rrahim Hoxha, Resolution on Inadmissibility of 27 December 2016, par. 31, see also ECtHR cases, inter alia, Oberschlick v. Austria, No. 23727/94, Decision on Inadmissibility of 21 March 1994; Dowsett v. UK, No. 8559/08, Decision on Inadmissibility of 4 January 2011, Sablon v. Belgium, No. 36445/97, Judgment of 10 April 2001, par. 86).
65. In addition, the Court recalls the ECtHR jurisprudence which holds that Article 6 does not apply to proceedings for the reopening of a case because a person whose sentence has become final and who applies for his case to be reopened is not “charged with a criminal offence” within the meaning of that Article (see ECtHR cases Franz Fischer v. Austria No. 27569/02, Decision on Inadmissibility of 6 May 2003).
66. The Court considers that the compatibility *ratione materiae* of a Referral with the Constitution derives from the Court’s substantive jurisdiction. “The right relied on by the Applicant must be protected by the Constitution in order for a constitutional complaint to be compatible *ratione materiae* with the Constitution.” (See Constitutional Court Cases: KI80/15, 81/15 and 82/15, Rrahim Hoxha, Resolution on Inadmissibility of 27 December 2016, par. 31)
67. Therefore, the Court considers that the Applicant’s complains about the rejection by the regular courts to reopen the criminal procedure are incompatible *ratione materiae* with Article 31 of the Constitution, in connection with Article 6 of the ECHR.
68. In conclusion, the Court, in accordance with Article 49 of the Law and Rule 36 (1) (c) and (3) (e) finds that the Referral:
 - a) with regard to the Applicant’s allegation concerning the criminal procedure is to be declared inadmissible for being out of time; and
 - b) with regard to the Applicant’s allegation concerning the reopening of the criminal procedure is to be declared inadmissible, because it is incompatible *ratione materiae* with Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

Request for Interim Measures

69. The Applicant has requested the Court to impose an interim measure, requesting the Court to order the Applicant’s release from imprisonment until the Court issues a final decision.

70. In his request, the Applicant alleges that his “unlawful execution” of the imprisonment sentence violates his human rights guaranteed by the Constitution.
71. The Court refers to Rule 55 (4) of the Rules of Procedure which specifies:
“[...] Before the Review Panel may recommend that the request for interim measures be granted, it must find that:
- (a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, 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*
- (c) the interim measures are in the public interest.”*
72. As concluded above, the referral is inadmissible and as a consequence his request for interim measure is to be rejected.

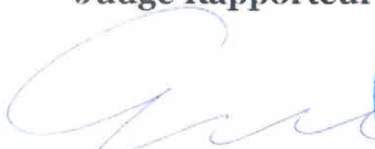
FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.7 of the Constitution, Articles 27 and 49 of the Law and Rules 36 (1) (c) and (3) (e), 55 and 56 of the Rules of Procedure, in the session held on 29 May 2017, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. To REJECT the Request for interim measure;
- II. TO NOTIFY the Parties of this Decision;
- 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



Altay Suroy



President of the Constitutional Court



Arta Rama-Hajrizi