



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

Prishtina, 27 December 2016
Ref. no.: RK 1024/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI08/16

Applicant

Premtim Provolija

Constitutional review of Judgment Pml. no. 220/2015 of the Supreme Court of Kosovo, of 17 November 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 Premtim Provolija, from village Sapanica, Municipality of Kaçanik (hereinafter: the Applicant), who is represented by the Law Firm „Sejdiu & Qerkini” from Prishtina.

Challenged decision

2. The Applicant challenges Judgment Pml. no. 220/2015 of the Supreme Court of Kosovo of 17 November 2015.

Subject matter

3. The subject matter is the request for constitutional review of the challenged Judgment, which allegedly violated Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. 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 of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 13 January 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 12 February 2016, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
7. On 2 March 2016, the Court notified the Applicant and the Supreme Court about the registration of the Referral.
8. On 20 October 2016, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 7 July 2014, the Basic Prosecution Office in Ferizaj - raised indictment (Indictment PP. No. I. 115/14) against the Applicant for two criminal offences: robbery in co-perpetration and unauthorized ownership, control and possession of weapons.
10. On 23 September 2014, the Basic Court in Ferizaj, by Judgment PKR. no. 116/14, after the assessment of guilty plea, found the Applicant guilty, , for both criminal offences and sentenced him with an aggregate punishment of imprisonment of two (2) years and two (2) months.
11. Against the Judgment of the Basic Court, appeals were filed with the Court of Appeal by the Applicant and the Basic Prosecution Office in Ferizaj. The Appellate Prosecution (Submission PPA. I/no. 178/15) also proposed to the

Court of Appeal that the appeal of the Basic Prosecution be approved, that the judgment be modified and the accused be imposed longer imprisonment sentence.

12. The essential issue raised before the Court of Appeal is whether there were essential violations of the criminal procedure provisions in the judgment of the Basic Court, considering that: i) at the time of the commission of the criminal offense, the Applicant was a “young adult” and, according to him, the provisions of the Juvenile Justice Code No. 03/L-193 (hereinafter: JJC), should have been applied, as provided by Article 4, par. 2 of this Code, and ii) the Basic Court refused to conduct an “expert opinion pertaining to the psychological development of the young adult”, as provided for in Article 11 of the JJC, despite the proposal of the defense.
13. On 29 June 2015, the Court of Appeal, by Judgment PAKR. No. 179/15 upheld Judgment No. 116/14 of the Basic Court and rejected as ungrounded the appeals of the Applicant and of the Basic Prosecution Office.
14. On 21 August 2015, the Applicant filed a request for protection of legality with the Supreme Court of Kosovo against Judgment PKR. No. 116/14, of the Basic Court in Ferizaj and Judgment PAKR. No. 179/15 of the Court of Appeal, referring to essential violation of the criminal procedure. On the other hand, on 12 October 2015, the State Prosecutor (by Submission KMLP. II. No. 164/15) proposed that the request for protection of legality be rejected as ungrounded.
15. On 17 November 2015, the Supreme Court of Kosovo through Judgment Pml. no. 220/2015, rejected as ungrounded the request for protection of legality, with detailed reasoning.

Applicant’s allegations

16. The Applicant alleges that the challenged Judgment of the Supreme Court violated Article 31 paragraphs 4 and 7 of the Constitution and in conjunction with Article 6 of ECHR. In this respect, the Applicant specifically alleges violation of: i) equality before the law in the criminal proceedings, and ii) the right of access to the Court.
17. As to the principle of equality of arms, the Applicant alleges that by rejecting the request for an opinion of the expert regarding the psychological development of the “young adult”, the Basic Court did not provide to the Applicant a reasonable opportunity to present his case and, as a result, placed him at a disadvantage against the allegations of the Prosecution Office.
18. As it pertains to the alleged violation of the right of access to the Court, the Applicant alleges that by rejecting the request for an expert opinion in relation to the psychological development of the “young adult”, the Basic Court did not provide the Applicant the right to be heard, by placing him at a disadvantage and, as a result, violating the effective application of a fair trial.
19. In addition, in support to his allegations, the Applicant also refers to the Judgment of the Constitutional Court of Kosovo, in case KI78/12, the Applicant

Bajrush Xhemajli, a Judgment rendered by this Court on 24 January 2013 (hereinafter: case *Xhemajli*), where the Court held violations of Article 31 of the Constitution.

20. Accordingly, the Applicant addresses the Court with a request to hold violation of the Applicant's individual rights, guaranteed by Article 31 of the Constitution and in conjunction with Article 6 of the ECHR, and to declare invalid the Judgment of the Supreme Court, by remanding it on retrial.

Admissibility of the Referral

21. The Court needs to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.
22. The Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution, paragraphs 1 and 7, which establish:

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

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."

[...]

23. In this case, the Court considers that the Applicant has fulfilled the procedural requirements of Article 113.7 of the Constitution. However, to find the admissibility of the Referral, the Court must then assess whether the Applicant has met the requirements provided by the specific procedures referred to in Articles 46 to 49 of the Law and the admissibility requirements established in Rule 36 of the Rules of Procedure.
24. The Court considers that the Applicant meets the requirements of Article 46 on [Admissibility]; he submits an individual referral on the basis of which the Applicant alleges that his individual rights and freedoms guaranteed by the Constitution were violated by a public authority after having been exhausted all legal remedies provided by the Law, as stipulated by Article 47 [Individual Requests]; and has submitted a referral within four (4) months, as provided by Article 49 [Deadlines].
25. The Court should further assess whether the Applicant has specified his referral, as required by Article 48 [Accuracy of the Referral] of the Law, which provides:

"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 notes that the Applicant has clarified his allegation that the rights guaranteed by Article 31 of the Constitution and in conjunction with Article 6 of the ECHR have been violated, and specifies the act of public authority challenged by him, namely Judgment Pml. no. 220/2015, of the Supreme Court, of 17 November 2015.
27. In addition, to hold the admissibility of the referral, the Court must examine whether the Applicant has fulfilled the admissibility requirements provided by Rule 36 [Admissibility Criteria] of the Rules of Procedure.
28. Rule 36 (1) of the Rules of Procedure specifies the requirements under which the Court may examine a referral, including the requirement that the referral is not manifestly ill-founded. According to Rule 36 (2), a Referral is manifestly ill-founded when it is satisfied 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:

[...]

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

[...]

29. Taking into account Rule 36 (2) (b) of the Rules of Procedure, the Court considers that the admissibility requirements have not been met. The Applicant did not justify the allegations that the challenged decision violated his constitutional rights and freedoms, for the following reasons:
30. The Applicant essentially alleges that in cases where a criminal offense is committed by a ” young adult”, the regular courts must apply the JJC, and that, in his case, by refusing to take the “expert opinion pertaining to the psychological development of the young adult,” the principles of: i) equality of the parties in the criminal proceedings, and ii) the right of access to the court, were violated.
31. First of all, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have violated Applicant’s rights and freedoms protected by the Constitution (constitutionality).
32. The Court reiterates that it is the role of the regular courts to interpret and apply the pertinent legal rules and that it is not the duty of the Court under the Constitution to act as a fourth instance court in respect of the decisions taken

by the regular courts (See, case *Perlala v. Greece*, no. 17721/04 paragraph 25. ECtHR Judgment of 22 February 2007).

33. The Court also recalls that it is not the role of the Constitutional Court to determine whether certain types of evidence are allowed, what evidence should be taken, nor to specify what evidence is acceptable and what is not. That is the role of the regular courts. The Constitutional Court's task is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way the evidence was taken (See, case of *Khan v. the United Kingdom*, Application no. 35394/97, paragraphs 34-35, ECtHR Judgment of 12 May 2000).
34. The Court considers that all the arguments of the Applicant, which were relevant to the resolution of the dispute, were duly heard and examined by the regular courts, and that the Applicant's allegations were administered in detail, and, accordingly, the proceedings before the regular courts, viewed in its entirety, were fair. The Court recalls that the Applicant filed these allegations also in the proceedings on the appeal with the Court of Appeal and through the request for protection of legality with the Supreme Court of Kosovo, which provided reasoned response to these Applicant's allegations.
35. Firstly, the Court of Appeal of Kosovo (by Judgment PAKR. No. 179/15) reasoned in detail the way in which the Court applied the procedural and the substantive law:

"... The allegations of the defense counsel of the accused are ungrounded that [...] of JJC are applied against any suspect for the criminal offence committed as young adult (persons from 18 to 21 years old), but the application of this provision comes into expression only in the case when against the young adult can be imposed the measure, under the condition by not taking into account the personality and the circumstances in which the offence was committed, it can be expected that by the educational measure will be reached the purpose, which would be reached by the imposition of punishment. The application of the provision of Article 4 para. 2 of JJC comes into expression only in the case when the perpetrator has the stagnation in mental development, whereas the investigation is carried out if the circumstances, which cause the doubt that the degree of mental development does not correspond to the adult. In the present case, there were no circumstances that the accused has stagnation in mental development, the court had no doubt in the mental development of the accused in relation with his age, therefore has rightly acted when adjudicated this case under the provisions of CPOK, and not under provisions of JJC."

36. In addition, in its Judgment, the Supreme Court of Kosovo, among others, addressed the Applicant's allegations as to the obligation of the courts to apply the JJC in the cases when the perpetrator is a "young adult" and the obligation of the Basic Court to take "the expert opinion pertaining to the psychological development of the young adult."

37. Regarding the obligation of the courts to apply the JJC, in cases where the criminal offense is committed by a “young adult”, the Supreme Court in its judgment reasoned:

“... according to the assessment of the Supreme Court, this provision cannot be applied against the person who is young adult in every case, but only in the cases provided by Article 11 para. 1 of JJC, which was cited above, and under which this is a possibility, and not legal imperative. From the wording of Article 11 para. 1 of JJC, it follows that against this category of the perpetrators of the criminal offence, the court may impose measure of punishments in accordance with Article 7 of JJC, but against them, as a rule, are imposed punishments provided for the perpetrators of the criminal offences of adulthood.

Therefore, from this follows that the provisions of JJC are not applied always against the perpetrators of the criminal offences of the young adult, as in the request for protection of legality was erroneously interpreted the provision of Article 4 paragraph 2 of JJC.”

38. As it pertains to the obligation of the court to take “the expert’s opinion pertaining to the psychological development of the young adult”, the Supreme Court reasoned:

“The Supreme Court from the case file concluded that in the present case the proposal for assigning an expert was not made in the court hearing, but in the initial hearing. From the minutes of the initial hearing, it follows that the convict entered guilty plea for all counts of the indictment. Previously, the court is satisfied that the requirements under Article 248 para. 1 of CCK were met, and rendered Judgment, by which admitted the guilty plea. All these are not challenged in the request for protection of legality.

From the minutes of the initial hearing it also follows that since the convict entered the guilty plea, his defense counsel (as well as Prosecutor) were asked to give statements on entrance of guilty plea and on this occasion the defense counsel of the convict stated that he accepts the guilty plea, because that was made after consultations with him-with defence counsel, who informed the convict on types of punishment provided for these criminal offences, on consequences and privileges of the latter, and that the guilty plea was made by full will without any error or promise by the defense counsel.

Under the provision it follows that the application of this provision against the young adult is in the discretion of the court and not necessity, because against the young adult, for the committed criminal offences as a young adult, in principle the provisions of CCK and CCK are applied. To apply this Article there should be a starting point, a reason to believe that among the other, also based on psychological development of the young adult, taking into account the opinion of the expert (and other facts mentioned above), there is a room for the imposition of the sanction which is imposed against the minor perpetrator. In the present case, during the

proceedings that preceded the initial hearing, and in this hearing itself, no such circumstances appeared, that would make this case special, in the abovementioned direction.”

39. In addition, the reasoning of the regular courts was in accordance with the legal opinion of the Supreme Court, of 14 February 2014, which the Supreme Court issued under its legal jurisdiction for establishment of the principled positions and the legal opinions on the issues that are important for implementation of laws by the courts in the territory of Kosovo, taking into account the uncertainties that may arise from Article 4, par. 2, of JJC. The Supreme Court in its legal opinion concluded:

“Against a young adult who has committed a criminal offence as a young adult, a proceedings under the JJC may be applied, if the court determines that the objective that would be achieved by imposing a term of imprisonment would also be achieved by imposing the measure or punishment, considering the circumstances in which the criminal offence was committed, the expert opinion in relation to the psychological development of the young adult and his or her best interest, otherwise against him would be applied the provisions of CPCR in all aspects.”

40. As a result, the Constitutional Court considers that the regular courts dealt with and justified in a substantial way all the Applicant’s allegations on the necessity of application of the JJC, in the cases where the offenses are committed by a “young adult” and the discretion of the courts to take an expert opinion pertaining the psychological development of the “young adult.”
41. Regarding the allegations of the Applicant that the challenged judgment of the Supreme Court violated Article 31, paragraphs 4 and 7, of the Constitution and in conjunction with Article 6 of the ECHR, namely with regard to the allegations for violation of: i) equality of parties in criminal proceedings and ii) the right of access to court:
42. The Court recalls that a principle of “equality of arms” between the parties in a case is an essential criterion of a fair hearing. Equality of arms, which must be observed throughout the trial process, means that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case. (See ECtHR judgments in the cases of *Ofner and Hopfinger*, Nos. 524/59 and 617/59, 19.12.60, Yearbook 6, p. 680 and 696). It means that each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage *vis a vis* the opposing party (See also Judgment in case no. 10/14, Applicant *Joint Stock Company Raiffeisen Bank Kosovo J.S.C.*).
43. However, in the present case, the Court recalls that the Applicant was found guilty based on the guilty plea in the initial examination, under the relevant provisions of the Criminal Procedure Code, while the necessity of obtaining the opinion related to the psychological development of the “young adult”, and the application of the provisions of this JJC, was addressed in the legal opinion of

the Supreme Court and was justified in detail in the judgments of the Court of Appeal and the Supreme Court, as it was elaborated above.

44. Regarding the alleged violation of the right of access to the court, the Court again refers to the reasoning of the regular courts on specifications and the relevant requirements for the application of the provisions of the JJC in the case of “young adults”.
45. In addition, in support of his allegations, the Applicant also refers to the judgment of the Constitutional Court of Kosovo in the case *Xhemajli*, where the Court found a violation of Article 31 of the Constitution.
46. The Court notes that there are several key aspects in which the current referral differs from the *Xhemajli* case. The Court notes that: i) in the case *Xhemajli*, the Applicant requested additional expertise on which “*his guilt or innocence*” directly depended, while in the present case the guilt of the Applicant was confirmed on the basis of a guilty plea, in accordance with the provisions of the Criminal Code Procedure; and ii) the necessity and the conditions under which the provisions of JJC apply in the case of “young adults” were initially elaborated in detail first in the legal opinion of the Supreme Court and, subsequently, in the reasoning of the judgments of the Court of Appeal and of the Supreme Court.
47. For the reasons above, the Court notes that the Applicant was given an opportunity that in various stages of the proceedings to present arguments and evidence that he considered relevant to his case. At the same time, he had the opportunity to effectively challenge the arguments and evidence presented by the opposing party and to challenge the interpretation of the law before the Basic Court, the Court of Appeal and the Supreme Court of Kosovo in the regular court proceedings.
48. In these circumstances, the Court considers that the Applicant has not substantiated his allegation of violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and in conjunction with Article 6 (Right to a fair trial) of the Convention, because the facts presented by him do not show in any way that the regular courts denied him the rights guaranteed by the Constitution and the Convention.
49. Therefore, the Court considers that the admissibility requirements have not been met. The Applicant did not present and substantiate his allegations that the challenged decision violated his constitutional rights and freedoms.
50. Accordingly, the Referral is manifestly ill-founded on a constitutional basis and is to be declared inadmissible, as specified in Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and, 2 (b) of the Rules of Procedure, in the session held on 20 October 2016, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- 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;
- IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur

Gresa Caka Nimani
Gresa Caka-Nimani



President of the Constitutional Court

Arta Rama-Hajrizi
Arta Rama-Hajrizi