



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

Prishtina, on 4 July 2016
Ref. No.:RK964/16

RESOLUTION ON INADMISSIBILITY

in

Cases No. KI10/15 and KI12/15

Applicants

Shpresim Uka and Bekim Syla

**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 Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge.

Applicants

1. The Referral KI10/15 was submitted by Mr. Shpresim Uka from Prishtina (hereinafter, the first Applicant), who is represented by lawyer Mr. Betim Shala from Prishtina.

2. The Referral KI12/15 was submitted by Mr. Bekim Sylja from village Bresje, Municipality of Fushë-Kosovë (hereinafter, the second Applicant), who is represented by lawyer Mr. Ali Beka from Prishtina.

Challenged decision

3. The Applicants challenge the same Judgment Pml. kzz 98/2014 of the Supreme Court, of 3 September 2014, which was served on the first Applicant on 9 October 2014 and on the second Applicant on 11 October 2014.

Subject matter

4. The subject matter of the Referral KI10/15 and KI12/15 is the constitutional review of challenged Judgment which allegedly violated the Applicants' 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 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 of the European Convention on Human Rights (hereinafter, ECHR).
5. The Applicants also request the Court to hold a public hearing.

Legal basis

6. The Referrals are based on Article 113 (7) of the Constitution, Article 49 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 and 39 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 2 February 2015, the first Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
8. On 5 February 2015, the second Applicant submitted the Referral to the Court.
9. On 12 March 2015, the President of the Court in Case KI10/15 appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.
10. On 12 March 2015, the President, pursuant to Rule 37 (1) of the Rules of Procedure of the Court, decided to join the Referral KI12/15 to the Referral KI10/15.
11. On 30 March 2015, the Court informed both Applicants that their Referrals were joined and sent a copy of the joined Referrals to the Supreme Court of Kosovo and the Special State Prosecutor (hereinafter, SSP).

12. On 1 July 2015, the President decided to replace Judge Kadri Kryeziu, whose mandate expired, with Judge Ivan Čukalović as a member of the Review Panel.
13. On 17 May 2016, the Review Panel considered the report of Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

14. On 29 July 2011, the SSP filed with the District Court in Prishtina an indictment [PPS 460/09] against the Applicants for having allegedly committed criminal offenses.
15. On 17 December 2012, the then District Court in Prishtina [Judgment P592/11] found the Applicants guilty for having committed the criminal offenses of aggravated and attempted murder, and attempted kidnapping.
16. On 21 March 2013 and on 25 March 2013, respectively, the first Applicant and the second Applicant filed an appeal with the Court of Appeal, alleging violations of the criminal procedures provisions, violations of the Criminal Code, and erroneous and incomplete determination of factual situation.
17. On 26 April 2013, SSP filed a reply on the allegations of the appeal of both Applicants stating that *“the impugned judgment is fully comprehensible, clear and precise”*.
18. On 12 December 2013, the Court of Appeal [Judgment PAKR 102/13] confirmed in general the Judgment of the District Court, finding both the Applicants guilty of aggravated murder and the first Applicant guilty of attempted aggravated murder.
19. On 15 May 2014 and on 2 June 2014, respectively, the second Applicant and the first Applicant filed with the Supreme Court a request for protection of legality, alleging violations of the relevant provisions of criminal procedure code and violation of the criminal code.
20. SSP filed a reply to the request for protection of legality asserting that *“a request for the protection of legality cannot be filed grounded on the erroneous and incomplete determination of 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 requests for protection of legality, because it could not find *“any contradiction between the enacting clause and the reasoning of any of the Judgments”* and *“there was no violation of the provisions of the criminal law”*

Applicant's allegations

22. The allegations of the first and second Applicant are completely identical. Thus the Court will assess them together.
23. The Applicants claim that the regular courts decisions violated their rights to equality before the law, to fair and impartial trial, to legal remedies, and to judicial protection of rights.
24. Both Applicants also consider that the regular courts violated the principle *in dubio pro reo*.
25. The Applicants request the Court “to order a public hearing” and “to hold that there has been a violation of individual rights of both Applicants”

Admissibility of the Referral

26. The Court first examines whether the Referrals KI10/15 and KI12/15 met the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.
27. In that respect, the Court refers to paragraphs 1 and 7 of 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.”

28. Moreover, the Court refers to 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”.

29. The Court further recalls Rule 36 [Admissibility Criteria] (1) (d) and (2) (b) of the Rules of Procedure, which foresees:

(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.

30. The Court also mentions Article 53 (Interpretation of Human Rights Provisions) of the Constitution, which provides that:

Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.

31. In fact, the Court recalls that the European Court of Human Rights (hereinafter, ECtHR) determined that “*it is the role of the regular courts to interpret and apply pertinent rules of procedural and substantive law*”. (See, case *Garcia Ruiz v. Spain [GC]*, no. 30544/96, para. 28, European Court of Human Rights [ECHR], 1999-1”).
32. The Court reiterates that the determination of the factual situation and applicable law falls on the jurisdiction of the regular courts, and that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and, therefore, it cannot act as a “fourth instance court”. (See case *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65. See also *mutatis mutandis* Case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
33. The Court reiterates that it is not its task to deal with errors of factual situation or applicable law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality)
34. Therefore, the Court reminds that it is up to the Applicants to submit a reasoned allegation and a compelling argument when claiming that a public authority has infringed their constitutional rights and freedoms.
35. The Court also emphasizes that the task of the Court is to assess whether the relevant proceedings before the regular courts related to the Referrals KI10/15 and KI12/15 were fair in their entirety, including the way the evidence was taken, or in any way unfair or arbitrary. (See *mutatis mutandis*, ECtHR cases: *Shub v. Lithuania*, ECtHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009; *Edwards v. United Kingdom*, no. 13071/87, Report of the European Commission of Human Rights, of 10 July 1991; *Barbera, Messeque and Jabardo v. Spain*, Judgment of 6 December 1988, series A, No. 146, paragraph 68)
36. The Court notes that the Applicants consider that, in the criminal proceedings conducted before the regular courts, there has been a violation of their rights and freedoms guaranteed by the Constitution and ECHR. The first Applicant, in his request of protection of legality, emphasized that “*both Judgments have perpetrated substantial violations of the provisions of the criminal procedure pursuant to Article 384, and violated the criminal law pursuant to Article 385 (1) of the CPCK*” and as further specified in the challenged Judgment. The second Applicant emphasized that “*the Judgments have violated Article 403 of the CPCK, and the Criminal Law pursuant to Article 404 of the CPCK.*”, and as further specified in the challenged Judgment.

37. The Court observes the the Supreme Court noticed that a great number of issues raised by the Applicants *“are matters that are related to the assessment of the evidences”* and *“a request cannot be submitted on the grounds of the erroneous or incomplete finding of the factual situation (Article 432 of the CPCK)”*.
38. Moreover, the Supreme Court considered that the first instance Judgment *“is detailed and clear pertaining to what was exactly found as granted – again, this was detailed in a completely all-inclusive manner”* and that the Court of Appeals Judgment *“is also articulate in its reasoning and completely clear pertaining to its findings”*.
39. Finally, the Supreme Court did not see *“any reason to further discuss the rest of the claims presented in the requests because they are clearly not grounded (...) and in the most part already mentioned in the Judgments”*.
40. In general, the Court considers that the Supreme Court Judgment thoroughly analyzed and answered the allegations made by the Applicants in their appeal, which deals with matters of legality.
41. The Court takes note that the Supreme Court pointed out that *“unfortunately it is a widespread tendency among many Defense Counsels to use the request for the protection of the legality as a second appeal, which should not be the case”*. Similarly, the Court notes that many Applicants use the referral before the Constitutional Court as it would be a “fourth instance court”.
42. Furthermore, the Court recalls that the Applicants claim a violation of their right to equality before the law (i), to fair and impartial trial (ii), to legal remedies (iii) and to judicial protection of rights (iv). They request the Court to hold a public hearing (v).
43. The Court, having identified the main matter of the constitutional analysis, recalls that, pursuant to Article 53 of the Constitution, it is bound to interpret human rights and fundamental freedoms guaranteed by the Constitution consistently with the decisions of the ECtHR.

(i) Violation of their right to equality before the law

44. The Court acknowledges Article 24 [Equality Before the Law] of the Constitution which establishes:

 (...)
 2. *No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.*
45. In that respect, the Court considers that it is not sufficient to the Applicants generally referring to an unequal treatment in order to determine the discrimination, without indicating the basis of that inequality. The competent

regular courts conducted the proceedings fairly and reasonably and found that both Applicants committed the criminal offense of which they were accused of and imposed a punishment on them.

46. The Constitutional Court further considers that the conducted proceedings and the punishment imposed on the Applicants were not guided and decided on the grounds of discrimination mentioned under Article 24.2 of the Constitution.
47. In fact, the Court recalls that the European Court of Human Rights determined that discrimination “*is treating differently, without an objective and reasonable justification, persons in relevantly similar situations*”. (See Judgment: *Willis v. the United Kingdom*, no. 36042/97, paragraph 48, ECHR 2002-IV; Judgment *Bekos and Koutropoulos v. Greece*, paragraph 63, *D.H. and others v. Czech Republic*, paragraph 44).”).
48. The Court considers that the Applicants had equal access and protection of their rights in all instances of the regular courts. They have not substantiated and proved a violation of their rights based on discrimination. Therefore, their allegations on inequality before the law are ungrounded.

(ii) Violation of the right to fair and impartial trial

49. The Court recalls that the Applicants claimed a violation of their right to fair and impartial trial. Article 31 [Right to Fair and Impartial Trial] establishes:

(...)

2. *Everyone is entitled to a fair and impartial public hearing as to (...) any criminal charges within a reasonable time by an independent and impartial tribunal established by law.*

(...)

4. *Everyone charged with a criminal offense 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 offense is presumed innocent until proven guilty according to law.*

50. First of all, the Court emphasizes that the fundamental right to a fair trial is derived from the right to judicial protection, guaranteed by Article 54 of the Constitution. More than other fundamental rights, the right to a fair trial demands that judges be careful, as they are always in danger of violating it. In fact, the right to a fair trial is a general reference to a complex of other rights: namely, the right to access to the courts, to present arguments and evidence, to a reasoned decision, and to the adversarial and equality of arms principles.
51. In this respect, the Court considers that the challenged judgments show a comprehensive and extensive analysis of all the facts and law related to the commission of the criminal offences and the determination of the sanction.
52. The Court notes that the Court of Appeal explained in detail and responded to the appeal of the Applicants, providing answers to the allegations on erroneous determination of factual situation, as well as on the alleged “*substantial*

violations of the criminal procedure provisions, pursuant to Article 384, violation of the the criminal law pursuant to Article 385 (1) of the CPCPK”, as well as on violation of “Article 403 of the CPCPK, and the Criminal Law pursuant to Article 404 of the CPCPK”.

53. The Court of Appeal partially approved the appealed allegations of the second Applicant in the part referred to the length of the sentence imposed and also included the time spent in detention on remand. Moreover, the Court of Appeal took into account the application of a more favorable criminal law.
54. Furthermore, the Court observes that the findings of the challenged Judgment, when reviewing the Courts of Appeal Judgment, thoroughly considered its general findings, the enacting clause and the ground of the Judgment, the cooperating witness and supporting evidences, the new evidences in the Court of Appeals, the principle in *dubio pro reo*, the calculation of the time spent in detention on remand, other claims. It concluded by rejecting the request for protection of legality.
55. The Court notes that the challenged judgment of the Supreme Court was rendered by a constitutionally and legally established court, deciding in the panel session within the prescribed composition, acting within the limits of its jurisdiction and in accordance with the applicable laws.
56. The Court considers that the challenged judgment of the Supreme Court took into account the allegations made in the requests for protection of legality, within the limits prescribed by law, explained in detail all allegations and justified why the requests were rejected as ungrounded. The presented explanations and reasons are not the result of unreasonable establishment of the facts or arbitrary application of the procedural and substantive law.
57. The Court recalls that the Applicants consider that the regular courts violated the principle in *dubio pro reo*, because the regular courts did not interpret the alleged doubts on the evidence in their favor, because they formed their opinion on their guilt before the beginning of the trial and then tried to interpret all the evidence in that direction.
58. In this regard, the Court notes that the regular courts based the outcome of the proceedings on individual and joint assessment of presented evidence, which determined the facts decisive for the decision on criminal responsibility and on the criminal sanction.
59. Moreover, the challenged Judgment thoroughly elaborates on the matter of the principle in *dubio pro reo*, crossing over its legal definition, the common misunderstanding of the practice of the principle, the essential content of the principle and why the principle in *dubio pro reo* has not been violated.
60. The Court recalls that it is beyond its jurisdiction to assess the quality of the conclusions of the courts regarding the assessment of the evidence, unless it is manifestly arbitrary. The Constitutional Court shall also not interfere in the way the courts have admitted the evidence as evidentiary material and will not interfere with the discretion of the court on assessing its probative value. It is

the exclusive role of the regular courts, even when the statements of the witnesses at the public hearing and under oath appear to be in the conflict. (See European Court of Human Rights, *Doorson v. Netherlands*, Judgment of 6 March 1996, published in Report No. 1996-II, paragraph 78).

61. The Court considers that the challenged judgment is based on the proceedings conducted in accordance with the legal provisions and with respect of the Applicant's rights and freedoms protected by the Constitution.
62. Therefore, the Court finds that the Applicants have not accurately explained how and why the challenged Judgment violated their right to fair and impartial trial and that they have not substantiated and proved their claim on a constitutional basis.

(iii) Violation of the right to legal remedies

63. The Court recalls that the Applicants also claim a violation of their right to legal remedies. Article 32 [Right to Legal Remedies] of the Constitution establishes:

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

64. In this respect, the Court notes that the Applicants had ample opportunities to present his case before the District Court, the Court of Appeal and the Supreme Court. The alleged violations of the material and procedural law have been extensively and comprehensively addressed by the regular courts.
65. In that connection, the Court reiterates that the ECtHR established the standards on what amounts to an effective legal remedy. These standards in principle do not require that each and every allegation brought by an Applicant should be dealt with. More importantly, such standards should not be translated to mean that an effective legal remedy is one which proves to be successful for the Applicant. To the contrary, that is not a condition required neither by the ECHR nor the Constitution.
66. In this regard, the Court recalls the ECtHR held that "*the effectiveness of a remedy within the meaning of Article 13 of the European Convention [corresponding to Article 32 of the Constitution] does not depend on the certainty of a favorable outcome of the proceedings for the applicant*" (Judgment *Gebremedhin v. France*, No. 25389/05, § 53).
67. This means that when building a case before the Constitutional Court it is not sufficient that the Applicants refer to a violation of Article 32 of the Constitution or Article 13 of the ECHR, just because the courts did not accepted as grounded the allegations on which they based their appeals, and mainly when the appeals were not favorable to the Applicants.
68. The Court notes that the Applicants in all instances of the proceedings had access to legal remedies right to an effective legal remedy was respected. The Applicants during the proceedings could submit objections against the

indictment, the legal qualification of the offense and file appeals against the judgments. In fact, they filed an appeal with the Court of Appeal and a request for protection of legality with the Supreme Court.

69. The Court considers that the allegations submitted by them were thoroughly reviewed and it was decided that no procedural and substantive violations were committed. The fact that the Applicants do not agree with the conclusion of the Court of Appeal or of the Supreme Court does not render the remedy ineffective as such.

(iv) Violation of the right to judicial protection of rights

70. The Court recalls that the Applicants also claim a violation of their right to judicial protection of rights. Article 54 [Judicial Protection of Rights] of the Constitution establishes:

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

71. The Court reminds that it stems from Article 54 of the Constitution that the condition for entailing the exercise of the right to judicial protection of rights is a violation or the denial of any right guaranteed by the Constitution. If there is such a violation, the bearer of that violated or denied right has the consequent right to an effective legal remedy.
72. The Court has just concluded that the Applicant's allegation on a violation of the right to fair and impartial trial is ungrounded and the right to an effective legal remedy was respected. Thus, there is no violation of rights giving rise to judicial protection and to an effective remedy. Consequently, there is no subject for constitutional consideration.
73. Therefore, the Court finds that there is no basis to examine the admissibility of the Applicant's allegation on a violation of their right to judicial protection of rights under Articles 54 of the Constitution.
74. In all, the Court considers that the Applicants have not substantiated all their allegations nor they have submitted *prima facie* evidence indicating a violation of their rights guaranteed by the Constitution and ECHR. (See, case No. KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Syla*, Constitutional Court of the Republic of Kosovo, Constitutional Review of Decision CA. no. 2129/2013, of the Court of Appeal of Kosovo, of 5 December 2013, and Decision CA. no. 1947/2013, of the Court of Appeal of Kosovo, of 5 December 2013).
75. The Court finds that the Applicants' Referrals have not met the requirements established by the Constitution, and as further provided by the Law and foreseen by the Rules of Procedure.

76. Therefore, the Referrals of the Applicants are manifestly ill-founded and are to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

(v) Request to hold a public hearing

77. The Court recalls that the Applicants request the Court “to order a hearing session”. Article 20 of the Law provides:

“1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.

2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files.”

78. The Court notes that the Applicants simply request an oral hearing session, without any facts and reasoning.
79. The Court considers that the case file is sufficient to decide on the Referrals, in accordance with Article 20.2 of the Law.
80. Therefore, the requests of the Applicants to hold an oral hearing are rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 48 of the Law and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, on 17 May 2016, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the Request for for 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;
- V. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Almiro Rodrigues



President of the Constitutional Court



Arta Rama-Hajrizi