



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

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Prishtina, on 18 September 2017  
Ref.no.: RK 1123/17

## RESOLUTION ON INADMISSIBILITY

in

**Case No. KI123/16**

Applicant

**Vullnet Berisha**

**Constitutional review of Decision PN. No. 23/16, of the Court of Appeal,  
of 18 January 2016**

**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 Gërzhaliu-Krasniqi, Judge and  
Gresa Caka-Nimani, Judge

### **Applicant**

1. The Referral was submitted by Vullnet Berisha (hereinafter: the Applicant), imprisoned in the Dubrava prison and represented by his father Daut Berisha from village Llukare, Municipality of Prishtina.

## **Challenged decision**

2. The Applicant challenges Decision PN. No. 23/16, of the Court of Appeal of 18 January 2016, in conjunction with Judgment P. No. 342/2012, of the District Court in Prishtina, of 17 December 2012.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged decisions, whereby the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6 (1) of the European Convention on Human Rights (hereinafter: the Convention), have allegedly been violated.
4. The Applicant alleges that his Referral should be reviewed in accordance with Article 50 [Return to the Previous Situation] of the Law on Constitutional Court of the Republic of Kosovo, referring to his limited possibilities to be informed in time about the deadline for submission of the Referral as he is serving the imprisonment sentence.

## **Legal basis**

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 and 49 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**

6. On 24 October 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 14 November 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
8. On 15 February 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeal.
9. On 5 May 2016, the Court requested the Basic Court in Prishtina to submit to the Court the evidence (acknowledgment of receipt) confirming the date of receipt of the Decision of the Court of Appeal (PN No. 23/16 of 18 January 2016) by the Applicant.
10. On 16 May 2016, the Basic Court in Prishtina filed the evidence (acknowledgment of receipt) confirming that the aforementioned decision was served on the Applicant on 26 January 2016.

11. On 3 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on inadmissibility of Referral.

### **Summary of facts**

12. On 10 May 2012, the Public Prosecutor in Prishtina, by Indictment PP. No. 267-10/2012 and PPM. No. 27-5/2012 accused the Applicant, in co-perpetration with the juvenile B. Q., of committing the criminal offenses of theft in the nature of robbery or robbery under Article 256, paragraph 1 of the Criminal Code of the Republic of Kosovo (hereinafter: CCK) and unauthorized ownership, control, possession, or use of weapons under Article 328 paragraph 2 of CCK.
13. On 17 December 2012, the District Court in Prishtina by Judgment P. No. 342/2012, found the Applicant guilty of commission of the criminal offences of theft in the nature of robbery or robbery and unauthorized ownership, control, possession, or use of weapons sanctioned by the relevant provisions of the CCK. The Applicant was sentenced to five (5) years of imprisonment and a fine of € 1000.
14. On 18 March 2013, the Applicant challenged the aforementioned judgment of the District Court with the Court of Appeal, claiming essential violation of the criminal procedure provisions, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on punishment, proposing that the appealed judgment be annulled and the case be remanded to the first instance court for retrial.
15. On 22 July 2014, the Court of Appeal by Judgment PAKR. No. 419/13 rejected as ungrounded the Applicant's appeal regarding the criminal offense of theft in the nature of robbery, while it modified the challenged judgment of the District Court and rejected as ungrounded the charges for the criminal offense of unauthorized possession or use of weapons, because this criminal offense was included in the Law on Amnesty of the Republic of Kosovo.
16. On 10 November 2014, the Applicant filed a request for protection of legality with the Supreme Court alleging violation of the criminal procedure, erroneous application of the substantive law, and proposed that he be imposed a significantly more lenient sentence or that the challenged judgments be remanded for retrial.
17. On 26 March 2015, the Supreme Court by Judgment PML. No. 15/2015, rejected the request for protection of legality as ungrounded and upheld the challenged judgments of the lower instance courts.
18. On 17 September 2015, the Applicant filed a request for reopening of the criminal proceedings with the Basic Court in Prishtina, claiming that the court decisions were based on inadmissible evidence, unlawful identification and false statement of the witness B.Q. because the identification was based on a more circumstantial description.

19. On 16 December 2015, the Basic Court by Decision Kp. No. 601/2015, rejected the request for reopening of criminal proceedings as ungrounded. The Basic Court, among others, reasoned that in the request for reopening of the criminal proceedings was not provided any fact or new evidence that was unknown to the courts at the time of the challenged decisions; and which, on its own or together with other evidence would prove the innocence of the Applicant or that he would be sentenced under a more lenient criminal provision.
20. On 31 December 2015, the Applicant filed an appeal against the above mentioned decision with the Court of Appeal claiming violation of the provisions of the CPC and Article 31 of the Constitution, proposing that his appeal be approved as grounded and that challenged decision be annulled and the case be remanded for retrial.
21. On 18 January 2016, the Court of Appeal by Decision PN. No. 23/16 rejected the appeal of the Applicant as ungrounded and upheld the challenged decision of the Basic Court. The Court of Appeal upheld the reasoning of the Basic Court that the legal presumptions for the reopening of the criminal proceedings are not met because it is not proven that the sentencing judgments were based on false testimony of the witness B. Q, and moreover, the witness B. Q. was not found guilty because of false testimony as it is provided by the relevant provisions of the CPC.

### **Applicant's allegations**

22. The Applicant alleges violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) [Right to a fair trial] of the Convention. The Applicant also alleges violation of Article 7 [General Duty to Establish a Full and Accurate Record] of the Criminal Procedure Code in conjunction with Article 7 [Access to the Courts] of Law No. 03/L-199 on Courts.
23. Regarding the request for return to previous situation based on Article 50 of the Law, the Applicant alleges: *"Pursuant to Article 50 of the Law on Constitutional Court, I file this request for return to previous situation... I was not able to use this opportunity, as I am serving the imprisonment sentence in Dubrava prison and the possibility to know about all the laws, and my rights are very much limited, and I was not able to be notified in time for the deadline of submitting my Referral to the Constitutional Court of the Republic of Kosovo"*.
24. Regarding the conduct and regularity of the proceedings, the Applicant, *inter alia*, alleges: *"During the court proceedings the Criminal Procedure Code was not correctly applied, the evidence was not correctly assessed, my alibi was not proved, the statements of the minor B.Q. and of the injured E. H. were not carefully examined, the identification by the injured was not correctly assessed (which during the entire proceedings had irregularities and was contradictory and not based on legal provisions), imaginary (inexistent) evidence was created, such as for example the weapon that was taken as an evidence based solely on a recording that was found in my telephone, in the minutes were introduced new untrue evidence"*.

25. The Applicant claims to have recorded a telephone conversation between him and the witness B. Q. and that he will bring this recording in a electronic form CD, as a new fact and evidence that would prove his innocence.
26. Finally, the Applicant requests the Court: *“To assess the legality of incriminatory judgment P. no. 342/2012 of the Basic Court in Prishtina and all evidence taken by the police, the Prosecution and Court based on which was rendered the incriminatory judgment of 17.12.2014, which is ungrounded and not based on facts and evidence, which is in the contradiction with the laws in force, general obligation for full and accurate determination of factual situation under Article 7 of the Criminal Procedure Code of Kosovo, due to the fact that nobody can be adjudicated and sentenced for the criminal offence he did not commit as it is provided by Article 1 and 2 of the Criminal Procedure Code of Kosovo, due to the fact that complete factual situation was not determined, new facts are discovered, which alone, or together with the previous evidence justify the innocence of the convicted person, and also the Judgment in contradiction with the Criminal Procedure Code was rendered, and DECISION Pn. No. 23/16 of the Court of Appeal, which rejected the appeal as ungrounded against the DECISION of the Basic Court in Prishtina for reopening of the criminal proceedings terminated by the final judgment.”*

#### **Admissibility of Referral**

27. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and in the Rules of Procedure.
28. In this respect, the Court refers to Article 113.7 of the Constitution, which establishes that:

*“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 refers to Article 49 [Deadlines] of the Law, which foresees:

*“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. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force.”*
30. The Court also takes into account Article 50 [Return to the Previous Situation] of the Law, which provides:

*“If a claimant without his/her fault has not been able to submit the referral within the set deadline, the Constitutional Court, based on such a request, is obliged to return it to previous situation. The claimant should submit the request for returning to previous situation within 15 days from the removal of obstacle and should justify such a request. The return to the*

*previous situation is not permitted if one year or more have passed from the day the deadline set in this Law has expired.”*

31. The Court also refers to Rule 36 (1) c) of the Rules of Procedure which specifies:
  - (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”.*
32. The Court notes that the Applicant requested that in his case be applied Article 50 [Return Return to the Previous Situation] of the Law because: *“...I was not able to use this right, as I am serving the imprisonment sentence in Dubrava prison and the possibility to know about all the laws, and my rights are very much limited, and I was not able to be notified in time about the deadline of submitting my Referral to the Constitutional Court of the Republic of Kosovo.”*
33. The Court also notes that the Applicant raises allegations of the irregularity of the court proceedings against him, claiming that his guilt was based on unsubstantiated evidence and false testimony of the witness B. Q.
34. Without prejudice to the claims raised by the Applicant and the proceedings conducted before the regular courts, the Court considers that first of all, as a preliminary question, it must examine whether the Applicant justified the application of Article 50 of the Law on return to previous situation, and consequently to be exempted from the obligation to submit the Referral within the legal deadline of 4 (four) months as required by Article 49 of the Law.
35. In the present case, the Court notes that the Applicant’s justification for failure to submit the Referral to the Court in accordance with the legal deadline specified in Article 49 of the Law is of a subjective nature and is related to his impossibility to know the law and his rights. However, the Court considers that the Applicant has not provided any evidence that would document that due to objective circumstances that are beyond his control, he has failed to submit the referral within the legal deadline of 4 (four) months.
36. In this regard, the Court considers that serving the imprisonment sentence in itself does not constitute a reason for exemption from the obligation to submit the referral within the legal deadline of 4 (four) months; and moreover, the Applicant has not provided any evidence that he was prevented by the prison authorities to submit his referral in accordance with Article 49 of the Law.
37. The Court also considers that the Law on the Constitutional Court meets the requirements of predictability and is accessible because it is published in the Official Gazette of the Republic of Kosovo, and that is generally accessible electronically on the Internet.
38. The Applicant cannot justify himself that not knowing the law can serve him as a basis for exemption from the obligation to submit the referral within the legal

deadline of 4 (four) months because he had the opportunity to submit the referral, if necessary with the appropriate legal advice, within the deadline of 4 (four) months (for further elaboration of principle that not knowing the law does not exempt the Applicant of responsibility, see, for example, *mutatis mutandis*, Case *Cantoni v. France* [GC], application no. 17862/91, Judgment of 11 November 1996, §§ 35).

39. The Court recalls that the purpose of the four-month legal time limit under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure is to promote legal certainty, to ensure that cases raising constitutional issues are dealt with within a reasonable time and that previously rendered decisions are not endlessly open to challenging (See case of *o' Loughlin and Others v. the United Kingdom* no. 23274/04, ECtHR Decision of 25 August 2005 and *mutatis mutandis* see case no. KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 3 March 2014).
40. The Court notes that it is the duty of the applicants or of their representatives to act with '*due diligence*' to ensure that their claims for protection of rights and fundamental freedoms are filed within the legal deadline of four (4) months provided for in Article 49 of the Law and further specified in Rule 36 (1) (c) of the Rules of Procedure (See, for example, the Constitutional Court of the Republic of Kosovo: case. No. KI07/15, Resolution on Inadmissibility of 8 December 2016, § 52 and other references mentioned in that decision).
41. Based on the elaborations above, the Court considers that in the present case the conditions to return to previous situation have not been met as it is provided in Article 50 of the Law, because the Applicant failed to substantiate his claim and has not presented any evidence which indicate how and why he failed to submit the Referral within the provided time limit, without his fault (See Constitutional Court of the Republic of Kosovo, Case no. KI25/15, Resolution on Inadmissibility of 2 December 2015, para. 29).
42. In addition, from the documents submitted, the Court notes that the Decision of the Court of Appeal (PN No. 23/16 of 18 January 2016) was served on the Applicant on 26 January 2016; while the Referral was submitted to the Court on 24 October 2016.
43. Based on the above, the Referral was not submitted in accordance with Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.
44. The Court finds that the Applicant's Referral is out of time and is to be declared inadmissible, because it was not submitted in accordance with Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.

## FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law and Rule 36 (1) c) of the Rules of Procedure, on 3 July 2017, unanimously

### DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and
- IV. This Decision is effective immediately.

**Judge Rapporteur**

Altay Suroy



**President of the Constitutional Court**

Alta Rama-Hajrizi