



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

Prishtina, on 14 November 2016
Ref. No.:RK1003/16

RESOLUTION ON INAMDISSIBILITY

in

Case No. KI13/16

Applicant

Armend Selimi

**Constitutional review of Decision PN-II-.no. 8/2015 of the Supreme
Court of Kosovo, of 26 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 is submitted by Armend Selimi from Prishtina (hereinafter, the Applicant) duly represented by Artan Qerkini, a lawyer practicing in Prishtina.

Challenged decisions

2. The Applicant challenges Decision PN-II-8/2015 of the Supreme Court of 26 November 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged decision of the Supreme Court which allegedly violated Articles 29 [Right to Liberty and Security], 30 [Right of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution of Republic of Kosovo in connection with Article 6 of the European Convention of Human Rights (hereinafter, the Convention).
4. In substance the Applicant is referring to the violation of his fundamental rights on two grounds: (i) because the Special Prosecutor has allegedly filed an untimely indictment against him, that is, after the lapse of two (2) year legal deadline as is provided for by Article 159 (1) of the Criminal Procedure Code of the Republic of Kosovo (hereinafter, the CPC) and (ii) because the Supreme Court approved the impugned indictment of the Special Prosecutor.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 47 of the Law No. 03/L-121 on the 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.

Proceedings before the Constitutional Court

6. On 19 January 2016, the Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On 12 February 2016, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (presiding), Arta Rama- Hajrizi and Gresa Caka-Nimani (judges).
8. On 25 March 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 21 October 2016, 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

10. On 21 October 2010, the Special Prosecutor commenced the investigation against the Applicant and other co-accused for the commission of the alleged criminal offences of unauthorized supply, transportation, production, exchange

or sale of weapons, Organized crime, Fraud, Abuse of official position or authorization and Misuse of authorizations in economy.

11. The investigation was extended several times until 21 October 2012. On 7 June 2013 and 19 July 2013, the Special Prosecutor issued decisions for the suspension of the investigations. However, on 19 January 2014, the Special Prosecutor issued a decision on re-initiation of the investigation and consequently, on 19 January 2015, filed Indictment against the Applicant (PPS 108/2010).
12. The defense council objected the filing of the indictment, alleging that the Indictment was submitted after the legal deadline specified in Article 159 of the CPC.
13. On 28 May 2015, the Basic Court (Decision No PKR. 23/2015) decided to accept the objection of the defense counsel and rejected the indictment as untimely.
14. The Special Prosecutor filed an appeal with the Court of Appeal, alleging that *“there is no legal deadline to file the Indictment and that the Prosecutor may file the Indictment at any time - with the only restriction of the deadline of the statutory limitation”*.
15. On 10 August 2015, the Court of Appeal (Decision PN 340/15) rejected the appeal of the Special Prosecutor as ungrounded.
16. The Court of Appeal considered that *“the Basic Court has analyzed in details the factual state and the legal procedure. The Trial Panel is fully convinced with the conclusions and the reasoning of the Basic Court. Due to these reasons, the Trial Panel fully agrees with this reasoning and fully ascertains the conclusion”*.
17. The Court of Appeal concluded that *“based on Article 159, paragraph 1 of CPC, the investigation shall be completed within two (2) years with the immediate filing of Indictment or the investigation in question shall automatically be suspended. Based on Article 68 of CPC, the termination of investigations implies the termination of proceeding as a whole, since one proceeding stage is not followed by the other. In the case in question, the investigation deadline had expired before the Prosecution filed the Indictment. As a result, the Prosecutor has filed the Indictment after the termination of the criminal proceeding, which is unlawful”*.
18. On 22 September 2015, the Special Prosecutor filed an appeal with the Supreme Court, claiming what follows.

“The CPC does not determine the explicit time for filing an indictment, but it is not correct that the systematic interpretation of CPC shall be that the indictment must necessarily ensue immediately after the conclusion of the investigation, as it is emphasized by the Court of Appeals. If the CPC does not determine an explicit time limit for filing an indictment, then there is no legal basis for the Court of Appeals to conclude that the Indictment is

out of time. The Indictment may only be rejected by the Presiding Judge of the trial panel during the 'indictment and plea stage', pursuant to the reasons on the basis of Article 253 (1) of CPC. This article does not foresee the filing of indictment out of time as a reason for its rejection...The European Court of human Rights has asserted that the "reasonability" of extension of the proceeding shall be assessed in view of the circumstances of the case...Article 4 (1) of the CPC determines that only a final decision prevents the criminal prosecution of the same individual for the same criminal offence. Therefore, no provision of the law prevents the prosecutor where the evidence supports the well-founded suspicion".

19. On 26 November 2015, the Supreme Court (Decision PN.II.8/2015) approved the appeal of the Special Prosecutor and modified the decision of the Court of Appeal.
20. The Supreme Court reasoned as it follows.

"It is clear and unfortunately the time limit for filing the Indictment is not determined specifically in CPC. No provision of the CPC shows exactly any circumstance in which the Indictment is considered as "out of date", or for rejecting the appeal on this basis. The Panel, initially considered Article 68 of the CPC which determines in details the four different stages of the criminal procedure: the investigation stage, the indictment and plea stage, the main trial stage and the legal remedy stage. By this clear difference of the stages of the criminal procedures in CPC, the Panel finds that the purpose of the legislative is clear and the filing of the appeal enters in the second state of the criminal procedure (the indictment and plea stage) and not in the first stage (the investigation stage). This point of view was strengthened by Article 159 of the CPC. This Article is very clear regarding the time limits of the investigative stage, and it does not include any provision which determines that the Indictment shall be filed within the allowed time limit. Then, the Panel considered Article 240 of the CPC, by which determines the actions which are in disposal of the Prosecutor after the investigation is finished. Paragraph 1 determines the procedure before the Court based on the Indictment filed by the State Prosecutor, and paragraph 2, determines that the State Prosecutor issued a Decision for the termination of the investigation. Both situations, expressively refer to the end of the investigation, and the Panel thinks that the meaning of the Article is that the filing of the Indictment is not part of the investigation stage, and therefore it is not a subject of the time limits determined by Article 159 of the CPC. Also it is logical that the State Prosecutor will not be able to decide of what actions he should undertake – to file an Indictment or to issue a Decision. Also, it is clear that the Indictments are long and detailed documents, which take a lot of time to be prepared correctly and completely. The Panel by majority of votes ascertains that there is not any time limit for filing the Indictment, "Out of date Indictment" is not determined by CPC. The State Prosecutor is limited only to the prescription of this present criminal case. However, the State Prosecutor is clearly instructed to file the Indictment as soon as the investigation stage ends, since that the danger of violating the right to fair trial within the reasonable time limit becomes greater by time passing. Further on,

this Court on the occasion of deciding on the merits of the criminal charge; on the occasion of deciding on the punishment will always consider the time limit of the criminal procedure”.

Applicant's allegations

21. The Applicant claims a “violation of the individual rights of the applicant, guaranteed by Articles 29, 30 and 31 of the Constitution of the Republic of Kosovo, Article 6 of the European Convention”.
22. The Applicant alleges: *“the lawmaker has foreseen Article 159 of CPC as a guarantee for the defendant that the investigations against him or her may be conducted for a maximum of (2) years, starting from the date of rendering the Decision for the initiation of investigations and if no indictment is filed within this period of time, the prosecutor shall immediately render the Decision for the termination of the investigations, which automatically takes the final form, because an appeal is not foreseen against it. Even if the prosecutor does not render the Decision for the termination of the investigation which on the basis of Article 158.3, by the expiration of the (2) year time limit is considered automatic, that decision shall be considered as existent, due to the reason that the Defendant should not bear consequences because the prosecution does not act in conformity with the legal provisions”.*
23. The Applicant also alleges that the Supreme Court deprived the Applicant from the right to fair and impartial trial, because *“the Criminal Procedure Code has stipulated preclusive deadlines, with the effect of losing the right of filing an indictment if the Prosecutor does not file an indictment within a period of (2) years, counting from the day of the Decision on initiation of the investigations”.*
24. Furthermore, the Applicant alleges that principle “in dubio pro reo” was violated in his case, because *“The presumption of innocence presents the constituent part of a fair trial. This principle places the burden of proof on the prosecutor, and conclusively guarantees the charged person the benefit of the doubt. This means that the prosecutor holds the burden of proof for all elements of the offence against all the defendants and the court is obliged to interpret the factual or legal doubts in favor of these defendants. In light of this interpretation, we shall always have violations of the principle “in dubio pro reo” each time the courts interpret the law in favor of the case of the prosecution”.*

Assessment of admissibility

25. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.
26. In this 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.*
27. The Court also 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.*
28. The Court further takes into account Rule 36 [Admissibility Criteria] (1) (d) and (2) (b) and (d) 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, or*
(...)
(d) *the Applicant does not sufficiently substantiate his claim.*
29. The Court recalls that the Applicant claims that the challenged decision allegedly violated his rights to liberty and security, his rights of Accused and his right to fair and impartial trial, each of them guaranteed by the Constitution.
30. The Court is mindful of the invoked constitutional provisions of Articles 29, 30 and 31 of the Constitution, as it follows.
31. Article 29 [Right to Liberty and Security]
1. *Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:*
- (1) *pursuant to a sentence of imprisonment for committing a criminal act;*
- (2) *for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;*
- (3) *for the purpose of educational supervision of a minor or for the purpose of bringing the minor before a competent institution in accordance with a lawful order;*

- (4) for the purpose of medical supervision of a person who because of disease represents a danger to society;
 - (5) for illegal entry into the Republic of Kosovo or pursuant to a lawful order of expulsion or extradition.
2. Everyone who is deprived of liberty shall be promptly informed, in a language he/she understands, of the reasons of deprivation. The written notice on the reasons of deprivation shall be provided as soon as possible. Everyone who is deprived of liberty without a court order shall be brought within forty-eight (48) hours before a judge who decides on her/his detention or release not later than forty-eight (48) hours from the moment the detained person is brought before the court. Everyone who is arrested shall be entitled to trial within a reasonable time and to release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial.
 3. Everyone who is deprived of liberty shall be promptly informed of his/her right not to make any statements, right to defense counsel of her/his choosing, and the right to promptly communicate with a person of his/her choosing.
 4. Everyone who is deprived of liberty by arrest or detention enjoys the right to use legal remedies to challenge the lawfulness of the arrest or detention. The case shall be speedily decided by a court and release shall be ordered if the arrest or detention is determined to be unlawful.
 5. Everyone who has been detained or arrested in contradiction with the provisions of this article has a right to compensation in a manner provided by law.
 6. An individual who is sentenced has the right to challenge the conditions of detention in a manner provided by law.

32. Article 30 [Rights of the Accused]

Everyone charged with a criminal offense shall enjoy the following minimum rights:

- (1) to be promptly informed, in a language that she/he understands, of the nature and cause of the accusation against him/her;
- (2) to be promptly informed of her/his rights according to law;
- (3) to have adequate time, facilities and remedies for the preparation of his/her defense;
- (4) to have free assistance of an interpreter if she/he cannot understand or speak the language used in court;
- (5) to have assistance of legal counsel of his/her choosing, to freely communicate with counsel and if she/he does not have sufficient means, to be provided free counsel;
- (6) to not be forced to testify against oneself or admit one's guilt.

33. Article 31 [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal

charges within a reasonable time by an independent and impartial tribunal established by law.

3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with 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.

6. Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.

7. Judicial proceedings involving minors shall be regulated by law respecting special rules and procedures for juveniles.

34. The Court recalls that the main argument of the Applicant is whether filing the indictment two years after the starting of investigations is or not in conformity with the criminal law.
35. In fact, the Applicant complains that the Supreme Court erroneously interpreted the law with regard to a time-limit to file an indictment and considers that the Supreme Court should have construed the relevant legal provisions in a different way.
36. The Court notes that the Supreme Court took into due account the Judgments of the Basic Court and of the Court of Appeal. Then, the Supreme Court started analyzing the question from the observation that *“no provision of the CPC shows exactly any circumstance in which the Indictment is considered as “out of date”, or for rejecting the appeal on this basis”*. The Supreme Court, after discussing the interpretation of Articles 68, 159 and 240 of the Criminal Procedure Code, considered that *“the filling of the Indictment (...) is not a subject of the time limits determined by Article 159 of the CPC”*. Finally, the Supreme Court concluded that *“there is not any time limit for filing the Indictment, “Out of date Indictment” is not determined by CPC”*.
37. The Court considers that the Applicant bases his claim on erroneous interpretation of Article 159 of the CPC made by the Supreme Court in relation to the Special Prosecutor having filed the indictment two years after the commencement of investigations. That procedural argument pertains to the domain of legality and as such does not fall under the jurisdiction of the Constitutional Court and thus it cannot be reviewed by the Court. On the other hand, the Court underlines that *“failure to abide by the time-limit prescribed by domestic law does not in itself contravene Article 6 § 1 of the Convention”*. (See the Case of *Mitkus v. Latvia*, Application no. 7259/03, ECtHR, Judgment 2 October 2012, paragraph 88)

38. Moreover in the case at issue, the Court, in accordance with its case law, considers that it is not reviewing the Law under dispute but only the Decision of the Supreme Court.
39. In this respect, the Court emphasizes that it is not its task to deal with errors of law allegedly committed by a regular court (legality) unless and in so far as such errors may have infringed rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which have led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of “fourth instance”, which would be to disregard the limits imposed on its jurisdiction. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See *García Ruiz v. Spain*, [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I; Case No. KI72/14, Applicant *Besa Qirezi*, Judgment of 4 February 2015, para.65).
40. The Court considers that the Applicant has neither presented facts which justify his allegation of a violation of his constitutional right to liberty and security, his rights of Accused and his right to fair and impartial trial, nor he has proved the alleged violation of his invoked constitutional rights.
41. In fact, the Court notes that the Applicant does not refer to any relevant and pertinent facts or situations in relation to be *deprived of liberty*, which would fall under Article 29 of the Constitution, in conjunction with Article 5 of the ECHR; in relation to a criminal charge, which could justify the enjoyment of the *minimum rights*, as established by Article 30 of the Constitution, in conjunction with Article 6 of the ECHR; and in relation to a *public hearing*, as established by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.
42. The Court considers that the observation is in conformity with the ECtHR jurisprudence, which held that the overall purpose of Article 5 of the ECHR is to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (*Assanidze v. Georgia*, ECtHR, application no. 71503/01, Judgment 8 April 2004). The ECtHR jurisprudence also held that Article 6 of the ECHR begins to apply when a criminal investigation has reached the point where the applicant has been charged with a criminal offense (*Zaprianov v. Bulgaria*, ECtHR, application no. 41171/98, Judgment 30 September 2004). In addition, the ECtHR jurisprudence specifically considered that the guarantee provided by Article 6 of the ECHR requires that a hearing takes place and by implication that there is an oral hearing.
43. In addition, the Court recalls that the Applicant alleged a violation of the principle “*in dubio pro reo*”, because “*the presumption of innocence presents the constituent part of a fair trial*”.
44. The Court reminds that the principle “*in dubio pro reo*” is somehow the reverse of the beyond reasonable doubt criterion of adjudication, meaning that, where there is no evidence in the trial beyond reasonable doubt, the principle “*in dubio pro reo*” comes into play.

45. In fact, in accordance with the structure and dynamic of the criminal proceedings, the Prosecutor started the criminal investigations based on an alleged reasonable suspicion of a criminal offense existence; then the Prosecutor allegedly indicted based on a grounded suspicion of a criminal offense having been committed. The principle "*in dubio pro reo*" only comes into play in the trial phase, as it is linked with the global assessment of the evidence presented during the trial. If no evidence beyond reasonable doubt, the conviction is not to be allowed, then *in dubio pro reo* operates and acquittal will follow. The criminal proceedings have not reached this phase yet. Therefore, the allegation is premature, misplaced and ungrounded.
46. Moreover, the Court recalls its case law, namely in Cases No. KI10/15 and KI12/15, Applicants *Shpresim Uka and Bekim Sylja*, Resolution on Inadmissibility, of 7 July 2016. In that case, the Court held 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 (,,) appear to be in conflict. (See European Court of Human Rights, Doorson v. Netherlands, Judgment of 6 March 1996, published in Report No. 1996-II, paragraph 78)*".
47. Thus, the Court considers that the Applicant has not succeeded to show and prove that the proceedings before the Supreme Court were unfair or tainted by arbitrariness or that his rights and freedoms protected by the Constitution have been infringed by the alleged erroneous interpretation of Article 159 of the CPC. The Court emphasizes that interpretation of Article 159 of the CPC is a matter of legality. No constitutional matter has been substantiated and proved by the Applicant.
48. The Court reiterates that, as a general rule, the interpretation of law is a matter solely for the regular instances whose findings and conclusions in this regard are binding on the Constitutional Court. However, where a decision of a regular court is clearly arbitrary, the Court can and must call it into question. (See *Sisojeva and Others v. Latvia*, [GC], application no. 60654/00, Judgment of 15 January 2007, para. 89).
49. In addition, the Court notes that the Applicant disagrees with the outcome of his case; however, the disagreement cannot of itself raise an arguable claim of a breach of Articles 29 [Right to Liberty and Security], 30 [Right of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution. (See, for example, Constitutional Court Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 May 2012, paragraph 28).
50. Based on the foregoing considerations, the Referral, on constitutional grounds, is manifestly ill-founded and must be declared inadmissible as established by Article 113 (7) of the Constitution, provided for by Article 48 of the Law and as further specified by Rules 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure, on 21 October 2016, 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;
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Arta Rama-Hajrizi

