



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 29 November 2016
Ref. no.:RK1007/16

RESOLUTION ON INADMISSIBILITY

in

Case no. KI154/15

Applicant

Farije Gavazaj and Emira Gavazaj

**Constitutional review of
Judgment PML. no. 67/2015 of the Supreme Court of Kosovo,
of 9 July 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 Farije Gavazaj and Emira Gavazaj from Prizren (hereinafter, the Applicants).

Challenged decision

2. The Applicants challenge Judgment PML. no. 67/2015 of the Supreme Court of Kosovo, of 9 July 2015, by which it rejected as inadmissible the request for protection of legality filed by the Applicant Farije Gavazaj against the Judgment PAKR. no. 492/2014 of the Court of Appeal, of 30 October 2014.
3. The challenged Judgment was served on the Applicants on 15 September 2015.

Subject matter

4. The subject matter is the constitutional review of the challenged judgment, which allegedly violated Articles 31 [Right to Fair and Impartial Trial] 102 [General Principles of the Judicial System] 108 [Kosovo Judicial Council] 109 [State Prosecutor] and 110 [Kosovo Prosecutorial Council] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), as well as Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).
5. In addition, the Applicants refer to violation of Article 22 [Direct Applicability of International Agreements and Instruments] and 54 [Judicial Protection of Rights] of the Constitution, Article 13 [Right to an effective remedy] and 17 [Prohibition of abuse of rights] of the ECHR, Article 2 of the International Covenant on Civil and Political Rights (hereinafter, the ICCPR) and Article 7 of the Universal Declaration of Human Rights (hereinafter, the UDHR).

Legal basis

6. 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

7. On 23 December 2015, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
8. On 22 January 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel, composed of Judges Altay Suroy (Presiding), Artta Rama-Hajrizi and Bekim Sejdiu.
9. On 1 February 2016, the Court notified the Applicants about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.
10. 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

11. On 11 July 2012, in the village Vërmica, Municipality of Prizren, there was a quarrel between a police patrol of four police officers and a group of persons. Nasi Gavazaj (the father of the Applicant Emira Gavazaj and the husband of the Applicant Farie Gavazaj) was among those persons.
12. Then, one of the police officers, A. B., took out a pistol and fired two shots in the direction of Nasi Gavazaj, who suffered life-threatening injuries. As a consequence of these injuries, Nasi Gavazaj died on 23 July 2012.
13. On 27 December 2012, the Basic Prosecutor in Prizren (indictment PP. no. 200/2012) accused the police officer A. B. of the criminal offences of murder and of unauthorized ownership, control or possession of weapons.
14. On 30 June 2014, the Basic Court in Prizren (Judgment P. no. 10/2013) found the accused police officer A. B. guilty of the criminal offence of murder and sentenced him to imprisonment and acquitted him of the criminal offence of unauthorized ownership, control, possession or use of weapons.
15. The Prosecutor filed an appeal with the Court of Appeal *“due to the essential violations of the criminal procedure provisions, erroneous and incomplete ascertainment of the factual situation, and the violation of the criminal law”*. The Applicant Farije Gavazaj also filed an appeal *“due to the essential violation of the criminal procedure provisions, and the decision on the criminal sanction”*.
16. On 30 October 2014, the Court of Appeal of Kosovo (Judgment PAKR. no. 492/2014) rejected as ungrounded the appeals and upheld the Judgment of the Basic Court.
17. The State Prosecutor filed with the Supreme Court a request for protection of legality *“due to the essential violation of the criminal procedure provisions (...) and the violation of the criminal law”*.
18. The Applicant Farije Gavazaj also filed a request for protection of legality *“due to violation of the criminal law, essential violation of the Criminal Procedure Code, and the erroneous and incomplete ascertainment of the factual situation, without any concrete proposal”*.
19. The Applicant Farije Gavazaj particularly alleged that *“the challenged Judgments are unlawful because the legal qualification of the criminal offence is erroneous; that the judgments were rendered by making a series of violations of the Criminal Code and the Criminal Procedure Code, without clarifying how such violations were manifested, describing the flow of the proceedings in this criminal case as extremely negligent by the prosecution bodies. In addition, it is stated in the Request that although there were two contradictory Forensic Expertise Reports related to the mental state of the Convicted, the Court did not find it reasonable to continue with a super expertise, in order to confirm what expertise it had to trust, further*

emphasizing to take into consideration the other circumstances and legal violations, without any concrete proposal”.

20. On 9 July 2015, the Supreme Court (Judgment PML. no. 67/2015) partially granted the request for protection of legality of the State Prosecutor and rejected as inadmissible the request of the Applicant Farije Gavazaj.
21. In fact, the Supreme Court reviewed the request for protection of legality filed by the Applicant Farije Gavazaj and, according to the provision of Article 433, paragraph 1 of the PCPCK, concluded that *“in the concrete case, the Injured person [the Applicant] is not an authorized person, therefore such a request is inadmissible”.*

Applicant's allegations

22. The Applicants claim a violation of Articles 31 [Right to Fair and Impartial Trial] 102 [General Principles of the Judicial System] 108 [Kosovo Judicial Council] 109 [State Prosecutor] and 110 [Kosovo Prosecutorial Council] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), as well as Article 6 [Right to a fair trial] of the ECHR.
23. In addition, the Applicants also refer to a violation of Article 22 [Direct Applicability of International Agreements and Instruments] and 54 [Judicial Protection of Rights] of the Constitution, Article 13 [Right to an effective remedy] and 17 [Prohibition of abuse of rights] of the ECHR, Article 2 of the ICCPR and Article 7 of the UDHR. However, the Applicants do not further explain to the same extent how all these constitutional provisions were violated.
24. The Applicants allege a violation of the right to fair and impartial trial, because *“all three other police officers, the colleagues of the accused, who were at the crime scene, declared that they were assaulted and it was never, by any piece of evidence whatsoever, proven what put them into risk, how they were put to risk, and who put them into risk. All these statements were fabricated, and reasons given by these Kosovo Police members to save the accused and themselves. Whereas, the Prosecution and the Basic Court and later the Court of Appeal, considered that they were true, thus violating our right to fair and impartial trial”.*
25. Even though, the Applicants enumerate some other facts and opinions on which they tried to substantiate the other alleged violations: the convict was favored by all state authorities; the convict was in detention on remand only two days and over two years he was in the house arrest; no investigation and criminal proceedings were launched against the three other police officers for the criminal offence of refraining from providing help; the testimonies of three other police officers in the court proceedings were biased and false; due to inactivity of the prosecution they had to file criminal reports by themselves; the Prosecutor should have accused the convict for the criminal offence of aggravated murder and not for the criminal offence of murder; the State Prosecutor in his request for protection of legality acted in favor of the defendant; the expertise is untrue, is a *“purchase of (...) interpretation”* and

the regular courts should not have accepted this expertise; the pretrial judge did not respect, not even once the provisions of the Criminal Procedure Code.

Admissibility of Referral

26. The Court examines whether the Applicants have fulfilled the admissibility requirements established by the Constitution, and as further provided by the Law and foreseen by the Rules of Procedure.
27. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:
 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. The Court further 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. In addition, the Court takes into account Rule 36 (1) (d) and (2) (a) 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*
[...]
 - (a) *the referral is not prima facie justified.*
30. In that respect, the Court recalls that the Applicants claim a violation of constitutional provisions of the Constitution, the ECHR, the ICCPR and of UDHR.
31. The Court notes that the Applicants mainly allege that the legal qualification of the criminal offence was erroneous; that the regular courts did not find it reasonable to continue with a super expertise related to the mental state of the convicted person; that there were shortcomings in the assessment of the evidence; that the judgments were rendered by making a series of violations of the Criminal Code and the Criminal Procedure Code.
32. Moreover, the Applicants described the details of the course and dynamic of the regular courts proceedings and concluded that the investigative,

prosecutorial and judicial bodies were negligent and biased during the overall proceedings.

33. However, the Court cannot see any justified clarification on how such violations or shortcomings were manifested and which concrete proposals they offered.
34. In fact, the Court observes that the Applicants refer to a number of provisions of the Constitution, of the ECHR, of the ICCPR and of the UDHR. Notwithstanding, they do not explain why they think that the Judgment of the Supreme Court has violated all those provisions guaranteeing their rights and freedoms.
35. The Applicants also extensively quote the case law of the European Court of Human Rights. However, they do not establish any relation or analogy with their case.
36. Notwithstanding, the Court recalls that the Supreme Court rejected as inadmissible the request for protection of legality filed by the Applicant. That decision of the Supreme Court is the last and final in the process of exhaustion of the legal effective remedies available to the Applicants.
37. The Supreme Court reasoned the abovementioned decision as it follows:

“(...) according to the provision of Article 433, paragraph 1 of the PCPCK, ‘A request for protection of legality may be filed by the Chief State Prosecutor, the defendant or his or her defense counsel’. Based on this, it results that in the concrete case, the Injured person is not an authorized person, therefore such request is inadmissible”.

38. In fact, the Court notes that the main arguments brought by the Applicants have to do with the favor given by state authorities to the convicted person; the erroneous legal qualification of the criminal offence; the super expertise related to the mental state of the convicted person; the shortcomings in the assessment of the evidence; and a series of violations of the Criminal Code and the Criminal Procedure Code.
39. The Court considers that all those arguments are not suitable to challenge the content of the Judgment of the Supreme Court which decided to reject as inadmissible the Applicants’ request for protection of legality, because the Applicant Farije Gavazaj was not an authorized person to file such a request.
40. The Court further considers that the Applicants tried to build their case based on the legality grounds, namely erroneous legal interpretation, errors on the assessment of the evidence and a series of violations of the Criminal Code and the Criminal Procedure Code.
41. In that respect, the Court reiterates that it is not its task to deal with errors of facts or of 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).

The Applicants must submit a reasoned allegation and a compelling argument when claiming that a public authority has infringed their constitutional rights and freedoms protected by the Constitution.

42. The Court 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 role of the Constitutional Court is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way the evidence was taken. (See Case *Khan v. the United Kingdom*, Application no. 35394/97, paragraphs 34-35, ECHR, Judgment of 12 May 2000).
43. In addition, the Court also reiterates that the role of the Constitutional Court is to ensure the compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "*fourth instance court*". (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
44. The Court considers that the Applicants do not agree with the conclusion of the Supreme Court on the determination of the length of the imposed sentence. However, the dissatisfaction of the Applicants with the outcome of the proceedings of the regular courts cannot of itself raise an arguable claim of a breach of the right to fair and impartial trial. (See *mutatis mutandis* case *Mezotur - Tiszazugi Tarsulat v. Hungary*, paragraph 21 ECHR, Judgment of 26 July 2005).
45. The Court further considers that the Applicants had a possibility to present before the regular courts the material and legal reasons for the resolution of the dispute; their arguments were duly heard and duly examined by the regular courts; the proceedings, viewed in their entirety, were fair and rendered decisions were justified in detail.
46. The Court notes that the Applicants have not brought before it a precise and concrete allegation on a violation of their rights and have not explained how and why the Judgment of the Supreme Court could have infringed their constitutional rights; they have only mentioned that there has been a violation of the constitutional rights. They have not provided any *prima facie* evidence which would point out to a violation of their constitutional rights. (See *Vanek vs. Slovak Republic*, ECtHR Decision, no. 53363/99 of 31 May 2005, and *Shub v. Lithuania*, No. 17064/06, ECHR, decision of 30 June 2009).
47. The Applicants have not *prima facie* showed that the relevant proceedings have been in any way unfair or arbitrary. (See, *mutatis mutandis*, *Shub vs. Lithuania*, no. 17064/06, ECHR Decision, of 30 June 2009).
48. The Court considers that the Applicants have not proved the allegations that the challenged decision violated their constitutional rights and freedoms, guaranteed by the Constitution, the ECHR, the ICCPR and the UCHR.

49. Accordingly, the Court considers that the admissibility requirements established by the Constitution, and as further provided by the Law and foreseen by the Rules of Procedure, have not been met.
50. Therefore, the Court finds that their Referral is inadmissible as manifestly ill-founded on a constitutional basis.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.7 of the Constitution, Article 47.2 of the Law and Rules 36 (2) (a) and 56 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; and
- IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur


Almiro Rodrigues



President of the Constitutional Court


Vjosa Rama-Hajrizi