



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

Prishtina, on 13 June 2016
Ref. No.:RK947/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI159/15

Applicant

Sabri Ferati

**Request for constitutional review of Decision P. no. 499/15 of the Court
of Appeal of Kosovo, of 29 September 2015**

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, and
Gresa Caka-Nimani, Judge

Applicant

1. The Applicant is Mr. Sabri Ferati from Podujeva, Republic of Kosovo (hereinafter, the Applicant), who is represented by Mr. Mahmut Halimi, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Decision P. no. 499/2015, of the Court of Appeal of Kosovo, of 29 September 2015.

Subject matter

3. The subject matter is the constitutional review of the decision of the Court of Appeal, of 29 September 2015, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights] of the Constitution of Kosovo (hereinafter: the Constitution), as well as Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. 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 29 December 2015, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 22 January 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur. On the same date, the President of the Court appointed the Review Panel composed of Judges Snezhana Botusharova (Presiding), Arta Rama-Hajrizi and Bekim Sejdiu.
7. On 2 February 2016, the Court informed the Applicant and the Court of Appeal about the registration of the Referral.
8. On 12 April 2016, after having considered the report of the Judge Rapporteur, the Review Panel recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On 19 September 2013, the Applicant caused a traffic accident in which seven (7) persons sustained serious bodily injuries, due to which 2 (two) persons died on the spot.
10. On 21 November 2013, the Basic Public Prosecutor's Office filed an indictment against the Applicant for the criminal offence of endangering public traffic under Article 378 paragraph 9 in conjunction with paragraph 1 of the Criminal Code of Kosovo (hereinafter CCK).

11. On 17 March 2014, the Basic Court in Prishtina - Branch in Podujeva (hereinafter: the Basic Court) rendered Judgment [P. no. 969/13], which declared the Applicant guilty and sentenced him to imprisonment of six (6) years. In the enacting clause of the Judgment reads:

"[...] On the basis of the analysis and the conclusions in relation to this accident, the group of experts has provided their opinion that it came to the accident due to the error of the driver of "Toyota Land Cruiser" vehicle who has undertaken the action of overpassing without making sure that there is sufficient space in the road for the full realization of the overpass (considering the distance and the speed of the vehicle from the opposite side).

[...]

In the case of rendering the Decision, the court has analyzed the Defense of the Accused person filed by his Defense Counsel...

[...]

The court on the basis of a detailed determined factual situation, witness statements, the evidence presented, professional expertise, and taking the allegations and the evidence of defense, decided as in the enacting clause of this judgment..."

12. The Applicant filed an appeal with the Court of Appeal against the Judgment [P.br.969/13], of the Basic Court.
13. On 23 September 2014, the Court of Appeal rendered Judgment [PA.1. no. 769/2014], which partially approved the appealing allegations of the Applicant, so that it modified the imprisonment sentence of 6 (six) years to imprisonment sentence of five (5) years. The reasoning of the Judgment reads:

"[...]

As to the Applicant's allegations that the first instance court has erroneously and incompletely determined the factual situation, the court considers as ungrounded, as the court took all the actions necessary to render this judgment.

[...]

As to the Applicant's allegations related to the length of the Applicant's imprisonment sentence, the court considers them as partially grounded, because the first instance court did not take into consideration the mitigating circumstances of the Applicant..."

14. The Applicant filed a request for protection of legality with the Supreme Court against the Judgment [P. no. 969/13] of the Basic Court and Judgment [PA.1. no. 769/2014] of the Court of Appeal.
15. On 12 February 2015, the Supreme Court rendered Judgment [Pml. No. 11/2015] which rejected the Applicant's request as ungrounded. In conclusion of the Judgment is stated:

"[...] all on what the Applicant based his request for protection of legality, the Basic Court and later the Court of Appeal, analyzed in details and comprehensively, provided their full clear reasons which are correct and

lawful and are approved by the Supreme Court, therefore it does not see it necessary to make their assessment once again."

16. On 18 May 2015, the Applicant filed the request with the Basic Court in Prishtina, requesting the reopening of the criminal proceedings.
17. On 21 August 2015, the Basic Court in Prishtina rendered Decision, which rejected the request for the reopening of procedure as ungrounded with the reasoning:

"On the basis of the assessment of this Court in the request filed for the reopening of the criminal proceeding no new facts or pieces of evidence have been presented, which were unknown to the court at the moment of rendering the Judgments mentioned above, which itself or along with previous pieces of evidence is likely to reason the innocence of the convict or his punishment on the basis of a softer criminal provision as provided by Article 423, paragraph 1, item 1.3 of CPCRK, therefore the facts and the pieces of evidence to which the Defense Counsel of the convict has referred himself do not offer reasons for allowing the reopening of the criminal proceedings."

18. Within legal deadline, the Applicant filed appeal with the Court of Appeal against the Decision of the Municipal Court.
19. On 29 September 2015, the Court of Appeal rendered Decision [PN. No. 499/2015], which rejected the Applicant's appeal as ungrounded, with the reasoning: *"The criminal panel of the Court of Appeals of Kosovo, following the review of the case files, assessment of the appealed allegations of the convict for the reopening of the criminal proceeding found that the appeal is ungrounded, due to the reason that the convict, in terms of Article 425, paragraph 2, as read in conjunction with Article 423, paragraph 1, subparagraph 1.3 of CCRK, has not offered new pieces of evidence which are a legal basis for allowing the reopening of the criminal proceeding of the final Judgment..."*

Applicant's allegations

20. The Applicant mentioned in his referral: *"I consider that the challenged judgments are unlawful because the first and second instance judgments contain essential violations of the criminal provisions, which violated the criminal law to the detriment of the convict. In particular, have not complied with the provisions of the Constitution (Article 24, "Equality before the law," Article 31, "The right to a fair and impartial trial," Article 54 "Judicial Protection") and the provisions of the Criminal Procedure Code of the Republic of Kosovo, and all these fundamental rights and freedoms, as well as the procedural safeguards guaranteed by the Constitution and the Criminal Code should be interpreted in accordance with international agreements and instruments."*
21. The Applicant addresses the Court with the proposal: *"that the Constitutional Court of the Republic of Kosovo declares unconstitutional all decisions and*

judgments, and to order that all these judgments and decisions be annulled and that the case be remanded for retrial and decision to the court of first instance (Basic Court - Department of General Crimes- Branch in Podujeva)."

Admissibility of the Referral

22. In order to be able to adjudicate the Applicant's complaint, the Court needs to first examine whether the complaint has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.

23. In this respect, Article 113 paragraph 7 of the Constitution provides:

"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".

24. Article 49 of the Law, also provides:

"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."

25. In this case, the Court refers to Rules 36 (1) (c) and (3) (e) of the Rules of Procedure, which foresees:

"(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.

(3) A referral may also be deemed inadmissible in any of the following cases:

[...]

(e) the Referral is incompatible ratione materiae with the Constitution".

26. In the present case, the Court by examining the case file found that the Applicant had two proceedings before the regular courts on which the decisions were rendered on different issues.

27. The first procedure against the Applicant was initiated by the Basic Public Prosecutor's Office on 21 November 2013. That procedure was completed on 12 February 2015 by Judgment [Pml. No.11/2015] of the Supreme Court, which

rejected the request for protection of legality of the Applicant, by which the Judgment [PA.1. no .769/2014] of the Court of Appeal, which found him guilty, has become final.

28. The Court notes that in the abovementioned proceedings was decided on the grounds of the merits of allegations of the prosecution that the Applicant had committed the criminal offence of endangering public traffic under Article 378 paragraph 9 in conjunction with paragraph 1 of the CCK, for which he was sentenced by final decision.
29. The determination of the Applicant's criminal charge was concluded by a final decision on 12 February 2015, whereas the Applicant's Referral was submitted on 29 December 2015, which is more than four months after the final decision.
30. Therefore, under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedures the Referral in relation to the first set of proceedings must be rejected as out of time.
31. The Court reiterates that the objective of the four months legal deadline is of the preclusive nature and is established to promote legal certainty by ensuring that cases raising issues under the Constitution are dealt within a reasonable time and that past decisions are not continually open to constitutional review (See case *O'LOUGHLIN and Others v. United Kingdom*, No. 23274/04, ECHR, Decision of 25 August 2005).
32. As regards the second procedure, the Court notes that these concern a request submitted by the Applicant to have the case against him reopened. The Applicant had initiated it on 21 August 2015, when he submitted a request for the reopening of the criminal proceedings before the Basic Court.
33. That procedure was completed on 29 September 2015, when the Court of Appeal rendered decision [PN. no. 499/2015], which rejected as ungrounded the request for reopening of proceedings, pursuant to Article 423 paragraph 1, sub-paragraph 1.3 of the CPCK, which defines the standards that must be met as a basis for the reopening of the proceedings.
34. In this regard, the Court notes that in this procedure, the regular courts decided solely on the fulfillment of the procedural requirements for the reopening of the proceedings, and not on the merits of the case, which was completed by final judgment of the Supreme Court on 12 February 2015.
35. The Court emphasizes Article 31 of the Constitution provides that, "*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...*".
36. The second set of proceedings regarding the re-opening of the case, in fact, do not determine any criminal charges, as these were determined in final instance by the Supreme Court on 12 February 2015.
37. As such, the right to a fair and public hearing does not apply to these proceedings. Therefore, the Applicant's complaint about the second set of

proceedings must be rejected as *incompatible ratione materiae* with the Constitution, because a request for reopening of criminal proceedings cannot be considered to determine a criminal charge within the meaning of the Constitution (see, by analogy, *Judgment of the European Court of Human Rights of 10 April 2001, no. 36445/97, paragraph 86*).

38. For the reasons set out above in paragraphs 28 and 35 the Referral is to be declared inadmissible, in accordance with Article 49 of the Law and Rules 36 (1) (c) and (3) (e) of the Rules of Procedure.

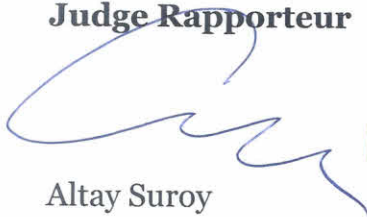
FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 49 of the Law and Rules 36 (1) (c) and (3) (e) of the Rules of Procedure, in the session held on 12 April 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; and
- IV. This Decision is effective immediately;

Judge Rapporteur



Altay Suroy



President of the Constitutional Court



Arta Rama-Hajrizi