



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE

УСТАВНИ СУД

CONSTITUTIONAL COURT

Prishtina, on 31 October 2016  
Ref. No.: RK990/16

## RESOLUTION ON INADMISSIBILITY

in

**Case no. KI181/14**

Applicant

**Lon Palushaj**

**Constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo, No. PML-KZZ. No. 170/2014, of 19 February 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 Applicant is Mr. Lon Palushaj, a resident of Klina. He is represented by Mr. Ramë Gashi, a lawyer from Prishtina.

## **Challenged decision**

2. The Applicant initially submitted a Referral challenging the Judgment of the Court of Appeal, PN No. 588/14, of 12 November 2014. The Applicant subsequently supplemented his initial Referral with the Judgment of the Supreme Court of the Republic of Kosovo, No. PML-KZZ. No. 170/2014, of 19 February 2015. This decision was served on the Applicant on 27 February 2015. This final judgment of the Supreme Court is now the subject of this Resolution.

## **Subject matter**

3. The Applicant alleges that the aforementioned Judgment of the Supreme Court violated his constitutional rights as guaranteed by Article 24 [Equality Before the Law], Article 30 [Rights of the Accused], Article 31 [Right to a Fair Trial], and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). The Applicant also invokes Article 6.1 of the European Convention on Human Rights (hereinafter: ECHR).
4. The Applicant also requested the Court to impose an interim measure, namely to order a stay of execution of the sentence of imprisonment pending the final decision of the Supreme Court on his request for protection of legality.

## **Legal basis**

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

## **Proceedings before the Constitutional Court**

6. On 15 December 2014, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On 13 January 2015, the President appointed Judge Kadri Kryeziu as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (presiding), Almiro Rodrigues and Ivan Čukalović.
8. On 21 January 2015, the Court notified the Applicant of the registration of the Referral. On the same date, a copy of the Referral in the form it had at that time was communicated to the Court of Appeals of Kosovo.
9. On 27 January 2015, the Applicant submitted a power of attorney authorizing Mr. Ramë Gashi to represent him in the proceedings before the Court.
10. On 5 June 2015, the Applicant supplemented his Referral to include the final Judgment of the Supreme Court of Kosovo.
11. On 29 June 2015, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur to replace Judge Kadri Kryeziu whose mandate had expired.
12. On 16 November 2015, the Applicant submitted additional supplemental arguments to his Referral.

13. On 19 February 2016, the Applicant submitted further additional information in support of his Referral.
14. On 16 August 2016, a copy of the final Referral was communicated to the Supreme Court of Kosovo.
15. On 13 September 2016, the President of the Court appointed Judge Almiro Rodrigues as Presiding Judge on the Review Panel to replace Judge Robert Carolan and Judge Snezhana Botusharova as a member in the Review Panel.
16. On 14 September 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

### **The facts of the case**

17. On 13 September 2006, a road traffic accident took place in the municipality of Klina, where the person F.G., suffered bodily injuries..
18. On 12 September 2007, the Applicant, acting as the attorney of Mr. F.G., submitted a claim in the Municipal Court of Klina against the Guarantee Fund of Kosovo. This claim alleged that F.G. had suffered substantial physical injuries as a result of the accident. The claim further alleged that the accident had been caused by a driver without motor vehicle insurance.
19. On 6 February 2008, a medical certificate was filed with the Municipal Court of Klina by Doctor B.B., documenting the injuries that Mr. F.G. was supposed to have sustained in the accident.
20. On 8 April 2008, the Municipal Court of Klina, presided by Judge K.P., held a hearing at which a financial settlement was agreed between the Applicant and the Guarantee Fund of Kosovo. As a result of this settlement, a sum of money was transferred into the bank account belonging to the Applicant.
21. On 10 August 2010, The Applicant, along with the Judge K.P., the Doctor B.B. and the representative of the Guarantee Fund of Kosovo were indicted, *inter alia*, for the criminal offence of Organized Crime under Article 274 par. 1 and 2 of Criminal Code of Kosovo (hereinafter: the CCK).
22. On 24 May 2012, by Judgment P.no. 477/11, the District Court of Peja re-qualified the criminal offence and found the Applicant guilty of the criminal offence of Fraud under Article 261 (1) and (2) of the CCK. The co-accused, Judge K.P. and Doctor B.B., were also convicted of crimes. The representative of the Guarantee Fund of Kosovo was acquitted.
23. The Applicant was sentenced to three (3) years imprisonment, and, *"pursuant to Article 54 par. 1 and 2 sub par. 4 and Article 57 par. 1 and 2 of PCKK the accessory punishment of Prohibition on Exercising a Profession, Activity or Duty is imposed for a period of three (3) years, starting from the day this judgment becomes final, provided that the period of time served in prison is not included in the duration of this accessory punishment"*.



24. On 11 July 2012, the Special Prosecutor of Kosovo filed an appeal with the Supreme Court against this Judgment of the District Court of Peja. This appeal only concerned the acquittal of the representative of the Guarantee Fund of Kosovo.
25. On 12 July 2012, the Applicant filed an appeal with the Supreme Court against his conviction, claiming substantial violations of the procedural provisions and erroneous and incomplete determination of the factual situation. Appeals were also filed by the other co-defendants.
26. On 25 April 2013, the Court of Appeal, as the court having jurisdiction based on the new Law on Courts, by Judgment PAKR no. 1122/2012, confirmed the Judgment of the District Court of Peja of 24 May 2012 (Judgment P.no. 477/11) with respect to the conviction and sentence of the Applicant.
27. On 26 December 2013, the Applicant submitted a request for protection of legality with the Supreme Court. The Applicant alleged that he had merely represented the injured party, Mr. F.G., albeit without an authorization, but that he had been misled by the Judge K.P., with whom he had served his apprenticeship as a lawyer, that he had not benefitted any material gain, and that the sentence was excessive for a first offence. The Applicant asserted that he should have benefitted from the principle *in dubio pro reo*.
28. On 6 January 2014, 25 February 2014, 18 June 2014 and 10 July 2014, based on the re-trial and conviction of the representative of the Guarantee Fund of Kosovo, the Applicant provided supplemental argument to the Supreme Court claiming that the co-defendant Judge K.P. had changed his original testimony, and that therefore, the Applicant should benefit from a re-trial. The Applicant also sought to re-open the criminal proceedings against him, and to achieve a stay of execution of the sentence. These attempts were not successful.
29. On 19 February 2015, by Judgment No. PML-KZZ. No. 170/2014, the Supreme Court rejected the Applicant's request for protection of legality as ungrounded. In the same judgment, the Supreme Court determined that the sentence against Judge K.P. should be modified, and it declared that the re-qualification of the criminal offence with respect to the Doctor B.B. was unlawful, and that the Doctor B.B. is acquitted.
30. With respect to the Applicant's request for protection of legality, the Supreme Court stated that,

*"The Supreme Court thinks that the objective and subjective elements of the criminal offence of Fraud have been confirmed in the Judgment of the first instance and are described in detail in the enacting clause. The Enacting clause is clear and intelligible.*

*By mentioning the purpose to profit unlawful material wealth for himself and the co-Defendant K.P., the District Court has described 'mens rea' which is required by Article 261, paragraph 1 of CCK. The details of the plan which was prepared together by the Defendants are described in the enacting clause. The plan consisted of the presentation of the request for compensation against the Guarantee Fund of Kosovo before the Court on behalf of F.G., without the knowledge of the person, the exaggeration of*

*the injuries suffered by F.G., as a result of which they have profited material wealth. The objective elements consist in realizing the described plan with the Defendants by allegedly 'representing' the Injured party F.G. without his authorization or knowledge in the court proceeding, by receiving the compensation amount, including the court proceeding costs as well as his compensation as an Attorney-at-Law for 'representation' of the Claimant, paid by the Guarantee Fund of Kosovo and by giving an amount of 16,000 Euros to K.P.."*

31. With respect to the indictment of the co-accused, Doctor B.B., the Supreme Court reasoned its decision to acquit him as follows:

*"The Indictment charges B.B. only for an action as part of the criminal organized group, by helping K.P. in his Abuse of official position. The Indictment in relation to the Defendant B.B. does not describe the essential objective elements of the criminal offence Fraud, such as the act of deceiving another person or committing fraudulent actions against another person, the measures of false representation or the concealment of the facts and inducement of the victim to act in that manner or to abstain from the action to the detriment of his or her property or the property of another person, neither does it mention another subjective corresponding element – the intent for the commission of these actions – requested by Article 261, paragraph 1 of CCK. The District Court, pursuant to Article 286, paragraph 2 of PCPCK, was not obliged for a legal qualification of the act in the Indictment. However, the re-qualification which the trial panel was allowed to make should have corresponded with the act, as it is specified by Article 305, paragraph 1, sub-paragraph 4 of PCPCK, which in fact is the object of the Indictment. In this case, by the re-qualification of the criminal offence as Fraud, pursuant to Article 261, paragraph 1 of CCK, the Court has surpassed the Indictment. The Court of Appeals has confirmed the Judgment of the first instance in relation to this and did not correct the violation."*

### **Applicant's allegations**

32. The Applicant claims a violation of his constitutional rights as guaranteed by Article 24 [Equality Before the Law], Article 30 [Rights of the Accused], Article 31 [Right to a Fair Trial], and Article 54 [Judicial Protection of Rights] of the Constitution. The Applicant also invokes Article 6.1 of the ECHR.
33. The Applicant alleges that he was not treated equally with the co-accused Doctor B.B., because the co-accused was acquitted whereas the Applicant was convicted based on the same re-qualification of the criminal offence. The Applicant alleges that he was denied the opportunity to present arguments in respect of the re-qualification of the criminal offence from Organized Crime to Fraud, in violation of his rights to a fair trial and to present his defence.
34. The Applicant requests the Court to find that the regular courts have violated his constitutional rights and to order a re-trial or, alternatively, to acquit him. The Applicant also requested the Court to impose an interim measure.



## Admissibility of the Referral

35. The Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution, and further specified in the Law and the Rules of Procedure.

36. In this respect, the Court refers to Article 113.1 and 7 of the Constitution, which provides:

*“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”.*

37. The Court also recalls Article 48 of the Law, which states that:

*“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”.*

38. In addition, the Court takes into account Rules 36 (1) (d) and 36 (2) of the Rules of Procedure, which provide that:

*“(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:*

*[...]*

*(d) the Applicant does not sufficiently substantiate his claim.”*

39. The Court notes that the Applicant’s allegations primarily relate to the manner in which the regular courts handled the indictment against him. The Applicant considers that the regular courts should have provided him with the opportunity to present arguments in relation to the re-qualified offence of fraud. The Applicant alleges that the courts did not adequately examine the testimony presented by the co-accused. The Applicant claims that he should have benefitted from the principle *in dubio pro reo*.

40. The Court recalls Article 30, paragraph 3, of the Constitution, which states that:

*“Everyone charged with a criminal offence shall enjoy the following minimum rights:*

[...]

3. to have adequate time, facilities and remedies for the preparation of his/her defense;

[...]”

41. The Court recalls Article 31 of the Constitution, which states, *inter alia*, that:

*“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 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.*

[...]

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

[...]”

42. The Court also recalls Article 6 of the ECHR, which states, *inter alia*, that:

*“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

[...].

*2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

*3. Everyone charged with a criminal offence has the following minimum rights:*

[...]

*d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

[...]”



43. The Court recalls that Articles 30 and 31 of the Constitution, and Article 6 of the ECHR, pertaining to the right to a fair criminal trial are essentially concerned with whether an applicant was afforded ample opportunities to state his case and contest the interpretation of the evidence. Moreover, it is not within the scope of jurisdiction of the Court to substitute its own assessment of the facts for that of the regular courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was interpreted, were fair (see, *mutatis mutandis*, ECtHR Judgment of 16 December 1992, *Edwards v. United Kingdom*, Application No. 13071/87, para. 34).
44. The Court cannot substitute its judgment for that of the District Court with respect to what the evidence did or did not prove in the Applicant's case. To find that there was a constitutional violation of the right to a fair trial in this case with respect to the sufficiency of the evidence, this Court would have to find that not only the reasoning of the District Court, but the reasoning of the Court of Appeals and the Supreme Court with respect to the interpretation of the evidence and the qualification of the criminal offence was so flawed that, in effect, the judgments of the regular courts were not reasoned.
45. The Court recalls that if a judgment of conviction is not reasoned, there is a presumption that a defendant did not receive a fair trial. (see, *mutatis mutandis*, Constitutional Court Resolution of 2 June 2016, no. 01/15, *Constitutional Review of Judgment no. PML. KZZ 157/2014 of the Supreme Court of Kosovo of 2 October 2014*, para. 39).
46. The Court considers that to find that the Applicant did not receive a fair trial pursuant to Articles 30 and 31 of the Constitution, or Article 6 of the ECHR, this Court would have to find that the verdict and judgment of the Supreme Court and the lower courts were not reasoned.
47. This Court cannot make that finding in this case. Indeed, the District Court, the Court of Appeals and the Supreme Court made detailed factual findings with respect to the interpretation of the evidence and the qualification to be given to the criminal offence to support the verdict that the Applicant was proven guilty beyond a reasonable doubt of the crime of committing fraud. The Court recalls the reasoning of the Supreme Court quoted in paragraph 28 above.
48. Therefore, the Court concludes that the allegations of a violation of the right to present a defense and the right to a fair trial must be rejected as inadmissible.
49. The Court notes that the Applicant also alleges that he was not treated equally with the co-accused, Doctor B.B., because in the case of the Doctor the re-qualification of the criminal offence was not accepted, whereas in the Applicant's case this requalification was accepted.
50. The Court notes that the Supreme Court reasoned its decision on the re-qualification of the criminal offence with respect to the Doctor on the basis of the absence of certain elements of the criminal offence of fraud, whereas the Supreme Court found that these elements were present in the Applicant's case. The Court recalls the reasoning of the Supreme Court quoted in paragraph 29 above.



51. The Court reiterates that it does not act as a court of fourth instance, in respect of the decisions taken by the Supreme Court. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. It is the role of the Constitutional Court to determine whether the regular courts' proceedings were fair in their entirety, including the way the evidence was taken (see Case: *Edwards v. United Kingdom*, no. 13071/87, Report of the European Commission of Human Rights, of 10 July 1991).
52. In the present case, the Court did not find that the pertinent proceedings before the regular courts were in any way unfair or arbitrary (see, *mutatis mutandis*, *Shub v. Lithuania*, ECHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).
53. Therefore, the Court concludes that the Applicant did not substantiate his claim on constitutional grounds and did not provide evidence indicating how and why his rights and freedoms, as protected by the Constitution, were violated by the challenged decision.
54. The Court concludes that the Applicant's Referral is, on a constitutional basis, manifestly ill-founded, in accordance with Article 48 of the Law and Rules 36 (1) (d) and 36 (2) (d) of the Rules of Procedure.

#### **Request to impose an interim measure**

55. The Applicant requested the Court to impose an interim measure, namely to suspend execution of the decision on serving the sentence until the Supreme Court renders a decision on the request for protection of legality.
56. The Court notes that subsequent to this request of 15 December 2014 for an interim measure, on 19 February 2015 the Supreme Court delivered its judgment on the Applicant's request for protection of legality. As such, since that date the request for an interim measure had lost its object.
57. As mentioned above, the Applicant has not shown a *prima facie* case on the admissibility of the Referral. Therefore, the request for imposition of an interim measure is to be rejected as ungrounded.

## FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 48 of the Law and Rules 36 (1) (d) and 36 (2) (d) of the Rules of Procedure, in the session held on 14 September 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**

Altay Suroy



**President of the Constitutional Court**

Arta Rama-Hajrizi