



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

Prishtina, 18 September 2017
Ref. No.:RK 1122/17

RESOLUTION ON INADMISSIBILITY

in

Case KI32/17

Applicant

Afrim Radoniqi

**Constitutional review of
Judgment Pml.no. 276/2016 of the Supreme Court,
of 5 December 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 Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Afrim Radoniqi from Gjakova (hereinafter, the Applicant).

Challenged decision

2. The challenged decision is the Judgment Pml.no. 276/2016 of the Supreme Court of 5 December 2016, which rejected as ungrounded the Applicant's request for protection of legality against the Judgment of the Court of Appeals PAKR.no.497/2016 and Judgment of the Basic Court in Gjakova PKR.no.105/2015.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment, which allegedly violates the Applicant's rights as guaranteed by Article 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

Legal basis

4. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Court

5. On 13 March 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
6. On 7 April 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu.
7. On 14 April 2017, the Court notified the Applicant of the registration of the Referral and requested him to fill out the Referral Form and to attach the Judgments of the Basic Court and Court of Appeals. On the same date the Court sent a copy of the Referral to the Supreme Court.
8. On 3 May 2017, the Applicant submitted the completed Referral Form and the requested judgments.
9. On 5 September 2017, 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 14 September 2012, the Applicant, who was a public attorney of the Municipality of Gjakova, purchased an immovable property from ZD. The

contract was confirmed by the Basic Court in Kraleva on the same day. Then, the Directorate of Cadaster, Property and Geodesy of the Municipal Assembly of Gjakova suspended and later on refused the registration of the immovable property.

11. On 11 April 2013, the Applicant as a representative of ZD filed an appeal with the Ministry of Environment and Spatial Planning-Kosovo Cadastral Agency, requesting the registration of the immovable property in the Public Cadastral Registry.
12. On 10 June 2015 and on 27 October 2015, the Prosecutor in Gjakova filed, respectively, the Indictments PP/I. No. 35/2015 of and PP/I. No. 22 / 2015 against the Applicant for having committed the criminal offences of falsifying official document, abusing official position or authority and conflict of interest.
13. On 18 July 2016, the Basic Court in Gjakova (Judgment PKR.no.105/2015) found the Applicant guilty and sentenced him with a fine payment, because, while employed as the Public Attorney of the Municipality of Gjakova, he submitted an appeal to the Cadastral Agency of Kosovo, presenting himself as the private legal representative of ZD.
14. On an unspecified date, the Applicant filed with the Court of Appeals an appeal alleging *“essential violations of provisions of the criminal procedure, erroneous and incomplete determination of the factual situation, violation of the criminal law and decision on the punishment”*.
15. On 20 September 2016, the Court of Appeals (Judgment PAKR.no.497/2016), partially approved the Applicant’s appeal, namely sentencing him with a lower fine, considering that the Applicant *“was simultaneously representing his client Z. D. acting as his legal representative (...), addressing also to the Ministry of Environment and Spatial Planning in Pristina (...), filing thereby a complaint on his behalf against the Decision of the Directorate of Geodesy, Cadastre and Property of the Municipality of Gjakova, while holding at the same time his position of the Public Attorney”*.
16. On an unspecified date, the Applicant filed a request for protection of legality, alleging *“the violation of criminal code”* and *“the essential violation of CPCRK”*. In addition, the Applicant argued that *“the Substantive Law was violated which is subject of reasonable doubt of legality of the challenged Judgments”*.
17. On 5 December 2016, the Supreme Court (Judgment Pml.no.276/2016) rejected as ungrounded the request for protection of legality, considering that the Applicant *“was involved in the administrative procedure at the Directorate of Cadastre, Property and Geodesy of the Gjakova Municipality even though he is in position of Public Attorney at Gjakova Municipality. Therefore, substantial elements of the criminal offense have been met in regards for what the convicted person was found guilty (...).”*

Relevant Law

Criminal Code of the Republic of Kosovo No. 04/L-082

Article 424 Conflict of interest

1. An official person who participates personally in any official matter in which he or she, a member of the family, or any related legal person, has a financial interest shall be punished by a fine or imprisonment up to three (3) years.

[...]

4. For purposes of this Article, "official matter" means a judicial or other official proceeding; an application, request for a ruling or other official determination; a contract or claim; a public auction or other procurement action; or, another matter affecting the financial or personal interests of the official or another person.

Applicant's allegations

18. The Applicant claims that the challenged decision violated his rights to equality before the law, to fair and impartial trial and to protection of property.
19. The Applicant alleges that the "*provisions of the Constitution and Substantive Law (...) were violated*", because the challenged decision "*is extremely contradictory and confusing, whereby it does not argue on where it stands the consummation of criminal offense-violation of criminal code*".
20. The Applicant also claims that he "*is denied on the Constitutional right for the rights on immovable property, is denied to take right for legal circulation on purchase-on-sale of immovable property*".
21. The Applicant also alleges that "*provisions of the Constitution of the Republic of Kosovo have been violated, namely Article 24, item 1, item 2 (Equality before law), Universal Declaration on Human Rights, European Convention on Protection of Human Rights and Fundamental Freedoms with its Protocols (applied directly in the Republic of Kosovo, applicable through Article 22 of the Constitution)*".
22. The Applicant further alleges that his rights "*have been violated in spite of the fact that such rights have been guaranteed with the Constitution of the Republic of Kosovo and with International instruments on the human rights (...). These rights are liberty, PROPERTY, security, and resistance to oppression*".
23. The Applicant requests the Court that, "*upon administration and confirmation of appellant's allegations, to adopt merit decision on allegations submitted in appeal by appellant Afrim Radoniqi*", here the Applicant.

Admissibility of the Referral

24. The Court refers to Article 46 [Admissibility] of the Law, which provides:

The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that all legal requirements have been met.

25. Thus the Court 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 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 49 [Deadlines] of the Law which 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. [...].

28. In that connection, the Court notes that the Applicant is an authorized party, challenges an act of the Supreme Court as a public authority, has exhausted the legal remedies available to him and has submitted his referral within the provided four (4) months period.

29. However, the Court further refers to Article 48 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.

30. In addition, the Court refers to Rule 36 (1) (d) and 36 (2) (b) (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.

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

31. In that respect, the Court recalls that the Applicant requested for protection of legality alleging “*essential violation of CPCRK*” and “*violation of criminal code*”. However, these allegations pertain to the domain of legality and as such does not fall under the jurisdiction of the Constitutional Court.
32. In fact, the Applicant requests the Court “*to adopt merit decision on allegations submitted in appeal by appellant Afrim Radoniqi*”. In essence, the Applicant is repeating the same allegations before this Court.
33. The Court observes that the Supreme Court considered that “*the essential violations of criminal procedural provisions (...) are not specified*” and “*it is not explained which violation (...) is in question. In addition, it was not given explanation of concretely where are the shortcomings of the judgments about the reasoning of decisive facts, but it is just mentioned to be lacking. Therefore, the court [the Supreme Court] concluded that the allegations are ungrounded*”.
34. The Applicant also alleged “*violation of criminal code*”, mainly considering that the criminal offence of conflict of interest was not applicable in his case and that the reasons given by the judgment of the Supreme Court are contradictory and confusing; they do not explain on “*where it stands the consummation of the criminal offense*”.
35. In this regard, the Court observes that the Supreme Court considered that the lower instance courts “*correctly found that in concrete case it is not about decision making by the convicted person or the Office of Public Attorney but about other actions of convicted person*”, because “*the law does not require that he personally must be a person who makes decision but it is sufficient that he personally participate in any official matter in which there is a financial interest*”.
36. In addition, the Supreme Court explained that “*as ‘official matter’ pursuant to provision of paragraph 4 of Article 424 of CCK means ‘judicial or other official proceeding; an application, request for a ruling or other official determination; a contractor claim; a public auction or other procurement action; or, another matter affecting the financial or personal interests of the official or another person’*”.
37. The Supreme Court concluded that “*substantial elements of the criminal offense have been met in regards for what the convicted person was found guilty*”.
38. In this relation, the Court considers that the Judgment of the Supreme Court thoroughly justifies the allegations made by the Applicant. The Supreme Court explains in detail why the request for protection of legality was rejected as

ungrounded, by considering that the facts of the case are not disputable, by assessing the allegations of essential violations of criminal procedural provisions and violation of criminal code, namely referring to the legal interpretation of the pertinent and relevant Criminal Code provisions applicable, and by assessing the decisions of the lower instance courts based on the allegations raised by the Applicant.

39. Moreover, the Applicant has not proved and substantiated that the proceedings and the challenged Judgment were unfair or arbitrary. (See ECtHR case *Shub vs. Lithuania*, Application No. 17064/06, Decision of 30 June 2009).
40. At the outset, the Court recalls Article 53 [Interpretation of Human Rights Provisions] which establishes that “*human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Rights*” Thus, the Constitutional Court, as “*the final authority in Kosovo for the interpretation of the Constitution*” (Article 112 of the Constitution), is bound to take into account the case law of the ECtHR when assessing alleged violations of human rights and fundamental freedoms guaranteed by the Constitution.
41. In that respect, the Court reiterates that it is not its task under the Constitution to act as a court of fourth instance, in respect of the decisions taken by the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (See ECtHR case: *Garcia Ruiz vs. Spain*, no. 30544/96, Judgment of 21 January 1999; see also Constitutional Court case: No. KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility, of 16 December 2011).
42. The mere fact that the Applicant disagrees with the outcome of the proceedings in his case, cannot of itself, raise an arguable claim for a breach of the Constitution. (See ECtHR case *Mezotur Tiszazugi Tarsulat vs. Hungary*, Application No.5503/02, Judgment of 26 July 2005).
43. The Constitutional Court can only consider whether the evidence has been presented in a correct manner and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial. (See case *Edwards v. United Kingdom*, Application No 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991).
44. The Applicant further claims that he “*is denied on the Constitutional right for the rights on immovable property*”. In this regard, it appears that the Applicant is trying to make an allegation on a violation of Article 46 of the Constitution.
45. Article 46 [Protection of Property] of the Constitution establishes:
 1. *The right to own property is guaranteed.*
 2. *Use of property is regulated by law in accordance with the public interest.*

3. *No one shall be arbitrarily deprived of property. [...]*

46. However, the Applicant does not succeed to build an argument on a constitutional basis. In fact, the Court recalls that the right to property applies only to a person's existing possessions and does not guarantee the right to acquire property. (See, *mutatis mutandis*, ECtHR case *Marckx v. Belgium*, Application No. 6633/74, Judgment of 13 June 1979, § 50).
47. The Court considers that the circumstances of the case did not confer on the Applicant a title to a substantive interest protected by Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR.
48. Lastly, the Court further recalls that the Applicant claims that he “*is denied to take right for legal circulation on purchase-on-sale of immovable property*”. He considers that this denial is a violation of the right to “*equality of the citizens to freely engage in legal transactions was violated as well*”. Thus he also alleges that the regular courts violated his right to equality before the law guaranteed by Article 24 of the Constitution.
49. In that connection, the Court recalls that a treatment is discriminatory if an individual is treated differently to others in similar positions or situations, and if that difference in treatment has no objective and reasonable justification.
50. The Court reiterates that the different treatment must pursue a legitimate aim in order to be justified and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized. (See ECHR case *Marckx v. Belgium*, Application No. 6833/74, Judgment of 13 June 1979, § 33.)
51. The Court considers that the Applicant has not submitted any *prima facie* evidence nor has he substantiated an allegation indicating that he was discriminated against in the Supreme Court's proceedings.
52. In sum, the Court concludes that the facts presented by the Applicant do not justify the Applicant's allegation of a violation of his rights to equality before the law, to fair and impartial trial and to protection of property. In fact, the Applicant has neither proved nor substantiated his allegation that the conducted proceedings before the Supreme Court were unfair or arbitrary.
53. Therefore, in accordance with Article 48 of the Law and Rule 36 (1) (d) and 36 (2) (b) (d) of the Rules of Procedure, the Court finds that the Referral is manifestly ill-founded on a constitutional basis and, pursuant to Article 46 of the Law, that the Referral is inadmissible.

FOR THESE REASONS

In accordance with Article 113 (7) of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, in the session held on 5 September 2017, 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



Arta Rama-Hajrizi