



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

Prishtina, on 21 Marta 2016
Ref. No.:RK1000/16

RESOLUTION ON INADMISSIBILITY

in

Case KI89/15

Applicant

Fatmir Koci

**Constitutional review of
Judgment PAKR. No. 473/2014 of the Court of Appeal of Kosovo
of 21 November 2014**

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 Gërzhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral is submitted by Mr. Fatmir Koci from Prizren (hereinafter, the Applicant) represented by Mrs. Flutra Hoxha, a lawyer practicing in Prishtina.

Challenged decisions

2. The Applicant challenges Judgment PAKR. No. 473/2014 of the Court of Appeal of Kosovo of 21 November 2014 in connection with Judgment P. No. 353/13 of the Basic Court in Prizren of 11 July 2014.
3. The challenged judgment was served upon the Applicant on 23 February 2015.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment PAKR. No. 473/2014³ of the Court of Appeal of Kosovo of 21 November 2014.
5. The Applicant alleges violation of Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 33 [The Principle of Legality and Proportionality in Criminal Cases], 54 [Judicial protection of Rights] of the Constitution in connection with Article 6 (1) and 3 (d) of the European Convention on Human Rights (hereinafter, the Convention) 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 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).

Proceedings before the Constitutional Court

7. On 23 June 2015 the Applicant via Post Office filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
8. On 3 August 2015 the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of judges Altay Suroy (presiding), Bekim Sejdiu and Arta Rama-Hajrizi.
9. On 17 September 2015 the Court notified the Applicant about the registration of the Referral and asked him to submit evidence of the date of service of the challenged judgment as well as pleadings presented during the course of regular proceedings. On the same day a copy of the Referral was sent to the Basic Court in Prizren and the Court of Appeal of Kosovo respectively.
10. On 28 September 2015 the Applicant in addition to submitting new documents also informed the Court that he has revoked the power of attorney of Mrs. Myrvete Çollaku and has authorized Mrs. Flutra Hoxha to represent him before the Court.
11. On 28 January 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

12. On an unspecified date the Applicant as an official person-electrician of the Kosovo Energy Distribution and Supply Company (hereinafter, KEDS) has asked from a private individual X an amount of €500 in order not to send the electricity meter for testing to KEDS office in Prishtina. The Applicant and X had agreed to meet in a certain restaurant in Prizren in order to conclude the afore-mentioned "agreement".
13. In the interim X contacted the Kosovo Police and told them about his discussion with the Applicant. The Kosovo Police gave €500 to X in order to offer them to the Applicant.
14. On 2 August 2013 the Applicant and X met in a certain restaurant in Prizren wherein the Applicant accepted €500 from X. The Applicant was subsequently stopped by the Kosovo Police which found the stated amount of money in his bag.
15. On 3 August 2013 the Basic Prosecution in Gjakova requested detention and decision on initiation of investigations against the Applicant on the grounds of criminal offences of abuse of official position or authority and accepting bribes as envisaged by Articles 422 and 428 of the Criminal Code of the Republic of Kosovo (hereinafter, the CCRK).
16. On 3 August 2013, the Basic Court in Gjakova by Decision PPr. KR. 73/13 approved the request of the Public Prosecutor and ordered one month detention against the Applicant.
17. On 22 October 2013 the Prosecutor filed indictment PP. No. 155/13 against the Applicant before the Basic Court in Prizren - due to criminal offence of accepting bribes - under Article 428 para.2 of CCRK. The Prosecutor had stated, inter alia, that it is beyond doubt that the Applicant was an official of "KEDS" and that he accepted €500 from X.
18. The Applicant pleaded before the Basic Court, inter alia, that his actions were not unlawful because X has declared that he is not injured, that he took the money from X to pay the electricity debt and not as bribe, and that it has not been proved that he has committed the stated criminal offence.
19. On 11 July 2014 the Basic Court in Prizren by Judgment P.no.353/13 found the Applicant guilty by holding:

"IS GUILTY that on 02.08.2013 at 13,10 hrs in Prizren, in capacity of the official person-electrician for measurement of meters in KEDS in Prizren, directly asks for benefit for himself in order that as the official for measurement of meters to act in contradiction with his official duty (that derive from his employment contract no. 12105/0 of 01.01.2013), not to send the electrical meter for calibration in Prishtina, which was previously taken from the house of the injured several days before so that from the injured Arsim Sadiku during their meeting in the restaurant at the market Super Viva receives the amount of €500 in banknotes 10x50 €, by putting

them on his bag and at the moment of getting out of the restaurant he was stopped by the unit of economic crimes and with preliminary control with him was found money, which the latter received and which was later confiscated.

Thus he committed criminal offence of receiving a bribe under Article 428 para. 2 of CCK.

SENTENCED To a fine in the amount of 1000 (one thousand) euro, and the imprisonment sentence of 3 (three) years and 3 (three) months, in which punishment will be calculated the time spent in the house arrest from 03.08.2013 until 21.10.2013”.

20. The Basic Court, inter alia, reasoned that it had made its findings based on the statements of the injured X, that the Applicant in his official capacity as an official person - electrician of KEDS directly - asked for profit - from X, that the Applicant accepted €500 from X and was subsequently stopped by the Kosovo Police.
21. On an unspecified date the Applicant filed a complaint with the Court of Appeal of Kosovo alleging, inter alia, that the Basic Court made essential violations of the criminal procedure and erroneous and incomplete assessment of the factual situation. The Applicant mainly complained that Kosovo Police set him up to accept the money from X, that X has admitted that he made an error of fact and of law, and that, the imprisonment sentence and the fine are severe when taking into account the Applicant's family situation.
22. On 21 November 2014 the Court of Appeal of Kosovo by Judgment PAKR. No. 473/2014 rejected the complaint of the Applicant as unfounded and upheld the judgment of the Basic Court.
23. The relevant part of the judgment of the Court of Appeal reads:

“With the assessments of these evidence and facts, this court finds that the allegations in the appeal regarding the factual situation cannot be accepted as such. First of all the injured himself reported the case to the police, then his testimony given to the police and to the prosecution office corresponds with the testimonies of the police officers, and other material evidence, such as the recorded CD, listing of calls/inbox and outbox messages, therefore the allegation that the testimony of witness in the court hearing is real, that the injured was in mistake of fact and that the case was completely invented, is completely excluded. What statement will be approved by the court is not connected nor limited by special formal rules. In principle is supported that statement that is substantiated by other evidence. Therefore this court finds that the conclusion of the first instance court that in the actions of the defendant exist elements of the criminal offence under Article 428 para. 2 of CPCK, for which he was accused and found guilty, is fair. According to the legal definition of the abovementioned provision, this criminal offence exists when the official person in a direct or indirect way requests or receives a gift or any benefit, in order that the official person acts or doesn't act in contradiction with

his official duty. These kinds of actions of the commission of this criminal offence are taken by the official person to act in contradiction with his official duty, thus we deal with unacceptable, unlawful action of the official person. On the other hand, since it was determined that the defendant requested and received money from the injured in order to not send the electrical meter to the Calibration Center, this court notes that in his actions are met the elements of the criminal offence of accepting bribes under Article 428 para.2 of CPCK, as he took money to act contrary to his official duty, thus taking unlawful action. The fact that the court did not calculate the time spent in the detention on remand in the imposed sentence is grounded, however in the present case we deal only with a technical error, as it follows from the case file and the challenged judgment, the time spent in the house arrest of the defendant was counted from the day of imposing the detention on remand. The defendant was in detention on remand from 03.08.2013 until 02.09.2013, whereas in the imposed sentence the court counted the time spent in the house arrest from 03.8.2013 until 21.10.2013. For these reasons, this court found as ungrounded the appealed allegations regarding the violation of the criminal law”.

The Law

The relevant part of the Criminal Code of the Republic of Kosovo reads as follows:

Article 428 Accepting bribes

1. An official person who requests or receives, directly or indirectly, any undue gift or advantage, for himself, herself or for another person, or who accepts an offer or promise of such gift or advantage, so that the official person acts or refrains from acting in accordance with his or her official duties, shall be punished by fine and imprisonment of six (6) months to five (5) years.

2. An official person who requests or receives, directly or indirectly, any undue gift or advantage, for himself or herself or for another person, or accepts an offer or promise of such gift or advantage, so that the official person acts or refrains from acting, in violation of his or her official duties, shall be punished by fine and imprisonment of three (3) to twelve (12) years.

3. When the offense under paragraph 1 of this Article results in a benefit exceeding fifteen thousand (15,000) EUR, the perpetrator shall be punished by fine and imprisonment of one (1) to eight (8) years.

Applicant's allegations

24. The Applicant alleges violation of Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 33 [The Principle of Legality and Proportionality in Criminal Cases], 54 [Judicial protection of Rights] of the

Constitution in connection with Article 6 (1) and 3 (d) of the European Convention on Human Rights (hereinafter, the Convention) and Article 7 of the Universal Declaration of Human Rights (hereinafter, the UDHR).

25. The Applicant alleges that: *“he was trapped and that his case was a set-up by the Kosovo Police because he had accepted the money in order to pay the debt and not as bribe, and that, X happened to be a friend of the investigating police officer”*.
26. The Applicant alleges that the Court of Appeal – in the main hearing - did not take into account that X has declared that he has given the money to pay the debt and not as bribe, that X has publicly asked the Applicant to forgive him, and that, X did not claim for damage compensation from the Applicant.
27. The Applicant alleges that regular courts have violated the principle of equality of arms because neither he nor his lawyer were notified when the Prosecutor examined X, the regular courts did not assess his statements but only those of the Prosecutor and the Kosovo Police, and moreover, the regular courts did not properly establish the fact that he was not an official person but rather an electrician rendering services for his employer.
28. The Applicant claims that his term of imprisonment is too high and not proportional to the indictment because in similar cases the regular courts have rendered less severe sentences.
29. Finally the Applicant asks the Court: (i) to declare his referral admissible, (ii) to find violation of Articles 21, 24, 31, 33, 54 of the Constitution, Article 7 of the UDHR and Article 6 of the Convention and (iii) establish any right or responsibility for the parties in this referral which this honored Court deems as legally grounded and reasonable.

Assessment of admissibility

30. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
31. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

“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.”

32. The Court also 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”.

33. The Court further takes into account Rule 36 (1) (d) and (2) (b) of the Rules of Procedure which specify:
- (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”*
34. As to the allegation of entrapment by the Kosovo Police, the Court considers that a question of importance is whether the Kosovo Police can be deemed to have “joined” or “infiltrated” the criminal activity rather than to have initiated it. In the concrete case, although the Kosovo Police had influenced the course of events, notably by giving banknotes to the private individual X, their actions must be treated as having “joined” the criminal activity rather than as having initiating it as the initiative in the case had been taken by the private individual X. The latter had complained to the Kosovo Police that the Applicant would require a bribe to reach a favorable outcome in his case, and only after this complaint was the Kosovo Police prompted into action. (See the Case of *Miliniene v. Lithuania*, Application no. 74355/01, ECtHR, Judgment of 24 June 2008).
35. As to the allegation of the Applicant for not being notified when X was examined by the Prosecutor, the Court notes that there is nothing in the referral that suggest that this question was raised by the Applicant during the course of regular proceedings. This question is being raised for the first time before the Constitutional Court. However, the Constitutional Court – in accordance with the principle of subsidiarity – cannot assess this question without it having been raised and assessed in the regular proceedings beforehand.
36. As to the allegations concerning the assessment of evidence namely what evidence should be given more weight and precedence, the demeanor of witness X *post factum* and the severity of the sentence are all questions of fact and law which fall under the purview of the regular courts. In fact, under our Constitution, it is the duty and prerogative of the regular courts to establish questions of fact and of law. Moreover, the Court notes that there is nothing in the present referral which would suggest that the evidence was taken unlawfully or in breach of constitutional provisions.
37. Finally, the Court considers that the Applicant only enumerates and generally describes the content of constitutional provisions without substantiating exactly how those provisions were violated in his case as is required by Article 48 of the Law.
38. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or 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).

39. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, *García Ruiz v. Spain [GC]*, no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).
40. The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of regular courts, and that the role of the Constitutional Court is solely to ensure 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).
41. The Court reiterates that its task is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way in which evidence were taken (See case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991).
42. In these circumstances, the Court considers that the Applicant has not substantiated his allegations of a violation of his fundamental human rights guaranteed by the Constitution, the Convention or the UDHR because the facts presented by him do not show in any way that the Court of Appeal of Kosovo had denied him the rights guaranteed by the Constitution.
43. Consequently, the Referral is manifestly ill-founded and must be declared inadmissible pursuant to Rule 36 (2) (b) 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 (2) (b) of the Rules of Procedure, on 28 January 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;
- IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur



Snezhana Botusharova



President of the Constitutional Court



Arta Rama-Hajrizi