



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

Prishtina, 21 August 2017
Ref. no.:RK 1118/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI36/17

Applicant

Bashkim Berisha

**Constitutional review of Judgment Rev. No. 358/2016 of the Supreme
Court of 16 January 2017**

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 Bashkim Berisha from village Prugovc, Municipality of Prishtina (hereinafter: the Applicant), represented by lawyer Fatlum Podvorica.

Challenged decision

2. The Applicant challenges Judgment [Rev. No. 358/2016] of the Supreme Court of 16 January 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 21 [General Principles] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereafter: the Constitution), and Article 6 of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. 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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 31 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 Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.
7. On 28 April 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 5 July 2017 the Review Panel considered the report of the Judge Rapporteur and made a recommendation on inadmissibility to the Court.

Summary of facts

9. On 07 December 2010, there was a traffic accident in which the Applicant sustained bodily injury.
10. The Applicant filed a claim with the Basic Court in Prishtina against the Insurance Company "Illyria" (hereinafter: Insurance "Illyria") for compensation of material and non-material damage.
11. On 29 January 2014, the respondent Insurance "Illyria" in response to the Applicant's claim, did not challenge the legal basis of the statement of claim, but proposed to be rendered an admissible judgment.
12. On 25 May 2014, the Basic Court rendered Judgment [C. No. 616/11], which partially approved the Applicant's statement of claim and ordered the

Insurance Company "Illyria" to pay the Applicant a certain amount of money as compensation for material and non- material damage.

13. The Judgment of the Basic Court reads: *„In determining the amounts for every form of damage compensation, non-material and material, the Court has decided on the basis of the opinion of medical experts. Accordingly the Court considers that the adjudicated amounts present real and fair reward/compensation, by which the claimant would be able to meet his needs due to the damages suffered, although they do not present an absolute reward/compensation of the damage caused to him. “*
14. Against Judgment [C. No. 616/11] of the Basic Court, the respondent Insurance „Illyria“ filed an appeal with the Court of Appeal on the grounds of substantial violation of the contested procedure provisions, erroneous and incomplete determination of factual situation and the erroneous application of the substantive law.
15. On 14 September 2016, the Court of Appeal rendered Judgment [Ac. No. 4270/14], which partially approved the appeal of the respondent Insurance “Illyria”, thereby reducing the amount of compensation for material and non-material damage. In the reasoning of the judgment of the Court of Appeal is stated:

„The Court of Appeal found that the first instance court has decided correctly and lawfully in this legal matter on the approved part of the Judgment, whereas in the other part, the Judgment had to be modified, due to erroneous application of the substantive law... “
16. The request for revision to the Supreme Court against the judgment of the Court of Appeal was submitted simultaneously by the Applicant and the Insurance “Illyria” due to incomplete determination of factual situation and erroneous application of the substantive law.
17. On 16 January 2017, the Supreme Court rendered Judgment [Rev. No. 358/2016] rejecting the Applicant's request for revision as ungrounded, while it partially approved the request for revision of the Insurance “Illyria” and reduced the monetary amount for material compensation.
18. The reasoning of the judgment reads:

„The subject matter in the Supreme Court were the allegations of the claimant (Applicant), according to which by the reduction of the amount of compensation as determined by the first instance court, the second instance court has erroneously applied the substantive law. However, the Supreme Court found that such allegations of the claimant are ungrounded.“

„The Supreme Court has partially approved the request for revision of the respondent (Insurance “Illyria”) as grounded and reduced the monetary amounts [...] The Court notes that, taking into account the aforementioned

criteria for compensation of non-material damage caused in a traffic accident, as well as the case law so far, the amounts determined by the second instance court as compensation in respect of physical pain, fear and decrease of overall daily life activities, are also too high and in contradiction with the criteria mentioned “

Applicant's allegations

19. The Applicant alleges that *“that there has been a violation of Article 31, Right to a Fair and Impartial Trial, of the Constitution of the Republic of Kosovo, as read in conjunction with paragraph 1 of Article 6, Right to a Fair Trial, of the European Convention on Human Rights... because by erroneous determination of factual situation and by erroneous application of legal provisions by the Court of Appeal and the Supreme Court the monetary compensation was reduced to him. “*
20. The Applicant requests the Court to *“declare Judgment Rev. No. 358/2016 of the Supreme Court of Kosovo, of 16 January 2017, and Judgment AC. No. 4270/14 of the Court of Appeal of Kosovo, of 14 September 2016, invalid and to remand the case for retrial.”*

Admissibility of the Referral

21. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and foreseen in the Rules of Procedure.
22. 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.”*
23. The Court notes that the Applicant is an authorized party; the referral was submitted in accordance with the time limits stipulated in Article 49 of the Law and the Applicant has exhausted all legal remedies.
24. However, the Court also refers to Article 48 [Accuracy of the Referral] of the Law, which foresees:

“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.”
25. The Court further refers to Rule 36 (1) d) and (2) (b) of the Rules of Procedure, which provides:

“(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“.

26. In essence, the Court observes that the Applicant considers that the courts have violated his rights under Article 31 of the Constitution in conjunction with Article 6 of the ECHR because in their decisions they erroneously established the facts and erroneously applied the substantive law, which had the effect of reducing the amount of compensation for material and non-material damage he considers is entitled to in the form given to him by the decision of the Basic Court.
27. In this regard, the Court reiterates that the European Court of Human Rights (hereinafter: ECtHR) found that „*the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law (See: mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, paragraph 28, European Court of Human Rights[ECtHR] 1999-I).*“
28. The Court also reiterates that the complete determination of the factual situation is within the full jurisdiction of regular courts, and that the role of the Constitutional Court is merely 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, see also: *mutatis mutandis* case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
29. Accordingly, the Court finds that the Applicant’s allegations of erroneous application and the inconsistent interpretation of the relevant legal provisions, as well as allegations of erroneous determination of factual situation allegedly committed by the regular courts, raise questions that fall within the scope of the regular courts (legality), and not the domain of the Constitutional Court (constitutionality).
30. The task of the Constitutional Court is to examine whether the constitutional rights (*right to a fair trial, the right to access to a court, the right to effective legal remedies etc.*) have been violated or neglected, and whether the implementation of the law was arbitrary or discriminatory.
31. This Court will therefore only exceptionally examine the manner in which the competent courts have established the facts and based on such determined factual situation applied positive-legal rules, when it is apparent that there has

been an arbitrary procedure of the regular court, in a procedure of determining the facts, as well as in the process of applying the relevant positive-legal rules.

32. However, the Court notes that the Applicant initiated the same questions regarding the procedural omissions allegedly made by the Court of Appeal when deciding on the appeal of the respondent, namely the Insurance Company “Illyria”.
33. In this regard, the Court notes that these identical objections were brought by the Applicant before the Supreme Court, which, in its judgment [Rev. No. 358/2016] dealt with them thoroughly, and it also assessed these allegations as ungrounded, with an explanation that do not seem to this Court arbitrary.
34. Moreover, the Court notes that the Supreme Court also examined other allegations related to the incorrect determination of factual situation, which, according to the Applicant's allegations “*influenced the Court of Appeal to reduce the amount of compensation*”. However, the Supreme Court found those allegations as ungrounded.
35. Furthermore, the Court does not find arbitrary the Judgment [Rev. No. 358/2016] of the Supreme Court, because the Supreme Court provided clear explanations with legal foundation for all its decisions, both in terms of the grounds for rejecting the Applicant's request for revision and in respect of the partial approval of the request for revision of the respondent.
36. Bearing in mind the above, as well as the circumstances of the particular case, the Court in the reasoning of the challenged decisions does not see any arbitrariness in the application of the substantive law. It cannot also find the elements that would indicate irregularity or arbitrariness in rendering the challenged decisions to the detriment of the Applicant.
37. Accordingly, the Court considers that nothing in the case presented by the Applicant indicate that the proceedings before the regular courts were unfair or arbitrary in order that the Constitutional Court would be satisfied that the essence of the right to fair and impartial trial was violated or that the Applicant was denied any procedural guarantees, which would lead to a violation of the right according to Article 31 of the Constitution or paragraph 1 of Article 6 of the ECHR.
38. The Court considers that the Applicant is obliged to substantiate his constitutional allegations and submit *prima facie* evidence indicating a violation of his rights guaranteed by the Constitution and the ECHR. That assessment is in line with the jurisdiction of the Court (see: case of the Constitutional Court No. KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Sylja*, of 5 December 2013).
39. However, the Court finds that the Applicant did not substantiate his allegations nor has he indicated that there has been a violation of his rights.
40. The Court further considers that it cannot act as a “court of fourth instance.”

41. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

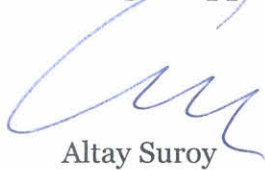
FOR THESE REASONS

The Constitutional Court, pursuant to Article 47 of the Law and Rules 36 (1) d) and (2) b) of the Rules of Procedure, in its session held on 5 July 2017, unanimously

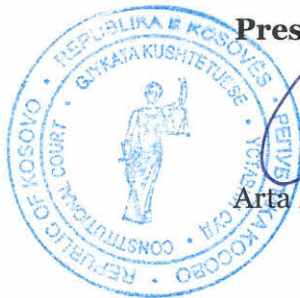
DECIDES

- 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. This Decision is effective immediately.

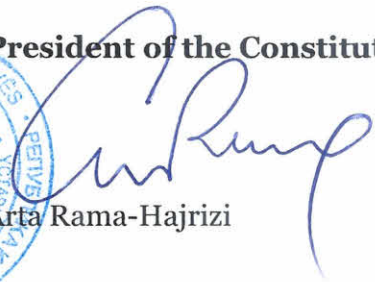
Judge Rapporteur



Altay Suroy



President of the Constitutional Court



Arta Rama-Hajrizi