



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

Pristina, on 23 October 2017
Ref. no.: RK 1142/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI09/17

Applicant

Fatmir Hoti

**Constitutional review of Judgment Pml. No. 281/2016 of the Supreme
Court of Kosovo, 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 Fatmir Hoti, residing in Gjakova (hereinafter: the Applicant), represented by Teki Bokshi, a lawyer from Gjakova.

Challenged decision

2. The challenged decision is Judgment Pml. No. 281/2016 of the Supreme Court of Kosovo of 5 December 2016 (hereinafter: the Supreme Court), which rejected the Applicant's request for protection of legality against Judgment of the Court of Appeals PAKR. No. 421/2016 of 9 September 2016 in conjunction with the Judgment of the Basic Court in Gjakova (Judgment PKR. No. 23/2014 of 16 May 2016).
3. The challenged Judgment of the Supreme Court was served on the Applicant on 23 December 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly, has violated the Applicant's rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) and Article 13 (Right to an effective remedy), as well as Article 1 of Protocol No. 1 (Protection of Property) of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

6. On 8 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 20 March 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërzhaliu-Krasniqi.
8. On 27 April 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 8 May 2017, the Applicant submitted additional documents to the Court.
10. On 5 September 2017, after having considered the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court the Referral to be declared inadmissible.

Summary of facts

11. On 16 May 2016, the Basic Court in Gjakova (by Judgment PKR No. 23/14) found the Applicant guilty for the criminal offense of Contracting for Disproportionate Profit from Property and sentenced him to imprisonment.
12. The Applicant filed an appeal against the Judgment of the Basic Court with the Court of Appeals. The Basic Prosecutor's Office in Gjakova- Serious Crimes Department also filed an appeal.
13. On 09 September 2016, the Court of Appeals (by Judgment PAKR No. 42/16) rejected the Applicant's appeal as ungrounded and upheld the Judgment of the Basic Court.
14. The Applicant submitted a request for protection of legality to the Supreme Court against the Judgments of the Court of Appeals and of the Basic Court.
15. On 5 December 2016, the Supreme Court of Kosovo (by Judgment PML No. 281/2016) rejected as ungrounded the request for protection of legality against the Judgments of the Basic Court and of the Court of Appeals.

Applicant's allegations

16. The Applicant alleged a violation of the rights to equality before the law, effective legal remedy, fair and impartial trial, protection of property and judicial protection of rights.
17. The Applicant considered that: *“The violation has to do with composition of the first instance panel which was not in compliance with the law, and which presents violation of Article 384, paragraph 1, item 1.1 of CPCRK. In the composition of the first instance trial panel took part also the Judges [...], who work as Judges of the Minor Offence Court who don't meet the legal requirements to adjudicate in the matters that are under the Department of Serious Crimes.”*
18. The Applicant stated that: *“Although the first instance judgment and the judgment on the appeal resulted in numerous essential violations [...], the Court of Appeals did not analyze those substantive violations of the criminal procedure provisions at all and, without any justification, rejected our appeals and upheld the first instance judgment.”*
19. The Applicant further alleged that: *“regarding the abovementioned violations, the court did not clearly and completely presented the facts due to which it considered that it was established beyond a reasonable doubt that the accused Fatmir Hoti committed the criminal offense for which he was convicted; the court did not establish contradictory evidence and why it had given trust to certain evidence, and not to others, and the Supreme Court did not give sufficient reasons because the Judgment of the Supreme Court is mainly negative regarding the course of the proceedings because the reasons given by the court are insufficient.”*

20. The Applicant requested the Court to:

- I. TO DECLARE the referral admissible;*
- II. TO HOLD that there has been a violation of Article 24 [Equality before the Law]; Article 31 [Right to Fair and Impartial Trial]; Article 31 of the Constitution of the Republic of Kosovo; Article 6.1 of the European Convention on Human Rights (hereinafter as the ECHR); Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property], of the Constitution of the Republic of Kosovo, Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo in conjunction with Article 5 and 6 [Right to a fair trial], Article 12, 13 [The right to an effective remedy] of the ECHR, Article 46 of the Constitution of the Republic of Kosovo in conjunction with Article 1 of Protocol 1 of ECHR as well as Article 54 of the Constitution of the Republic of Kosovo – [Judicial Protection of Rights].*
- III. TO DECLARE INVALID Judgment PML. No. 281/2016 of the Supreme Court of Kosovo of 05 December 2016;*
- IV. TO REMAND the Judgment of the Supreme Court of Kosovo for reconsideration in compliance with the Judgment of the Constitutional Court.*
- V. TO ORDER that this Judgment is notified to the parties, in accordance with Article 20.4 of the Law, to publish in the Official Gazette;*
- VI. This Judgment is effective immediately.*

Admissibility of the Referral

21. The Court first will examine whether the Referral has fulfilled the admissibility requirements established 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. However, the Court refers as well to Article 48 [Accuracy of the Referral] of the Law, which provides 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.

24. The Court also refers to Article 49 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.

25. The Court further refers to Rule 36 (1) (d) and (2) (b) 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.”

26. In the present case, the Court notes that the Applicant is an authorized party to submit the Referral, has exhausted all legal remedies in accordance with Article 113.7 of the Constitution and the Referral is submitted within the deadline of 4 (four) months as established in Article 49 of the Law.

27. The Court shall also determine whether the Applicant has accurately clarified and specified the allegations in accordance with Article 48 of the Law.

28. The Court notes that the Applicant has accurately clarified the rights he claims to have been violated, as well the concrete act of the public authority.

29. As far as the applicability of Rule 36 (1) (d) and (2) (b) is concerned, the Court considers that the gist of the Applicant’s complaint is the following:

(i) the Basic Court has unlawfully decided because it was incorrectly composed;

(ii) the regular courts did not clearly and completely determine factual situation and, accordingly, the decisions of the regular courts were not adequately analyzed and reasoned.

30. As regards to the allegation (i), the Court notes that the Supreme Court (Judgment No. 281/2016) rejected the request for protection of legality against the Judgments of the Basic Court and the Court of Appeals with respective reasoning.

31. The Supreme Court in its Judgment concluded: *“from the minutes from the main trial, that neither the parties nor the convict’s defense counsels had any objection related to the composition of the trial panel; whereas by the minutes from the main trial of 14 March 2016 in which were assigned aforementioned judges, they have decisively stated that they had no objection to the composition of the trial panel.*

According to the assessment of the Supreme Court, the substantial violation of provisions of the criminal procedure as provided by Article 384, paragraph 1 of CPCK is committed when the court was not properly constituted or the participants in the rendering of the judgment included a judge who did not

attend the main trial or was excluded from adjudication under a final decision. This did not happen in this specific case. Pursuant to the provisions of Article 12, paragraph 4 of the Law on Courts, the Presiding Judge of the Basic Court shall also assign judges to departments to ensure the efficient adjudication of cases, and may temporarily reassign judges among branches and departments as needed to address conflicts, resolve backlogs, or ensure the timely disposition of cases. Therefore, this allegation of the request for protection of legality was ungrounded.”

32. The Court considers that the challenged Judgment of the Supreme Court took into consideration all the allegations stated in the request for the protection of legality within the limits prescribed by the law. It responded in detail to all the allegations and it reasoned why the request was rejected as ungrounded. The presented explanations and reasons were not a result of unjustified findings of facts or of arbitrary application of the procedural and substantive law.
33. About the allegation (ii), the Court notes that the Judgment of the Basic Court shows a comprehensive and a detailed analysis of all the facts and law related to the commission of criminal offenses and imposing of the sentence.
34. The Court is of the opinion that the Court of Appeals explained in detail and responded to the Applicant's appeal, providing reasoned answers to his allegations for essential violation of the provisions of the Criminal Code, erroneous and incomplete determination of factual situation and the decision on the punishment.
35. Moreover, the Court of Appeals „*accepted the entire factual findings and the legal stance of the [Basic Court], considering that it correctly determined the factual situation and correctly applied the substantive law when it found that the [Applicant's] appeal is ungrounded and upheld the judgment [of the Basic Court].*“
36. The Court notes that the regular courts assessed the facts and interpreted and applied the provisions of the procedural and substantive law regarding the Applicant's request. Their conclusions were based on a detailed examination of all the arguments presented by the Applicant and the injured party.
37. The Court further notes that the Applicant repeated before it the same arguments he had filed in the proceedings before the regular courts, in particular, regarding the determination of the factual situation and the legality of the regular courts' decisions.
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 the evidence or applying the law (legality), unless they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, the role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law (See: *mutatis mutandis*, the European Court of Human Rights (hereinafter: ECtHR) case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, para. 28).

39. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as “fourth instance court” (See: ECtHR, case *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65; see also: *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
40. In other words, the complete determination of the factual situation and the correct application of the law is within the jurisdiction of the regular courts (matter of legality).
41. The mere fact that the Applicant does not agree with the outcome of the proceedings in his case do not give rise to an arguable claim of a violation of his rights as protected by the Constitution.
42. 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 has had a fair trial (See: *inter alia*, case *Edwards v. United Kingdom*, No 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991).
43. In that respect, the Court concludes that the Applicant did not substantiate the allegations that the relevant proceedings were in any way unfair or arbitrary and that the challenged decision violated the Applicant’s fundamental rights and freedoms guaranteed by the Constitution and the ECHR (See: *mutatis mutandis*: ECtHR, decision of 30 June 2009, *Shub v. Lithuania*, No. 17064/06).
44. With regard to the Applicants’ alleged violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of ECHR, 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*, No. 6633/74, Judgment of 13 June 1879, paragraph 50).
45. In certain circumstances, a “*legitimate expectation*” of obtaining an asset may also enjoy the protection of Article 46 of the Constitution and Article 1 of Protocol No. 1 to the ECHR (See, *mutatis mutandis*, ECtHR case *Bélané Nagy v. Hungary*, no. 53080/13, Judgment of 13 December 2016, para. 74).
46. However, the Court recalls that no “*legitimate expectation*” can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the Applicant’s submissions are subsequently rejected by the national courts (See *Bélané Nagy v. Hungary*, *Ibidem*, para. 75).
47. The Court considers that the circumstances of the case do 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. The Court further considers that the Applicant has not presented facts showing that the proceedings before the regular courts were in any way a constitutional violation of his constitutionally guaranteed rights to equality before the law, to fair and impartial trial and to protection of property.
49. In sum, the Court concludes that the Applicant has not substantiated his allegations, nor has submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR.
50. Therefore, the Referral is manifestly ill-founded on constitutional basis and it should be declared inadmissible pursuant to Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.1 and 7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (b) of the Rules of Procedure, in its 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;
- IV. This Decision is effective immediately.

Judge Rapporteur

Snezhana Botusharova



President of the Constitutional

Arta Rama-Hajrizi

