



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

Prishtina, 5 October 2017
Ref. no.: RK1132/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI53/17

Applicant

X

**Constitutional review of Judgment Pml. No. 50/2017 of the Supreme Court
of Kosovo, of 20 March 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 minor X (hereinafter: the Applicant), represented by Fitim Shporta, a lawyer from Prizren.

Challenged decision

2. The challenged decision is Judgment Pml. No. 50/2017 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 20 March 2017 which rejected the Applicant's request for protection of legality against Decision No. 73/1626 of the Court of Appeals (Decision PAM. No. 73/2016, of 22 December 2016) as ungrounded.
3. The challenged Judgment of the Supreme Court was served on the Applicant on 5 April 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged judgment, which allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 50 [Rights of Children], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR), as well as Articles 3 and 12 of the Convention on the Rights of the Child.
5. The Applicant filed a request for non-disclosure of his identity, due to his minor age.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 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

7. On 26 April 2017, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 27 April 2017, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
9. On 4 May 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.
10. 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 Referral.

Summary of facts

11. On 29 August 2016, the Basic Court in Prizren, Department for Minors (hereinafter: the Basic Court), Decision PM. No. 105/2015, after holding the hearing in a non-public session, and in the presence of the Applicant, other minors, the legal representatives, the Probation Service and the State Prosecutor imposed an educational measure against the Applicant, namely committed him to an Educational-Correctional Institution for a period of one (1) year.
12. The Basic Court in Prizren found that the Applicant had committed three criminal offenses of aggravated theft in co-perpetration under Article 327, paragraph 1, subparagraph 1.1. in conjunction with Article 31 of the Criminal Code of Kosovo (hereinafter: CCK), one criminal offense of aggravated theft in co-perpetration under Article 327, paragraph 2, subparagraph 2.3 in conjunction with Article 31 of the CCK, and one criminal offense of attempted aggravated theft in co-perpetration under Article 327, paragraph 1, sub-paragraph 1.1 in conjunction with Articles 28 and 31 of the CCK.
13. On 21 October 2016, the Applicant filed an appeal with the Court of Appeals against the aforementioned Decision of the Basic Court. In his appeal, the Applicant mainly alleged a violation of the criminal law, because the Basic Court did not correctly and completely assess the mitigating circumstances, and as a result, a more lenient educational measure or a suspended sentence was not imposed on the Applicant. In addition, the Applicant requested the Court of Appeals to notify him about the panel session of the Court of Appeals.
14. On 22 December 2016, the Court of Appeals (Decision No. 73/2016) rejected the Applicant's appeal as ungrounded and upheld the Decision of the Basic Court of 29 August 2016.
15. In its decision, the Court of Appeals found that: “ [...] *the allegations of defense counsels of the juveniles that the educational institutional measures imposed to the juveniles are too harsh and they should be replaced with more lenient measures, are ungrounded since in the appeals in defense counsels of the juveniles there are no concrete mitigating circumstances which would be a subject of review by the first instance court and which would affect in modifying the imposed measure, making it more lenient; therefore, the Court of Appeals considers that the Court of the first instance assessed fairly all the circumstances which had influence on imposing the educational measures, including here the report of the Probation Service; therefore, the period of the educational measure imposed to the juveniles is in accordance with the ascertained and assessed circumstances and it is to their best interest. [...]*”
16. On 2 February 2017, the Applicant submitted a request for protection of legality to the Supreme Court against the aforementioned decision of the Court of Appeals.

17. In his request for protection of legality, the Applicant alleged violation of Article 390, paragraph 1 of the Criminal Procedure Code of Kosovo (hereinafter: the CPCR), because the panel session for minors at the Court of Appeals was held without his presence, despite the Applicant's request to be notified about this hearing. In this regard, the Applicant also alleged violation of Article 31 of the Constitution, Article 6 of the ECHR, and Articles 3 and 12 of the Convention on the Rights of the Child.
18. On 20 March 2017, the Supreme Court (Judgment PML. No. 50/2017) rejected the Applicant's request for protection of legality as ungrounded.
19. Regarding the Applicant's allegation about notification of a session of the panel, the Supreme Court held that:

"[...] the above mentioned claims do not stand, based on the fact that provisions of Article 390, paragraph 1, of the CPCR emphasizes that when the accused person was sentenced to imprisonment, the notification for the session of the Appellate Panel shall be sent to the competent State Prosecutor, the injured person, the accused person and his defense counsel

The fact that the educational institutional measure - sending the juvenile to Educational Correctional Institution for a period of 1 year was imposed on the juvenile [the Applicant], stands but this measure is not punishment of imprisonment as stipulated under provision of Article 390, paragraph 1, of the CPCR. Further on, the provision of Article 5 of Juvenile Justice Code stipulates that the provisions of the Criminal Code of Kosovo, the Criminal Procedure Code of Kosovo, the Law on Execution of Penal Sanctions and any other relevant legislation shall apply to juveniles, unless otherwise regulated by the present Code. Therefore, in the present case, the Court of Appeals of Kosovo rightfully applied the provisions of Article 390, paragraph 1, of the CPCR, where it did not inform about the session of the Panel neither the juvenile, nor his defense counsel."

Applicant's allegations

20. The Applicant alleges that the Court of Appeals and the Supreme Court violated the provisions of the criminal procedure and his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 50 [Rights of Children] of the Constitution, in conjunction with Article 6 [Right to a Fair Trial] of the ECHR, as well as Articles 3 and 12 of the Convention on the Rights of the Child.
21. In this regard, the Applicant claims that *"by ignoring the best interests of the child, the court did not give the opportunity to the child and his legal representative to be heard in the session before the appellate panel, although in all court proceeding the child and his legal representative should have been given the opportunity to be heard with regard to their matter."*

Relevant provisions of the Constitution, the European Convention on Human Rights and the Convention on the Rights of the Child, the Criminal Procedural Code and the Juvenile Justice Code

Constitution

Article 31 [Right to Fair and Impartial Trial]

“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 public 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.

[...]

Article 50 [Rights of Children]

[...]

4. All actions undertaken by public or private authorities concerning children shall be in the best interest of the children.

[...]

European Convention on Human Rights

Article 6 [Right to a fair trial] of the ECHR:

“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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Convention on the Rights of the Child

Article 3

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 8

“States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”.

Article 12

[...]

“2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

[...]

(vii) To have his or her privacy fully respected at all stages of the proceedings.

Criminal Procedure Code

Article 390 [Session before Appeal Panel]

“1. When an imprisonment sentence was imposed on the accused, the notification of the session of the appeal panel shall be sent to the state prosecutor, to injured party, and to the accused and his/her defense counsel.”
[...]

Juvenile Justice Code No. 03/L-193

Article 5

“The provisions of the Criminal Code of Kosovo, the Kosovo Code of Criminal Procedure, the Law on Execution of Penal Sanctions and any other relevant legislation shall apply to minors, unless otherwise regulated by the present Code.”

Assessment of the admissibility of Referral

22. The Court first examines whether the Applicant has met the admissibility requirements established in the Constitution and as further foreseen in the Law and specified in the Rules of Procedure.

23. 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”.

24. The Court notes that the Applicant is an authorized party in accordance with the Constitution, challenges an act of public authority, in this case the Judgment of the Supreme Court, has exhausted all the necessary legal remedies and has submitted his referral within a period of 4 (four) months from the receipt of the judgment.

25. However, the Court also refers to Article 48 [Accuracy of Referral] 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”.

26. The Court also recalls Rule 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, which establishes:

“(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.”

27. The Court recalls that the Applicant essentially alleges that the Court of Appeals has violated his right to be summoned and attend the panel session of the Court of Appeals, as provided by Article 390 (1) of the CPCPK. In this regard, he alleges violation of Articles 31 and 50 of the Constitution, Article 6 of the ECHR and Articles 3 and 12 of the Convention on the Rights of the Child.
28. The Court notes that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution *“human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”*
29. The Court referring to the case law of the European Court of Human Rights (hereinafter: the ECtHR) states that *“the entitlement to a “public hearing” as guaranteed by Article 31.2 of the Constitution and Article 6.1 of the ECHR necessarily implies a right to an “oral hearing”* (See case of the Constitutional Court KI74/16, X, Resolution on Inadmissibility of 10 November 2016, paragraph 30; see also, *mutatis mutandis* ECtHR case *Döry v. Sweden*, Application No. 28394/95, Judgment of 12 November 2002, paragraph 37).
30. Accordingly, the principle of an oral and public hearing is particularly important in the criminal context, where the accused person of a criminal offence in general, must be provided an opportunity to be physically present in the session of a first instance court, which fully meets the requirements of Article 31 of the Constitution and Article 6 of the ECHR (See case of the Constitutional Court, KI68/16, *Fadil Rashiti*, Resolution on Inadmissibility of 2 June 2017, paragraph 41, see also ECtHR case *Jussila v. Finland*, Application No. 73053/01, [GC], Judgment of 23 November 2006, paragraph 40).
31. However, referring to its case law and the ECtHR case, the Court considers that the personal presence of the accused is of no critical importance in the appeal hearing as in the hearing. *“The manner in which Article 31 of the Constitution and Article 6 of the Convention apply to proceedings before the appellate courts depends on the particular features of the proceedings in progress and that the proceedings as a whole, the legal order and the role of the Court of Appeal in the legal system”* (see Constitutional Court cases, KI68 / 16, *Fadil Rashiti*, Resolution on Inadmissibility of 2 June 2017, paragraph 42 and KI74 / 16, X Resolution on Inadmissibility of 10 November 2016, paragraph 32, see also , *mutatis mutandis*,

case of ECtHR, *Hermi v. Italy*, Application No. 18114/02, Judgment of 18 October 2006, para. 60).

32. In the present case, the Court notes that the first instance court met the requirement for holding a public and oral hearing because the court hearings were conducted in the personal attendance of the Applicant and his defense counsel, as well as of the prosecutor. The Court also recalls that the Basic Court, after having determined that the Applicant had committed the aforementioned criminal offenses, imposed on him the educational measure.
33. Consequently, the Court considers that the first instance court, namely the Basic Court met the requirement for holding an “oral hearing” in accordance with Article 31.2 of the Constitution and Article 6.1 of the ECHR.
34. The Court further recalls that the Applicant in his appeal filed with the Court of Appeals had essentially alleged a violation of the criminal law and requested that he be notified and summoned to the appellate panel session.
35. The Court notes that in the appeals procedure, the Court of Appeals only upheld the Judgment of the Basic Court based on the facts established by the Basic Court.
36. Thus, the Court finds that the Applicant in the proceedings before the Court of Appeals was not deprived of his rights and guarantees foreseen by Article 31.2 of the Constitution and Article 6.1 of the ECHR with regard to an “*oral and public hearing*”.
37. Further the Court notes that the Supreme Court rejected as ungrounded the Applicant's request for protection of legality based on Article 390.1 of the CPCK and Article 5 of the Juvenile Code.
38. The Supreme Court in its interpretation of these provisions assessed that: “*The fact that the educational institutional measure - sending the juvenile to Educational Correctional Institution for a period of 1 year was imposed on the juvenile [the Applicant], stands but this measure is not punishment of imprisonment as stipulated under provision of Article 390, paragraph 1, of the CPCK. Further on, the provision of Article 5 of Juvenile Justice Code stipulates that the provisions of the Criminal Code of Kosovo, the Criminal Procedure Code of Kosovo, the Law on Execution of Penal Sanctions and any other relevant legislation shall apply to juveniles, unless otherwise regulated by the present Code.*”
39. Therefore, the Court finds that the reasoning given by the Supreme Court with respect to the Applicant's allegations of violation of the Criminal Procedure Code, is clear and, after reviewing all the proceedings, the Court also found that the proceedings before the regular courts were not unfair or arbitrary (See case *Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).

40. As regards the Applicant's allegations of violation of Article 50 [Rights of Children] of the Constitution, and Articles 3 and 12 of the Convention on the Rights of the Child, the Court notes that the Applicant has not presented *prima facie* evidence nor has he substantiated his claim as to how the Court of Appeals and the Supreme Court have violated his rights.
41. The mere fact that the Applicant does not agree with the outcome of his case cannot raise of itself an arguable claim of the violation of his rights as protected by the Constitution, ECHR and the European Convention on Rights of the Child (see case of Constitutional Court KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 May 2012, paragraph 28).
42. In the present case, the Court considers that the facts presented by the Applicant do not in any way justify the alleged violation of Articles 31 and 50 of the Constitution, Article 6 of the ECHR and Articles 3 and 12 of the Convention on the Rights of the Child and that the Applicant has not sufficiently substantiated his claim.
43. Therefore, the Referral is manifestly ill-founded on constitutional basis and must be declared inadmissible.

Applicant's request for non-disclosure of identity

44. The Court recalls that the Applicant in his Referral filed a request for non-disclosure of identity due to his minor age.
45. In this regard, the Court refers to Rule 29 (6) of the Rules of Procedure, which provides that:

“The party filing the referral may request that his or her identity not be publicly disclosed and shall state the reasons for the request. The Court may grant the request if it finds that the reasons are well-founded.”
46. The Court, based on the minor age of the Applicant and in accordance with the Articles 8 and 40 of the Convention on the Rights of the Child, which, according to Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, “are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions”, grants his request for non-disclosure of identity.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rules 29 (6) and 36 (2) (b) and (d) of the Rules of Procedure, on 5 September 2017, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO APPROVE the Request to not disclose his identity;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- V. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Arta Rama-Hajrizi

