



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

Prishtina, 2 October 2017
Ref. No.:RK 1128/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI77/16

Applicants

Burim Ramadani and Arsim Ramadani

**Constitutional review of Judgment Pml. No. 296/2015 of the Supreme
Court of Kosovo of 10 February 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 Burim Ramadani and Arsim Ramadani (hereinafter: the Applicants). They are represented by Vahide Braha, a lawyer from Prishtina.

Challenged decision

2. The Applicants challenge Judgment Pml. No. 296/2015 of the Supreme Court of Kosovo of 10 February 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly has violated the Applicants' rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) as well as Article 6 [Right to a fair trial] of the European Convention for the Protection of Human Rights (hereinafter: the 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 of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 18 May 2016, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court)
6. On 14 June 2016, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.
7. On 23 June 2017, the Court notified the Applicants about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.
8. On 06 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

Initial procedure

9. In 2011, The Applicants were found guilty in final instance and sentenced to imprisonment for the criminal offence of murder of five members of the H family.
10. On 13 June 2011, the Applicants submitted Referral KI81/11 for constitutional review of Judgment P. No. 162/2003 of the District Court in Gjilan of 7 April 2005 and the Judgments of the Supreme Court (Ap. No. 393/2006 of 20 May 2008), (Ap. No. 04/2009 of 16 September 2009) and (PKL. No. 30/2010 of 1 February 2011).

11. In Referral KI81/11, the Applicants alleged that the challenged judgments violated their rights guaranteed under Articles 30 [Rights of the Accused], 31 [Right to Fair and Impartial Trial] and 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution and Article 5 (1), Article 6 (1) and (2), and Article 14 of the ECHR.
12. On 15 May 2012, the Constitutional Court of Kosovo, by Decision KI81/11, after considering the allegations of the Applicants, concluded that the Referral is manifestly ill-founded and REJECTED the Referral as inadmissible.

Reopening of proceedings

13. On an unspecified date, the Applicants filed a request through their lawyer for reopening of criminal proceedings, in which they requested to present new evidence and to have a new expertise performed on the data taken from the Applicants' mobile phones.
14. On 4 September 2015, the Basic Court in Gjilan (by Decision No. 162/03) rejected as inadmissible the request for a new expertise on the data taken from the Applicants' mobile phones. At the same time, the Panel rejected the request for the presentation of new evidence, reasoning that:

“After the assessment of the request of the defense counsel of the convicts Burim and Arsim Ramadani, the response of the state prosecution and its investigations, the Panel of this Court found that the request should be dismissed as inadmissible because the facts and evidence do not provide reasons for allowing the reopening of the proceeding because they are repeated requests of the defense counsel and they were consumed in the previous requests.”
15. The Applicants filed an appeal against the decision of the Basic Court in Gjilan on the grounds of erroneous and incomplete determination of factual situation and erroneous application of the substantive law, with a proposal that the Court of Appeals approves the appeal as grounded, so that the case be remanded for retrial or that the first instance decision is modified and the Court of Appeals decides on the merits of the request.
16. On 26 October 2015, the Appellate Prosecutor's Office in Prishtina (by submission PPN/I. No. 167/15) proposed that the Applicants' appeal be rejected as ungrounded and that the challenged decision be upheld.
17. On 30 December 2015, the Court of Appeals rejected the appeal (Decision PN/No. 582/15). The Court of Appeals reasoned that the appeal *“is rejected as ungrounded [...] filed against Decision of the Basic Court [...] whereas according to the official duty, the appealed Decision is modified so that the request [...] for reopening of the criminal proceedings completed by final Judgment [...] is rejected in entirety as ungrounded.”*
18. The Applicants filed a request for protection of legality with the Supreme Court in which they pointed out that the courts *“ignored the matter of alibi of the convicts, for which matter were presented also the concrete evidence which*

should have been examined in the reopened proceedings. The decisions of the two courts are arbitrary because the presented evidence, which in the request are emphasized as new, were not assessed.”

19. On 10 February 2016, the Supreme Court of Kosovo (Judgment Pml. No. 296/2015) rejected as ungrounded the request for protection of legality. The Supreme Court reasoned that,

“In this present case no new evidence was presented which within the meaning of the above mentioned provision would be considered as new, in order to allow the reopening of the criminal proceedings, whereas the fact that now new witnesses have been found with the old statements which were used during the criminal proceedings in all instances, is irrelevant because in this present case, the provided evidence regarding the alibi of the accused persons in any variant cannot affect the application of a more lenient provision or paragraph from the one based on which the convicts were found guilty, due to the fact that the matter of alibi is assessed in the judgments of the first instance, second instance and third instance courts, therefore, the claims of the defense counsel are clearly found as ungrounded.”

Applicant's allegations

20. The Applicants first repeat the same allegations that were raised in the request for protection of legality before the Supreme Court, which are: (a) that the regular courts did not allow the new expertise of the data taken from the Applicants' mobile phones; (b) that the courts did not accept as new evidence the witness testimonies given under oath before a notary; (c) that the courts have not considered evidence regarding the alibi of the Applicants; (d) that the courts did not take into account the more favorable law when pronouncing the judgments; and (e) that the courts have applied the wrong law when imposing the sentence.
21. Furthermore, the Applicants state that the regular courts decided and assessed the evidence under the "*discretionary right*" which they had no right to do, by rendering decisions "*according to their free conviction*" without holding a hearing where the evidence is presented, thereby violating a large number of Articles of the Criminal Procedure Code and the Criminal Code of Kosovo.
22. The Applicants further claim that the decisions of the regular courts were "*arbitrary and unlawful*," because they imposed punishments foreseen for adults, although the Applicants were minors at the time of the commission of the offence.
23. Finally, the Applicants consider that "*their right was violated, according to Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), and Article 31 of the Constitution of Kosovo, the right to fair and impartial trial, and by special emphasis paragraph 7 of this Article where the special procedures for minors are determined, in this present case the adult juveniles according to JJC. Since in this case all the three instances including also the extraordinary remedy, decided contrary to the applicable*

law, as mentioned above, under Article 34, paragraph 2 of JJC (applicable law in Kosovo from 22 March 1989 until 12 December 1999, when UNMIK Regulation 1999/24 entered into force), and Article 385.1.3 of the CPCK “an inapplicable law was applied to the criminal offence which is the subject-matter of the charge.”

24. For all the foregoing reasons, the Applicants conclude that “*the right to reopen the proceeding completed by a final judgment was not allowed to them*” and that the Court should annul the decisions of the regular courts as unconstitutional and “*to allow reopening of the proceedings (by the force of law) for the foregoing reasons.*”
25. The Applicants propose that “*The Court holds that the regular courts [...] have violated the Applicants’ rights to regular legal process according to the principle of justice as it is determined by Article 6 of the ECHR and Article 31 of the Constitution of the Republic of Kosovo, and after consideration [we] ask this panel to conclude that the described decisions of the two regular courts including here also the request for protection of legality as an extraordinary remedy by the Supreme Court of Kosovo, are unlawful.*”

Assessment of the admissibility of Referral

26. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.
27. 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.*
28. The Court also refers to Article 49 [Deadlines] of the Law, which provides that,

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.
29. The Court considers that the Applicants are authorized parties, have exhausted the available legal remedies and submitted the Referral in due time.
30. However, the Court refers 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.

31. In addition, the Court refers to paragraph (3)(e) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresees that,
- (3) A Referral may also be deemed inadmissible in any of the following cases:*
- [...]*
- (e) the Referral is incompatible ratione materiae with the Constitution;*
32. In that respect, the Court recalls that the Applicants allege that they have been denied the right to a fair and impartial trial in the proceedings before the Court of Appeals and the Supreme Court regarding their request for the reopening of their case.
33. The Court recalls Article 31 [Right to Fair and Impartial Trial] of the Constitution, which provides that,
- (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.*
34. The Court also recalls Article 6 of the ECHR, which provides that,
- (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.*
35. Furthermore, the Court recalls the consistent case law of the European Court of Human Rights (hereinafter: ECtHR), which establishes that,
- "The [ECtHR] reiterates that according to the established case-law, Article 6 does not apply to proceedings for the re-opening of criminal proceedings, given that someone who applies for her case to be re-opened and whose sentence has become final is not "charged with a criminal offence" within the meaning of Article 6." (see ECtHR Decision on Inadmissibility of 5 February 2004, Erdemli v. Turkey, no. 33412/03; and ECtHR Decision on Inadmissibility of 6 May 2003, Fischer v. Austria, no.27569/02).*
36. The Court recalls that the Applicants have been convicted and sentenced in final instance on criminal charges, and their request for protection of legality in relation to those proceedings was rejected by the Supreme Court on 1 February 2011.

37. The Court also recalls that the Applicants submitted a Referral, registered under number KI 81/11, alleging that the regular courts had violated their right to a fair and impartial trial in the determination of the criminal charges against them, and that the Court had rejected that Referral on 15 May 2012 as inadmissible because manifestly ill-founded on a constitutional basis.
38. The Court notes that the present referral pertains to proceedings regarding a request to reopen criminal proceedings, which were initiated by the Applicants at some point before 4 September 2015.
39. The Court considers that the proceedings regarding the Applicants' request for the reopening of proceedings do not concern the determination of a criminal charge within the meaning of either article 31(2) of the Constitution or Article 6(1) of the ECHR.
40. As such, the challenged proceedings do not come within the scope of Article 31 of the Constitution and Article 6 of the ECHR.
41. Therefore, the Court concludes that the Applicants' allegations are incompatible *ratione materiae* with the Constitution.
42. Consequently, the Referral is to be declared inadmissible pursuant to Rule 36, paragraph (3)(e) of the Rules of Procedure

FOR THESE REASONS

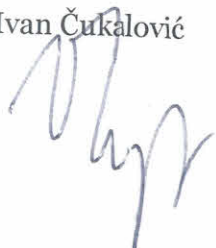
The Constitutional Court of Kosovo, in accordance with Article 113, paragraphs 1 and 7, of the Constitution, Article 46 of the Law, and Rule 36 (3)(e) of the Rules of Procedure, at its session held on 06 September 2017, unanimously

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. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Arta Rama-Hajrizi