



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

Prishtina, 21 August 2017
Ref. No.:RK 1120/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI15/17

Applicant

Haxhi Islamaj

**Constitutional Review of the Judgment, PML. No. 112/16 of the Supreme
Court of 17 August 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 Gërzhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Haxhi Islamaj with residence in Madanaj village, Municipality of Gjakova (hereinafter: the Applicant).

Challenged decision

2. The challenged decision is the Judgment, PML. No. 112/16 of the Supreme Court of Kosovo of 17 August 2016, which rejected the Applicant's request for protection of legality against the Judgment of the Basic Court in Gjakova (PKR. No. 93/2011 of 3 July 2015) and the Judgment of the Court of Appeals (PAKR. No. 529/2015 of 22 December 2015) as ungrounded.
3. The challenged decision was served on the Applicant on 1 December 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged decision which has allegedly violated the Applicant's right guaranteed by Article 31 [Right to Fair and Impartial Trial] 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: ECHR).

Legal Basis

5. The Referral is based on Article 113, paragraph 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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 18 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: Altay Suroy (Presiding), Ivan Ćukalović and Selvete Gërxhaliu- Krasniqi.
8. On 3 April 2017, the Court notified the Applicant of the registration of the Referral. A copy of the Referral was also sent to the Supreme Court. On the same day the Court requested the Basic Court in Gjakova to provide a copy of the receipt of service, which shows when the challenged decision was served on the Applicant
9. On 20 April 2017, the Basic Court in Gjakova submitted the copy of the receipt to the Court, which shows that the Applicant received the challenged decision on 1 December 2016.
10. On 4 July 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

11. On 16 February 2010, the District Public Prosecution Office in Peja (PP.nr.368/2009) filed an indictment accusing the Applicant for committing the criminal offense of attempted aggravated murder and the criminal offence of unauthorized ownership, control, possession or use of weapon.
12. On 3 July 2015, the Basic Court in Gjakova, Department for Serious Crimes (hereinafter: the Basic Court), Judgment, PKR.nr. 93/2011 found the Applicant guilty for committing the criminal offences of attempted aggravated murder and unauthorized ownership, control, possession or use of weapon.
13. On 26 October 2015, against the Judgment of the Basic Court of 3 July 2015, the Applicant filed an appeal with the Court of Appeals. In his appeal he alleged essential violation of the provisions of the criminal procedure and criminal law, incorrect and incomplete determination of factual situation and decision on criminal sanction. In addition, the Applicant alleged that the Judgment of the Basic Court is unclear, unreasoned and contradictory.
14. On 22 December 2015, the Court of Appeals (Judgment PAKR.nr.529/15) rejected the Applicant's appeal as ungrounded and upheld the Judgment of the Basic Court in Gjakova.
15. In its Judgment, the Court of Appeals, based on the appeal and *ex officio* decided to amend the Judgment of the Basic Court of 3 July 2015 only for the part concerning the victim [D.K], who initially was accused and convicted by the Basic Court for committing the criminal offence of unauthorized ownership, control, possession or use of weapon. In this respect, the Court of Appeals, pursuant to Article 363, paragraph 1, sub-paragraph 1.3 of the Criminal Procedure Code (hereinafter: the CPC) rejected the indictment for the aforementioned criminal offence against [D.K] with the reasoning that the aforementioned criminal offence was covered by Article 3 of the Law on Amnesty.
16. With regard to the Applicant's appeal, the Court of Appeals reasoned that:

"[...] the challenged judgment does not contain violations of criminal procedure provisions as stated in the appeal. The enacting clauses were drafted in compliance with provisions of Article 365 paragraph 1 subparagraph 1.1 of CPCK; [...] The first instance court produced its findings through the administered evidence and presented facts as clear and complete, giving the reasons why these facts are considered as confirmed."

Whereas the allegations of the defense that in the enacting clause of judgment it was concluded, that the weapon was confiscated from the defendant with identified number and type, the court considers it as a technical error of the first instance court [...] In the reasoning of the judgment, the circumstances, which the court took into consideration when imposing the sentence are included, which are accepted by this court as legal and rightful, since they are supported with administered evidence.

Based on the abovementioned reasons, the allegations of the defense of the defendant that judgment comprises with essential violation of criminal procedure provisions are ungrounded allegations. “

17. On 26 April 2016, against the Judgments of the Basic Court (PKR.nr 93/2011 of 3 July 2015) and the Court of Appeals (PAKR. Nr. 529/2015 of 22 December 2015), the Applicant filed a request for protection of legality with the Supreme Court. In his request for protection of legality, the Applicant claimed essential violations of the provisions of the criminal procedure and criminal law. In addition he alleged that the Judgment of the Basic Court is unclear and contradictory.
18. Based on the case files, the Court notes that the Applicant didn't raise the issue of the application of the Law on Amnesty neither before the Court of Appeals nor before the Supreme Court.
19. On 17 August 2016, the Supreme Court of Kosovo (Judgment, 112/2016) rejected the Applicant's request for protection of legality as ungrounded.
20. The Supreme Court, in its Judgment held that: *“In fact it is true that the judgment contains shortcomings that however are not of essential nature of violation of criminal procedure provisions on which basis they would annul it. Despite those errors, the judgment contains legal justifications regarding the all administered evidence in the court session, all legal justifications were given in relation to the assessment of the evidence and the reasons why the trust was given to evidence that confirmed guiltiness of the convicted and to the evidence that the trust was not given. “*
21. The Supreme Court in its Judgment concluded that the Judgments of the lower court instances do not contain violations of the provisions of the criminal procedure and criminal law.

Applicant's allegations

22. The Applicant alleges that the regular courts violated his right to fair and impartial trial guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Articles 6 of the ECHR.
23. Firstly, the Applicant claims that: *“The reasoning of the Basic Court decision is unclear and it has been confirmed as well by the Supreme Court which states that the judgment of the first instance court indeed has contradictions and errors.”*
24. In this respect, the Applicant alleges that the shortcomings in the Judgment of the Basic Court limited his right to appeal.
25. Furthermore, the Applicant referring to the jurisprudence of the Court, *inter alia*, claims that *“[...] the right to receive a reasoned decision includes the obligation of the authorities to provide reasoning for their judgments with reasonable grounds on procedural and substantive level.”*

26. The Applicant, regarding this allegation concludes that: “[...] judgment of the Basic Court- Department of Serious Crimes in Gjakova violated the constitutional principles of preventing arbitrariness in decision makings, because the given reasoning does not comprise the defined facts, legal provisions and their logical relation in between.”
27. Secondly, the Applicant holds that “[...] there is no explanation by the Court of Appeal why the Law on Amnesty is not applied in my favor. With regards to this issue neither the Supreme Court provided statement on this matter in its Judgment. This fact is important to me for my final sentence and I want to know the reason of this unequal treatment because I have been punished for the criminal offence of unauthorized ownership, control or possession of weapon whereas D.K. is acquitted from this criminal offence based on the Law on Amnesty.”
28. Finally, the Applicant concludes his Referral by requesting the Court:

“To annul the decisions of regular Courts and to remand the case for the retrial at the Basic Court in Gjakova and reconsideration by this Court and avoid constitutional violations of Article 31 of Constitution and article 6 of ECHR.”

Relevant provision of the Law on Amnesty No. 04/L-209

Article 7

Decision for Granting Amnesty from execution of the punishment

The decision for granting amnesty shall be rendered, with EULEX assistance, by the first instance court, respectively the court that has subject matter and territorial jurisdiction to adjudicate the respective issue that is addressed to it:

1.1 . ex officio; or

1.2. requested by the convicted person, the perpetrator, the State Prosecutor or the persons who according to Criminal Procedure Code may appeal against the judicial decision.

2. The Court renders a decision where it determines the part of the punishment that shall be waived, unless otherwise provided by this law.

Admissibility of the Referral

29. 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.
30. In this respect, the Court refers to paragraphs 1 and 7 of 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.*

31. The Court also refers to Article 47 of the Law which provides:

“The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law”.

32. Further, the Court is to assess whether the Applicant has met the required Rules of Procedure, namely Rule 36 (1) (b) and (d) and 36 (2) (b) and (d) of the Rules of Procedure, which provides that:

“(1) The Court may consider a referral if:

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted”.

[...]

(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;”

As to the Applicant’s allegation concerning the unclear and unreasoned decision

33. Firstly, the Court recalls that the Applicant alleges that the Judgment of the Basic Court is unclear and not reasoned.

34. The Court notes that the Applicant raised the same allegations concerning the unreasoned Decision in the proceedings before the Court of Appeals and the Supreme Court. His allegations were addressed by the respective courts and reasoned accordingly. Therefore, the Judgment of the Supreme Court is now the final decision on the contested subject matter.

35. In this respect, the Court recalls the reasoning of the Supreme Court, which held that: *“In fact it is true that the judgment contains shortcomings that however are not of essential nature of violation of criminal procedure*

provisions on which basis they would annul it. Despite those errors, the judgment contains legal justifications regarding all administered evidence in the court session, all legal justifications were given in relation to the assessment of the evidence and the reasons why the trust was given to evidence that confirmed guiltiness of the convicted and to the evidence that the trust was not given.”

36. In this relation, the Court notes that the Applicant has not sufficiently substantiated his claim on violation of Article 31 of the Constitution and Article 6 of the ECHR. Furthermore, the Court considers that the Supreme Court in its Judgment addressed the essential issues raised in the Applicant’s request for protection of legality, in particular the allegation concerning the unreasoned and contradictory decision of the Basic Court.
37. In relation to this, the Court considers that the reasoning in the Judgment of the Supreme Court is clear and, after having reviewed all the proceedings, the Court has also found that the proceedings before the lower court instances have not been unfair or arbitrary (See ECtHR case *Shub vs. Lithuania*, No. 17064/06, Decision of 30 June 2009).
38. Furthermore, the Court emphasizes that it does not act as a court of fourth instance in respect of the decisions taken by the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law (See ECtHR case *Garcia Ruiz vs. Spain*, no. 30544/96, Judgment of 21 January 1999; see also Constitutional Court case KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
39. Therefore, as to the Applicant’s allegation that the Basic Court’s Judgment is unclear and not reasoned, the Court finds that the Referral is inadmissible for being manifestly ill-founded on constitutional basis because the facts presented by the Applicant do not in any way justify the alleged violation of Article 31 of the Constitution and Article 6 of the ECHR invoked by him and that he has not sufficiently substantiated his claim.

As to the Applicant’s allegation concerning application of the Law on Amnesty

40. Secondly, the Court recalls that the Applicant claims that concerning the criminal offence, unauthorized ownership, control, possession or use of weapon the Court of Appeals did not apply the Law on Amnesty in his favour.
41. In this respect, the Applicant claims that “[...] *there is no explanation by the Court of Appeal why the Law on Amnesty is not applied in my favor. With regards to this issue neither the Supreme Court provided statement on this matter in its Judgment. This fact is important to me for my final sentence and I want to know the reason of this unequal treatment because I have been punished for the criminal offence of unauthorized ownership, control or possession of weapon whereas D.K. is acquitted from this criminal offence based on the Law on Amnesty.*”

42. In this regard, the Court notes that the Applicant alleges unequal treatment.
43. The Court recalls Article 7 (Decision for Granting Amnesty from execution of the punishment), paragraph 1, of the Law on Amnesty which provides that:
1. *The decision for granting amnesty shall be rendered, with EULEX assistance, by the first instance court, respectively the court that has subject matter and territorial jurisdiction to adjudicate the respective issue that is addressed to it:*
 - 1.1 . *ex officio; or*
 - 1.2. *requested by the convicted person, the perpetrator, the State Prosecutor or the persons who according to Criminal Procedure Code may appeal against the judicial decision.*
44. Based on the aforementioned provision, the Courts could have adjudicated on the application of the Law on Amnesty *ex officio* or the Applicant could have requested to be granted an amnesty for the criminal offence he was accused of.
45. Based on the submitted case file, including the Judgments of the regular courts, the Court notes that the Applicant did not raise this issue neither in his appeal submitted to the Court of Appeals nor in his request for protection of legality submitted to the Supreme Court.
46. Thus, the Applicant for the first time raises the issue of application of the Law on Amnesty before the Constitutional Court alleging unequal treatment.
47. Therefore, the Court considers that in accordance with the principle of subsidiarity, the Applicant should have presented the issue of the application of the Law on Amnesty and his allegation of unequal treatment in his request for protection of legality before the Supreme Court. However it was not presented.
48. Based on the foregoing, the Court considers that the Applicant's failure to complain about the application of the Law on Amnesty before the regular courts shall be understood as a waiver of the right to further object the violation. Thus, the Applicant has not exhausted all legal remedies afforded to him by the applicable law (See *mutatis mutandis*, ECtHR Case *Selmouni v. France*, No. 25803/94, Decision of 25 November 1996, Constitutional Court case KI 07/09, *Demë and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paras. 28-29).
49. The principle of subsidiarity requires that the applicants exhaust all procedural possibilities in the regular proceedings in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right before coming to the Constitutional Court. (See *mutatis mutandis*, ECtHR Case *Selmouni v. France*, No. 25803/94, Decision of 25 November 1996, see Constitutional Court cases KI120/11, *Ministry of Health*, Resolution on Inadmissibility of 4 December 2012, par. 32, KI118/15, *Dragiša Stojković*, Resolution on Inadmissibility of 17 May 2016, par. 34).

50. Therefore, the Court, based on the principle of subsidiarity finds that the Applicant's allegation regarding the application of the Law on Amnesty in his favour is inadmissible because he didn't exhaust all legal remedies in the regular courts proceedings before coming to the Constitutional Court.
51. In conclusion, the Court, in accordance with Article 113, paragraph 7 of the Constitution, Article 47 of the Law and Rule 36 (1) (b) and 36 (2) (b) and (d) finds that the Referral:
- a) with regard to the Applicant's allegation concerning the unreasoned decision is inadmissible for being manifestly ill- founded on constitutional basis; and
 - b) with regard to the Applicant's allegation that the Court of Appeals didn't apply the Law on Amnesty in his favour is inadmissible due to non-exhaustion of legal remedies.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113, paragraph 7 of the Constitution, Article 47 of the Law and Rules 36 (1) (b) and (d) and 36 (2) (b) and (d) of the Rules of Procedure, in its session held on 4 July 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; and
- IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur

Snezhana Botusharova



President of the Constitutional Court

Arta Rama-Hajrizi

