



Research Article

© 2024 Xharije Nela

This is an open access article licensed under the Creative Commons Attribution-NonCommercial 4.0 International License (<https://creativecommons.org/licenses/by-nc/4.0/>)

Limitation of the right to appeal against the decision to take the case to court

PhD (C.) Xharije Nela

"Aleksander Moisiu" University, Durres, Albania

DOI: <https://doi.org/10.2478/ejels-2024-0011>

Abstract

The Albanian code of criminal procedure regulated with Law 35/2017, dated 30.3.2017, was amended by bringing a subject to procedural delays. The decision of the judge of the preliminary hearing is related to the acceptance of the request to send the case to trial, the dismissal of the accusation or the case and the change of the legal qualification of the criminal offense.

One of the decisions that the Law has given to the judge of the preliminary hearing is the transfer of the case to the court, which takes this decision if it conclusively considers that there is sufficient evidence to send the case to trial, therefore this decision is not allowed to appeal. Therefore, the lawmaker has limited the right to appeal against this decision.

The right to appeal against a court decision is one of the fundamental rights guaranteed in the Constitution of Albania, Article 43 of which sanctions that: "everyone has the right to appeal against a court decision to a higher court, except when otherwise provided in the law for minor criminal offenses, civil or administrative cases of minor importance or value", in accordance with the conditions provided for in Article 17 of the Constitution. Referring to the Criminal Procedural Law, the Lawmaker stated that the court has a "decision" and an "order" (paragraph 1, Article 112 CPC). In disciplining appeals, the lawmaker in his article 407, paragraph 1, explicitly provided that "the Law determines the cases in which court decisions and orders may be appealed, as well as the remedy for appeal". Referring to Article 332/g, it is provided that no appeal is allowed against the decision to refer the case to court. Therefore, due to this provision, the right of appeal is limited. This article will address the problems of bringing the case to trial without completing the necessary investigative actions, as it limits to the individual one of the rights that is not only procedural but also material such as the request for a shortened trial which brings not only economic benefits for the proceeding body but also a 1/3 reduction of the sentence for which he can plead guilty. A decision which cannot be appealed to a higher court.

Keywords: Judge, preliminary hearing, case, court, right of appeal.

1. Introduction

Limitations of the rights and freedoms provided for in this Constitution can only be imposed by law for a public interest or for the protection of the right of others.¹ The restriction must be commensurate with the situation that dictated it and these restrictions may not prejudice the essence of freedoms and rights and cannot, in any case, exceed the restrictions provided for in the European Convention on Human Rights. Preliminary investigations constitute one of the most important phases of the proceeding for the very role of conducting a full investigation in the judicial review, so it was necessary the control that the court had to exercise. At this stage, evidence is collected that determines the probability of the criminal offense and the perpetrator (Miha, 2024).

In this regard, the amendment of the Criminal Procedure Code with Law no. 35/2017 brought about a number of increases regarding the control of procedural actions and investigations of the Prosecutor as well as the requests that were realized during the preliminary investigations. The preliminary hearing for the very cause for which it was sanctioned should be quick and without exceeding the 30-day time limit sanctioned in the Criminal Procedure Code. The hearing is held behind closed doors with the necessary participation of the prosecutor and the defendant's defense counsel. Meanwhile, referring to the amendments, Chapter IX was added to the Code of Criminal Procedure, Article 332, which clarifies the manner of trial and the decision of the judge of the preliminary hearing. Article 332/dh,² has well-defined the methods of decision-making of the judge of the preliminary hearing. While Article 332/g includes the complaint: *"1. An appeal against the decision to send the case to court is not allowed. 2. Against the decision to dismiss the charge or the case, the prosecutor, the defendant and the victim or its heirs may appeal to the court of appeal"*. In the continuation of the paper, we will focus on limiting this right, to exercise an appeal against the decision to refer the case to court, a decision which may be in accordance with the request made by the prosecutor or contrary to his request.

¹ Article 54 of the Constitution.

² After hearing the discussions of the parties, the court decides: a) to accept the request of the prosecutor and send the case to the court, when it deems that there is sufficient evidence in support of the accusation; b) to continue the trial by the same court when the parties present an agreement on the terms of the plea and the imposition of sentence; c) to invite the parties to submit final discussions when the defendant has requested a shortened trial, after carrying out the verification on the state of the acts, according to the provisions of Article 332/c of this Code. The parties have the right to request a time limit to prepare, no longer than 15 days. When the defendant is accused of committing a criminal offense for which a sentence of imprisonment of a maximum of over 10 years is foreseen, the court sets the date of the hearing and notifies the chairman to complete the trial panel according to the law; ç) dismissal of the accusation or the case when there are cases of paragraph 1, Article 328 of this Code; d) declaration of incompetence and sending the case to the competent court in the cases provided by law.

2. The right to appeal against a court decision according to national and international acts

The Albanian Constitution in its Article 43 before the amendments made by the Law 76/2016 dated 22.07.2016 provided that everyone has the right to appeal against a court decision to a higher court, except when the Constitution provides otherwise. Meanwhile, with Law 76/2016, Article 43 is limited to the right of appeal only in cases where it is provided otherwise in the Law on minor criminal offenses, civil or administrative matters of minor importance or value. Therefore, the Constitution has imposed a restriction of this right of appeal only in cases when the special law provides for this restriction, so the Constitution itself has imposed a restriction of the right of appeal, in the spirit of this constitutional amendment, amendments have been made to the Code of Criminal Procedure (Hasneziri, 2024).

The right to appeal against a court decision is one of the fundamental rights of the individual, which on the basis of the constitutional provision finds application also in the material and procedural provisions. In this way, any legal provision that does not respect the content of Article 43 of the Constitution, resulting in the violation of a fundamental right of the individual, is considered incompatible with the Constitution and as such should be repealed. The right of appeal provided by Article 43 of the Constitution should be understood as an opportunity for each individual to have certain procedural means to challenge the decision rendered by a lower court in a higher court, guaranteeing to the individual the right to face justice at all its levels, according to the legal framework in force for this purpose.

The Constitution guarantees the right to appeal taking into account the legal certainty and predictability of the legal system, but it cannot be concluded from these principles that courts do not have the right to make different decisions. The principle of the rule of law shall be considered respected if the individual is provided with a minimum or only an effective opportunity of appeal, so that no claim can be made that other courts should follow the same line of judgment and assessment. This guarantee doesn't go away. The claim that the decision of the reviewing court must necessarily be subject to another examination to see whether or not it properly complied with the legal norm, or acted according to the instructions of the higher court, cannot be raised at the constitutional level. In the interest of legal certainty and predictability of the legal system, courts should take care that the legal and constitutional framework is properly implemented. Article 2 of Protocol 7 of the ECHR, stipulates that anyone found guilty by a court has the right to appeal his or her acquittal to a higher court. Everyone whose rights and freedoms as set forth in this Convention have been violated has the right to an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.³ In accordance with these provisions, the Criminal Procedure Code in its Article 407 provides for cases and remedies of appeal, where the remedies of appeal are appealed, recourse to the Albanian Supreme Court and request for review. In general,

³ Article 13 ECHR.

the legislator has granted the parties in the trial the right to exercise the right of appeal against a decision. When the law does not distinguish between them, this right belongs to everyone.

Also, if we refer to Article 422, the right of appeal is provided that the Prosecutor, the defendant and the plaintiff and the civil defendant have the right to appeal the decisions of the court of first instance, hereinafter Article 432 provides for the right of recourse that the parties have for a decision of the Court of Appeal as well as the concrete cases when recourse can be made. These are the general provisions provided by the Code regarding the right of appeal or recourse. Referring to the criminal procedural law, the lawmaker stated that the court has a "decision" and an "order" (paragraph 1, Article 112 CPC). In disciplining appeals, the lawmaker in his article 407, paragraph 1, explicitly provided that *"the law determines the cases in which court decisions and orders may be appealed, as well as the remedy for appeal"*.

3. Practices of the Constitutional Court and the ECHR regarding the right to appeal

The practice of the Albanian Constitutional Court, is quite rich in regard to the constituent elements of the right of appeal. What in the first years of its operation has been faced with such actions that denied or partially violated the right of appeal to the individual. In its jurisprudence, the Court has emphasized that the right of access guarantees the violated subjects the right to address to a court, which will hear their claims and announce a decision after a fair and public trial. This right of the individual includes not only the right to set in motion the court, but also the right to have from it a final solution to the dispute subject to trial, since access to the court should be substantial and not merely formal.⁴ Good administration of justice begins with ensuring that an individual has access to court to provide him with all aspects of a judicial form of adjudication of the case. The denial of the right to address the court and to receive a final response from it to the allegations raised, constitutes a violation of the fundamental right to a fair trial, because access to the court is, first and foremost, a key condition to realize the protection of the other rights of the individual. The rule of law cannot be conceived without acknowledging to individuals the right and opportunity to address the Court. The Court has also emphasized that the right to appeal, as well as that of access to the court, cannot be affected to the applicant for reasons arising from deficiencies or errors in the activity of state bodies themselves.⁵ The European Court of Human Rights (ECHR) has ruled that the rules disciplining formal steps for lodging an appeal are intended to ensure the proper administration of justice. According to ECHR, the essence of the right of access to the court is violated when the procedural rules cease to serve the purposes of "legal certainty" and "proper administration of justice" and form a kind of obstacle that prevents the

⁴ For more see decision No. 5, dated 22.02.2022; no. 22, dated 29.04.2021; no. 3, dated 23.02.2016 of the Albanian Constitutional Court.

⁵ Decision No. 5, dated 02.03.2011; no. 22, dated 26.07.2006 of the Albanian Constitutional Court.

litigant from having his/her case fundamentally decided by the competent court. In particular, the issues of “legal certainty” and “proper administration of justice” are two main elements to distinguish between excessive formalism and the acceptable application of procedural formalities. In examining the proportionality of a restriction of access to the court, the ECHR takes into account procedural errors committed during the proceedings, which prevented the applicant from enjoying such access, and determines whether the applicant was forced to bear an excessive burden due to these errors (Vito and Rakar, 2024).

4. Competencies and decision-making of the judge of the preliminary hearing

The legal provisions foresee the decision-making of the judge of the preliminary hearing and this is related to the receipt of the request to send the case to court, the dismissal of the accusation or the case and the change of the legal qualification of the criminal offense. When it finds invalid acts or unusable evidence, the court declares them by decision and, where possible, orders their repetition. The court sets the deadline within which the investigations must end and the date of the new hearing. Also, when during the preliminary hearing it turns out that the legal qualification of the fact is wrong, or when the accusation is not clearly and accurately worded, the court invites the prosecutor to make the necessary corrections or clarifications. If the prosecutor does not act, the court decides to return the documents. This decision shall be notified to the Chief Prosecutor.

After listening to the discussions of the parties, the decision of the pre-session judge is related to:⁶

- accepting the request of the prosecutor and sending the case to court, when it considers that there is sufficient evidence in support of the accusation;
 - sending the case to the competent court, when the parties present an agreement on the terms of the guilty plea and the imposition of the sentence;
 - sending the case to the competent court when the defendant has requested a shortened trial, after verifying the status of the acts, according to the provisions of Article 332/c of this code;
 - dismissal of the accusation or case when there are cases of paragraph 1, article 328 of this code.
 - the decision shall be deposited with the Secretary within 10 days of its publication.
- The parties have the right to obtain copies of it.

The examination procedure at the preliminary hearing does not replace the adjudication of the case on the merits, nor does it prejudge its final decision.

So, this judge does a preliminary and not in-depth verification and control. The verification of the indictment (request for trial) brought by the prosecutor is based on two main directions: first, the verification of the results of the investigation, whether they are complete or incomplete; second, the verification of the indictment filed by the prosecutor if it is clear and accurate. The fact that this judge makes an in-depth

⁶ Article 332/dh of the decision of the judge of the preliminary hearing.

examination does not mean that this judge will approve a priori any request of the prosecutor to send the case to trial or to dismiss the charge. This judge should check whether the investigation is complete, whether there is a lack of evidence or a lack of use of evidence. Although this preliminary hearing does not replace the trial based on the case, the standard of sufficiency of reasonable suspicion based on evidence and facts must be followed whether or not there is a criminal fact and whether or not it was committed by the person to whom this criminal fact is attributed, the person has committed the criminal offense, and only after creating sufficient conviction then must decide to send the case for trial.

The pre-trial judge shall not refer the case to court when he considers that the fact does not exist or that the criminal offense was committed by the defendant. The nature of the trial of the preliminary hearing, does not tolerate the possibility of the judge of this hearing to express himself regarding the probability of the accusation in the evidentiary standard "beyond any reasonable doubt", provided in article 390/1 of the Criminal Procedure Code, because such a conclusion belongs to the trial phase of the case on the merits and is formed on the basis of the evidence received at trial in the presence of contradiction of the parties before a natural and neutral court, while, as above, the function of the preliminary hearing judge presupposes the preliminary examination of the request submitted by the Prosecutor for sending the case to trial, regarding the appropriateness of this request of the formulated accusation. The standard of proof that must be achieved by preliminary investigations in order to accept the request to send the case to trial, referring to the nature of the trial in the preliminary hearing, is that of sufficient evidence to support the accusation in adjudicating the merits.

4.1 The Court's practice regarding the decision of the judge of the preliminary hearing, when requesting the referral of the case to court

The Criminal Chamber of the Albanian Supreme Court with decision no. 138, dated 10.05.2022 has sanctioned that: The duty of the judge of the preliminary hearing is, in the presence of the source of evidence presented to him, to limit whether in the situation in which the acts are, the case can be referred to court, without making substantive assessments pertaining to the trial phase. The judge's assessment of the preliminary hearing cannot be separated from that of the criminal facts described. In their ruling No. 00-2023-94 I Decision (23), dated 19.1.2023, the Criminal Chamber of the Albanian Supreme Court brings to attention that, by law no. 35/2017, "Criminal Procedure Code of the Republic of Albania" (as amended), foresees the phase of the preliminary hearing, as an important and inevitable phase of the criminal proceeding, aimed at guaranteeing the rights of defense, by verifying and checking the completeness of the investigations conducted, the actions and the decision-making of the prosecutor during the preliminary investigation phase. The Preliminary Hearing Judge has the power to verify the evidence collected against the defendant during the preliminary investigation phase, as well as the merits/consistency of the prosecution in adjudicating the merits. In other words, the main task of the preliminary hear-

ing judge is to check whether the prosecutor's request for sending the case to trial is based, both from the point of view of the sufficiency of the evidence and from the point of view of the usability and validity of the acts, but it is not intended to reach conclusions on the guilt of the defendant.

The control exercised by the judge of the preliminary hearing over the investigations carried out, including the clarification or correction of the accusation, does not mean that he assumes the functions of the prosecutor in the exercise of criminal prosecution. The duty of the pre-trial judge is, in the presence of the source of evidence presented to him, to verify whether, in the situation in which the acts are located, the case can be referred to court, without making substantive assessments pertaining to the trial phase. The judge's assessment of the preliminary hearing in this case is based on the criminal fact and the evidence filed by the prosecution body, but this does not mean that he does an in-depth analysis arguing whether the level of evidence goes beyond reasonable doubt.

4.2 Limitation of the right to appeal against the decision to refer the case to the Albanian Supreme Court

Supreme Court with decision no. 8 dated 16.01.2023 has argued that no appeal can be filed against the decision of the Court of Appeal, which has partially changed the decision-making of the Court of First Instance by accepting the prosecutor's request to refer the case to court.

The right to appeal (appeal or recourse) must be expressly provided for in the law. Thus, the law stipulates that for every decision of the court of first instance, procedural subjects have the right of appeal, while for every decision of the court of appeal, they have the right of recourse based on article 432 of the CPC. From the analysis of article 332/g of the CPC, which provides that: "1. An appeal against the decision to send the case to court is not allowed. 2. Against the decision to dismiss the indictment or the case, the prosecutor, the defendant and the victim or its heirs may appeal to the Court of Appeal." Pursuant to the aforementioned provision, the lawmaker has clearly provided that no appeal is allowed against the decision to send the case to court. This provision is applicable both in cases when the sending of the case to court is decided by the court of first instance (the *judge of the preliminary hearing*) and also when the sending of the case to court is decided by the court of appeal, which, by amending the decision of first instance, has disposed of the sending of the case to court. The special provision in the present case, which regulates the decision-making of the courts at the stage of the preliminary hearing, has priority over the general provision, which provides that a recourse may be made to the Albanian Supreme Court against decisions of the court of appeal.

Consequently, referring to the above-mentioned provisions, the applicant, in the capacity of defendant, is not entitled to file an appeal/recourse against the decision-making of the Court of Appeal, which has changed the decision-making of the court of first instance, having disposed to send the case to court, as this appeal tool is not foreseen in the special provisions of the criminal procedural law. In the literal in-

terpretation of the above provision, it is clear that the right of the parties to appeal against the decision of the judge of the preliminary hearing is conditioned by the manner of its disposition. When the court has a decision to send the case to court, no appeal is allowed against this decision. The reason for such a prediction is achieved by the logical and systematic interpretation of the provision. As the college has taken the position, from the logical interpretation of the provisions regarding the preliminary hearing, it is concluded that the right of appeal is not foreseen against the decision of the preliminary hearing, precisely because procedural violations that can be found in the preliminary hearing, can be adjusted during the trial of the merits. On the other hand, when the judge of the preliminary hearing decides to dismiss the accusation or the case, the law recognizes the right to appeal to the prosecutor, the defendant and the victim or its heirs. Notwithstanding that the law does not explicitly provide for it, such a conclusion on the existence of the right to appeal should be applied even when the judge of the preliminary hearing has disposed according to article 332/ç of the Criminal Procedure Code, ordering the return of acts and the completion of investigations. In the conditions when the judge of the preliminary hearing has not accepted the request of the prosecutor, but has decided to return it for further investigation, therefore this decision, analogous to the decision of dismissal, the prosecutor has the right to appeal to the Albanian Supreme Court. Such a conclusion can be reached even if we refer to article 43 of the Constitution.

The Constitutional Court has held that the right to appeal within the meaning of article 43 of the Constitution should be understood as the possibility of each individual to have certain procedural means to challenge, in a higher court, the decision given to him by a lower court. This important constitutional guarantee is a positive overstatement, compared to the standards offered in this regard by the European Convention on Human Rights. Referring to the above, but also in the systematic and purposeful interpretation of the provisions of the CPC, it is concluded that the legislator, in cases where he wanted to limit the right of appeal, did so expressly. In all other cases, this right exists and may be exercised under criminal procedural provisions.

5. Conclusions and recommendations

Referring to the competence of the judge of the preliminary hearing who verifies the evidence collected against the defendant, he checks whether this request is based or not in relation to the sufficiency of the evidence and whether these evidences are useful or the acts are valid. In the case when the judge has concluded that there is a need for further investigations and the prosecutor has not conducted investigations according to the order of the court and the court decides on the transfer of the case to the court without completing all the necessary investigations, in this case the defendant in the trial of the merits is denied the right to request a shortened trial. Indeed, the legislator has limited the right to appeal regarding this decision-making, for judicial economy and for not prolonging the trial, as the claims of the parties will be considered in the trial of the merits. But through the transfer of the case to trial without

being met with the necessary investigative actions, or for procedural violations such as the effective non-notification of the defendant, he is limited to one of the rights that is not only procedural but also material such as the request for a shortened trial which brings not only economic benefits for the proceeding body but also a reduction of 1/3 of the sentence for which he can plead guilty.

References

Constitution of the Republic of Albania.

Criminal Procedure Code of the Republic of Albania.

Decisions of the Albanian Constitutional Court 5, dated 22.02.2022; no. 22, dated 29.04.2021; no. 3, dated 23.02.2016.

Decision of the Albanian Constitutional Court No. 5, dated 02.03.2011; no. 22, dated 26.07.2006.

Decision in the case Zubac v. Croatia [GC], dated 05.04.2018, § 98.

Decision of the Albanian Constitutional Court No. 23 dated 19.01.2023.

Decision of the Criminal College of the Albanian Supreme Court no. 00-2020-485 dated 24.12.2022.

Decision No. 145 dated 15.05.2020.

Hasneziri, L. (2024). Terms of exclusion or limitation of contractual liability under English civil law *Academic Journal of Business, Administration, Law and Social Sciences*, Vol. 10. No. 1.

DOI: <https://doi.org/10.2478/ajbals-2024-0003>

Miha, E. (2024). Legal changes of the decision not to initiate a proceeding in the Albanian criminal procedure code, their implementation in practice. *Balkan Journal of Interdisciplinary Research*, Vol. 10. No. 1.

DOI: <https://doi.org/10.2478/bjir-2024-0008>

Vito, D. Rakar, I. (2024). Gender Responsive Budgeting (GRB) in Western Balkans between aspirations and reality. *European Journal of Economics, Law and Social Sciences*, Vol. 8. No. 1.

DOI: <https://doi.org/10.2478/ejels-2024-0002>