



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

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Prishtina, on 8 June 2018  
Ref. No.: RK 1255/18

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI17/18**

Applicant

**Ndue Lekaj**

**Request for constitutional review of Decision Pml. No. 155/2017 of the Supreme Court of Kosovo of 11 October 2017, Judgment AP. No. 506/2008 of the Supreme Court of Kosovo of 15 April 2009, and Judgment P. No. 75/2001 of the District Court in Peja, of 4 April 2008**

### **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 Ndue Lekaj from village Dol, Municipality of Gjakova (hereinafter: the Applicant) who is represented by Ibrahim Dobruna, a lawyer from Prishtina.

## **Challenged decision**

2. The Applicant challenges Decision Pml. No. 155/2017 of the Supreme Court of 11 October 2017, Judgment AP. No. 506/2008 of the Court of Appeals of 15 April 2009 and Judgment P. No. 75/2001 of the District Court in Peja, of 4 April 2008.

## **Subject matter**

3. The subject matter is the constitutional review of the aforementioned court decisions which allegedly violate the rights and freedoms guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to Fair and Impartial Trial] and Article 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 paragraph 1 (Right to a fair trial) and Article 5 (Right to liberty and security) of the European Convention on Human Rights (hereinafter: the ECHR).
4. The Applicant also requests the Constitutional Court (hereinafter: the Court) to impose an interim measure, which would suspend the execution of the Judgment of the Supreme Court of 15 April 2009, and order his immediate release from prison pending a retrial.

## **Legal basis**

5. The Referral is based on Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 27 [Interim Measures], Article 47 [Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo No. 03/L-121 (hereinafter: the Law) and Rules 29 [Filing of Referrals and Replies], and 54 [Request for Interim Measures] of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

## **Proceedings before the Court**

6. On 6 February 2018, the Applicant submitted the Referral to the Court.
7. On 8 February 2018, 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 Gërxhaliu-Krasniqi.
8. On 12 February 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 16 May 2018, 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

10. On 19 August 2000, B. Gj. sustained several gunshot wounds from a firearm. On the same day, the Applicant was arrested on suspicion of having committed the crime of attempted murder.
11. On 21 August 2000, the Municipal Public Prosecutor's Office in Peja filed a request with the District Court in Peja to conduct an investigation against the Applicant on the grounds of a reasonable suspicion that he committed the criminal offense of attempted murder, under Article 30, paragraph 1, of the Criminal Code of Kosovo (hereinafter: CCK) in conjunction with Article 19 of the Criminal Code of Yugoslavia (hereinafter: CCY).
12. On 23 August 2000, the Investigating Judge of the District Court in Peja (hereinafter: the investigating judge) authorized the investigation and ordered the Applicant to be placed in detention for one month (Decision HPQ- no. 95/2000). The Investigating Judge reasoned that,

*“Ordering of detention in the present case is necessary. Actually, if the defendant would be at liberty there is a grounded suspicion that he would attempt to repeat respectively to finish off the attempted offence, and further he may influence on the witnesses or try to flee in order to avoid the criminal responsibility.”*
13. On 23 August 2000, the Applicant was interviewed in the context of the investigation procedure and made a statement (Hep. no. 95/2000), which, *inter alia*, reads: „[...] on the critical day, I fired three-four times in the direction of the car in which the injured was [...] .” The Applicant claimed that this was in self-defense.
14. The investigating judge filed a request in writing to the District Court in Peja (hereinafter: the District Court) proposing the extension of the Applicant's detention for another two (2) months in order to complete the investigation.”
15. On 18 September 2000, the District Court rendered Decision KP. No. 62/00 which approved the request of the investigating judge and extended the detention on remand of the Applicant for another 2 (two) months, that is, until 19 November 2000.
16. On 25 October 2000, the Applicant's lawyer submitted a request to the investigating judge in which he proposed *“the termination of the detention of the accused (Applicant), and his release to defend himself in freedom, offering a monetary and personal guarantee.”*
17. On 2 November 2000, the investigating judge rendered Decision HPQ. No. 95/2000 on the termination of detention on remand of the Applicant, with the reasoning that:

*“[...] after hearing the claimant and the defendant and the reasons of the defense counsel for filing a request, the investigating judge of the District Court accepted the guarantees given to the court that the defendant (the*

*Applicant) would not be hiding or escaping from his current address. However, if the defendant does not appear before the court at his request, the Court will suspend Decision HPQ. No. 95/2000."*

18. On 11 July 2001, the District Public Prosecution in Peja filed Indictment PP. No. 143/2000, against the Applicant for the criminal offense of attempted murder as stipulated under Article 30, paragraph 2, item 2, of the LCP, in conjunction with Article 19, of the CCY.
19. On 22 February 2008, in the absence of the the Applicant, the District Court held a main hearing attended by a defense counsel assigned *ex officio*.
20. The District Court held that "[...] according to the Kosovo Police report, the accused has fled the country and it is impossible to have him brought by force at the court, whilst from the day the criminal offence was committed to the day of the main trial, there have passed more than seven years and this presents a special reason to hold the main trial in the absence of the accused."
21. On 22 February 2008, the District Court, held a main hearing in the presence of the public prosecutor, the lawyer for the victims and a lawyer appointed *ex officio* to represent the Applicant. The District Court found that the legal requirements for holding a main trial in the absence of the accused had been met in accordance with Article 300, paragraphs 3 and 4 of the CCY.
22. On 4 April 2008, the District Court rendered Judgment P. No. 75/01, which found the Applicant guilty and sentenced him to 5 years of imprisonment, including the time spent in detention from 19 August 2000 until 2 November 2000.
23. On 26 August 2008, the District Court in Peja issued a national order for the arrest of the Applicant.
24. On 27 August 2008, the District Public Prosecutor filed an appeal with the Supreme Court against Judgment P. No. 75/01 of the District Court regarding the length of the imprisonment, stating that "[...] the imposed sentence is low, taking into account all the circumstances of the criminal offense".
25. On 15 April 2009, the Supreme Court rendered Judgment Ap. No. 506/08, which approved the appeal of the District Public Prosecutor, increasing the imprisonment sentence of the Applicant from 5 (five) years to 7 (seven) years.
26. The reasoning of Judgment Ap. No. 506/08 says: "*The Court held the panel session in which the Public Prosecutor of Kosovo was not present, nor the accused, or his defense counsel, even though they were regularly summoned; it was found that the accused is abroad...*

[...]

*As the Judgment does not contain essential violations of the provisions of the criminal procedure, nor violations of the criminal law, for which this Court takes care ex-officio, the judgment is assessed solely in the spirit of the appealing allegations ?- the decision on punishment."*

27. The judicial authorities of the Republic of Kosovo submitted a request to the authorities of the Federal Republic of Germany for the arrest and extradition of the Applicant for the purpose of executing the judgment.
28. On 7 December 2016, the High Court of Stuttgart, acting upon the request of the judicial authorities of the Republic of Kosovo, rendered Decision 1 Ausl. 141/16, which ordered the arrest and extradition of the Applicant to the Republic of Kosovo.
29. The Applicant was extradited to the Republic of Kosovo and he is, at present, in the Correctional Center Dubrava where he is serving the imprisonment sentence of 7 years.
30. On 22 June 2017, the Applicant's lawyer submitted to the Supreme Court a request for protection of legality against Judgment P. No. 75/2001 of the District Court in Peja of 4 April 2008 and Judgment AP. No. 506/2008 of the Supreme Court of Kosovo of 15 April 2009.
31. On 11 October 2017, the Supreme Court rendered Decision Pml. No. 155/2017 with which it rejected the request for protection of legality as out of time, stating that: *"[...] from the case file it results that the convict had a defense counsel during the entire criminal proceedings (as he had absconded), he was served with the Judgment of the Supreme Court of Kosovo on 10.06.2009, while he submitted the request for protection of legality on 22.06.2017, that is, more than 8 years after the receipt of the judgment."*

### **Applicant's allegations**

32. The Applicant considers that in their entirety the court proceedings conducted before the District Court in Peja and the Supreme Court, in both the procedural and substantive aspects, were unfair as his right to defend himself before the courts in person and through an attorney was violated.
33. The Applicant alleges that as a result of the non-observance of the investigative and court proceedings, and by holding a trial in the absence of the accused without the presence of defense counsel authorized by him, there has been a violation of his constitutional rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial] and 53 [Interpretation of Human Rights Provisions] of the Constitution, as well as Article 6, paragraph 1, (Right to a fair trial) and Article 5 (Right to liberty and security) of the ECHR.
34. The Applicant further states *"[...] that the principle of equality of arms and the principle of contradiction, were also violated which also applies to the personal service of a judgment..."*
35. The Applicant requests the Court to hold that the trial in the absence of the accused and the appeal trial held in the absence of a defense attorney, constitute a violation of his constitutional rights and freedoms, as well as the rights and freedoms guaranteed by the ECHR.

36. The Applicant requests the Court to annul all judgments and remand the case for retrial.

### **Admissibility of Referral**

37. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law, and as further specified in the Rules of Procedure.

38. 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.*

39. The Court refers to Article 49 [Deadlines] of the Law, which establishes:

*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.*

40. In this regard, the Court considers that the Applicant is an authorized party, that he exhausted all legal remedies.

41. However, the Court also refers to Article 48 [Accuracy of the Referral] of the Law, which states:

*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.*

42. In addition, the Court takes into account Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresees:

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

*(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant*

*(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.*

43. In the present case, the Court notes that the Applicant's main allegations related to the alleged violations of the rights and freedoms guaranteed by the Constitution and the ECHR, are brought in connection to the fact:
- i) that the regular courts conducted the proceedings and rendered judgments in which he was found guilty in his absence (in absentia).*
  - ii) that the Supreme Court, without his presence or the presence of a lawyer, modified the judgment of the District Court regarding the length of the imprisonment sentence.*
44. In this regard, the Court notes that the Applicant's court proceedings began on 21 August 2000, when the Municipal Public Prosecutor's Office in Peja filed a request with the District Court in Peja to conduct investigations against the Applicant on grounds of a reasonable suspicion that he committed the criminal offense.
45. The Court further notes that the Applicant's criminal proceedings ended on 15 April 2009, by final Judgment Ap. No. 506/08 of the Supreme Court, by which the subject of the Applicant's dispute regarding the criminal liability and the sentence is completely resolved.
46. The Court notes that based on the case file, it follows that the final Judgment Ap. No. 506/08 of the Supreme Court, was served on the Applicant's legal representative on 10 June 2009.
47. In this regard, the Court recalls Article 49 [Deadlines] 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..."*
48. Based on all the above, the Court concludes that in the proceedings which began on 21 August 2000 and ended on 15 April 2009, the Applicant's criminal liability was established. Therefore, the Court will not deal with determining the grounds of the Applicant's allegations that the regular courts in this part of the proceedings violated his rights and freedoms guaranteed by the Constitution and the ECHR, because the legal rules provided by Article 49 of the Law and Rule 36.1. (c) of the Rules of Procedure Law have not been met.
49. It follows that the Applicant's Referral regarding this part of the court proceedings was not submitted within the legal deadline established in Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.
50. The Court further notes that the Applicant on 22 June 2017 submitted to the Supreme Court a request for protection of legality in which he requested the repetition of procedure in order to determine again his criminal liability.
51. The Court further notes that on 11 October 2017, the Supreme Court rendered Judgment Pml. No. 155/2017, which rejected the request for protection of legality of the Applicant, as out of time, providing clear and legal reasoning,

which reads „[...] throughout the criminal proceedings, the Applicant had a defense counsel [...] to whom the judgment was served on 10 June 2009 [...] the request for protection of legality was submitted by the Applicant on 22.06.2017, that is, more than 8 years after the receipt of the judgment.“

52. Accordingly, the Supreme Court, in this proceedings the did not deal with the determination of the Applicant's guilt or innocence, but dealt exclusively with the procedural issue concerning the deadlines, whereby it concluded that the request for protection of legality was submitted by the Applicant out of the deadline provided by law.
53. In this regard, the Court concludes that the Applicant's allegations related to the violations regarding Judgment Pml. No. 155/2017 of the Supreme Court, are manifestly ill-founded.
54. Based on the above, the Court concludes that the Applicant did not provide relevant arguments to justify his allegations that his constitutionally guaranteed rights and freedoms, as well as his rights guaranteed by the ECHR, were violated in any way.
55. The Court reiterates that it is the Applicant's obligation to substantiate his allegations and submit *prima facie* evidence for a violation of the rights guaranteed by the Constitution and the ECHR. The assessment followed is made in accordance with the jurisdiction of the Court (see: case of the Constitutional Court No. K119/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Sylja*, Resolution on Inadmissibility of 5 December 2013).
56. Therefore, the Court concludes that the Applicant's Referral is manifestly ill-founded on a constitutional basis and is to be declared inadmissible in accordance with Rule 36 (1) (c) (d) and (2) (b) of the Rules of Procedure.

### **Request for interim measure**

57. The Court recalls that the Applicant also requested the Court to impose the interim measure because “*which would suspend the enforcement of the Judgment of the Supreme Court of 15 April 2009, and to order his immediate release from prison pending a retrial.*“
58. In this regard, the Court refers to Article 27 [Interim Measures] of the Law, which provides:
  1. “*The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.*”
59. The Court also refers to Rule 55 (4) of the Rules of Procedure, which specifies:

“*Before the Review Panel may recommend that the request for interim measures be granted, it must find that:*

*“(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*

*(...)*

*If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application”*

60. The Court reiterates the conclusion that the Applicant's Referral was declared inadmissible, as manifestly ill-founded, because the Applicant has not provided any *prima facie* evidence on the admissibility of the Referral.
61. Therefore, in accordance with Article 116.2 of the Constitution, Article 27.1 of the Law and Rule 55 (4) of the Rules of Procedure, the request for interim measure is rejected as ungrounded.

### **FOR THESE REASONS**

The Constitutional Court of Kosovo, in accordance with Article 27.1 of the Law and Rules 36 (1) (c), (d) and 36 (2) (b), 55 (4) of the Rules of Procedure, in the session held on 16 May 2018, unanimously

### **DECIDES**

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for interim measure;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 paragraph 4 of the Law; and
- IV. This Decision is effective immediately.

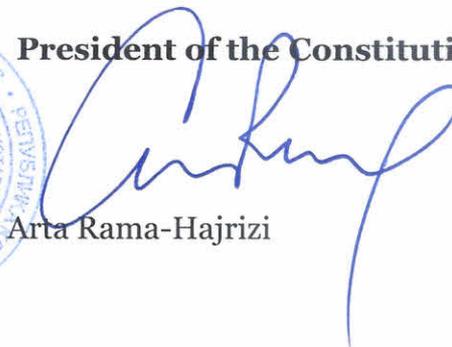
**Judge Rapporteur**



Snezhana Botusharova



**President of the Constitutional Court**



Arta Rama-Hajrizi