



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

Prishtina, 21 October 2019  
Ref. no.:MM 1460/19

## DISSENTING OPINION

of Judge Selvete Gërxhaliu – Krasniqi

in case KI10/18

I respect the decision of the majority of the judges of the Constitutional Court (hereinafter: the majority). However, I cannot agree with this decision reached by the majority for the following reasons:

*I dissent from the decision of majority because:*

1. Failure of the majority to clearly define what period of the Applicant's detention on remand it declares in violation of the Constitution;
2. Failure of the majority to address the right to compensation under paragraph 5 of Article 29 of the Constitution; and
3. The majority failed to assess the reasons for the extension of detention on remand, in accordance with the ECtHR case law.

### SCOPE OF THE REFERRAL

1. The Applicant requested the Court to assess the constitutionality of his stay in detention on remand, stating: *"The further stay of the defendant under the measure of detention is a violation of all fundamental rights determined by national acts and also international covenants, and also the stay under the measure of detention for more than 7 years represents a fundamental violation of the principle of fair trial and it supersedes the principle of presumption of innocence, by taking into consideration that the defendant is serving a sentence and not a security measure as defined by the law"*.
2. The Applicant alleges that: *"by the decisions of the regular courts, namely Judgment PML. No. 357/2017 of the Supreme Court, of 22 December 2017, Decision PN1. No. 2156/2017 of the Court of Appeals, of 6 December 2017,*

*Decision PKR. No. 155/15 of the Basic Court in Ferizaj, it was decided in an unlawful manner regarding the detention on remand of the accused [...]*" .

3. In the present case the Applicant alleges that "[...] *the abovementioned decisions extended for more than 7 years the detention measure, with the allegation that there is grounded suspicion and in fact his basic constitutional rights were [not] disregarded, since it is not known when this matter will be completed.*"
4. The Applicant alleges these decisions infringed and violated the fundamental constitutional rights of the accused, "**lawfulness of arrest or detention** ", Article 29, paragraph 1 item (2) of the Constitution in conjunction with Article 5 paragraph 1 of the ECHR. The Applicant also requests the assessment of his constitutional rights: "**that the case is speedily decided**", Article 29, paragraph 4 of the Constitution, in conjunction with Article 5 paragraph 4 of the ECHR.
5. In the allegations concerning the violation of Article 31 of the Constitution, the Applicant requests the Court to make an assessment of the: "[...] **constitutional right to trial within a reasonable time**".
6. The decision of the majority rightly identifies that "[...] *the review of claims "within a reasonable time" brought by a person remanded in detention that just concern the stages of the proceedings to which Article 5 paragraph 3 apply, more specifically, from arrest to conviction by the trial courts, fall only under the scope of Article 5 and not the scope of Article 6 (1) of the ECHR (See ECtHR Case Abdoella v. Netherlands, Application No. 12728/87, Judgment of 25 November 1992, paragraph 24)*"<sup>1</sup>.
7. Therefore, the constitutional referral must be dealt within the meaning of Article 29 of the Constitution in conjunction with Article 5 of the ECHR. In the following I will briefly explain the reasons for my disagreement with the decision of the majority, specifying the majority's failures to deal with the constitutional referral, in accordance with Article 29 of the Constitution in conjunction with Article 5 of the ECHR.

### **What period of the Applicant's detention on remand the decision of the majority declares in violation of the Constitution**

8. It follows from the case file that the Applicant was arrested on 31 July 2010. The Applicant requested from the Court the constitutional review of the arrest and detention on remand until 22 December 2017.<sup>2</sup> *In this case the Applicant states that "the further detention on remand of the defendant is a violation of all the fundamental rights set forth in domestic law as well as in international conventions [...]"*<sup>3</sup>

---

<sup>1</sup> Judgment, paragraph 112.

<sup>2</sup> The Court did not deal with the period after 22 December 2017 until 6 April 2018, this period relates to the decisions by which the regular courts have decided regarding the Applicant's criminal liability as well as the period of review of appeals until 19 February 2019. Judgment of the Basic Court in Ferizaj PKR no. 155/15 of 6 April 2018, Judgment of the Court of Appeals of Kosovo, PAKR no. 324/2018 of 7 August 2018, as well as the Judgment of the Supreme Court of Kosovo, PML. Nr. 19/2019 of 19 February 2019.

<sup>3</sup> Judgment, paragraph 60.

9. *The decision of the majority held that “.....Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017 is not in compliance with Article 29 [Right to Liberty and Security], paragraph 1, item (2) of the Constitution of the Republic of Kosovo, in conjunction with Article 5 (Right to liberty and security), paragraph 3 of the European Convention on Human Rights.”<sup>4</sup>*
10. The question arises, what period of time between 31 July 2010 and 22 December 2017 of the Applicant's detention on remand is covered by the judgment of the majority, which was declared contrary to Article 29 of the Constitution in conjunction with Article 5 of the ECHR.
11. I consider that, due to the specific importance of the right to liberty and security within the individual rights and freedoms, and because of the Applicant's stay in detention on remand for a long period of time, the Court should clearly state what is the duration of detention on remand that the Court has declared to be not in compliance with Article 29 of the Constitution in conjunction with Article 5 of the ECHR.
12. In its case law, the ECtHR has addressed and clarified the importance of the right to liberty and security in a democratic society, its relation to the principle of legal certainty and rule of law, specifying that the general purpose of the right to liberty and security is to ensure that no one can be arbitrarily deprived of liberty. (See, *mutatis mutandis*, ECtHR Judgment of 13 December 2013, *El-Masri v. The Former Yugoslav Republic of Macedonia*, No. 39630/09, paragraph 230).<sup>5</sup>
13. The ECtHR in the same Judgment, in item 7 “[...] holds that the applicant's detention in the hotel for twenty-three days was arbitrary, in breach of Article 5 of the Convention, (see ECtHR Judgment of 13 December 2013, *El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/09, item 7).
14. The right to liberty and security in constitutional democracies is an essential right of the individual. The arrest and detention as a form of deprivation of liberty has a special place in the Constitution and in the ECHR. Any decision on the basis of which an individual has been detained or extended the detention is subject to judicial review, based on clear criteria of the ECtHR case law.

### **Failure of the Court to address the right to compensation pursuant to paragraph 5, of Article 29 of the Constitution**

15. The accurate determination of the Applicant's detention on remand, which in the decision of the majority was declared to be contrary to Article 29 of the Constitution in conjunction with Article 5 of the ECHR, is crucial because:

---

<sup>4</sup> Judgment ,item II.

<sup>5</sup> See, case of the Court KI63/17, Applicant *Lutfi Dervishi*, Resolution on Inadmissibility, 16 November 2017, paragraph 47.

- a) accurate determination of the right to compensation of the individual in case the decisions of the regular courts are declared in violation of Article 29 of the Constitution, and
- b) the impact of the Judgment on the advancement of the constitutional order, and the protection of human rights and freedoms in the Republic of Kosovo, in the application of Article 29 paragraph 5 of the Constitution.
16. With regard to the right to compensation, the Constitution in Article 29 paragraph 5 expressly states that: *"Everyone who has been detained or arrested in contradiction with the provisions of this article has a right to compensation in a manner provided by law"*.
17. The decision of the majority rightly assesses the issue of compensation in the Applicant's case. The decision of the majority states: *"[...] the Court further clarifies that it has no legal authority to determine any form or manner of compensation in cases where it finds a violation of the relevant constitutional provisions, in the specific case of Article 29 of the Constitution (see also the case of the Constitutional Court in case KI108/18, Applicant Blerta Morina, Resolution on Inadmissibility of 1 October 2019, paragraph 196)."*<sup>6</sup>
18. The finding of the majority that the Court does not have legal authority to determine any type or manner of compensation referring to case KI108/18, is ungrounded. Case KI108/18 has absolutely nothing to do with Article 29 of the Constitution, namely the right to liberty and security. In case KI108/18 the subject matter was the constitutional review of Article 23 [Human Dignity]; Article 24 [Equality Before the Law], and Article 36 [Right to Privacy] of the Constitution in conjunction with Article 8 [Right to respect for private and family life] of the ECHR.<sup>7</sup>
19. I regret to note that the decision of the majority does not even take into account the existence of the constitutional norm, which is embodied in Article 29 of the Constitution itself, paragraph 5. It is the primary duty of the Court to interpret and, in the present case, to apply the constitutional norm. It is equally important to note that Judgment KI10/18 is the first Judgment of the Court under Article 29 of the Constitution in conjunction with Article 5 of the ECHR.
20. In this Judgment, the Applicant's right to compensation was ignored by the majority, which failed to consider and deal with it within the constitutional norm. The Constitution recognizes the right of a person detained or arrested contrary to the provisions of Article, 29 to enjoy the right to compensation in the manner provided by law.
21. In addition, the majority in this Judgment has failed to bring to the attention of the competent authorities the positive obligation to issue a law<sup>8</sup> that would compensate individuals detained or arrested in breach of the provisions of Article 29 of the Constitution.

---

<sup>6</sup> Judgment, paragraph 119.

<sup>7</sup> Resolution on Inadmissibility Case KI108/18, Applicant Blerta Morina, of 1 October 2019, paragraph 4.

<sup>8</sup> The Assembly of the Republic of Kosovo as a legislative body is obliged by the Constitution to issue a special law pursuant to paragraph 5, Article 29 of the Constitution.

22. It is incomprehensible, the hesitancy of the majority with the decision it has rendered itself, the decision of the majority states: “[...] *It is, therefore, understandable that this judgment cannot have any effect as to the status of the Applicant. However, the Court considers that it is very important that through this Judgment of the Constitutional Court will be set a new standard in the case law in the Republic of Kosovo and, consequently, the regular courts will in future have to comply with the principles and standards elaborated in this Judgment, which have been interpreted in accordance with the ECtHR case law.*”<sup>9</sup> What new standard for case law is set by this judgment?

### **Majority failed to assess reasons for extension of the detention measure on the basis of ECtHR case law**

23. The majority finds that, “[...] *the challenged Judgment of the Supreme Court Pml. No. 357/2017, of 22 December 2017, which rejected the Applicant’s request for protection of legality against Decision PN1. No. 2156/2017 of the Court of Appeals, of 6 December 2017 and the Decision PKR. No. 155/15 of the Basic Court in Ferizaj of 24 November 2017 is not in compliance with Article 29, paragraph 1, item (2) of the Constitution, in conjunction with Article 5, paragraph 3, of the ECHR.*”<sup>10</sup>
24. The majority considers that the decisions of the three regular courts are not in compliance with Article 29, paragraph 1, item (2) of the Constitution, in conjunction with Article 5, paragraph 3, of the ECHR, reasoning that “[...] *The Court also notes that the argument given in the decisions of the three regular courts “in particular the fact that the relations between the family of the defendant Fahri Deçani and the family of the deceased [B.K.] are still deteriorated, the release of the defendant at liberty may lead to the repetition of the criminal offense”, cannot be infinitely the basis for the extension of detention on remand.*”<sup>11</sup>
25. Does this mean that only these three decisions (24 November 2017-22 December 2017)<sup>12</sup> of the regular courts are not reasoned in accordance with Article 29 paragraph 1, item (2) of the Constitution, in conjunction with Article 5, paragraph 3 of the ECHR!
26. The Applicant requested the Court to assess whether the decisions of the regular courts imposing and extending detention on remand for 7 years are in accordance with the Constitution. The Applicant has raised this allegation within the right, **that the case be decided by the court within the shortest possible time, and in case the arrest or detention is unlawful, to order the release of the person.** This request of the Applicant falls under Article 29, paragraph 4 of the Constitution in conjunction with Article 5 paragraph 4 of the ECHR. Dealing with the request within the meaning of paragraph 4 of Article 29 of the Constitution would bring the

---

<sup>9</sup> Judgment, paragraph 117.

<sup>10</sup> Judgment, paragraph 115.

<sup>11</sup> Judgment, paragraph 101.

<sup>12</sup>Judgments that have been declared incompatible with the Constitution: Judgment of the Supreme Court Pml. no. 357/2017 of 22 December 2017 rejecting the Applicant’s request for protection of legality against Decision of the Court of Appeals PN1. no. 2156/2017 of 6 December 2017 and the Decision of the Basic Court in Ferizaj PKR. no. 155/15, of 24 November 2017.

decision of the majority, in a *corpus habebas*, within the criteria of Article 5 of the ECHR.

27. However, let us return to the line of reasoning of the decision of the majority. The majority in the decision never addressed the question of whether the facts and the legal reasoning of the three regular courts<sup>13</sup> are well-founded and proven, and if they are well-founded and proven, what are the obligations of the authorities responsible when it comes to physical security, and the right to life of an arrested person, who is in detention pending trial.
28. If the facts and legal reasoning of the three regular courts are well founded, then is there a sufficient basis for the decisions of the three regular courts to be declared incompatible with the Constitution solely on the basis of the “*stereotype*” wording?<sup>14</sup>
29. In order to clarify to the Applicant what are the fundamental reasons for extending detention on remand under the ECtHR case law, also applicable in the present case, and with a view to establishing a standard of treatment of the right to liberty and security in the case law of the Republic of Kosovo, in this Judgment, the majority should have considered and explained the four fundamental reasons which serve as basic principles for the continuation of the detention of persons pending trial.
30. It is noteworthy that the majority properly identified the fundamental reasons for the extension of detention on remand, although it reiterates twice in the Judgment the reasons for the extension and detention under the ECHR case law, but does not consider those reasons at all.<sup>15</sup>
31. According to the case law of the ECtHR, the fundamental reasons for continuing detention on remand are:[...] 1) *the risk of flight*; 2) *interference with the court*; 3) *prevention of crime*; 4) *the need to preserve public order* (See ECtHR cases cited above, case *Tiron v. Romania*, paragraph 37; case *Smirnova v. Russia*, paragraph 59; and case *Piruzyan v. Armenia*, paragraph 94”.<sup>16</sup>
32. The four fundamental reasons for extension of detention of persons pending trial are required to be met cumulatively, in each case considering the imposition and extension of detention measure.

---

<sup>13</sup> Judgment, paragraph 101.

<sup>14</sup> Judgment, paragraph 103.

<sup>15</sup> Judgment, paragraphs 77 and 94.

<sup>16</sup> For more see. Guide to Article 5 of the Convention, Right to Liberty and Personal Security, Council of Europe / ECtHR, 2014 , p. 27-29.

## Conclusion:

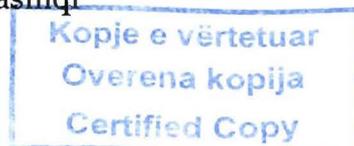
I respectfully express my dissent with the decision of the majority:

1. Because, the Court missed the opportunity that Judgment KI10/18, produces a positive effect in improving the constitutional order of the Republic of Kosovo, in the sense of protecting individual rights and preventing arbitrariness in the application of Article 29 of the Constitution in conjunction with Article 5 of the ECHR;
2. The decision of the majority is unclear in defining what period of time of the Applicant's detention on remand declares in violation of the Constitution;<sup>17</sup>
3. The decision of the majority failed to put into motion paragraph 5 of Article 29 of the Constitution. Article 29 is the only constitutional norm, enshrined in the Constitution of the Republic of Kosovo, which expressly provides for the right to compensation in the event that a person is detained or arrested contrary to the provisions of this Article.
4. The majority in the present case failed to assess the fundamental principles for the extension of the detention measure based on the ECtHR case law..

Respectfully submitted,

Selvete Gërxhaliu-Krasniqi

Judge



---

<sup>17</sup> The Applicant has spent 7 years in detention on remand, expressed in 2555 days, while if expressed in months, 84 months.