



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

Prishtina, on 5 February 2018
Ref. No.: RK 1193/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI88/17

Applicant

Slobodan Gavrić

**Constitutional review of
Judgment Pml. No. 55/2017 of the Supreme Court
of 3 April 2017**

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 Slobodan Gavrić, a resident of Belgrade, Republic of Serbia (hereinafter: the Applicant), who is represented by Dejan Vasić, a lawyer from Mitrovica.

Challenged decision

2. The Applicant challenges Judgment Pml. No. 55/2017 of the Supreme Court of 3 April 2017, which rejected as ungrounded the Applicant's request for protection of legality against Judgment PAKR. No. 591/2016 of the Court of Appeals of 15 November 2016, and Judgment PKR. No. 392/15 of the Basic Court of 29 June 2016.
3. Judgment Pml. No. 55/2017 of the Supreme Court was served on the Applicant on 24 April 2017.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged judgment, which has allegedly violated the Applicant's rights and freedoms guaranteed by paragraph 2 of Article 5 [Languages], and paragraph 2 of Article 24 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

Legal basis

5. The Referral is based on Article 113 (7) of the Constitution, Article 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 2 August 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On 4 August 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Arta Rama-Hajrizi and Bekim Sejdiu.
8. On 8 August 2017, the Court notified the Applicant about the registration of the Referral and requested a signed power of attorney for his legal representative. On the same date, the Court sent a copy of the Referral to the Supreme Court.
9. On 4 September 2017, the Applicant submitted a signed power of attorney for his legal representative.
10. On 10 January 2018, the Review Panel considered the report of the Judge Rapporteur and made a unanimous recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 25 December 2014, the Applicant was transporting explosives from Belgrade to Prishtina, allegedly for the purpose of sale to a third party. He was stopped in

Pristina and searched by police, which found in his car a bag containing 23 packages of explosives with a total weight of 12.219 kilograms..

12. On 10 July 2015, the Special State Prosecutor (hereinafter, the Prosecutor) filed an indictment against the Applicant for the criminal offense of *'Preparation of terrorist offenses or criminal offenses against the constitutional order and security of the Republic of Kosovo'*, as provided in Article 144, paragraphs 1 and 3, in conjunction with Article 135, paragraph 1, item 1.9, of the Criminal Code of Kosovo (hereinafter, the CCK).
13. On 29 June 2016, the Basic Court in Prishtina (Judgment PKR. No. 591/2016) found the Applicant guilty of the offences he was charged with and sentenced him to a term of imprisonment of 13 years.
14. The reasoning of the Judgment of the Basic Court reads that the Applicant *"committed the criminal offense for which he was found guilty and criminally liable, committed with intent, because he was aware of his actions and wanted to commit the offence"*.
15. The Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court, on the grounds of *"essential violation of the legal provisions of the criminal procedure; erroneous and incomplete determination of factual situation and a decision on punishment."* In particular, the Applicant alleged that the Basic Court had not sufficiently established his "intent" to commit the criminal offense, as a constituent part of the criminal offense for which he was convicted.
16. On 15 November 2016, the Court of Appeals (Judgment PAKR. No. 591/2016) partially approved the Applicant's appeal regarding the duration of the sentence, and rejected the other grounds of appeal. The Court of Appeals reduced the sentence from 13 years to 11 years of imprisonment.
17. The reasoning of the Judgment of the Court of Appeals reads that *"the appealed judgment does not contain essential violations of the provisions of the criminal procedure stated in the appeal (...) and which would have influenced on the modification of the judgment and the requalification of the criminal offense"*.
18. The Applicant submitted to the Supreme Court a request for protection of legality, on the grounds of *"essential violations of the provisions of the criminal procedure (Article 384, paragraph 1, sub-paragraph 1.10, in conjunction with Article 232, paragraph 1, sub-paragraph 1.2, of the CPCK) and violation of the criminal law"*.
19. The Applicant also alleged that the Court of Appeals had violated the Criminal Code because *"Article 2, paragraph 3, of the CCK is violated as in this case should have been used Criminal Code in Serbian version by which the actions of the convict does not present legal figure of the criminal offence because Article 144.3 in Serbian version does not envisage carrying materials into territory of Kosovo"*.

20. On 3 April 2017, the Supreme Court (Judgment PML. No. 55/2017) rejected the request for protection of legality as ungrounded.
21. In its Judgment, the Supreme Court reasoned that *“the second instance court in its judgment has reasoned all relevant facts in this criminal matter including legal qualification of the criminal offence (page 15 of the judgment) which this court has also granted”*.

Applicant’s allegations

22. The Applicant claims that he was convicted for “bringing explosives into Kosovo” on the basis of the Albanian language version of Article 144.3 of the CCK, whereas the Serbian language version of Article 144.3 does not refer to bringing explosives into Kosovo. As a Serb, the Applicant alleges that only the Serbian language version of the law should be applied to him.
23. The Applicant alleges that this violates Article 5 (1) of the Constitution, because both Albanian and Serbian are official languages of the Republic of Kosovo.
24. The Applicant states that *“Article 5, paragraph 1, of the Constitution prescribes that the official languages in the Republic of Kosovo are Albanian and Serbian. Article 144, paragraph 3 of the Serbian version of the law reads “Every person who carries out of the territory of Kosovo explosives and weapons...” thus the Serbian version of the law does not provide that the act of execution can be carrying in, but only carrying out”*.
25. Furthermore, the Applicant alleges that, by applying the Albanian language version of the CCK to him, the challenged decision violated his right to equality before the law, as guaranteed by Article 24 (2) of the Constitution, because *“Article 24.2 of the Constitution also prohibits discrimination on this basis”*.
26. The Applicant requests the Court to *“render a modifying decision regarding the qualification of the criminal offence and proportionally reduce the sentence”*.

Admissibility of Referral

27. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution and as further provided in the Law and foreseen in the Rules of Procedure.
28. 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.”*

29. The Court notes that the Applicant is an authorized party, the Referral was submitted in accordance with the deadlines prescribed in Article 49 of the Law, and the Applicant has exhausted all legal remedies.

30. However, the Court further refers to Article 48 of the Law [Accuracy of the Referral], which provides:

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. The Court further refers to Rule 36 (1) (d) and (2) (b) of the Rules of Procedure, which foresee:

(1) The Court may consider a referral if:

(...)

(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:

(...)

(d) the Applicant does not sufficiently substantiate his claim.

32. The Court notes that the Applicant claims that he was convicted of a crime as it is defined in the Albanian language version of the CCK, whereas in the Serbian language version of the CCK the relevant provision does not contain the specific element of “bringing into Kosovo” of explosives. The Applicant considers that only the Serbian language version of the law should be applied to him as a Serb.

33. In fact, the Court recalls that the Applicant alleges that the regular courts have violated his right to equality before the law regarding equality of official languages, guaranteed by Articles 5 and 24 (2) of the Constitution, as it “prohibits discrimination on this basis”.

34. However, the Applicant is not presenting facts and substantiating an allegation on the basis of discrimination; the presented facts and allegations may be seen, in essence, from the perspective of the principle of legality as protected by Article 33 [Principle of Legality and Proportionality in Criminal Cases] of the Constitution, as well as by Article 7 (No punishment without law) of the European Convention on Human Rights (hereinafter, the ECHR).

35. In that respect, the Court refers to Article 33 [Principle of Legality and Proportionality in Criminal Cases] of the Constitution, which establishes:

1. No one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.

36. The Court also recalls Article 7 (No punishment without law) of the ECHR, which provides:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed.

37. At the outset, the Court recalls that, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, “*human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*”.
38. In this regard, the Court further recalls that the European Court of Human Rights (hereinafter, the ECtHR) established the fundamental principles on Article 7 of the ECHR, connected with Article 33 of the Constitution, particularly in the cases *S.W. v. the United Kingdom*, Application no. 20166/92, Judgment, 22 November 1995, §§ 34-36: *Streletz, Kessler and Krenz v. Germany*, Applications Nos. 34044/96, 35532/97 and 44801/98, Judgment, 22 March 2001, § 50: and *Korbely v. Hungary*, Application No. 9174/02, Judgment, 19 September 2008, § 69.

Fundamental principles

39. The ECtHR determined that the guarantee enshrined in Article 7 of the ECHR is an essential element of the rule of law and occupies a prominent place in the ECHR system of protection. Thus its object and purpose requires that Article 7 should be construed and applied in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment. (See *Korbely v. Hungary, Ibidem*, § 69).
40. Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. The Court has thus indicated that when speaking of “law” Article 7 alludes to (...) a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability. (See *Korbely v. Hungary, Ibidem*, § 70).
41. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances (...). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. (See *Jorgic v. Germany*, no. 74613/01, §§ 100-101, 12 July 2007;

Streletz, Kessler and Krenz, cited above, § 50; and *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, judgments of 22 November 1995, Series A no. 335-B, pp. 41-42, §§ 34-36, and Series A no. 335-C, pp. 68-69, §§ 32-34, respectively). (See *Korbely v. Hungary*, *Ibidem*, § 71).

42. Furthermore, the Court reiterates that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (*see Waite and Kennedy v. Germany [GC]*, no. 26083/94, § 54, *ECHR* 1999-I). (See *Korbely v. Hungary*, *Ibidem*, § 72).

Application of the above principles to the Referral

43. In that respect, the Court recalls that the Applicant claims that the act of bringing explosives into Kosovo was not defined as a criminal offense in the Serbian language version of the CCK at the time the act was committed; bringing explosives into Kosovo, he states, was only defined as a criminal offense in the Albanian language version of the CCK.
44. The Court considers that the Applicant is essentially alleging that the law that was applied to him was not sufficiently accessible and foreseeable, because the Serbian language version did not clearly specify that the acts which he committed were in fact defined as a criminal offense.
45. The Court recalls that the Applicant raised his allegation before the Basic Court, the Court of Appeals and the Supreme Court, in his request for protection of legality.
46. The Basic Court took note of the principle of “*nullum crimen sine lege, nulla poena sine culpa*”. It considered that “*the accused was aware that by his actions he will cause prohibited consequences in foreign country, consequences which by the law are envisaged being criminal offences*”.
47. The Court of Appeals considered that “*there was an intent and decisiveness of the accused to commit the criminal offence; whereas, by no evidence was established that he was forced or under threat as it is alleged by the defence; while the first instance court has provided sufficient reasoning which it was based on when establishing existence of criminal offence*”.
48. The Supreme Court specifically analysed the Applicant's allegation on that it should have been applied the law in Serbian language, which would have been more favorable to the Applicant.
49. In fact, the Supreme Court noted that “*we are here dealing with one, mainly same law in two languages and by no means we are dealing with different laws as it is claimed in the request*”. The Supreme Court considered that “*it is true fact that provision of Article 144.3 of CCK provides that whoever sends or carries into or out of the territory of the Republic of Kosovo weapons, explosives, poison, supplies, ammunition or other material for the commission of one or more criminal offenses (chapter XIV), shall be punished by*

imprisonment from five (5) to fifteen (15) years and in the Serbian version of the same provision is missing the word “into” (...or out territory of Kosovo...). However, it is about a technical error of translation into Serbian language although it is about the same provision of the Law no. 04/L-082 of 20 April 2012 which is applicable”.

50. Furthermore, the Supreme Court concluded that *“the convict was found guilty for criminal offence in compliance with Article 144.3 in conjunction with Article 135, paragraph 1, item 1.9 of CCK, therefore, provision of Article 144.3 must be interpreted pursuant to item 1.9, paragraph 1 of Article 135 of CCK which relates to criminal offences envisaged by Articles 372-377 (chapter XXX) which cover import, export, purchase, transport, production of weapons and which are entirely in compliance with the same provision in Serbian version of the criminal code”.*
51. The Court notes that the Supreme Court’s reasoning rests on three pillars: the CCK is one and same law in two languages; the missing word “into” (...or out territory of Kosovo...) in the Serbian version is a technical error of translation into Serbian language; and the Applicant was convicted of the criminal offense defined in Articles 144 (3), in conjunction with Article 135 of the CCK, which also defines criminal offenses including the import of explosives into Kosovo.
52. In fact, the Court notes that the Applicant was convicted on the basis of Article 144(3) in conjunction with Article 135 of the CCK. As such, the relationship between these two articles makes it clear that importation, or “bringing into Kosovo”, of explosives is a constituent part of the crimes defined as terrorist offenses. In that respect, the Court also notes that the Serbian language version of Article 135 of the CCK does not differ from the Albanian language version.
53. In that respect, the Court observes that Article 135 [Definitions for terrorism provisions in articles 121-145] of the Criminal Code (Law No. 04/L-082) on Criminal Code of Kosovo provides:

For the purposes of Articles 121-145 of this Code terms used below shall have the following meaning:

1. Terrorism, act of terrorism or terrorist offense - the commission of one or more of the following criminal offenses with an intent to seriously intimidate a population, to unduly compel a public entity, government or international organization to do or abstain from doing any act, or to seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of the Republic of Kosovo, another State or an international organization:

[...]

1.9. unauthorized supply, transport, production, exchange or sale of weapons, explosives or nuclear, biological or chemical weapons in violation of Articles 176, 369 or 372-377 of this Code.

54. In these circumstances, the Court reiterates that it is primarily for the regular courts to resolve problems of interpretation of the legislation; the Court's role is confined to ascertaining whether the effects of such an interpretation are

compatible with the Constitution and the ECHR and, in principle, it is not its task to substitute itself for the regular courts. (See *Korbely v. Hungary, Ibidem*, § 72).

55. The Court recalls that the object and purpose of Article 7 of the ECHR is satisfied where the individual can know from the wording of the relevant provisions – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts will make him criminally liable. (See *Korbely v. Hungary, Ibidem*, § 70).
56. In fact, the Court reiterates that Article 7 of the ECHR permits clarification of the rules of criminal liability through judicial interpretation, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. (See *Korbely v. Hungary, Ibidem*, § 71).
57. As such, the Supreme Court considered that the law was sufficiently accessible and foreseeable to the Applicant before he committed the acts of which he was convicted.
58. Before the foregoing, the Court considers that the Supreme Court acted in accordance with its jurisdiction and the effects of its legal interpretation are compatible with the Constitution and with the ECHR.
59. Moreover, the Court considers that it was up to the Applicant's to substantiate his allegation that he was unfairly and arbitrarily convicted for committing an act that was not defined as a criminal offense in the Serbian language version of the CCK.
60. Thus, the Court concludes that the evidence presented by the Applicant does not in any way justify the allegation that he was convicted of committing acts which were not defined as criminal offenses in the law, in violation of his right as guaranteed by Article 33 of the Constitution, in conjunction with Article 7 (1) of the ECHR.
61. Therefore, the Court finds that the allegation is manifestly ill-founded on a constitutional basis, as the Applicant has neither substantiated his allegations on a constitutional basis nor has he showed that the decisions of the regular courts have in any been unfair or arbitrary.
62. The Court recalls that the Applicant alleged that the challenged decision violated his right to equality before the law, as guaranteed by Article 24 (2) of the Constitution.
63. The Court, as reasoned above, is not bound by the legal qualification given by the Applicant and thus assessed the facts and allegations of the Applicant in the light of Article 33 of the Constitution and Article 7 (1) of the ECHR.
64. Thus, the Court considers that no additional and separate issue arises under Article 24 of the Constitution.

65. In sum, the Referral has not met the admissibility requirements established by Article 113 (1 and 7) of the Constitution, provided by Article 48 of the Law and foreseen by Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 (1 and 7) of the Constitution, Article 48 of the Law, and Rules 36 (1)(d) and (2)(d) and 56 (2) of the Rules of Procedure, at its session held on 10 January 2018, 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



Almiro Rodrigues



President of the Constitutional Court



Arta Rama-Hajrizi