



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE

УСТАВНИ СУД

CONSTITUTIONAL COURT

Prishtina, 14 December 2018

Ref. No.:RK1300/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI72/18

Applicant

Shpejtim Zymeraj

Constitutional review of Judgment PML. No. 44/2018 of the Supreme Court of 10 April 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Shpejtim Zymeraj from Gjakova (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment PML. No. 44/2018 of the Supreme Court of 10 April 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment, which allegedly violated the Applicant's rights guaranteed by Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to Fair and Impartial Trial], Article 53 [Interpretation of Human Rights Provisions] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). The Applicant also alleges violation of Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 31 May 2018, the Court adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 25 May 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 16 August 2018, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi
8. On 30 August 2018, the Court notified the Applicant and the Supreme Court about the registration of the Referral. By the same letter, the Court requested the Applicant to complete the referral and to attach Judgment (P. No. 1889/2017) of the Basic Court in Prizren of 6 October 2017.
9. On 14 September 2018, the Court requested again the Applicant to submit the requested documents.

10. On 20 September 2018, the Applicant submitted certain documents to the Court, however, he did not submit Judgment (P. No. 1889/2017) of the Basic Court in Prizren of 6 October 2017.
11. On 22 November 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

12. On 27 September 2017, the Applicant was deprived of his liberty due to a reasonable suspicion that he committed the criminal offense of unauthorized ownership, control or possession of weapons, and on that occasion was seized from the Applicant the weapon - gun „Sig Sauer“- as a tool of commission of the criminal offense.
13. On 28 September 2017, the Basic Prosecutor's Office in Prizren filed with the Basic Court in Prizren a request for the imposition of the detention on remand on the Applicant.
14. On 29 September 2017, the Basic Court in Prizren by Decision PP. No. 453/2017 imposed the measure of detention on remand on the Applicant and J.M for a period of one month.
15. On 5 October 2017, the Basic Prosecutor's Office in Prizren filed an indictment against the Applicant due to a reasoned suspicion that he committed the criminal offense of unauthorized ownership, control or possession of weapon.
16. On 6 October 2017, after the plea agreement was reached, the Basic Court in Prizren (by Judgment P. No. 1889/2017) found the Applicant guilty and sentenced him to a fine, as well as an accessory punishment the seizure of the weapon, by which the criminal offence was committed. On the same date, the Basic Court in Prizren also quashed the measure of detention on remand against the Applicant.
17. On 2 February 2018, against Judgment (P. No. 1889/2017) of the Basic Court, the Applicant filed a request for protection of legality with the Supreme Court *„on the grounds of essential violations of the Criminal Code with the proposal that the Supreme Court of Kosovo approves the request as grounded and modifies the final judgment“*.
18. On 10 April 2018, the Supreme Court (by Judgment Pml. No. 44/2018), rejected as ungrounded the request for protection of legality. In the reasoning of the decision, the Supreme Court states:

“The Supreme Court of Kosovo notes that the actions of the convict contain all elements of the criminal offense for which he was found guilty, and the allegation of the defense counsel that the judgment of the first instance court violated the criminal law to the detriment of the convict are ungrounded, as the first instance court conducted a fair assessment of all the evidence for which provided fair and legal reasoning”.

Applicant's allegations

19. The Applicant alleges that the challenged decision violated his rights guaranteed by Articles 21, 22, 31, 53, and 54 of the Constitution, as well as Article 6 of the ECHR.
20. At the outset, the Applicant alleges that he has a permit for hunting weapon, and requests that his confiscated weapon be returned to him irrespective of the imposed fine.
21. In relation to these allegations, the Applicant reasons that *“the case law of the same Court (Basic Court in Prizren) did not find guilty in such cases of possession of weapons with a license, since it is not a criminal offence and the weapon should be returned to the owner”*.
22. Furthermore, the Applicant claims that the regular courts have *„erroneously interpreted the facts and erroneously interpreted the law”*.
23. Regarding these allegations, the Applicant reasons that he *„has correctly and sincerely accepted to enter into a plea agreement, hoping that his seized weapon will be returned, based on the license he possesses for it. But this correctness and sincerity of the convict was not rewarded, but it had the opposite effect because he was punished harsher than he deserved.”*
24. Finally, the Applicant alleges that: *„The proceedings absolutely acted against the principle of fair and correct trial, by biased application of law and thus violated Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Articles 22, 31 and 53 of the Constitution of the Republic of Kosovo.”*
25. The Applicant proposes to the Court to annul and declare unconstitutional the following court decisions:

*“1. Judgment P. No. 1889/2017 of the Basic Court in Prizren, of 06.10.2017
2. Judgment Pml. No. 44/2018 of the Supreme Court of Kosovo, of 10.04.2018”.*

Admissibility of the Referral

26. The Court first examines whether the applicant has fulfilled all admissibility requirements established by the Constitution, as further specified by the Law and the Rules of Procedure.
27. 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."

28. The Court also examines whether the Applicant has met the admissibility requirements as further specified in the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

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

Article 48
[Accuracy of Referral]

"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".

Article 49
[Deadlines]

"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..."

29. As to the fulfillment of the abovementioned criteria, the Court finds that the Applicant is an authorized party; has exhausted available legal remedies; has specified the act of the public authority which he challenges before the Court and has submitted the Referral in time.
30. In addition, the Court refers to Rule 39 (2) [Admissibility Criteria] of the Rules of Procedure, which stipulates:

„(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim.“

31. The Court notes, first of all, that the Applicant alleges a violation of a number of articles of the Constitution, but reasons only violation of Article 6 of the ECHR, which, according to the Applicant, was violated because the regular courts **a)** applied different case law they applied in similar cases, and **b)** that

they erroneously interpreted the facts and erroneously interpreted the law, thereby violating the constitutional guarantee of the right to fair and impartial trial.

32. Furthermore, the Applicant does not reason the violation of other Articles of the Constitution, but connects the same with Article 6 of the ECHR and alleges that Articles 21, 22, 31, 53 and 54 of the Constitution were violated in conjunction with the right to fair and impartial trial.

a) Alleged violations of Article 6 of the ECHR and 31 of the Constitution in conjunction with different case law

33. As to the allegations of the different case law of the regular courts in similar or identical cases, the Court notes that the Applicant did not substantiate these claims with evidence. The Applicant failed to submit to the Court any document (judgment, decision) to substantiate these claims.
34. On the contrary, the Court notes that the Court requested the Applicant on two occasions to submit the judgment of the Basic Court for which the Applicant claims to be incompatible with the plea agreement, however, the Applicant did not enclose the requested documents.
35. The Applicant also failed to submit to the Court any other judgment of the Basic Court in Prizren that would prove that the case law of this court in similar or identical cases was different.
36. In this regard, the Court finds that the Applicant did not provide the Court with evidence relating to the "*different case law of the regular courts*" and, accordingly, the Court considers that his claims concerning these allegations are manifestly ill-founded.

b) Alleged violations of Article 6 of the ECHR and 31 of the Constitution regarding erroneous interpretation of facts and law

37. Regarding these allegations of the Applicant, the Court notes that the Applicant essentially challenges the determination of factual situation and the application of the law in force by the regular courts and the way in which his case was resolved.
38. The Court recalls that the regular courts based their decisions on indisputable evidence and the Applicant's guilty plea.
39. In that regard, the Court recalls the challenged judgment of the Supreme Court, which emphasizes:

"From the case file and the challenged judgment, it results that the convict carried weapon without a permit, which is also confirmed by the defense counsel of the convict who, in the proceedings conducted before the first instance court, accepted the guilt for the criminal offense he was charged with, and in the previous stages stated that he went through all the procedures for receiving the permit, but that the relevant Ministry had

not yet issued him a permit to possess weapons. Also, from the documents contained in the case file, it does not result that the convict was carrying a weapon with a permit, nor was the convict able to provide any evidence, which is why the court rejects as ungrounded the allegation of the defense counsel of the convict, that he carried a weapon with a permit“.

40. In this respect, the Court reiterates that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). The Constitutional Court may not itself assess the facts which have led the regular courts to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of “fourth instance”, which would be to disregard the limits imposed on its jurisdiction. In fact, the role of regular courts is to interpret and apply the relevant rules of procedural and substantive law (see: the ECtHR case *Perlala v. Greece*, No. 17721/04, of 22 February 2007, paragraph 25).
41. The role of the Court in this case is not to decide on the Applicant's guilt or the question whether the regular courts have correctly determined the facts and applied the law, but to examine whether the proceedings before the regular courts, viewed in their entirety, were fair (see, *mutatis mutandis*, the ECtHR case, *Donadze v. Georgia*, No. 74644/01, of 7 March 2006, paragraphs 30-31).
42. The Court considers that the regular courts rendered decisions after a detailed consideration of all the arguments presented by the Applicant. In this way, the Applicant was given the opportunity at all stages of the proceedings to present arguments and evidence that he considers relevant for his case. The guilty plea agreement was signed by the Applicant in the presence of his defense counsel.
43. Accordingly, the Court notes that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle; that he was able to adduce the arguments and evidence he considered relevant to his case at the various stages of those proceedings; he was given the opportunity to challenge effectively the arguments and evidence presented by the responding party; that all the arguments, viewed objectively, relevant for the resolution of his case were heard and reviewed by the regular courts; the factual and legal reasons against the challenged decisions were examined in detail; and that, the proceedings, viewed in entirety, were fair (see: *mutatis mutandis*, the ECHR case *Khan v. the United Kingdom* no. 35394/97, of 12 May 2000, paragraph 38).
44. As for the other allegations of the Applicant regarding a violation of the rights and freedoms guaranteed by Articles 21, 22, 31, 53 and 54 of the Constitution, the Court finds these allegations as ungrounded, as the Applicant did not justify them.
45. The Court further notes that the Applicant is not satisfied with the outcome of the proceedings before the regular courts. However, the dissatisfaction of the Applicant with the outcome of the proceedings before the regular courts cannot of itself raise an arguable claim for the violation of the right to fair and

impartial trial (see, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).

46. Based on the foregoing reasons, the Court concludes that the facts presented by the Applicant do not in any way justify his allegations of a violation of the rights guaranteed by the Constitution.
47. Therefore, in accordance with Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, the Applicant's Referral is manifestly ill-founded on constitutional basis and, accordingly, inadmissible.

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 Rule 39 (2) of the Rules of Procedure, in the session held on 22 November 2018, unanimously

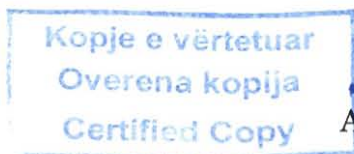
DECIDES

- 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. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Radomir Laban



Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only