



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 03 Juna 2019
Ref. no.:RK 1365/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI186/18

Applicant

Đeljalj Kazagić

**Constitutional review of Decision Pml. No. 168/2018 of the Supreme
Court of the Republic of Kosovo of 3 August 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 Đeljalj Kazagić (hereinafter: the Applicant), residing in Mitrovica.

Challenged decision

2. The Applicant challenges the constitutionality of Decision Pml. No. 168/2018 of the Supreme Court of 3 August 2018 (hereinafter: the challenged Decision), which was served on him on 5 September 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly violated the rights guaranteed by Article 30 [Rights of the Accused] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on 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).

Proceedings before the Court

5. On 20 November 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 21 November 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
7. On 12 December 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding) Remzije Istrefi-Peci and Nexhmi Rexhepi (members).
8. On 8 May 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. The Applicant submitted the Referral to the Court for the third time.

Facts regarding first Referral KI82/16

10. On 24 May 2016, the Applicant submitted to the Court the Referral KI82/16, requesting constitutional review of Decision Pml. No. 13/2016 of the Supreme Court of 13 November 2016, which allegedly violated his rights guaranteed by Articles: 24 [Equality Before the Law], 27 [Prohibition of Torture, Cruel, Inhuman or Degrading Treatment], 29 [Right to Liberty and Security], 31

[Right to Fair and Impartial Trial], and 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution.

11. The Applicant was sentenced by decisions of the regular courts, which he challenged, to an aggregate punishment of 11 (eleven) years of imprisonment.
12. On 1 March 2017, the Court rendered the Resolution on Inadmissibility, which declared the Applicant's Referral on constitutional basis as manifestly ill-founded, because the Applicant did not substantiate his allegations of violation of fundamental rights and freedoms guaranteed by the Constitution.

Facts regarding second Referral KI50/18

13. On 30 March 2018, the Applicant submitted Referral KI50/2018, challenging the constitutionality of Decision Pml. No. 110/2017 of the Supreme Court of 13 November 2017, alleging that the regular courts, by rejecting his requests for reopening of the criminal proceedings, violated Article 30 [Rights of the Accused], paragraph 3 of the Constitution, "because he was denied the right to ensure protection and the opportunity to challenge the witness' statements and the evidence against him" as well as a violation of Article 31 [Right to Fair and Impartial Trial], paragraphs 1 and 2 of the Constitution, alleging that "he was prevented from attending the session of the Court of Appeals".
14. On 16 January 2019, the Court rendered the Resolution on Inadmissibility, after it found that the Applicant's allegations pertaining to the rejection by the regular courts of his request for reopening of the criminal proceedings were incompatible *ratione materiae* with the Constitution, namely Article 31 of the Constitution, in conjunction with Article 6 of the Convention, do not apply in such cases.

Facts regarding present Referral KI186/18

15. On 4 September 2017, the Applicant filed a request for reopening of the criminal proceedings against the final Judgment P. No. 42/2014 of the Basic Court in Mitrovica, of 12 February 2015. It was the fourth request for reopening of the criminal proceedings that the Applicant submitted to the Basic Court.
16. On 18 January 2018, the Basic Court in Mitrovica (hereinafter: the Basic Court), by Decision P. No. 42/2014, rejected the Applicant's request for reopening of the criminal proceedings. The Basic Court reasoned that no circumstance provided by Article 423, paragraph (3), second part of the CPC have been met, which would exclude the criminal prosecution against the person who has taken investigative actions.
17. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the Decision of the Basic Court.
18. On 9 March 2018, the Court of Appeals, by Decision PN. No. 206/2018, rejected as unfounded the Applicant's appeal, reasoning that in the present case "the legal requirements for reopening of the criminal procedure under Article 423 par. 1 of the CPCRK have not been met [...]".

19. On 25 April 2018, the Applicant filed a request for protection of legality against Decision PN. No. 206/2018 of the Court of Appeals of Kosovo of 9 March 2018, on the grounds of violations of the criminal law and other violations of the provisions of the criminal procedure.

20. On 3 August 2018, the Supreme Court, by Judgment PML. No. 168/2018, rejected as ungrounded the request for protection of legality and upheld the decisions of lower instance courts as fair and reasoned.

21. In its judgment, the Supreme Court, *inter alia*, reasoned:

"In the request for protection of legality, the convict Xhelal Kazagji claims that the decision of the Court of Appeals [...] was taken with essential violation of the provisions of the criminal procedure [...] the judgment based on which he was found guilty is the production of the criminal offense committed by the State Prosecutor who conducted the investigative actions in the matter and that during the investigation no evidence requested by the convict was collected. Likewise, the convict alleges that during the court hearings the rights guaranteed by the Constitution and the Convention were violated [...] by the very fact that during the procedure he was not allowed to collect exculpatory evidence [...]."

From the case file it is determined that the court of first instance provided sufficient legal reasons for rejecting the complaint and which reasons are accepted also by this court. The decision is clear and the reasons were given why it is established that no new evidence or new facts has been provided in the request for reopening of the criminal proceedings, on the basis of which it is possible to determine another factual situation or to justify the innocence of the convict [...]."

Applicant's allegations

22. The Applicant alleges that the regular courts violated his constitutional rights, guaranteed by Articles 30 and 31 of the Constitution, as well as Article 6 of the Convention, which he relates to Article 414 of the Criminal Procedure Code - a provision which talks about the possibility of participation of the convict in the proceedings before the Court of Appeals.

23. The Applicant further requests: "[...] to me, as a prisoner in serving the punishment, to enable me - to allow my presence in the session of the Appellate Panel, and I particularly expressed this wish, that in the session of the Appellate Panel of the Court of Appeals, to supplement the necessary explanations regarding the content of the appeal and in particular to clarify the matter of the appeal, namely, in the request for reopening [reopening] of the criminal proceedings, as well as the Decision of the EULEX Basic Court in Mitrovica. In particular, to allow me to object the proposal of the Appellate Prosecutor with my attendance - presence at the Appellate Panel of the Court of Appeals when deciding on the appeal filed".

28. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party; he exhausted available legal remedies; has specified the act of

“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...”

*Article 49
[Deadlines]*

“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 48
[Accuracy of the Referral]*

27. The Court also examines whether the Applicant has fulfilled the admissibility requirements as prescribed by Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which foresee:

[...]”

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.

[...]

“1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

26. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

25. The Court examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution and further specified in the Law, and foreseen in the Rules of Procedure.

Admissibility of the Referral

24. Finally, the Applicant requests the Court: “To annul the judgment of the Supreme Court, Pml. No. 168/2018 of 03.08.2018; and with this the Decision of the Court of Appeals of Kosovo, PN. No. 206/2018, of 09.03.2018, as well as the Decision of the EULEX Basic Court in Mitrovica P no. 42/2014, of 18.01.2018, as well as the judgment of the Basic Court of EULEX in Mitrovica P no. 42/2014, of 12.02.2015 (together with the annulment of the judgment of the Court of Appeals of Kosovo PAKR No. 230/15 of 07.09.2015 and judgment of the Supreme Court of Kosovo P. ML. No. 268/2015 of 06.01.2016 and PML 13/3016 of 10.02.2016), and to remand the case P. No. 42/2014 for retrial to the Basic Court in Mitrovica.”

- the public authority challenged by him before the Court and the constitutional rights which have allegedly been violated, and has submitted the Referral in time.
29. However, the Court also takes into account the admissibility requirements established in the Rules of Procedure, and in the present case refers to subparagraph (3) (b) of Rule 39 [Admissibility Criteria] of the Rules of Procedure, which foresees:
- “(3) The Court may also consider a referral inadmissible if any of the following conditions are present:
- [...] (b) the Referral is incompatible *ratione materiae* with the Constitution;” [...]
30. The Court, in this case, will not assess the Applicant’s allegations which were subject to the Court’s assessment in decisions KI82/16 and KI50/18. The Court will assess the Applicant’s allegations relating to the proceedings and the decisions taken by the regular courts when deciding on his fourth request for reopening of the criminal proceedings.
31. The Court recalls that the Applicant alleges that the regular courts, by rejecting his request for reopening of the criminal proceedings, violated his rights guaranteed by Articles 30 and 31 of the Constitution, and Article 6 of the Convention, which he relates to the right to participate at a hearing, within the meaning of Article 414 of the CPCRK. The Court notes that, in essence, the Applicant’s allegations fall within the scope of the right to a fair trial, namely the right to be protected and heard.
32. In this regard, the Court initially notes that, in relation to the Applicant’s request for reopening of the criminal proceedings, the regular courts decided only with respect to the fulfillment of the procedural criteria, namely that the legal requirements for the reopening of criminal proceedings have not been met.
33. In light of this, the Court recalls its Resolution in case KI50/18, in which it decided that “the Applicant’s allegations pertaining to the rejection by the regular courts of his request for reopening of the criminal proceedings as such are incompatible *ratione materiae* with the Constitution [...]”.
34. In this regard, the Court considers that the compatibility *ratione materiae* of a Referral with the Constitution derives from the Court’s substantive jurisdiction. The rights relied on by the Applicants must be protected by the Constitution in order for a constitutional complaint to be compatible *ratione materiae* with the Constitution, and accordingly, within the jurisdiction of the Constitutional Court (see, the Constitutional Court, KI07/17 Applicant Pashk Mirashti, Resolution on Inadmissibility of 29 May 2017, paragraph 66)

35. The Court, in accordance with the case law of the European Court on Human Rights (hereinafter: the ECtHR) and its case law, recalls that Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 paragraph 1 [Right to a fair trial] of the Convention do not apply to requests for reopening or repetition of proceedings (see: analogously, cases of the Constitutional Court: K159/15, with Applicant *Sabri Ferati*, Resolution on Inadmissibility, of 13 June 2016, paragraph 37, K180/15, 81/15 and 82/15, with Applicant *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, paragraph 31, see: *inter alia*, *Zawaadzki v. Poland*, application no. 34158/96, of 6 July 1999; *Sablon v. Belgium*, no. 36445/97, of 10 April; and *Steck-Risch and Others v. Liechtenstein* (dec.), no. 29061/08, of 11 May 2010; *Nistler v. Austria*, no. 24912/08, ECtHR, Decision of 19 November 2013; *Dichev v. Bulgaria*, no. 1355/04, Judgment of 27 January 2011).
36. In addition, the Court recalls the case law of the ECtHR which finds that Article 6 of the Convention does not apply to proceedings for the reopening of a case, namely when a person whose sentence has become final and who applies for his case to be reopened is not "charged with a criminal offence" (see ECtHR cases *Franz Fischer v. Austria* No. 27569/02, Decision of 6 May 2003).
37. In this regard, the Court considers that the Applicant's allegations pertaining to the rejection by the regular courts of his request for reopening of the criminal proceedings are incompatible *ratione materiae* with the Constitution.
38. For this reason, the Court considers that the Applicant's Referral does not meet the procedural admissibility requirements, as established by the Constitution and the Law, and as further specified by the Rules of Procedure.
39. Therefore, the Court concludes that the Applicant's Referral, in accordance with Rule 39 (3) (b) of the Rules of Procedure, is inadmissible for review of its merits.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (3) (b) and 59 (b) of the Rules of Procedure, on 8 May 2019, unanimously

DECIDES

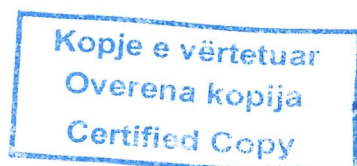
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bekim Sejdiu

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.