



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

Prishtina, on 03 August 2020
Ref. no.:RK 1594/20

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI35/20

Applicant

Đeljalj Kazagić

**Constitutional review of Decision Pzd. No. 133/2019 of the Supreme
Court of the Republic of Kosovo, of 18 November 2019**

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, who is serving the imprisonment sentence.

Challenged decision

2. The Applicant challenges the constitutionality of Decision PZD. No. 133/2019 of the Supreme Court of 18 November 2019 (hereinafter: the challenged Decision), which was served on him on 6 December 2019.

Subject matter

3. The subject matter of this Referral is the constitutional review of the challenged Decision, which allegedly violates the Applicant's rights guaranteed by Articles 21 [General Principles], 24.1 [Equality Before the Law], 31.2 [Right to Fair and Impartial Trial] and 33.4 [The Principle of Legality and Proportionality in Criminal Cases], 54 [Judicial Protection of Rights], and 55.5 [Limitations on Fundamental Rights and Freedoms] 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 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).

Proceedings before the Constitutional Court

5. On 20 February 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 24 February 2020, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu Krasniqi and Bajram Ljatifi (members).
7. On 3 March 2020, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral, in accordance with the Law, to the Supreme Court.
8. On 22 July 2020, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. The Applicant submits a Referral to the Court for the fifth time.

Facts regarding first Referral, KI82/16

10. On 24 May 2016, the Applicant submitted to the Court the Referral KI82/16, whereby he requested the 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. On 1 March 2017, the Court rendered Resolution on Inadmissibility, declaring the Applicant's Referral as manifestly ill-founded on constitutional basis, as the latter had not substantiated his allegations of violations of fundamental human rights and freedoms guaranteed by the Constitution.

Facts regarding second Referral, KI50/18

12. On 30 March 2018, the Applicant submitted the 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 review of criminal proceedings, violated Article 30 [Rights of the Accused], paragraph 3 of the Constitution, "*because of denial of the right to ensure his defence and the opportunity to challenge the statements of witnesses and the evidence charging him*", and Article 31 [Right to Fair and Impartial Trial], paragraphs 1 and 2 of the Constitution, by alleging that "*he was prevented to take part in the session of the trial panel of the Court of Appeals*".
13. On 16 January 2019, the Court rendered the Resolution on Inadmissibility, after having found that the Applicant's allegations relating to the refusal of regular courts of his request for review of criminal proceedings were not *ratione materiae* compatible with the Constitution, given that Article 31 of the Constitution in conjunction with Article 6 of the Convention do not apply in such cases.

Facts regarding the third Referral, KI186/18

14. On 30 March 2018, the Applicant submitted the Referral KII86/2018, challenging the constitutionality of Decision Pml. No. 168/201 of the Supreme Court of 3 August 2018, alleging that the regular courts, by rejecting his requests for review of criminal proceedings, violated Article 31 [Right to Fair and Impartial Trial] of the Constitution, on the grounds that he was prevented to attend the trial session of the Court of Appeals.
15. On 8 May 2019, after having considered the circumstances of the case, the Court found that Article 6 of the Convention does not apply to proceedings for the review of a criminal case. For this reason, the Court considered that the Applicant's allegations concerning the refusal of regular courts of his request for review of criminal proceedings, as such, were not *ratione materiae* compatible with the Constitution. Consequently, the Court concluded that the Applicant's Referral pursuant to Rule 39 (3) (b) of the Rules of Procedure is inadmissible.

Facts regarding fourth Referral, KI96/19

16. On 12 June 2019, the Applicant filed Referral KI96/19, through which he challenged the constitutionality of Decision Pzd. No. 8/2019 of the Supreme Court, of 5 February 2019, alleging that the Supreme Court, rejecting his requests for the review of criminal proceedings, violated Article 31 [Right to Fair and Impartial Trial] of the Constitution, because it did not take into account the facts and mitigating circumstances for a more lenient punishment.
17. On 8 October 2019, the Court rendered Resolution on Inadmissibility and concluded that Article 6 of the Convention is not applicable to the review proceedings of a criminal case. For this reason, the Court considered that the Applicant's allegations concerning the refusal of regular courts of his request for review of criminal proceedings, as such, were not *ratione materiae* compatible with the Constitution. Consequently, the Court concluded that the Applicant's Referral in accordance with Rule 39 (3) (b) of the Rules of Procedure was declared inadmissible.

Facts regarding present Referral KI35/20

18. On 5 June 2019, the Applicant submitted to the Basic Court in Mitrovica, a request for extraordinary mitigation of sentence, against the Judgment of the Basic Court in Mitrovica, P. No. 42/2014, of 12 February 2015, which was upheld by the Court of Appeals by Judgment PAKR No. 230/15, of 7 September 2015 and was modified only with respect to the part related to the sentence, imposing on the Applicant an aggregate sentence of imprisonment, for a period of 11 (eleven) years.
19. On 8 October 2019, the Basic Court in Mitrovica sent the Applicant's request to the Supreme Court for a decision-making, proposing that the request for extraordinary mitigation of sentence be rejected. Also on 23 October 2019, the State Prosecutor proposed to the Supreme Court that the Applicant's request be rejected.
20. On 18 November 2019, the Supreme Court, by Decision Pzd. No. 133/2019, rejected as ungrounded the request for extraordinary mitigation of sentence, arguing that: *"...mitigation of a finally imposed punishment is permissible where, after the judgment has become final, circumstances occur which did not exist when the judgment was rendered or, although they existed, were unknown to the court at that time, and such circumstances obviously would have led to a less severe punishment. (...) However, the request does not mention the circumstances which did not exist at the time rendering the judgments or the courts did not know about them, which would affect the imposition of a milder sentence. From the above, this court finds that the legal conditions for the approval of the request for extraordinary mitigation of sentence have not been met and in accordance with the provision of Article 431 par.6 of the CPCK, it was decided as in the enacting clause of this decision."*

Applicant's allegations

21. The Applicant alleges that the Supreme Court, by the challenged Decision, violated his rights guaranteed by Articles 21.4, 24.1, 31.2, 33.4, 54 and 55.5 of the Constitution.
22. The Applicant generally complains that the reasoning of the challenged Decision is in full contradiction with his request for extraordinary mitigation of sentence, because his allegations were not taken seriously by the Supreme Court. He further alleges that the non-application of certain legal provisions of the CPCRK and CCRK, such as Article 3 [Application of the most favorable law] by the Supreme Court has caused the violation of his rights and freedoms guaranteed by the Constitution.
23. Finally, the Applicant requests the Court: *"1. To quash-annul Decision P. zd. No. 133/2019 of 18.11.2019 of the Supreme Court of Kosovo, rejecting as UNGROUNDED my request for extraordinary mitigation of sentence filed on 05.06.2019 and to remand the latter to the Supreme Court of Kosovo for a retrial for review and decision-making according to the same, due to the alleged brutal violation of the constitutional provision of Article 33, paragraph 4 and thus my human rights and freedoms guaranteed by the Constitution of the Republic of Kosovo and the European Convention on Human Rights and Fundamental Freedoms. Or, within its authority;*
2. To modify the final Judgment PAKR No. 230/15 of the Court of Appeals of Kosovo of 07.09.2015 by which it sentenced me for four (4) criminal offenses with a total - total sentence ($12 = 4 + 2 + 2 + 4$) 12 years imprisonment. Namely with an aggregate sentence of eleven (11) years. As for the first criminal offense: Sexual abuse of persons under the age of sixteen (contrary to Article 198.1 of the CCK) for which I was sentenced by a final judgment to four (4) years imprisonment, according to the legal basis of the Request for extraordinary Mitigation of sentence and according to the constitutional provision of Article - 33, paragraph 4, to be annulled - this sentence of imprisonment of four (4) years is annulled and the total sentence is reduced from 12 years to eight ($8 = 0 + 2 + 2 + 4 = 12 - 4$) years of imprisonment, namely to reduce the aggregate sentence from 11 years to 7 years, eventually to seven and a half years (7 eventually 7.5) years imprisonment".

Admissibility of the Referral

24. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and foreseen by the Rules of Procedure.
25. 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.
[...]*

26. The Court also examines whether the Applicant has fulfilled the admissibility requirements as required by Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

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 the 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...”.

27. With regard to the fulfillment of the admissibility criteria, as mentioned above, the Court finds that the Applicant is an authorized party and challenges an act of a public authority, namely Decision Pzd. No. 133/2019 of the Supreme Court, of 18 November 2019, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms he alleges to have been violated, in accordance with Article 48 of the Law and has submitted the Referral within the deadline set out in Article 49 of the Law.
28. However, in addition, the Court examines whether the Applicant also met the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure, in accordance with paragraphs (2) and (3) (b) of Rule 39 of the Rules of Procedure, which establishes:

“(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.”

(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;

[...]"

29. The Court initially clarifies that it will not examine the Applicant's allegations which were the subject of the Court's assessment in cases KI82/16, KI50/18, KI186/18 and KI96/19. In the present case, the Court recalls that the Applicant challenges the constitutionality of the challenged Decision Pzd. No. 133/2019 of the Supreme Court, of 18 November 2019, alleging violation of his rights guaranteed by Articles: 21, 24.1, 31.2, 33.4, 54 and 55.5 of the Constitution.
30. The Court notes that the substance of the Applicant's allegations relates to the manner of reasoning of the challenged Decision by the Supreme Court, claiming that the reasoning given by the latter is in full contradiction with his request for extraordinary mitigation of sentence, because his allegations and testimonies have not been taken seriously. The rest of the allegations relate to the manner of application of the provisions of the procedural and substantive law, namely the CPRK and CCRK.
31. In this context and in the following, the Court will address the Applicant's allegations regarding: i. alleged violations of Article 31 of the Constitution and ii. alleged violations of Articles 21, 24.1, 33.4, 54 and 55.5 of the Constitution, applying the case law of the European Court of Human Rights (hereinafter: the ECtHR), on the basis of which the Court, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.
 - i. *Regarding the allegation of violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR*
32. The Court initially recalls that the right claimed by the Applicants must, first of all, be protected and guaranteed by the Constitution and the ECHR. Therefore, in the circumstances of the present case, the Court will assess whether the right requested by the Applicant is protected by the Constitution and the ECHR, namely whether Article 31 of the Constitution and Article 6 of the ECHR are applicable in his case.
33. In this context, the Court recalls that the Applicant filed a "request for extraordinary mitigation of sentence" with the Supreme Court, through the Basic Court, based on the CPRK. In the circumstances of this case, the Court notes that the Supreme Court assessed only the procedural aspects of the admissibility of the Applicant's request, without affecting the substance of Judgment P. No. 42/2014 of the Basic Court in Mitrovica, of 12 February 2015 which became final by Judgment PAKR. No. 220/2015 of the Court of Appeals of 7 September 2015.

34. In this regard, the Court, referring to the case law of the European Court of Human Rights (hereinafter: the ECtHR), recalls that Article 6 of the Convention does not apply to the proceedings for the reopening of a criminal case because a person whose sentence has become final and who applies for his case to be reopened is not “*charged with a criminal offence*” within the meaning of Article 6 of the Convention (see ECtHR cases *Franz Fischer v. Austria*, application no. 27569/02, Judgment of 6 May 2003).
35. In the present case, the Applicant’s request for extraordinary mitigation of the sentence, filed with the Supreme Court, in fact requested the reopening of the proceedings completed by a final decision, regarding the decision on punishment. However, as can be seen from the reasoning of the Supreme Court, the Applicant’s request was rejected, because the latter did not meet the legal requirements for the reopening of the final Judgment of the Basic Court in Mitrovica P. No. 42/2014, of 12 February 2015, regarding the decision on punishment.
36. The Court further recalls the case law of the ECtHR, which establishes: “...that Article 6 of the ECHR does not apply as long as the domestic authorities do not agree to reopen the proceedings, even in cases where the Applicant has filed a request for reopening thanks to a previous judgment of the Court, which found that there has been a violation of the Convention regarding the challenged proceedings before the domestic courts (see ECtHR Judgment *Franz Fischer v. Austria*, application no. 37950/97, of 29 May 2001). However, as soon as the proceedings are reopened or when an extraordinary review of the proceedings is approved, the safeguards referred to in Article 6 of the ECHR apply to the entire court proceeding (see ECtHR Decision *Vanyan v. Russia*, application 53203/99, 15 December 2005 paragraphs 56–58).
37. In addition, the Court recalls that the extraordinary legal remedies seeking the extraordinary mitigation of punishment do not normally involve the determination of „civil rights and obligations“ or the grounds of „any criminal charge“ and therefore, Article 6 is deemed inapplicable to them (see, inter alia, *X v. Austria*, 7761/77, Commission Decision of 8 May 1978, *Hurter v. Switzerland*, Decision No. 48111/07, of 15 May 2012; *Dybeku v. Albania* Decision No. 557/12, paragraph 30, of 11 March 2014).
38. In this context, the Court considers that the Applicant’s allegations that with the challenged Decision of the Supreme Court [APP-UPP. No. 1/2018], of 26 February 2019, violated his rights guaranteed by Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR are not *ratione materiae* compatible with the Constitution.

ii. Regarding other allegations of violation of Articles 21.4, 24.1, 33.4, 54 and 55.5 of the Constitution
39. In addition, the Court notes that the Applicant alleges that the challenged Decision also violates his rights guaranteed by Articles 21.4, 24.1, 33.4, 54 and 55.5 of the Constitution. In the present case, the Applicant only mentions the respective articles, without further elaborating on how and why their violation occurred with the challenged Decision of the Supreme Court. In this regard, the

Court recalls that it has consistently emphasized that the mere mentioning of articles of the Constitution and the ECHR is not sufficient to build a substantiated allegation of a constitutional violation. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (see, in this context, the cases of the Court, KI136/14, Applicant: *Abdullah Bajqinca*, Resolution on Inadmissibility, paragraph 33; KI187/18 and KI11/19, Applicant: *Muhamet Idrizi*, Resolution on Inadmissibility, 29 July 2019, paragraph 73, and most recently case KI125/19, Applicant: *Ismajl Bajgora*, Resolution on Inadmissibility of 11 March 2020, paragraph 63).

40. Therefore, in relation to these allegations, the Court in accordance with its case law declares the Applicant's Referral as manifestly ill-founded and consequently inadmissible.

Conclusion

41. The Court, based on the above, concludes that the Applicant's Referral:
- i. with respect to allegations of violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, is incompatible *ratione materiae* with the Constitution;
 - ii. with respect to allegations of violation of Articles 21.4, 24.1, 33.4, 54 and 55.5 of the Constitution, on constitutional basis, should also be declared inadmissible as manifestly ill-founded, in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 39 (2) and (3) (b), as well as Rule 59 (2) of the Rules of Procedure, in its session held on 22 July 2020, 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



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