



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

Prishtina, on 23 October 2020
Ref.No.:RK 1630/20

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI15/19

Applicant

Shemsi Ferizi

**Constitutional review of Judgment NJN. No. 157/2017 of the Basic Court
in Prishtina, of 13 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 Shemsi Ferizi (hereinafter: the Applicant), represented by Mustafa Musa, lawyer from Gjilan.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment NJN. Nr. 157/2017 of the Basic Court in Prishtina, of 13 April 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly has violated the rights of the Applicant guaranteed by Articles 31 [Right to Fair and Impartial Trial], 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo in conjunction with Article 6.1 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR), and Article 2 of Protocol No. 7 (Right of appeal in criminal matters) of the European Convention on Human Rights (hereinafter: ECHR). The Applicant also alleges a violation of Articles 8 and 11 of the Universal Declaration of Human Rights (hereinafter: the UDHR.).

Legal basis

4. The Referral is based on Article 113 (1) and (7) [Jurisdiction and Authorized Parties] of the Constitution of Republic of Kosovo, 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 22 January 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 6 February 2019, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (presiding), Gresa Caka-Nimani and Safet Hoxha.
7. On 26 February 2019, the Court notified the Applicant's representative about the registration of the Referral and requested from him to submit the power of attorney for representing the Applicant before the Court.
8. On 8 March 2019, the Applicant's representative submitted a document titled "request for an update on the case" on which occasion he requested from the Court to "decide as soon as possible on the review of the criminal proceedings".
9. On 29 March 2019, the Applicant's representative submitted the aforementioned power of attorney to the Court.
10. On 19 April 2019, a copy of the Referral was sent to the Basic Court in Prishtina.

11. On 23 May 2019, the Basic Court in Prishtina submitted the documentation consisting of 131 pages concerning the procedures of international cooperation in the criminal case in question. The Basic Court in Prishtina also submitted a response from the procedural and material point of view to the allegations raised by the Applicant submitting the Referral no. KI15/19.
12. On 14 August 2019, the Court requested from the Applicant's representative to submit the evidence (acknowledgment of receipt) confirming the date of receipt of the challenged decision of the Basic Court in Prishtina.
13. On the same date, the Court requested from the Basic Court in Prishtina to submit the evidence (acknowledgment of receipt) confirming the date of receipt by the Applicant of the challenged decision of the Basic Court in Prishtina.
14. On 30 August 2019, a copy of the Referral was sent to the Ministry of Justice, from which was also requested to submit the evidence (acknowledgment of receipt) confirming the date of receipt by the Applicant of the challenged decision of the Basic Court in Prishtina.
15. On 22 and 30 August 2019 and 5 September 2019, the Basic Court in Prishtina, the Ministry of Justice and the Applicant's representative submitted their responses regarding the Referral no. KI15/19.
16. The responses of the Basic Court in Prishtina, the Ministry of Justice and the Applicant's representative are reflected in the text below, the part referring to the assessment of the admissibility of the Referral.
17. On 5 February 2020, the Court decided that the Referral no. KI15/19 is to be examined on another date due to the supplementation of the report with additional data by the Judge Rapporteur.
18. On 15 May 2020, the Court once again requested from the Ministry of Justice and the Basic Court in Prishtina to submit the evidence (acknowledgment of receipt) confirming the date of receipt by the Applicant of the challenged decision of the Basic Court in Prishtina.
19. On 18 May and 4 June 2020, the Ministry of Justice and the Basic Court in Prishtina submitted their responses in respect of the Referral no. KI15/19.
20. The responses of the Ministry of Justice and the Basic Court in Prishtina are reflected in the text below, the part referring to the assessment of the admissibility of the Referral.
21. On 23 September 2020, 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

22. On the basis of the documents contained in the Referral it results that the Applicant was sentenced to life long imprisonment by the criminal court in Basel-Switzerland by Judgment SG 2002/248 St/Sc/ste of 19 September 2002, which became final on 26.09.2003, because of the criminal offence of Murder and Multiple Attempted Murder, based on Article 112, Article 68 (1), Article 69 and Article 55, para.1 of the Swiss Criminal Code.
23. On 25 September 2017, the Ministry of Justice of the Republic of Kosovo had received a letter from the Federal Department of Justice and Police of Switzerland, whereby a consent was given upon the request of the Applicant (convict Shemsi Ferizi) for transfer from the Correctional Institution in Switzerland to Correctional Institutions in the Republic of Kosovo, to serve the remaining portion of the prison sentence.
24. The Swiss Confederation - The Federal Department of Justice and Police and the Swiss Police submitted the following documents: (i) Final decision of the Criminal Court Basel-Stadt SG 2002/248 St/Sc/ste of 19.09.2002; (ii) Request for transfer of 31.03.2015 in Menzingen-Switzerland; (iii) Letter from the Department of Justice and Security of the Canton Basel-Stadt-Service for Citizens and Migration dated 06.05.2015, the Institute for Prison Legal Enforcement (iv) a copy of the applicable legal provisions; (v) birth certificate - including identity data of the defendant (Applicant).
25. On 20 December 2017, the Ministry of Justice of the Republic of Kosovo had submitted a request to the Basic Court in Prishtina to take action in relation to the transfer of the Applicant from the Swiss Correctional Institutions to the Correctional Institution of the Republic of Kosovo.
26. On 13 April 2018, the Basic Court in Prishtina (Judgment NJN.no.157/2017) in the case of conversion of life long imprisonment, imposed by the Criminal Court Basel-Stadt (city of Basel) in Switzerland, by Judgment SG 2002/248 St /Sc/ste of 19.09.2002, which became final on 26.09.2003, against the convict Shemsi Ferizi, due to the criminal offense of Murder and Multiple Attempted Murder, based on Article 112, Article 68 (1), Article 69 and Article 55 para.1 of the Swiss Criminal Code, deciding upon the request of the Ministry of Justice of the Republic of Kosovo with reference to the letter from the Federal Department of Justice and Police of Switzerland, whereby a consent was given at the request of the convict Shemsi Ferizi for his transfer from the Institute for Legal Enforcement-Switzerland, to Correctional Institutions in the Republic of Kosovo, in the session of the panel held on 13.04.2018, rendered the judgment: *“By a unique sentence of life long imprisonment in which shall be accounted the time spent in detention on remand from 26.02.2001 onwards”*.
27. The above Judgment of the Basic Court had established: (i) that the Applicant has given his consent for the transfer and conversion of the sentence from the Swiss authorities to the Kosovo authorities; (ii) the transfer and conversion of the Applicant's sentence has been implemented pursuant to Article 65 of the Law on International Legal Cooperation in Criminal Matters; and, (iii) that

there is a Treaty between the Republic of Kosovo and the Swiss Confederation on the transfer of sentenced persons.

28. In the end, the Basic Court had determined that: *“On the basis of Article 63 para.2 of the Law on International Legal Cooperation in Criminal Matters No. 04 / L-213, no appeal is allowed against this judgment”*.
29. On 18 May 2018 the Ministry of Justice addressed the Federal Department of Justice and Police of the Swiss Confederation with a Transfer Request [Ref. MD/DBGJ/2086 / fg/18; DBNJ/2014/1377] wherein it confirmed the decision to allow the transfer of the Applicant as all conditions under the cooperation treaty between the Swiss Confederation and the Republic of Kosovo for cooperation in criminal matters, were met.

Applicant’s allegations

30. The Applicant alleges a violation of Articles 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 6.1 (Right to a fair trial) and Article 2 of Protocol No. 7 (Right of appeal in criminal matters) of the European Convention on Human Rights (hereinafter: ECHR). The Applicant also alleges a violation of Articles 8 and 11 of the Universal Declaration of Human Rights.
31. The Applicant alleges: *“European Convention for the Protection of Human Rights and Fundamental Freedoms dated. 04.11.1950, amended by Protocols no.11 and no.14 in article 6 provides the rights for a fair trial, where paragraph 1 foresees the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing, while in the present case the defendant Shemsi was not given the opportunity at all to be heard by the Basic Court in Prishtina.”*
32. The Applicant alleges: *“Protocol 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 Strasbourg, 22.11.2984, in Article 2 provides for the Right of appeal in criminal matters. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal.. The exercise of this righ, including the grounds on which it may be exercised, shall be governed by law.”*
33. As for the guarantees under Articles 8 and 11 of the Universal Declaration of Human Rights, the Applicant claims: In the Universal Declaration of Human Rights (dated 10.12.1948), Article 8 provides that everyone has the right to an effective remedy before the competent national tribunals for act violating the fundamental rights granted him by the constitution of by law. Further, pursuant to Article 11, no heavier penalty shall be imposed than the one that was applicable at the time the penal offence was committed. What was not done in this case, is that the criminal offence was committed on 26.02.2001, when the applicable law was the Criminal Law of SAPK, whereas in the challenged judgment, was applied the criminal code of RS, which is less favorable for the defendant Shemsi.”

34. As regards the application of the unfavorable law, the Applicant alleges: *“The criminal law of the SAPK, which was in force at the time of the commission of the criminal offense, for the criminal offense of aggravated murder had foreseen a sentence not less than 10 years or the death penalty, but since the death penalty is prohibited under the provision of Article 25 paragraph 2 of the Constitution of the Republic of Kosovo it should be proceeded with the provision of Article 22 of the Constitution which provides for the direct applicability of international agreements and instruments. Hence, according to this provision, the above provisions of international Conventions and Protocols apply directly in the Republic of Kosovo, which in the present case have been violated by the Judgment NJN.no.157/17 of the Basic Court in Prishtina.”*
35. Finally, the Applicant requests from the Court: *“With our Referral we request from the Court to ascertain that the Judgment of the Basic Court in Prishtina NJN.no.157/17 of 13.04.2018 was rendered by a flagrant violation of the guaranteed rights of the defendant Shemsi Ferizi from the village of Vernice, Municipality of Mitrovica, as he was not enabled to provide his defense, that he was denied the right to appeal against this judgment and that the court has applied the law which was not applicable at the time of the commission of the criminal offense, which is a law much more less favorable than the law applicable at the time when the criminal offense was committed, which had not foreseen the punishment of a life long imprisonment.”*

Relevant legal provisions

CRIMINAL CODE OF THE REPUBLIC OF KOSOVO No. 04/L-082

Article 44

Punishment of life long imprisonment

- 1. The law may provide for the punishment of life long imprisonment for the most serious criminal offenses committed under especially aggravating circumstances or criminal offenses that have caused severe consequences.*
- 2. The law shall not prescribe the punishment of life long imprisonment as the only principal punishment for a particular criminal offense.*
- 3. Life long imprisonment cannot be imposed on a person who at the time of committing the criminal offense was under twenty one (21) years of age or on a person who at the time of committing the offense had substantially diminished mental capacity.*

Article 45

Punishment of imprisonment

- 1. The punishment of imprisonment may not be shorter than thirty (30) days or more than twenty five (25) years.*

2. The punishment of imprisonment is imposed in full years and months and in cases where the term is up to six (6) months, in full days.

CRIMINAL LAW OF THE SOCIALIST AUTONOMOUS PROVINCE OF KOSOVO (No. 011-25/17, 28 June 1977)

*Murder
Article 30*

[...]

(2) The term of imprisonment of at least ten years or a death penalty shall be pronounced against:

1) a person who takes another person's life in a brutal or insidious manner;

2) a person who takes another person's life and while doing so intentionally endangers life of one or more persons;

LAW ON INTERNATIONAL LEGAL COOPERATION IN CRIMINAL MATTERS No. 04/L-213

Article 62

Purpose and conditions for transfer

1. The Ministry may grant the transfer of a person sentenced by another state to a correctional institution in the Republic of Kosovo in order to serve his or her sentence or the remaining sentence, provided that the criminal offence for which the person was sentenced in the sentencing state is a criminal offence under national law.

2. Transfer may be granted upon receipt of written request submitted to the Ministry by the sentencing state or by the sentenced person or by someone authorised on his or her behalf if the sentencing state consents to the transfe.

Article 63

The enforcement procedure

1. Persons transferred under this Law shall be subject to one of the following procedures:

1.1. sentences shall be continued when the sentencing state is a member state of the European Union or a state with which the Republic of Kosovo has an agreement to that effect;

1.2. sentences shall be converted when the sentencing state is not one mentioned in paragraph 1.1 of this Article.

2. The Basic Court of Pristina is competent to decide on the enforcement procedure mentioned in paragraph 1. of this Article. The decision cannot be appealed.

Article 64

Continuation of the sentence

- 1. In the cases where paragraph 1.1 of Article 63 of this law is applicable, the competent court shall issue a decision to continue the enforcement of the sentence imposed in the sentencing state. The court is obliged to adhere to the legal nature and duration of the sentence imposed in the sentencing state.*
- 2. In the event that the sentence imposed in the sentencing state by its nature or duration is incompatible with national law, the sentence shall be converted according to Article 65 of this law.*

Article 65

Conversion of the sentence

- 1. In the cases referred to in paragraph 1.2 of Article 63 of this law, the competent court shall issue a decision imposing a sentence in accordance with national law.*
- 2. When converting the sentence, the court shall:*
 - 2.1. be bound by the findings presented in the judgment rendered by the sentencing state;*
 - 2.2. not convert a punishment of imprisonment into a punishment of a fine;*
 - 2.3. deduct the period of the sentence served by the sentenced person in the sentencing state from the sentence imposed; and*
 - 2.4. not aggravate the criminal status of the sentenced person and not be bound by any minimum sanction which the law of the sentencing state may provide for the offence committed.*
- 3. The conversion procedure shall take place before the sentenced person is transferred.*

TREATY BETWEEN THE REPUBLIC OF KOSOVO AND THE SWISS CONFEDERATION ON THE TRANSFER OF SENTENCED PERSONS (Decree No. DMN-004-2012, 01 June 2012)

Article 12 Effect of transfer for administering State

- 1. The competent authorities of the administering State shall:*
 - a) in the case of the Republic of Kosovo, convert the sentence, through a judicial or administrative procedure, into a decision of the State, thereby substituting for the sanction imposed in the Swiss Confederation a sanction prescribed by the law of the Republic of Kosovo for the same offence, under the conditions set out in Article 13, paragraph 1.*

[...]

2. *The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions.*

Article 13 Continued enforcement and conversion of sentence

1. *In the case of conversion of sentence according to Article 12, paragraph 1.a, the procedures provided for by the law of the Republic of Kosovo apply. When converting the sentence, the competent authority::*

- a) shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the Swiss Confederation;*
- b) may not convert a sanction involving deprivation of liberty to a pecuniary sanction;;*
- c) shall deducte the full period of deprivation of liberty served by the sentenced person; and*
- d) shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the Republic of Kosovo may provide for the offence or offences committed.*

2. *In the case of continued enforcement according to Article 12, paragraph 1.b, the Swiss Confederation shall be bound by the legal nature and duration of the sentence as determined by the Republic od Kosovo.*

If, however, this sentence is by its nature or duration incompatible with the law of the Swiss Confederatin, or its law so requires, the Swiss Confederation may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the Republic of Kosovo, nor exceed the maximum prescribed by the law of the Swiss Confederation..

3. *Prior to the transfer, the administering State shall submit the decision, indicating the sentence, to the sentencing State.*

Assessment of the admissibility of the Referral

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

37. 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”.

[...]

38. In addition, 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 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...”

39. The Court also refers to Rule 39(1) (c) (2) and (3) (b) of the Rules of Procedure, which specifies:

“(1) The Court may consider a referral as admissible if:

(c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant

(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”

40. In this respect, the Court notes that there is a decision determining the fundamental rights and freedoms of the Applicant: (i) Judgment SG 2002/248 St/Sc/ste of the Criminal Court of Basel-Stadt in Switzerland, of 19 September 2002 , whereby a sentence of life long imprisonment had been imposed on the Applicant; and, (ii) the Judgment of the Basic Court in Prishtina [NJN.no.157 / 2017] of 13 April 2018, which does not determine the civil rights and obligations nor the criminal responsibility of the Applicant, but however enables the conversion and then the transfer , and serving of the sentence in the Correctional Institutions of the Republic of Kosovo. In the present case, the Court notes that the Applicant does not raise any allegations against the actions of the Swiss authorities.
41. As to the determination of the deadline for submission of the Referral as provided in Article 49 of the Law and further specified in Rule 39 (1) (c) of the Rules of Procedure, concerning the Judgment of the Basic Court in Prishtina [NJN.no. 157/2017] of 13 April 2018, the Court notes that the Applicant's Referral was submitted to this Court on 22 January 2019, whereas for the Court is unknown the date when the Judgment of the Basic Court in Prishtina was served on the Applicant [NJN.nr .157 / 2017] i 13 April 2018.
42. In this regard, the Court has requested the evidence (acknowledgment of receipt) indicating the date of receipt of the challenged decision, from the Applicant's representative, the Basic Court in Prishtina and the Ministry of Justice. None of the parties involved in this procedure had managed to provide the evidence (acknowledgment of receipt) confirming the date of receipt of the challenged decision by the Applicant or his representative.
43. In the response submitted to the Court on 22 August 2019, the Basic Court of Prishtina had stated: “Judgment NIN.no.157/2017 of 13.04.2018, concerning the transfer of the convict Shemsi Ferizi, was forwarded and submitted to the Ministry of Justice by this court on 20.04.2018 [...] The Ministry of Justice after receiving the decision of the court which according to the law issues its decision prior the transfer of the convicted person, decides to approve or not to approve the transfer, hence the progress- further procedures after the submission of the decision to the MoJ, including the service of the decision on the Applicant, pertain to and is to be decided by other authorities and not by the court that issued the decision, in the present case the Basic Court in Prishtina”.
44. In the response submitted to the Court on 5 September 2019, the Ministry of Justice stated: *“Please note that since we are dealing with a request of the Court, and the acknowledgment of receipt and Judgment of the Basic Court in Prishtina, we kindly ask you to address the said request to the above Court, as the body that has issued the Judgment”.*

45. In the response submitted to the Court on 30 August 2019, the Applicant's representative stated: *"We are informing you that we are not able to fulfill your request, due to the fact that the Basic Court in Prishtina has never sent the judgment in question to the Applicant Shemsi Ferizi, since at that time he was serving the sentence in the Swiss Penitentiary Institutions, instead this Judgment was submitted to the competent Swiss authorities, in order for the Applicant Shemsi Ferizi to be extradited to Kosovo."*
46. In response to the repeated request of the Court of 15 May 2020 concerning the date of receipt of the challenged Judgment by the Applicant, the Ministry of Justice in its response submitted to the Court on 18 May 2020 stated, among other things: *"Please note that, the Ministry of Justice as the central authority for international legal assistance, without wishing to elaborate on the interpretation of the case, is kindly informing you that the court decision on the transfer of the convicted person and conversion of the sentence according to the Law on International Legal Cooperation in Criminal Matters, article 65, paragraph 3, is taken prior to the transfer of the convicted person and is a procedure of adapting the sentence according to the findings and the decision pronounced by the authorities of the sentencing state. Also, according to Article 63, paragraph 2 of the said law, the decision cannot be appealed. We also inform you that according to the Bilateral Agreement between the Republic of Kosovo and the Swiss Confederation on the transfer of sentenced persons, respectively Article 16, the sentencing state alone has the exclusive right to decide on any application for review of the judgment."*
47. In response to the the repeated request of the Court of 15 May 2020 concerning the date of receipt of the challenged Judgment by the Applicant, the Basic Court in its response submitted to the Court on 4 June 2020 reiterated that the challenged Judgment was served on the Ministry of Justice on 20 April 2018. The Basic Court had attached to the submitted response the acknowledgment of receipt confirming that the challenged judgment was submitted to the Ministry of Justice on the aforementioned date. The Basic Court reiterated: *"...after the submission of the decision to the MoJ, including the submission of the Applicant's decision, it belongs to and is to be decided by other authorities and not by the court that issued the decision, which in the present case is the Basic Court in Prishtina"*.
48. The Court notes that if the dates 13 April 2018 when by the challenged Judgment was decided to convert the sentence of life long imprisonment, but also the date 20 April 2018 when the Basic Court had submitted to the Ministry of Justice the challenged Judgment attached the acknowledgment of receipt that confirms that the challenged judgment was submitted to the Ministry of Justice are counted as the dates when the legal deadline of four (4) months starts to run, then, it results that the Referral was submitted to the Court after the deadline provided by Article 49 of the Law. However, given the above responses, the Court considers that on the Applicant cannot be placed a disproportionate burden to prove that his Referral is within the legal deadline. The nature of the case and the fact that no appeal is allowed against the Judgment of the Basic Court oblige the Court to avoid extreme formalism because a particularly strict interpretation of a procedural rule may raise issues

of access to justice (see, *mutatis mutandis*, the case of the ECHR, *Perez de Rada v. Spain*, Judgment of 28 October 1998, paragraph 49).

49. In the above-mentioned case of *Perez de Rada v. Spain*, the ECtHR stated that its role was limited to ascertaining whether the effects of the interpretation of domestic law were compatible with the ECHR. This applies in particular to the interpretation by courts of rules of a procedural nature such as the time-limits deadlines governing the filing of documents or lodging of appeals. The ECtHR noted that the rules on time-limits for filing appeals are undoubtedly designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty. However, the rules in question, or their application, should not prevent the litigants from making use of an available remedy. In the case of *Perez de Rada*, the ECtHR noted that the Applicant clearly intended to appeal to the Court of Appeals (*Audiencia Provincial*) against the decision of the Court of First Instance (*Aoiz Court of first instance*) which had annulled an agreement concluded between the Applicant and her neighbor. The Applicant had unsuccessfully tried to file an appeal against the decision of the court of first instance through the Madrid duty court, but seeing that the appeal had to be addressed to the court of first instance (*Aoiz Court of first instance*), the head of the registry office of the duty court had removed the stamp from the appeal thus making it invalid. The Applicant also tried unsuccessfully to submit the appeal to the Court of First Instance (*Aoiz Court of first instance*) with the aim of annulling the decision of the same court, on which occasion, by declaring the appeal inadmissible as out of time, had prevented any appeal to the court of appeals (*Provincial Audiencia*). The ECtHR found that obliging the Applicant to travel to Aoiz in order to lodge the appeal within the legal deadline, while the challenged decision was served on her in Madrid, in the present case, is unreasonable. The ECtHR found that the particularly strict interpretation of procedural rules with respect to legal deadlines by the domestic courts had denied the Applicant's right of access to court guaranteed by Article 6 (1) of the ECHR (see the case *Perez de Rada*, cited above, paragraphs 43-50).
50. Consequently, the Court will assess whether the Judgment of the Basic Court in Prishtina [NJN.no.157 / 2017] of 13 April 2018, has in any way, violated the fundamental rights and freedoms of the Applicant.
51. The Court will deal with the Applicant's allegations, by applying the case law of the ECHR, pursuant to which the Court is obliged by Article 53 [Interpretation of Human Provisions] to interpret the fundamental rights and freedoms guaranteed by the Constitution.
52. As regards the decisions of the Kosovo authorities for conversion, transfer, and serving of the sentence by the Applicant, the Court notes that even those proceedings could potentially raise issues of fundamental human rights and freedoms that the ECtHR has examined in within the framework of Article 5 (Right to Freedom and Security) of the ECHR and in some cases it has set itself in motion to examine whether Articles 6(Right to a fair trial) and 7 (No punishment without law) of the ECHR are applicable to the proceedings in question (see, *mutatis mutandis*, *Vermae v. Finland*(decision), no. 38704/03, of 15 March 2005; *Janos Czoszanski v. Sweden* (decision), no. 22318/02 , 26

October 2004 and the Case of *Grori v. Albania*, ECtHR, Appeal No. 25336/04, Judgment of 7 July 2009, paragraphs 134-162 and the references cited therein).

53. The Court, relying on the consolidated jurisprudence of the ECtHR, should, in principle, assess whether the procedure of conversion, transfer, and serving of the sentence by the Applicant has been implemented in accordance with clear and accessible legal provisions under domestic and international law (see *Grori v. Albania*, cited above, paragraphs 134-162).
54. The Court notes that in the above-mentioned case *Grori v. Albania*, the ECHR had found a violation of Article 5(1) of the ECHR to the detriment of the complainant on the basis of the following test: (i) if the complainant had been transferred to serve the sentence by the Italian authorities to the Albanian authorities with his consent, as provided by the criminal procedural law; (ii) if the transfer and conversion of the Applicant's sentence had a domestic legal basis and (iii) if it was based on a bilateral international agreement on cooperation in criminal matters between Albania and Italy.
55. In the present case, the Court shall assess whether the conversion of the sentence, and the transfer of the Applicant from the Swiss authorities to the Kosovo authorities, meets the ECHR test used in the case *Grori v. Albania*.
56. With respect to (i) the Applicant granting of consent for transfer to the Correctional Institutions of the Republic of Kosovo, the aforementioned Judgment of the Basic Court determines: *"The sentenced Shemsi Ferizi, whose transfer is requested is a citizen of the Republic of Kosovo, who has given consent for transfer, respectively for serving the remaining portion of the sentence in Correctional Institutions in the Republic of Kosovo, the decision by which the sentence was imposed is final, the criminal offense for which he was found guilty and convicted is foreseen as a criminal offence by CCK, specifically as criminal offence of Aggravated Murder provided by Article 179, para.1, item 8 of the Criminal Code of the Republic of Kosovo and Attempted Premeditated Murder under Article 28 para.1 [...] Granting of consent by the defendant for the transfer, respectively for serving the remaining portion of the sentence in the Correctional Institutions of the Republic of Kosovo, results from the reference MDIDBGJ /3937/17 DBJN/2009-00345 dated 01.11.2017 of the Ministry of Justice of the Republic of Kosovo."*
57. As for the (ii) legal basis for converting the Applicant's sentence, the above-mentioned Judgment of the Basic Court states: *"For the reasons mentioned above, this court has carried out the conversion of the sentence pursuant to Article 65 of the Law on International Legal Cooperation in Criminal Matters and at the same time considers that all legal conditions provided by the Treaty between the Republic of Kosovo and the Swiss Confederation on the Transfer of Sentenced Persons have been met, and there are not present any foreseen facts which would present an obstacle related to the enforcement of sentence or transfer of enforcement."*

58. As for the (iii) legal basis for the transfer of the Applicant-International Treaty for transfer to the Correctional Institutions of the Republic of Kosovo, the above-mentioned Judgment of the Basic Court determines: *“The Review Panel of the Basic Court in Prishtina, having reviewed the request for the transfer of the convict and other accompanying documents, and after evaluating the same, based on the Treaty between the Government of the Republic of Kosovo and the Swiss Confederation on the Transfer of Sentenced Persons and the Law on International Legal Cooperation in Criminal Matters No.04/L-213, considers that the envisaged legal conditions for allowing the transfer of the convict Shemsi Ferizi to the Correctional Institution of the Republic of Kosovo have been met”*.
59. As for the calculation of the Applicant’s time spent in detention on remand, the above-mentioned Judgment of the Basic Court determines: *“[...] a unique sentence of life long imprisonment in which shall be accounted the time spent in detention on remand from 26.02.2001 onwards”*
60. In view of the above, the Court concludes that the conversion of the sentence and the transfer of the Applicant was carried out in accordance with the ECtHR test used in the case of *Groni v. Albania*, because: (i) the Applicant gave his consent to the transfer and sentence conversion; and (ii) the transfer and conversion of the Applicant’s sentence has been implemented pursuant to Article 65 of the Law on International Legal Cooperation in Criminal Matters; and, (iii) Treaty between the Republic of Kosovo and the Swiss Confederation on the Transfer of Sentenced Persons.
61. Therefore it cannot be said that the procedure of transfer and conversion of the sentence, to a degree that was reasonable in the circumstances of the case, was not foreseeable for the Applicant or that the conversion of the sentence was not based on the procedure prescribed by law (see, conversely, *Groni v. Albania*, cited above, paragraph 161).
62. The Court recalls once again that the Applicant alleges that the Judgment of the Basic Court in Prishtina NJN. Nr. 157/2017, of 13 April 2018, has violated his rights and freedoms guaranteed by Articles 31 and 54 of the Constitution in conjunction with Article 6.1 and Article 2 of Protocol No. 7 (Right of appeal in criminal matters) of the ECHR. The Applicant also alleges a violation of Articles 8 and 11 of the UDHR.
63. Paragraph 2 of Article 31 [Right to Fair and Impartial Trial] of the Constitution provides: *“2. Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal, established by law”*.
64. Article 54 [Judicial Protection of Rights] of the Constitution provides: *“Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated”*.

65. Paragraph 1 of Article 6 (Right to a fair trial) of the ECHR states: “*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*”.
66. As to the Applicant's allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court notes that the Basic Court during the sentence conversion procedure did not determine the civil rights and obligations nor the merits of the criminal charge against the Applicant, it has only complied with the findings submitted by the sentencing State (see Article 65 of the Law on International Legal Cooperation in Criminal Matters No.04/L-213). Based on the ECtHR jurisprudence, the proceedings concerning the execution of the sentence are not covered by Article 6 of the ECHR (see, *mutatis mutandis*, *Aydin v. Turkey* (judgment), No. 41954/98, 14 September 2000).
67. Consequently, the allegation for violation of the right to fair and impartial trial is incompatible *ratione materiae* with the provisions of Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR.
68. As regards the Applicant's allegation for violation of Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 13 [Right to an effective remedy] of the ECHR, Article 2 of Protocol No. 7 [Right of appeal in criminal matters] of the ECHR and Article 8 [without title] of the UDHR, the Court notes that only the sentencing State has the right to decide on the application for review of the judgment (see Article 16 [Review of judgment] of the Treaty between the Republic of Kosovo and the Swiss Confederation on the Transfer of Sentenced Persons) and that the Basic Court in Prishtinë has jurisdiction over the execution procedure and that its decision may not be appealed (see Article 63 [The enforcement procedure] of the Law No.04/L-213 on International Legal Cooperation in Criminal Matters, however, the Court assesses that the Applicant's right to appeal has not been violated because he was given the opportunity and in fact had submitted a constitutional referral to this Court, which is the competent authority to assess the substance of the Applicant's complaints. The right to judicial protection of rights and the right to an effective remedy does not provide for a guarantee of favorable outcome for the Applicant (see the case of the ECHR *Kudla v. Poland*, Judgment of 26 October 2000, paragraph 157). An effective remedy in the context of Article 54 of the Constitution in conjunction with Article 13 of the ECHR, does not imply a successful remedy, but merely an accessible remedy before a competent authority for the assessment of the substance of Applicant's complaints (see the case of the ECHR, *C v. the United Kingdom*, Decision of 1983).
69. Consequently, the Applicant's allegation for violation of Article 54 of the Constitution in conjunction with Article 13 of the ECHR, Article 2 of Protocol no. 7 of the ECHR and Article 8 of the UDHR, must be rejected as manifestly ill-founded.

70. The Court also notes that the Applicant complains that in his case was not applied the most favourable law as to the time of commission of the criminal offense. He claims that in his case the criminal law of the Socialist Autonomous Province of Kosovo (hereinafter, SAPK) should have been applied instead of the criminal law applicable in the Republic of Kosovo.
71. In this respect, the Court considers that the allegation for application of the most favorable law, in substance, raises issues under Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 (No punishment without law) of ECHR and Article 11 [No title] of the UDHR. Accordingly, the Court will consider this allegation within Article 33 of the Constitution in conjunction with Article 7 of the ECHR and Article 11 of the UDHR (see, *mutatis mutandis*, *Vermae v. Finland* and *Janos Csozanski v. Sweden*, cited above).
72. Paragraph 3 of Article 33 of the Constitution provides: “*3.No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed*”.
73. Paragraph 1 of Article 7 of the ECHR 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 when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed*”.
74. Paragraph 2 of Article 11 of the UDHR provides: “*2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed*”.
75. As to the allegation for application of the most favourable law, namely the criminal law of SAPK, the Court notes that in the Applicant's case on the basis of Article 12.1 a) of the Treaty between the Republic of Kosovo and the Swiss Confederation on the Transfer of Sentenced Persons , it is envisaged that the Kosovo authorities will convert the sentence, through a judicial or administrative procedure into a decision of that State, thus substituting for the sanction imposed in the Swiss Confederation a sanction prescribed by the law of the Republic of Kosovo for the same criminal offence.
76. The Court takes into consideration that the application of the criminal law applicable in the Republic of Kosovo in the Applicant's case cannot be characterized as a determinant factor for the merits of the criminal charge or a new sentence within the meaning of Article 33 of the Constitution in conjunction with Article 7 of the ECHR (see, *mutatis mutandis*, *Janos Csozanski v. Sweden*, cited above). In addition, there is no right under the Constitution or the ECHR to serve a prison sentence under a certain regime of sentences (see, *mutatis mutandis*, *János Csozanszki v. Sweden* and *Aydin v. Turkey*, cited above).

77. However, the Court notes that Article 30 (2) 1) of the criminal law of the SAPK referred to by the Applicant provided that for a criminal offence of murder could be pronounced a sentence of imprisonment of not less than ten years or the death penalty. The Court finds that the Applicant's allegation that the law of SAPK is more favorable in his case, is a manifestly ill-founded allegation given that for the offence in question it had envisaged also the death penalty.
78. In view of the foregoing, the Court considers that the Applicant has failed to prove that he has substantial grounds to believe that the application of the criminal law in force in the Republic of Kosovo instead of the criminal law of the KSAK is flagrantly disproportionate, or generally disproportionate (see, mutatis mutandis, *Vermae v. Finland*, cited above).
79. Hence, the Applicant's allegation for violation of Article 33 of the Constitution in conjunction with Article 7 of the ECHR and Article 11 of the UDHR, must be rejected as manifestly ill-founded.
80. Consequently, the Referral must be rejected as inadmissible on constitutional basis as provided for by Article 113 (7) of the Constitution, and Articles 47 and 48 of the Law and as further specified in Rule 39 (2) and (3) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court in accordance with Article 113.7 of the Constitution, Articles 47 and 48 of the Law and Rules 39 (2) and (3) (b) and 59 (2) of the Rules of Procedure, on 23 September 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

Remzije Istrefi-Peci

Arta Rama-Hajrizi



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