



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

Prishtina, on 21 December 2020
Ref.No:RK 1668/20

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RESOLUTION ON INADMISSIBILITY

in

cases no. KI237/19 and KI238/19

Applicant

Ekzon Keka and Muhamet Thaçi

**Constitutional review of Judgment Pn. II. 8/2019 of the Supreme Court
of the Republic of Kosovo, of 17 October 2019**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. Referral KI237/19 was submitted by Ekzon Keka, residing in Kamenica, represented by Driton Musliu, a lawyer. Referral KI238/19 was submitted by Muhamet Thaçi, residing in the village Muçivërc, Municipality of Kamenica, represented by Florent Latifi, a lawyer (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge the constitutionality of Judgment Pn. II. 8/2019 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), of 17 October 2019, in conjunction with Decision Pml. No. 259/2018 of the Supreme Court, of 5 November 2018 and Judgment PA1. No. 748/2018 of the Court of Appeals, of 13 August 2018.

Subject matter

3. The subject matter of the Referrals is the constitutional review of the challenged Judgment, which allegedly violates the Applicants' rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).
4. The Applicants also request the imposition of an interim measure for the suspension of the execution of the imprisonment sentence, until the final decision of the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

Legal basis

5. The Referrals are based on paragraph 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 no. 01/2018 of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 23 December 2018, the Applicants submitted their Referrals to the Court.
7. On 30 December 2019, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur for case KI237/19, and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).
8. On 14 January 2020, the President of the Court, in accordance with paragraph (1) of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, ordered the joinder of Referral KI237/19 with Referral KI238/19.
9. On 27 January 2019, the Court notified the Applicants about the registration and joinder of the referrals. On the same date, the Court also notified the Supreme Court about the registration of the Referrals and their joinder.

10. On 25 November 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

11. The Applicants submit for the second time Referrals to the Court.

Summary of facts of the previous Referrals KI19/19 and KI20/19

12. On 1 and 6 February 2019, the Applicants submitted to the Court Referrals KI19/19 and KI20/19, challenging the constitutionality of Decision Pml. No. 259/2018 of the Supreme Court, of 5 November 2018, in conjunction with Judgment PA1. No. 748/2018 of the Court of Appeals of 13 August 2018 and Judgment P. No. 62/2014 of the Basic Court in Gjilan - Branch in Kamenica, of 7 June 2018. The Applicants have also requested the imposition of an interim measure in order to suspend the execution of imprisonment sentence until the decision of the Court.
13. On 29 July 2019, the Court, after analyzing the Referrals of the Applicants, decided: 1) to declare their Referrals inadmissible, as manifestly ill-founded, in relation to their allegations of violation of constitutional rights by the Supreme Court by Decision Pml. No. 259/2018, of 13 August 2018, because the latter have not proved and have not sufficiently substantiated their allegations of violation of the rights guaranteed by the Constitution, and 2) to declare inadmissible, as out of time, the allegations of violation of rights by the Court of Appeals by Judgment PA1. No. 748/2018, of 13 August 2018, because from the receipt of the Judgment, more than 4 (four) months have passed for the submission of the Referrals to the Court. The Court, in accordance with Article 27.1 of the Law and Rule 57 (4) (a) of the Rules of Procedure, rejected the Applicants' requests for interim measure because they could no longer be subject of review, as the Referrals were declared inadmissible.

Summary of facts of current Referrals KI237/19 and KI238/19

14. On 8 October 2019, the Applicants filed a request for review of the criminal proceedings, based on the fact that the previous request was made by the parties themselves, who enjoy the quality of a party to file such a request and that the Supreme Court has erroneously found that the submission was submitted by unauthorized parties.
15. On 17 October 2019, the Supreme Court, by Judgment Pn. II. 8/2019 rejected the joint request of the Applicants for review of the criminal procedure as ungrounded, which allowed the review of merits of their request for protection of legality, against Judgment PA1. No. 748/18 of the Court of Appeals of Kosovo of 13 August 2018.
16. Relevant parts of the Judgment of the Supreme Court:

“In the joint request of the convicts Egzon Keka and Muhamet Thaqi, it is alleged that the Judgment of the Court of Appeals contains essential violations of the provisions of the criminal procedure because it is confusing and unclear. The enacting clause of this Judgment states that the request of the Basic Prosecution in Gjilan is approved by modifying the Judgment of the Basic Court, while the reasoning of the Judgment states that the Court of Appeals within the meaning of Article 394 of the CPCK, assessing the appealing allegations from the appeal, found that the appeal of the Basic Prosecution in Gjilan is not grounded. From this it is seen that the enacting clause and the reasoning of the judgment are in contradiction with each other.

According to the assessment of the Supreme Court of Kosovo, the allegations of the convict's defense counsel are ungrounded, as the Judgment of the Court of Appeals against which the request was filed, does not contain essential violation of the provisions of criminal procedure. The Court of Appeals acting on the appeal of the Basic Prosecution in Gjilan has modified the Judgment of the Basic Court in Gjilan – branch in Kamenica regarding the decision on the sentence and the convicts for the criminal offenses for which they were found guilty, has imposed the sentences as presented in the reasoning above of this judgment. However, the fact remains that in the reasoning of the Judgment of the Court of Appeals on page 2 a technical error was made stating that the appeal of the Basic Prosecution in Gjilan is not grounded, but this technical error did not make the judgment incomprehensible, much less to have any ambiguity between the enacting clause and the reasoning, because throughout the reasoning of the judgment are given proper reasons for the decisive facts regarding the decision on sentence, therefore, only the issuance of a technical error did not render the Judgment of the Court of Appeals unclear, and this error could not affect the legality of this judgment.

Also, in the request of the convict's defense counsel it is alleged that the Court of Appeals has violated the criminal law under Article 385 paragraph 1 item 1.5 of the CCRK, because in the case of imposing a sentence of imprisonment has worsened the position of convicts, as it has not assessed the mitigating circumstances provided by Article 74 of the CCRK but has taken into account only the aggravating circumstances.

From the content of the request for protection of legality, it results that all the allegations are related to the decision on sentence.

The Supreme Court of Kosovo, finds that pursuant to the provision of Article 385 paragraph 5 of the CPCK, when it comes to the decision on punishment, violation of the Criminal Law is committed when in rendering a decision on punishment, alternative punishment or judicial admonition, or in ordering a measure of mandatory rehabilitation treatment or the confiscation of material benefit acquired by the commission of a criminal offence, the court exceeded its authority under the law. In this case, the court of first instance, assessing the

circumstances related to the sentence, has imposed the type of sentence provided by law and through individualization of the sentence has imposed the sentence within the limits provided for this criminal offense.

In case this violation is not in question, the decision on punishment by this extraordinary legal remedy can be challenged only if this part of the Judgment was rendered with essential violation of the provisions of the criminal procedure which may be related to the absence or ambiguities of the reasons related to the decision on punishment, however, in the present case such a claim was not presented in the request for protection of legality. For the reasons stated above, the request for protection of legality was rejected as ungrounded and in accordance with the provision of Article 437 of the CPCK it was decided as in the enacting clause of the judgment”.

Applicant’s allegations

17. The Applicants allege that the decisions of the regular courts violated their rights and freedoms protected by the Constitution.
18. The Applicant Ekzon Keka requests from the Court: *“...the constitutional review of Judgment PN .II. 8/2019 of the Supreme Court, of 17.10.2019 and Judgment PA1. Nr. 748/2018 of the Court of Appeals, of 13.08.2018. (Also in relation to this case we refer to the decision of the Constitutional Court KI104/16 of 4.08.2017, as the case law of the Constitutional Court as it is a similar case). In this regard, we request that the Constitutional Court of Kosovo impose an interim measure to suspend the execution of the imprisonment sentence for the defendant Egzon Keka until a decision on merits is taken by the Constitutional Court”.*
19. While the Applicant Muhamet Thaçi requests the Court: *“...to annul Decision Pml. No. 259/2018 of the Supreme Court of Kosovo, of 5.11.2018, which declares as inadmissible the request for protection of legality and the request is assessed only from the procedural aspect that it does not meet the requirements. We also request the annulment of Judgment PA1. No. 748/2018 of the Court of Appeals, of 13.08.2018, by which the defendant is imposed a new sentence of effective imprisonment without being summoned to the hearing and thus violates Article 31 of the Constitution of Kosovo (the right to fair and impartial trial) in conjunction with Article 6 (right to a fair trial) of the European Convention on Human Rights”.*

Admissibility of the Referral

20. The Court will first examine whether the Referrals have fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and foreseen by the Rules of Procedure.
21. Regarding the admissibility of the Referrals of the present cases, the Court initially 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.”

[...]

22. The Court further refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

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...”

23. Regarding the fulfillment of the admissibility criteria, as stated above, the Court finds that the Applicants are authorized party and challenge an act of a public authority, after the having exhausted of all available legal remedies. The Applicants have also clarified the rights and freedoms that they claim to have been violated, in accordance with Article 48 of the Law, and submitted the Referral in accordance with the deadline established in Article 49 of the Law.
24. However, the Court also refers to the Rules of Procedure, in the present case, Rule 35 [Withdrawal, Dismissal and Rejection of Referrals], sub-Rule (5) and Rule 39 [Admissibility Criteria], sub-Rule (2), which establish:

Rule 35 “(5) The Court may decide to summarily reject a referral if the referral is incomplete or not clearly stated despite requests by the Court to the party to supplement or clarify the referral, if the referral is repetitive of a previous referral decided by the Court, or if the referral is frivolous”.

[...]

Rule 39 “(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”.

[...]

25. The Court first recalls that the Applicants challenge before the Court the constitutionality: **i.** of Judgment PA1. no. 748/2018 of the Court of Appeals, of 13 August 2018, in relation to which, in similar circumstances they refer to the Judgment of the Court, in case KI104/16, of 4 August 2017, alleging a violation of Article 31 of the Constitution and Article 6 of the ECHR, **ii.** Decision Pml. No. 259/2018 of the Supreme Court, of 5 November 2018, alleging violation of their rights guaranteed by the Constitution; and **iii.** Judgment PN. II. 8/2019 of the Supreme Court, of 17 October 2019, alleging violation of their rights guaranteed by the Constitution.
26. The Court, in accordance with Rule 35, sub-Rule (5) of the Rules of Procedure, recalls that it could not examine the repeated allegations of the Applicants which were the subject of the Court's review in cases KI19/19 and KI20/19. More specifically, the Court will not assess the constitutionality of Judgment PA1. No. 748/2018, of 13 August 2018 and the constitutionality of Decision Pml. No. 259/2018 of the Supreme Court, of 5 November 2018, because they were subject to review by the Constitutional Court in the joint cases KI19/19 and KI20/19, for which it had decided by the Resolution on Inadmissibility of 29 July 2019.
27. In this regard, in the circumstances of the cases before us, the Court will assess only the constitutionality of Judgment PN. II. 8/2019 of the Supreme Court of 17 October 2019, which was not subject to review by the Court in the abovementioned cases.
28. In this regard, the Court notes that the Applicants, in general, allege that Judgment PN. II. 8/2019 of the Supreme Court of 17 October 2019 violates their rights and freedoms guaranteed by the Constitution. However, they do not further explain how and why, the violation of their constitutional rights has occurred by Judgment PN. II. 8/2019 of the Supreme Court of 17 October 2019.
29. From the case file, the Court notes that the Applicants' allegations before the Supreme Court were related to the objective failure to determine the facts of the case regarding the exercise of joint requests for protection of legality, filed against Judgment PA1. No. 748/2018 of the Court of Appeals of 13 August 2018, where the Supreme Court rejected their requests, considering that they were filed by unauthorized parties because to the requests were not attached, as evidence the powers of attorney of the defense counsels. In the request for review of the criminal procedure, the Court notes that the Supreme Court has accepted the review of the merits of the joint requests for protection of legality and analyzed the allegations of the Applicants of essential violations of substantive and procedural law by the Court of Appeals.
30. The Court further notes that the Supreme Court, on the basis of the request for the review of the criminal proceedings, filed by the Applicants, on 8 October 2019, allowed the review of the merits of the joint request for protection of legality of the Applicants, and after analyzing their allegations, filed against the

Judgment of the Court of Appeals, of 13 August 2019, decided to reject the requests for protection of legality, as ungrounded.

31. In this regard, the Court considers that the Supreme Court, which *ex officio* takes care of the legality of the decisions of the lower instance courts, has responded separately to each of the allegations raised by the Applicants, in the Applicants' requests for protection of legality, giving comprehensive and detailed reasons for the rejection of allegations of violation of their rights as ungrounded (see above the detailed reasoning of the Supreme Court, in paragraph 22).
32. The Court further considers that the Applicants have had sufficient opportunity to present to the Supreme Court all allegations of violation of their rights. Furthermore, the Court considers that their arguments have been duly heard and duly examined by the Supreme Court. Therefore, the Court notes that the proceedings before the Supreme Court, viewed in their entirety, were not in any way unfair or arbitrary which would have rendered the proceedings irregular within the meaning of Article 31 of the Constitution and Article 6 of the ECHR (see the case of the ECtHR *Shub v. Lithuania*, No. 17064/06, Judgment of 30 June 2009).
33. The Court further recalls that it is not its role to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that led a regular court to issue one decision instead of another. If it were different, the Court would act as a "fourth instance" court which would result in exceeding the limitations provided for by its jurisdiction.
34. Furthermore, 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*, paragraph 25 and *Khan v. the United Kingdom*, paragraph 34, and see also cases: KI70/11, Applicants *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011; and KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 41). The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments.
35. The Court in this regard states that the Applicants are merely dissatisfied with the outcome of the proceedings before the regular courts, therefore, their dissatisfaction cannot in itself raise an arguable claim of violation of the rights and freedoms guaranteed by the Constitution (see, case of the ECtHR *Mezotur-Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).
36. In this context, the Court, having examined the proceedings in entirety before the Supreme Court, finds that the Applicants' Referrals should be declared inadmissible as manifestly ill-founded, because the Applicants have not in any way substantiated their allegations on constitutional basis for violation of their constitutional rights.

Request for interim measure

37. The Court recalls that the Applicants requested the imposition of an interim measure, requesting the suspension of the execution of the imprisonment sentence, until the final decision of the Court.
38. The Court has just concluded that the Applicants' Referrals must be declared inadmissible within the meaning of Rule 39 (2) of the Rules of Procedure.
39. Therefore, in accordance with Article 27.1 of the Law and Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for interim measure is to be rejected, as the latter cannot be the subject of review, because the Referral is declared inadmissible. (See, similarly, the cases of the Court, KI159/18, Applicant *Azem Duraku*, Resolution on Inadmissibility of 3 April 2019, paragraph 91; KI13/19, Applicant *Fevzi Hajdari*, Resolution on Inadmissibility of 12 April 2019, paragraph 75 and recently joined cases KI19/19 and 20/19 Applicants *Muhamet Thaqi and Egzon Keka*, Resolution on Inadmissibility of 29 July 2019, paragraphs 53-55).

Conclusion

40. In conclusion, the Court finds that the Applicants' Referrals:
 - i. in relation to Judgment PA1. No. 748/2018 of the Court of Appeals of 13 August 2018, and Decision Pml. No. 259/2018 of the Supreme Court of 5 November 2018, is to be rejected, in accordance with Rule 35 (5) of the Rules of Procedure;
 - ii. in relation to the challenged Judgment are manifestly ill-founded on constitutional basis and must be declared inadmissible, in accordance with Rule 39 (2) of the Rules of Procedure.
 - iii. with regard to the imposition of an interim measure, it must be rejected in accordance with Article 27.1 of the Law and Rule 57 (4) (a) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 27 (1) of the Law and Rules 35 (4) and 39 (2), 57 (4) (a), and 59 (b) of the Rules of Procedure, on 25 November 2020, unanimously

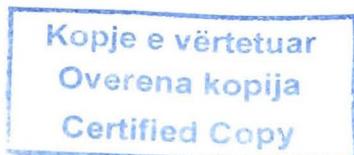
DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for imposition of the interim measure;
- III. TO NOTIFY this Decision to the parties;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- V. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Safet Hoxha



Arta Rama-Hajrizi

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