



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

Prishtina, on 24 May 2021
Ref.No:RK 1784/21

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RESOLUTION ON INADMISSIBILITY

in

Case no. KI89/20

Applicant:

Skender Bislimi

**Referral for Constitutional Review of the Judgment Pml.no. 351/2019 of
the Supreme Court of 26 December 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 Skender Bislimi from the village of Gllamnik, municipality of Podujeva, with residence in Kruševac, Republic of Serbia

(hereinafter: the Applicant). The Applicant is represented by lawyers Miro Delević and Nebojša Vlajić from Mitrovica.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court Pml.no. 351/2019, of 26 December 2019.
3. The challenged judgment of the Supreme Court was served on the Applicant's lawyer Nebojša Vlajić on 10 January 2020.

Subject matter

4. The subject matter is the constitutional review of the Judgment of the Supreme Court, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 3 [Equality Before the Law], Article 5 [Languages], Article 24 [Equality Before the Law], Article 30 [Rights of the Accused], Article 31 [Right to Fair and Impartial Trial], Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on Article 113.7 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

6. On 9 June 2020, the Applicant submitted the Referral by mail to the Constitutional Court (hereinafter: the Court), alleging *"based on the decision of the Kosovo Judicial Council, this appeal is filed after the prescribed legal deadline, due to the COVID-19 pandemics"*.
7. On 12 June 2020, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel, composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).
8. On 2 July 2020, the Court notified the Applicant's lawyers of the registration of the Referral.
9. On the same day, the Court notified the Supreme Court of the registration of the Referral, and requested that the Supreme Court send the evidence as to whether and when the Judgment of the Supreme Court Pml.no. 351/2019, in Serbian language, was served on the Applicant or his lawyers.

10. The Supreme Court did not respond to the Court's request of 2 July 2020.
11. On 26 August 2020, the Court sent a new letter to the Supreme Court with the same request.
12. On 28 August 2020, the Supreme Court responded to the request and sent all requested information and evidence to the Court.
13. On 25 March 2021, after considering the report of the Judge Rapporteur, the Review Panel unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

14. On 6 January 2017, the Special Prosecutor's Office of the Republic of Kosovo filed an indictment, SPP.no.85/2011, to the Basic Court in Prishtina - Department for Serious Crimes (hereinafter: the Basic Court), against the Applicant on a grounded suspicion that he committed a criminal offense "*War crime against civilian population according to Articles 22 and 142 of the Criminal Code of the Socialist Republic of Yugoslavia, currently punishable pursuant to Articles 31 and 152 of the Criminal Code of Kosovo, in violation of Common Article 3 of the Geneva Convention of 12 August 1949, and violation of Articles 4 and 5 of Protocol II, of 8 July 1977*".
15. On 25 October 2018, the Basic Court rendered Judgment TKD.no.3/17, whereby the Applicant was found guilty of committing the criminal offense stated in the Indictment SPP.no.85/2011 of the Special Prosecutor's Office of 6 January 2017. Consequently, the court sentenced him to 10 (ten) years in prison.
16. The reasoning of the Judgment of the Basic Court reads: "*After conducting the evidentiary procedure, the court, by analysing and presenting each piece of evidence separately, and all the evidence together, established the factual situation as stated in the enacting clause of this judgment. This factual situation was established on the basis of the testimony of witnesses and material evidence presented at the court hearing, concluded with specific facts that were proven in connection with the criminal offense charged against the accused.*"

The court carefully analysed the defence of the accused person's defence counsel and the defence of the accused himself, which refers to their alibi, that the accused Skender Bislimi at the time described in the enacting clause of this judgment was in Serbia together with his family in that period, specifically in the town of Kruševac. On that occasion, he presented one piece of material evidence such as a birth certificate of children, which in itself does not dispute the fact that the accused was at the crime scene...."

17. The Applicant's lawyers filed an appeal with the Court of Appeals against the Judgment TKD.no.3/17 of the Basic Court, alleging violations of the provisions of the criminal procedure, erroneous determination of the factual situation as well as the period of the imposed sentence.

18. On 20 August 2019, the Court of Appeals rendered Judgment PAKR no. 341/2019, whereby it rejected the appeals of the Applicant's lawyers as ungrounded. The reasoning of the judgment of the Court of Appeals states:

"Regarding the appellate allegations of significant procedural violations of the criminal law, as well as the violation of the provisions of Article 370 paragraph 7 of CCK, the Court of Appeals states that it carefully considered the judgment of the first instance court as well as the appeals of the accused person's defence counsel, as well as all other case files, assessing that the challenged judgment does not contain significant violations of criminal procedure nor other violations that this court monitors ex officio. The court reasoned the decisive facts, each piece of evidence separately as well as all together, the factual situation was determined on the grounds of material evidence as well as non-material statements of the heard witnesses."

19. The Applicant's lawyers submitted to the Supreme Court a request for protection of legality against the Judgment PKR.no. 3/2017 of the Basic Court of 25 October 2018 and the Judgment PAKR.no. 341/2019 of the Court of Appeals of Kosovo of 20 August 2019, stating... *"that the challenged judgments were rendered with substantial violations of the provision of Article 370, paragraph 7 of the CPCCK, ... that the subject of the criminal offense of war crime against civilian population according to Article 142 of CC of SFRY, can be a person who issues orders, gives orders or the direct executor of a prohibited act, respectively, the main thing in this criminal offense is the formulation of who can be the perpetrator of the crime while according to the judgment of the first instance court, it can be any person, ... for the existence of a war crime, it is necessary to violate the rules of international law related to war and international conventions which oblige active participants to abide by the rules of war and thus, the fact that the convicted person was not an active participant to any party to the conflict, he cannot be the perpetrator of this criminal offense"*.

20. On 26 December 2019, the Supreme Court rendered Judgment Pml.no. 351/2019, whereby it rejected the request for protection of the legality of the Applicant's lawyer as ungrounded. In the reasoning of its judgment, the Supreme Court concluded:

"the claims of the convicted person's defence counsel are ungrounded because the judgments against which the request for protection of legality was filed, do not contain a substantial violation of the provisions of the criminal procedure, nor a violation of the criminal law that is claimed. In the reasoning of its judgment, the first instance court clearly stated its conclusions regarding the criminal offense charged against the convicted person according to the indictment, moreover, based on the provision of Article 142 of the CC of the SFRY, it determined that all objective and subjective elements were manifested in the actions of the convicted person..."

Although the request for protection of legality was filed due to substantial violations of the provisions of criminal procedure and violation of criminal law, based on its content, allegations were made for erroneous and incomplete determination of the facts, however, these allegations were not

assessed by the Supreme Court of Kosovo since according to the provision of Article 432, paragraph 2, of the CPCK, the request for protection of legality cannot be filed due to erroneous and incomplete determination of the factual situation. The Supreme Court of Kosovo also assessed the allegations made in the request regarding violations of the provision of Article 370, paragraph 7 of the CPCK, however, it found on this occasion that the request did not point out a specific violation other than the fact that the legal provision was cited, therefore for this reason and in terms of Article 436 of the CPCK, it did not consider this part of the request as it was limited to the verification of violations in terms of the above provision.”

Applicant's allegations

21. The Applicant alleges that the judiciary violated his rights and freedoms guaranteed by Article 3 [Equality Before the Law], Article 5 [Languages], Article 24 [Equality Before the Law], Article 30 [Rights of the Accused], Article 31 [Right to Fair and Impartial Trial], Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution.
22. The Court cannot notice in the Referral that the Applicant has separately stated or constructed his allegations of violation of the constitutional rights of the mentioned articles separately, but he constructs the stated violations of the mentioned Articles of the Constitution on the claim *“that the Supreme Court of Kosovo did not serve the Judgment Pml.no.351/2019 of the Supreme Court of Kosovo of 26 December 2019, in Serbian language, nor did it do so until the submission of the constitutional complaint, so the defence counsel can only speculate and assume the outcome of the mentioned decision of the Supreme Court”*.
23. Furthermore, the Applicant states that *“The subject of the criminal offense of war crimes against civilian population according to Article 142 of the CC of FRY may be any person who issues orders, gives orders or direct executor of acts. The basic question I ask in the submitted constitutional complaint is “WHO”??? may be the perpetrator of the criminal offense of war crimes against civilian population according to Articles 22 and 142 of the Criminal Code of the Socialist Republic of Yugoslavia” according to the belief and opinion of the defence counsel it can only be a person who is a member of a military, political or organizational party to the conflict or any person who is in the service of that party to the conflict”*.
24. In support of this, the Applicant adds *“For the existence of a criminal offense of war crime, it is necessary that the perpetrator violate the rules of international law and conventions on war, because these international rules oblige active participants in the war to abide to the rules of war. As the Applicant was not an active participant to either side in the war, he cannot be the perpetrator of the criminal offense which he is charged for”*.
25. The Court does not find in the Referral what is the specific request of the Applicant towards the Court, respectively, with what requests he came before the Court. However, given the content of the allegations in the Referral, one may

get the impression that the Applicant is requesting the court to respond to *“WHO” may be the perpetrator of the criminal offense of “war crime against the civilian population, according to Articles 22 and 142 of the Criminal Code of the Socialist Republic of Yugoslavia”*.

Admissibility of the Referral

26. The Court initially considers whether the Referral has fulfilled the admissibility criteria set out in the Constitution, further specified in the Law and the Rules of Procedure.
27. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which stipulate:

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

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”

28. Furthermore, the Court also refers to the admissibility criteria as set out in the Law. In this regard, the Court refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which 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 [...].”

29. In addition, the Court must examine whether the Applicant has fulfilled the admissibility criteria set out in Rule 39 (Admissibility Criteria) of the Rules of Procedure.

“(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.”

30. Before considering the Applicant’s allegations, the Court must remove several doubts and ambiguities stated by the Applicant in the Referral, which as such, in procedural terms, prevent the Court from considering the Applicant’s allegations in the Referral. More specifically, the Applicant stated in the Referral that he had not received the Judgment of the Supreme Court of Kosovo in the Serbian language, and that he was therefore not aware of its contents.
31. Precisely in order to remove this first ambiguity about the date of the served Judgment Pml.no. 351/2019 of the Supreme Court, in Serbian language, the Court sent letters to the Supreme Court on two occasions, on 2 July 2020 and on 26 August 2020, requesting the information be provided to the Constitutional Court *“whether the Judgment Pml.no. 351/2019 of the Supreme Court, was served in Serbian language to the Applicant or his defence counsel, if so when it was served, and if not, why not”*.
32. On 28 August 2020, the Supreme Court responded to the Court’s request stating that the Judgment Pml.no. 351/2019 of the Supreme Court, was sent by mail to the Applicant’s defence counsel, and that on 10 January 2020, it was received by Lawyer Nebojša Vlajić, on which occasion he also signed the confirmation of receipt of the Supreme Court judgment in Serbian language. In order to confirm its allegations, the Supreme Court also submitted evidence, respectively the confirmation of receipt of the delivery of 10 January 2020, with the signature of lawyer Nebojša Vlajić, as the person who received the Judgment Pml.no. 351/2019 of the Supreme Court.
33. From that it can be concluded that the deadline for submitting the Referral to the Court started to be calculated from 10 January 2020, respectively from the day when, according to the confirmation of the Supreme Court, the judgment Pml.no. 351/2019, was served on the Applicant’s defence counsel.
34. Furthermore, as a next step in procedural terms, the Court must determine whether the Applicant’s Referral was filed in accordance with the deadlines stipulated by Article 49 of the Law and Rule 39, 1. c) of the Rules of Procedure.
35. To this end, the Court finds that the Applicant submitted his Referral to the Court on 9 June 2020, explaining *“based on the decision of the Kosovo Judicial Council, this appeal is filed after the prescribed legal deadline, due to the COVID-19 pandemics”*, where he did not submit to the Court any other explanation or decision of the Kosovo Judicial Council to which he refers as the

only legal basis that should be admitted by the Constitutional Court, and based on his Referral submitted after the expiry of the 4-month period be admitted into consideration.

36. In this regard, the Court would like to state that it is aware of all the circumstances that have arisen in connection with COVID-19, however, the Court also would like to add that the decisions of the Kosovo Judicial Council concerning the organizational structure of work on which the Applicant invokes do not affect the work of the Constitutional Court, which functions in accordance with the Law no. 03/L-121 on the Constitutional Court, as well as the Rules of Procedure of the Constitutional Court, which clearly stipulate the legal and procedural conditions governing the work of the Constitutional Court.
37. In addition, the Court would like to add the fact that for this very purpose it issued a "Notification" on 16 March 2020 regarding the work of the Constitutional Court, with the aim of clearly informing all citizens about organizational changes related to the work of the Constitutional Court, so as not to create ambiguities or doubts about its operational work regarding the acceptance of constitutional complaints.
38. The Court recalls the content of the published notification of 16 March 2020:

"In accordance with the recommendations of the Government of the Republic of Kosovo and having regard to the general situation in the country, after the confirmation of the first cases with the COVID-19 virus, the Constitutional Court has decided to reduce its public and official activities. However, in order to respect the right of all citizens of the Republic of Kosovo to submit their constitutional complaints and that the latter are dealt with irrespective of the current situation, the Court will during this period of time continue to work with the reduced staff, who will be physically present in their working places. All judges will continue their work from their homes and will be available to deal with any urgent referral that may be filed with the Court. Also, all Court advisors and the Secretariat officials, with the exception of those who will be on duty in the Court, will continue to work from their homes, as far as it is possible in these circumstances. The Constitutional Court will therefore continue to receive the submissions of citizens and of all authorized parties during the official working hours, as on any other business day (08:00 – 16:00). But, in order to prevent further spread of the COVID-19 virus, all interested parties are encouraged to submit their referrals during this time, if possible, electronically, in the official email of the Court: gjykata.kushtetuese@gjks.org. With regard to the time limit for the submission of referrals, the Court recalls that in accordance with Article 50 of Law 03/L-121 on the Constitutional Court: "If a claimant without his/her fault has not been able to submit the referral within the set deadline, the Constitutional Court, based on such a request, is obliged to return it to previous situation. The claimant should submit the request for returning to previous situation within 15 days from the removal of obstacle and should justify such a request. The return to the previous situation is not permitted if one year or more have passed from the day the deadline set in this Law has expired."

39. Precisely from the press release of the Constitutional Court of 16 March 2020, it can be clearly concluded that the Constitutional Court, despite the reduced number of staff at the time of publication of the notification, in order to prevent the spread of COVID-19, it provided mechanisms that will not raise the issue about the constitutional right of the parties in addressing to the Constitutional Court if they think that their constitutional rights and freedoms have been violated by a decision of any public body.
40. Moreover, the Court recalls that the Rules of Procedure of the Constitutional Court, more precisely Rule 32 of the Rules of Procedure, stipulates the manner of filing referrals to the Constitutional Court.

“Rule 32, Filing of Referrals and Replies

(1) A referral shall be filed in writing in either official language of the Republic of Kosovo or in one of the languages in official use in Kosovo. The referral form provided by the Court on its webpage or its equivalent shall be used. The referral shall be addressed to the Secretary General, shall include the date of filing, and the signature of the person filing the referral. [...]

(8) A referral shall be filed in person at the office of the Secretariat of the Court during regular working hours, or shall be filed by mail or by means of electronic communication.”

41. Based on the content of Rule 32 of the Rules of Procedure, it can be concluded that it provides for 3 (three) mechanisms for filing referrals to the Constitutional Court.
42. More specifically, in addition to the personal submission of referrals to the Constitutional Court, pursuant to Rule 32 of the Rules of Procedure, the party has at its disposal other mechanisms for submission of referrals, namely *a)* submitting a referral to the Constitutional Court by regular mail, and *b)* submitting a referral to the Constitutional Court by email. The Court recalls that for that purpose, the address of the seat of the Constitutional Court is published on the website of the Constitutional Court, which can be used to send referrals by mail, as well as the electronic web address of the Constitutional Court for sending referrals by means of electronic communication to the Constitutional Court.
43. In addition, the Court would like to note that Article 50 of the Law provides for the possibility of *Return to the Previous Situation*, which obliges the Constitutional Court to take into consideration a referral, despite the fact that the legal deadline of 4 months has expired.

“Article 50, Return to the Previous Situation

If a claimant without his/her fault has not been able to submit the referral within the set deadline, the Constitutional Court, based on such a request, is

obliged to return it to previous situation. The claimant should submit the request for returning to previous situation within 15 days from the removal of obstacle and should justify such a request. The return to the previous situation is not permitted if one year or more have passed from the day the deadline set in this Law has expired.”

44. Based on the content of Article 50 of the Law, in order for a request for return to the previous situation to be approved, the following requirements must be met: (i) the Applicant must prove that without his/her fault has not been able to submit the referral within the set deadline, namely within four (4) months as provided by Article 49 of the Law; (ii) the Applicant must submit the request for returning to previous situation within 15 days from the removal of the obstacle; (iii) the Applicant is obliged to justify the request in question; and, (iv) one year or more have not passed from the day the deadline set in this Law for submitting the referral to the Court has expired. These requirements are cumulative.
45. Precisely in order to determine whether the Applicant has fulfilled these prescribed conditions, the Court analysed all the Applicant's allegations, and found the following: as far as the requirement which sets forth the obligation that i) *“the Applicant must prove that without his/her fault has not been able to submit the referral within the set deadline, namely within four (4) months as provided by Article 49 of the Law”*, the Court is of the opinion that the Applicant has not fulfilled the first requirement considering that he has not explained nor justified in his request what made it impossible or prevented him from submitting the Referral to the Court within the prescribed deadline. Moreover, he did not justify his request or submit any documentation to show that he was directly or indirectly prevented due to the new situation with COVID-19, that he could not use even other alternative mechanisms of submitting the referral. Considering that the Applicant has not fulfilled the first requirement, the Court considers that there is no need to continue the assessment whether the other requirements prescribed by Article 50 of the Law have been met.
46. The Court reiterates that it is obliged to approve or not to approve the return to previous situation, based on its own assessment, on a case by case basis, whether the requirements stipulated in Article 50 of the Law have been met and which are cumulative. In the circumstances of this case, based on the case file, the Court assesses that (i) the Applicant has not proved that without his fault he has not been able to submit the referral within the prescribed deadline, namely within four (4) months as provided by Article 49 of the Law, because even though it is indisputable the fact that there was pandemic Covid-19, in his request there is no justification for the inability to submit the referral to the Court during the months of April and May 2020, and furthermore, there is no justification for the inability to have the referral submitted to the Court by the lawyers that the Applicant had during the proceedings and who are indicated in the Referral as his representatives.
47. In view of this, the Court can only conclude that there was nothing to prevent the Applicant from submitting the Referral to the Constitutional Court within 4 months, using one of the mechanisms for submitting a Referral to the

Constitutional Court as prescribed by Rule 32 of the Rules of Procedure or fulfilling the conditions prescribed in Article 50 of the Law.

48. Accordingly, the Court having regard to the date of served Judgment Pml.no. 351/2019 of the Supreme Court, which is 10 January 2020, as well as the date of submission of the Referral to the Court, which is 9 June 2020, establishes that the Applicant's Referral regarding the Judgment Pml.no. 351/2019 of the Supreme Court, was submitted after the legal deadline of 4 (four) months.
49. The Court recalls that the purpose of the statutory limitation of 4 (four) months is in accordance with Article 49 of the Law and pursuant to Rule 39 (1) (c) of the Rules of Procedure, to promote legal certainty, ensuring that cases involving constitutional matters are considered within a reasonable time and that earlier decisions are not permanently open to challenge (see Constitutional Court case no. KI140/ 13, *Ramadan Cakiqi*, Resolution on Inadmissibility of 17 March 2014, paragraph 24, and ECtHR Decision on admissibility in case *Çelik v. Turkey*, application no. 52991/99 of 23 September 2004).
50. In conclusion, the Court finds that the Referral does not fulfil the procedural conditions of admissibility set out in Article 113.7 of the Constitution, Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, therefore, as such, the Referral must be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.1. and 7 of the Constitution, Articles 20 and 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, in the session held on 25 March 2021, 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. The decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Selvete Gërxhaliu-Krasniqi

Arta Rama-Hajrizi

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