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Pristina, 30 October 2010
Ref. No.:AGJ63/10

JUDGMENT

In

Case No. KI 06/10

VALON BISLIMI

Against

Ministry of Internal Affairs,

Kosovo Judicial Council

And

Ministry of Justice

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

INTRODUCTION

The Applicant

1. The Applicant is Mr Valon Bilsimi, from Pristina. In the proceedings before the Constitutional Court he was represented by Mr Feriz Gërvalla a lawyer from Pristina.

The Opposing Parties

2. The Opposing parties in the procedure before the Constitutional Court are the Ministry of Internal Affairs (MIA), the Kosovo Judicial Council and the Ministry of Justice of the Republic of Kosovo.

3. The Municipal Court in Pristina participated in the procedure before the Constitutional Court and was represented at the public hearing held on 14 July 2010.

Subject matter

4. The subject matter of this Referral is the assessment of the constitutionality of the alleged violation of the Applicant's freedom of movement as guaranteed by Article 35 (2) of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution). According to the Applicant the right to leave his country has been violated by refusing the issuance of his passport which is required to travel abroad. The Applicant further argued that in the Kosovo legal system there is no effective legal remedy to pursue his right to leave the country.

5. The Applicant through his representative has also submitted a request for interim measures in order to avoid "further discriminations and violations of the right to freedom of movement of citizens with the conditioning of any ongoing criminal procedure."

Legal basis

6. The Referral is based on Articles 113.7 and 116.2 of the Constitution, Articles 20 and 27 of the Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Sections 53 and 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of the facts

7. On 11 November 2004 the Municipal Court in Pristina issued a Decision, No. P. nr. 1341/04, confirming criminal charges against the Applicant and four other persons for the criminal act of aggravated theft prescribed by Article 253(1) 1 of Provisional Criminal Code.

8. Almost four years later in 2008, the Municipal Court in Pristina scheduled three public hearings in the above mentioned criminal case against the Applicant and the others, i.e. on 24 June 2008, 9 July 2008 and 24 July 2008. Notwithstanding the Applicant's presence, all scheduled hearings were adjourned because of the absence of other parties in the proceedings.

9. After July 2008, the Applicant has not received any further summons for the hearing in the above mentioned criminal case.

10. On 27 April 2009 the Applicant submitted a request for issuance of passport to the Department for Document Production of the Kosovo Ministry of Internal Affairs. On the same day the Applicant paid 25 Euro fee for the passport. However, the Applicant did not yet receive his passport nor has he received any written decision rejecting his request for it.

11. On 13 January 2010 the Applicant requested the Municipal Court in Pristina to issue a certificate of not being subjected to investigation in order to receive a passport. He has not received any certificate or decision of the court with regard to non-issuance of the passport. Instead according to the Applicant he received only "verbal rejection" of his request.

12. On 28 May 2010 the Municipal Court in Pristina issued Judgment, No. P. nr. 1341/04, in the case of the Applicant and others and rejected the criminal charges and terminated the criminal procedure against them.

The Applicant's complaints

13. The Applicant complains that his right to freedom of movement as guaranteed by Article 35 (2) of the Constitution has been violated. He argues that the Municipal Court of Pristina unfairly and erroneously interpret the applicable legal provisions failing to provide him with the certificate which, it is alleged, is a necessary document for the Ministry of Internal Affairs to issue any passport of the Republic of Kosovo.

14. The Applicant also complains that there are no legal remedies in Kosovo that can be used to remedy his situation. Therefore according to him there is a need to create mechanisms within the State for the citizens of Kosovo that are in his situation to prevent further violation of the right to be given a passport.

15. The Applicant argues that the his right to freedom of movement has been violated due to the erroneous application of Article 271(2) of the Criminal Procedure Code of Kosovo (CPCK) as well as Article 27.1, item A and Article 28.2 of the Law on Travel Documents. According to the Applicant both laws provide that the limitation of the right to freedom of movement caused by the refusal of the issuance of a passport can only be imposed in cases where a prior decision of the competent court has been issued.

16. The Applicant also argues that the Ministry of Internal Affairs does not have any legal basis to deprive him of his constitutional right based on absence of the certificate issued by the Court that a person is not under investigation. In substance, according to him, the restriction imposed on his right to freedom of movement is not based on law but it is a matter of erroneous interpretation of the laws and practice, including the misinterpretation of a Memorandum of Understanding entered into between the Ministry of Internal Affairs, the Kosovo Judicial Council and the Ministry of Justice, dated 21 August 2008.

17. Finally, the Applicant requested imposition of a temporary measure in order "to avoid further discrimination and violations of the right to freedom of movement of citizens with the conditioning of any ongoing criminal procedure."

Opposing Party's comments

18. The Ministry of Justice in its statement to the Court dated 24 March 2010 stated as follows "Although we are signatory parties to the Memorandum of Understanding, pursuant to the provisions of that memorandum, the Ministry of Justice takes no concrete responsibilities in relation to the implementation of Article 27 of the Law on Travel Documents." The statement added that the Ministry of Justice has no competence on intervention in the work of judiciary. The Ministry of Justice confirmed this view at the hearing held on 14 July 2010.

19. The MIA was requested to reply to the Referral but did not submit any written reply. At the hearing held on 14 July 2010 the MIA Representative emphasised that the Memorandum of Understating was signed by them in order to facilitate the process on issuance of the passports. According to the MIA representative there is a legal obligation on the Courts to inform the issuing authority i.e., the MIA in cases in which an individual Decision on refusal of issuance of a passport has been issued. However, they allege that the Courts do not issue Decisions on rejecting the issuance of passports although, it is alleged, they are obliged by the Law and the Memorandum to do that. According to the MIA representative "rejection of issuance of travel document without a court order is not fair."

20. The representative of the MIA also stated that the Municipal Courts should only implement the law, and that the Memorandum should facilitate their work. It was further stated at the hearing that if there is no decision, the Ministry of Internal Affairs should provide passports to applicants.

21. At the public hearing held on 14 July 2010, the representatives of MIA and of Municipal Court in Pristina, clarified the practice based on Memorandum of Understanding as follows: the MIA municipal offices of civil registration compiles the list of persons who have submitted the requests for the passports and send the list to the Court. After receiving a list from MIA, the Court verifies those in their records (i.e. those against whom there are criminal proceedings) and does not issue the certificates to them, while with regard to the persons that are not in the records the Court issues the certificates.

22. The representative of the Kosovo Judicial Council at the public hearing before the Court emphasised that the Courts were bound to enforce Article 18 of the Criminal Procedure Code, quoted below. Article 27 of the Law on Travel Documents provides when a court may disallow issuance of passport. The representative also added that the Kosovo Judicial Council will issue an internal act soon based on the law and the Constitution, requiring the Courts to enforce this law and to issue Decisions on each case, based on the relevant provisions of the law, and then to inform the Ministry of Interior of criminal charges pending, and the cases in which the Court prohibits the issuance of a passport or where it orders the confiscation of the passport.

23. In a letter dated 11 May 2010 from the Municipal Court of Pristina, it was confirmed that in the Applicant's case four hearing sessions were scheduled but were not held because of the absence of some of the accused (but not of the Applicant) and also because of the absence of the injured party. Consequently the proceedings were still ongoing.

24. The Municipal Court further confirmed that with regard to the Applicant's case, "the Municipal Court has not issued and does not issue any special ruling for the non-issuance of the passport, but it issues a ruling in cases when the passport is confiscated". With regard to Article 3 of the Memorandum of Understanding, the Municipal Court stressed "that it implements this agreement by receiving group of referrals of persons that request the issuance of certificates that no criminal proceedings are ongoing." Furthermore it was stated that "In conformity with Article 18 of the CCP the Court does not at all issue certificates that no criminal proceedings are ongoing, when the indictment is in force, as in actual case, and for a criminal offence punishable by a fine or imprisonment of up to three years from the day when the judgement of conviction is rendered."

25. Finally in the same latter it was clarified that "Since in actual case no decision has been issued with regard to the abovementioned, there is no possibility for the appeal."

Proceedings before the Court

26. On 25 January 2010, the Applicant filed a Referral with the Constitutional Court. The President appointed Judge Kadri Kryeziu as Judge Rapporteur and appointed a Review Panel, composed of Judges Ivan Čukalović (Presiding), Enver Hasani and Iliriana Islami.

27. On 19 February 2010 the Review Panel considered the Judge Rapporteur's Report and decided to request additional information in relation to the Referral from the Ministry of Internal Affairs, the Kosovo Judicial Council and the Ministry of Justice.

28. On 17 March 2010 the Court requested additional information in relation to the Referral from the Applicant.

29. On 28 April 2010 the Review Panel considered the Report of the Judge Rapporteur including the additional information obtained.

30. On 16 June 2010 the full Court deliberated and decided that the Referral is admissible.

31. On 14 July 2010, a public hearing was held at which the Applicant's representative was present as well as representatives of the Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice. A representative of the Municipal Court of Pristina was also present at the hearing.

32. On 22 September 2010 the Court met in private session to deliberate and adopted this judgement.

Relevant legal background

Law on Travel Documents

33. In the Republic of Kosovo the legal rules, procedures and manner of application for issuance of travel documents and their validity is regulated by the Law on Travel Documents (Law No. 2008/03-L037).

34. Article 3 of the Law on Travel Documents defines the Passport, as follows:

"Passport is a travel document which is provided to a Kosova Republic citizen (in further text: citizen) for state border crossing and proving the identity and citizenship."

35. Article 8 of the same Law regulates that the competent organ for issuing the passport is the Ministry of Interior.

36. Article 23 of the Law on Travel Documents further defines that the application for issuance of passport is conducted in a specific form. That form requires the following data (see Art. 23.2):

"a) personal name;
b) personal number of the citizen;

c) date of birth;
d) gender;
e) place of birth;
f) permanent residence;
g) citizenship;
h) date and place of submission of application;
i) name, surname and residence of legal representative.
j) signature of the applicant."

37. Article 26 of the said Law further defines that the Ministry of Interior shall decide on the application for the passport within 15 days after within its submission.

38. Article 27 of the Law on Travel Documents defines situations when the Ministry of Interior shall refuse the application for passport as follows:

"27.1 Competent body, to which was submitted the application for passport, refuses the application on the basis of court decision if:

a) against the citizen who has submitted the application for issuance of passport is conducted criminal procedure respectively procedure for dissolution of marriage and for recognition of parental right, if the court requires prohibition of issuance of passport.

b) there exists the interests of protection of the state, determined by law;

c) to the citizen is pronounced at least twice imprisonment sentence for criminal offences of illegal production and drugs trafficking, money counterfeit, smuggling, falsification of documents, illegal production and weapons and explosives trafficking, illegal border crossing, trafficking in human beings, international terrorism, financing of terrorist activity and other criminal offences regarding the foreign states.

27.2 If the court has brought a final decision against the citizen, based on the points a,b,c of paragraph 1 of this article, it should inform the competent body about the refusal of application and for this it should provide reasoning.

27.3 If any of the reasons from points a, b, c, of paragraph 1 of this article, is presented after the issuance of passport, competent body for issuance of passports should issue decision on taking back the passport.

27.4 Appeal against the decision based on paragraph 3 of this article, does not stop the execution of decision."

39. The Law on Travel Documents further defines that the competent court is obliged to immediately inform the Ministry of Interior if the grounds for refusal of passport ceased (see Art. 28 of the Law).

40. Finally, Article 28(2) of the Law on Travel Documents provides,

"It is considered that there are no reasons for refusal of application for issuance of passport from paragraph 1 of Article 27 of this Law if the competent court, does not renew the prohibition."

Memorandum of Understanding between Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice

41. On 21 August 2008 a Memorandum of Understanding was entered into between the Ministry of Internal Affairs, the Kosovo Judicial Council and the Ministry of Justice intending to establish procedures and responsibilities between those bodies on the implementation of Article 27 of the Law on Travel Documents.

42. Article 2 of the Memorandum prescribes, *inter alia,* that

> *"Immediately after receiving an application of citizen, the Civil Registry Office of the Municipality shall forward the request to the Municipal Court to determine whether the following is undergoing against the citizen;*
> *Criminal procedure*
> *Marriage settlement procedure*
> *Parental rights recognition procedure*
> *Or, to determine whether an imprisonment sentence has been imposed against the citizen at least twice on …"*

43. Article 3 of the aforesaid Memorandum, in the pertinent part, reads:

> *"The delivery of the names who have applied for a passport should be considered as requirement by the court to express its opinion whether the application of the citizen for the issuance of a passport can be accepted.*
>
> *In cases where the citizen has not been convicted or a court procedure is not undergoing in line with cases as per Article 2 above, the Court shall sent the response within one working day.*
>
> *In cases where the citizen* has *been convicted or if a court procedure is ongoing in line with Article 2 above, the court shall notify the Ministry of Internal Affairs and the respective citizens on the development of the court procedure and shall inform the decision on granting or rejecting the issuance of the passport to the citizen.*
>
> *After taking the decision, the court shall inform the Ministry of Internal Affairs and the citizen in question within 3 working days"*

44. The Provisional Criminal Procedure Code of Kosovo adopted on 6 July 2004, as amended on 6 November 2008 by the Criminal Procedure Code of Kosovo, reads as follows:

> *Article 18*
>
> *"When it is provided that the initiation of criminal proceedings has the consequence of limiting certain rights, such consequence shall take effect, if it is not determined otherwise by law, upon the entry into force of the indictment and for a criminal offence punishable by a fine or imprisonment of up to three years from the day when the judgment of conviction is rendered, irrespective of whether it is final or not."*
>
> *Article 271*
>
> *"The defendant's promise that he will not leave/abandon his residence*

(1)The court during the proceedings may require the defendant to promise that he will not hide or change his residence without permission of the court when there is doubt that he has committed a crime and when the court has a reason to doubt that the defendant may hide, go to an unknown place or leave Kosovo.

The promise of the defendant will be noted in the minutes.

(2)The travel document of the defendant, who has given his promise according to paragraph 1 of this article, may be confiscated temporarily. An appeal against the decision to confiscation of travel document does not suspend execution of the decision.

(3) When making his promise, the defendant is warned that in case of violation of the promise, the defendant will be placed into custody. "

Assessment of the Request for Interim Measures

45. The Applicant requested the Court to issue an interim measure in order "to avoid further discrimination and violations of the right to freedom of movement of citizens with the conditioning of any ongoing criminal procedure."

46. The Applicant has not submitted any evidence that would justify the imposition of such interim measure. He has not proven that the proposed interim measure is necessary to avoid any risk of irreparable damage, or whether such a measure is in the public interest, as required by Article 27 of the Law on the Constitutional Court.

47. It follows that the request must be rejected.

Admissibility

48. In order to be able to adjudicate the Applicants' Referral, the Constitutional Court needs first to examine, whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution.

49. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

"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";

and to Article 47.2 of the Law, stipulating that:

"The individual may submit the referral in question only after he/she has exhausted all legal remedies provided by the law."

50. The Constitutional Court recalls that a similar admissibility criterion is prescribed by Article 35 of the European Convention on Human Rights (the "Convention").

51. According to the well established jurisprudence of the European Court on Human Rights, the Applicants are only required to exhaust domestic remedies that are available and effective. Furthermore, this rule must be applied with some degree of flexibility and without excessive formalism. The European Court on Human Rights further recognized that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is

essential to have regard to the particular circumstances of each individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the country concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see European Court on Human Rights judgment in the case Akdivar v. Turkey judgment of 16 September 1996).

52. Moreover, where a suggested remedy did not in fact offer reasonable prospects of success, for example in light of settled domestic case law, the fact that the applicant did not use it is no bar to admissibility (see European Court on Human Rights judgment in the case of Pressos Compania Naviera S.A. v. Belgium of 20 November 1995, para. 27; Radio France c. France, no. 53984/00, decision of 23 September 2003, para 33).

53. According to the case-law of the European Court of Human Rights the administrative authorities form one element of a State that respect the rule of law and their interests coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose (see, *mutatis mutandis*, Hornsby v. Greece, judgment of 19 March 1997, *Reports* 1997-II, p.511, para. 41).

54. The Constitutional Court has therefore to consider which domestic remedies were available and effective to the Applicant and whether he had exhausted them.

55. The Applicant's representative claims that there are no available and effective domestic remedies that the Applicant could pursue.

56. The Opposing Parties during the public hearing explained the current practice in details but none of them showed that there are remedies that are available to the applicant's situation and that they are effective.

57. In the letter of 11 May 2010 of the Municipal Court of Pristina it was explicitly mentioned that "the Municipal Court has not issued and does not issue any special ruling for the non-issuance of the passport, but it issues a ruling in cases when the passport is confiscated."

58. In the actual case the Municipal Court of Pristina was acting as an administrative body and failed to provide the Applicant with the certificate which, it is alleged, is a necessary document for the Ministry of Internal Affairs to issue any passport of the Republic of Kosovo. This practice is evidently based on the above mentioned Memorandum of Understanding.

59. Indeed, most significantly, the Municipal Court confirmed in their letter of 11 May 2010 that "since in actual [the Applicant's] case no decision has been issued with regard to the abovementioned, there is no possibility for the appeal."

60. Consequently, taking realistic account not only of the existence of formal remedies in the Kosovo legal system, but also its general legal context and, in particular, the existing practice with regard to the issuance of the passports in Kosovo, the Constitutional Court is of the view that there were no effective remedies at the Applicant's disposal which he could pursue and exhaust.

61. Accordingly, the Referral is admissible.

Merits

i. As regards the Right to Freedom of Movement

62. .At the outset it should be recalled that Article 53 of the Constitution provides as follows:

> *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

63. Article 35 of the Constitution provides as follows:

> *Article 35 [Freedom of Movement]*
>
> *1. Citizens of the Republic of Kosovo and foreigners who are legal residents of Kosovo have the right to move freely throughout the Republic of Kosovo and choose their location of residence.*
>
> *2. Each person has the right to leave the country. Limitations on this right may be regulated by law if they are necessary for legal proceedings, enforcement of a court decision or the performance of a national defense obligation.*

64. Similarly, Article 2 of Protocol No. 4 of the Convention provides as follows:

> *Freedom of movement*
>
> *1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
>
> *2. Everyone shall be free to leave any country, including his own.*
>
> *3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
>
> *4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.*

65. The Constitutional Court emphasises that Article 2 of Protocol No. 4 to the Convention guarantees to any person a right to liberty of movement, including the right to leave any country for another country of the person's choice to which he or she may be admitted. The right to leave any country, including one's own, must be read subject to the third paragraph of Article 2, which provides for certain restrictions that may be placed on the exercise of that right in the interests of, *inter alia*, national security or public safety.

Applicable test

66. According to the well established jurisprudence of the European Court of Human Rights the applicable test with regard to the alleged violation of the right to leave any country could be summarized as follows: in order to comply with Article 2 of

Protocol No. 4 any restriction must be "in accordance with the law", pursue one or more of the legitimate aims contemplated in paragraph 3 of the same Article and be "necessary in a democratic society" (see European Court on Human Rights judgment in the case Raimondo v. Italy of 22 February 1994, Series A no. 281-A, p. 19, para. 39).

67. This Constitutional Court observes that in the case at issue it was not disputed that there had been interference with the right of the Applicant as guaranteed by Article 35 of the Constitution and Article 2 of Protocol No. 4 to the Convention, by virtue of non issuance of the passport.

Whether the restriction was "in accordance with law"

68. With regard to the lawfulness of the measure, the Court draws attention to the settled case-law of the European Court of Human Rights according to which the expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concemed and foreseeable as to its effects (see Rotaru v. Romania [GC], no. 28341/95, para. 52, ECHR 2000-V). In order for the law to meet the criterion of foreseeability, it must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned – if need be, with appropriate advice - to regulate their conduct.

69. The Court notes that on 27 April 2009 the Applicant submitted a request for the issuance of a passport to the Department for Document Production of the Kosovo Ministry of Internal Affairs.

70. In accordance with Article 26 of the Law on the Travel Documents the Ministry of Interior was obliged to decide on the Applicant's application for the passport within 15 days after 27 April 2009. However the Ministry failed to do so.

71. The Court further notes that in the Applicant's case the Ministry of Interior effectively prevented the issuance of a passport to the Applicant without either the Ministry of Interior or a Court issuing a decision to that effect.

72. It should be recalled that pursuant to Article 27 on Law on Travel Documents, the competent body i.e. Ministry is entitled to refuse the application for passport *"on the basis of court decision"* and *"if the court requires prohibition of issuance of passport."*

73. The Court recalls that according to the Applicant the restriction imposed on his right of the freedom of movements is not based on law but it is a matter of erroneousness interpretation of the laws and practice based on Memorandum of Understanding between Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice from 21 August 2008.

74. The Court is satisfied that the law in question, i.e. Law on Travel Documents meets the criterion of accessibility and foreseeability, as described in paragraph 68 above.

Whether the restriction pursued a legitimate aim

75. The Court also considers that the imposition of a measure such as that in the instant case in order to ensure the Applicant's presence in the criminal proceedings instituted against him has a legitimate aim.

Whether the restriction was "necessary in a democratic society"

76. With regard to the proportionality of a restriction imposed on account of presence in the criminal procedure, the Court reiterates that it is justified only so long as it furthered the pursued aim.

77. The Court notes the settled jurisprudence of the European Court of Human Rights which states that an imposed measure, while justified at the outset, may become disproportionate and breach that individual's rights if it is automatically extended over a long period (see European Court Human Right judgment in case Luordo v. Italy, no. 32190/96, para. 96,; Földes and Földesné Hajlik v. Hungary, no. 41463/02, para. 35).

78. In any event, the authorities are under an obligation to ensure that a breach of an individual's right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in all the circumstances. They may not extend for long periods measures restricting an individual's freedom of movement without regular re-examination of their justification. Such review should normally be carried out, at least in the final instance, by the courts, since they offer the best guarantees of the independence, impartiality and lawfulness of the procedures. The scope of the review by the Court should enable it to take account of all the factors involved, including those concerning the proportionality of the restrictive measure and the passage of time (see, mutatis mutandis, European Court on Human Rights judgement in the case Le Compte, Van Leuven and De Meyere v. Belgium, 23 June 1981, para 60, Series A no. 43).

79. The Constitutional Court notes that a criminal proceedings against the Applicant was pending before the Municipality Court of Pristina for more than 6 years and that finally the Applicant was acquitted.

80. The Constitutional Court also notes that in the proceedings against the Applicant the Municipal Court has not issued any decision pursuant to Article 271 of the Criminal Code of Procedure. Instead the Court refrained to issue a certificate that was according to the established practice a necessary criterion for issuance of the passport although this document was not listed in Article 23.2. of the Law on the Travel Documents.

81. The Court considers that the scope of the judicial procedure also failed to satisfy the requirements of Article 2 of Protocol No. 4 of the Convention.

82. The Court is also of the opinion that the administrative body did not take account of all the relevant information in order to ensure that the restriction on the applicant's freedom of movement was justified and proportionate in the light of the circumstances of the case.

83. As to whether the authorities fulfilled their duty to re-examine regularly the measures restricting the applicant's freedom of movement, the Constitutional Court notes that no re-examination of the impugned measures was carried out.

84. In view of the foregoing considerations, the Constitutional Court considers that the Applicant was subject to measures of an automatic nature, with no limitation as to their scope or duration (see Riener v. Bulgaria, 23 May 2006, para 127).

85. It concludes that the authorities have failed in their obligation under Article 2 of Protocol No. 4 to the Convention to ensure that any interference with an individual's

right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in the light of the circumstances.

86. Accordingly, there has been a violation of the Applicant's right to freedom of movement, guaranteed by Article 35 of the Constitution in conjunction with Article 2 para. 2 of Protocol No. 4 of the Convention.

ii. As regards to the Right to an Effective Legal Remedy

87. Article 54 of the Constitution, entitled Judicial Protection of Rights, reads as follows:

> *"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".*

88. Article 13 of the Convention provides:

> *"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

89. The Applicant stated that that there are no available and effective domestic remedies that the he could pursue.

90. The Opposing Parties, as it was already mentioned above, explained the current practice in details but none of them show that there are remedies that are available to the Applicant's situation and that were effective.

91. The Court recalls that according to the case-law of the European Court of Human Rights, Article 13 of the Convention guarantees the availability at (national level of) a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable claim" under the Convention and to grant appropriate relief.

92. The scope of obligation under Article 13 of the Convention varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, European Court on Human Rights judgment in the case Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 42, para 113)

93. The rule on exhaustion of remedies is based on the assumption reflected in Article 13 (with which it has a close affinity) that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see the European Court on Human Rights judgment in the case Kudla v. Poland, 26 October 2000).

94. Consequently, where there is an arguable claim that an act of the authorities may infringe the individual's right to leave his or her country, guaranteed by Article 2 of Protocol No. 4 to the Convention, Article 13 of the Convention requires that the legal system must make available to the individual concerned the effective possibility of challenging the measure complained of and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (see, mutatis mutandis, Shebashov v. Latvia (dec.), 9 November 2000, no. 50065/99 and Al-Nashif v. Bulgaria, no. 50963/99, 20 June 2002).

95. There is no doubt that the Applicant's complaint under Article 2 of Protocol No. 4 to the Convention in respect of the effective prohibition against him leaving Kosovo was arguable. He was entitled, therefore, to an effective complaints procedure in Kosovo law.

96. The Constitutional Court notes that the Opposing Parties signed the Memorandum of Understanding on 21 August 2008, with the purpose of establishing procedures and responsibilities between the Ministry of Internal Affairs, Ministry of Justice and the Kosovo Judicial Council on the implementation of Article 27 of the Law on Travel Documents.

97. The Court emphasises the Memorandum can only facilitate the implementation of the Law and should not in any circumstances be used as an excuse for non-implementation of the Law.

98. The Court recalls that pursuant to practice based on the Memorandum the Applicant's request for the passport was never considered with sufficient procedural safeguards and thoroughness by an appropriate authority.

99. Accordingly the practice based on the Memorandum of Understanding of 21 August 2008, applied by the Ministry of Internal Affairs and Municipal Court prevented the Applicant from enjoying his right to an effective legal remedy in violation of Article 54 of the Constitution in conjunction with Article 13 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY:

I. REJECTS the request for Interim Measure;

II. DECLARES the Referral as admissible

III. HOLDS that there has been a violation of the Applicant's right to freedom of movement guaranteed by Article 35 (2) of the Constitution in conjunction with Article 2 of Protocol No. 4 to the European Convention on Human Rights;

IV. HOLDS that the practice based on Memorandum of Understanding of 21 August 2008, applied by the Ministry of Internal Affairs and Municipal Court prevents the Applicant in enjoying his right to an effective legal remedy in violation of Article 54 of the Constitution in conjunction with Article 13 of the European Convention on Human Rights;

V. FINDS that the Ministry of Internal Affairs should decide on the Applicant's application for passport of 27 April 2009 in accordance with Law on Travel Documents within 30 days after receipt of this Judgment.

VI. This Judgment shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

VII. The Judgment is effective immediately and it may be subject to editorial revision.

Judge Rapporteur

Kadri Kryeziu, Deputy-President

President of the Constitutional Court

Prof. Dr. Enver Hasani