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

Prishtina, on 3 May 2019
Ref. no.:RK 1356/19

[This translation is unofficial and serves for informational purposes only]

RESOLUTION ON INADMISSIBILITY

in

Case No. KI119/17

Applicant

Gentian Rexhepi

Constitutional review of Judgment PML. No. 41/2017 of the Supreme Court of the Republic of Kosovo of 3 July 2017

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 Gentian Rexhepi from Prishtina (hereinafter: the Applicant) who is represented by a lawyer Faton Qirezi.

Challenged decision

2. The Applicant challenges Judgment [PML. No. 41/2017] of 3 July 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [PAKR. No. 345/2016] of 16 September 2016 of the Court of Appeals and Judgment [PKR. No. 291/14] of 18 February 2016 of the Basic Court in Prishtina (hereinafter: the Basic Court).

Subject matter

3. The subject matter is the constitutional review of the challenged judgment, which according to the Applicant's allegation, violated his fundamental rights and freedoms 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 on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 22 [Processing Referrals] and Article 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).

5. On 31 May 2018, the the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 3 October 2017, the Applicant submitted the Referral to the Court.

7. On 5 October 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Ivan Čukalović (Presiding), Bekim Sejdiu and Selvete Gërxhaliu- Krasniqi.

8. On 9 October 2017, the Applicant notified the Applicant about registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 16 June 2018, the mandate of judges: Almiro Rodrigues and Snezhana Botusharova ended. On 26 June 2018, the mandate of judges Altay Suroy and Ivan Čukalović ended.

10. On 27 June 2018, the Court requested the Applicant to submit to the Court his request for protection of legality filed with the Supreme Court and the request for protection of legality filed with the Supreme Court by lawyer S.G.

11. On 13 July 2018, the Applicant's lawyer submitted to the Court the abovementioned requests for the protection of legality.

12. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.

13. On 2 October 2018, the President of the Court rendered Decision KSH. 119/17 on the replacement of Judge Ivan Čukalović, whose mandate as a judge ended on 26 June 2018, and Judge Bajram Ljatifi was appointed instead. Judge Bekim Sejdiu was appointed Presiding of the Review Panel.

14. On 3 April 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

15. On 26 May 2009, the District Public Prosecutor's Office in Prishtina filed an Indictment [PP. No. 33/2009] against the Applicant for the criminal offense of aggravated murder and the criminal offense of unauthorized ownership, control, possession or use of weapons, provided for in paragraph 4 of Article 147 and paragraph 2 of Article 328, namely, of the Provisional Criminal Code of Kosovo (hereinafter: the PCCK). The respective indictment was confirmed by the Decision [KA. No. 277/09] of 28 August 2009.

16. On 4 November 2013, by Judgment [P. No. 301/09, PKR. No. 34/13], the Basic Court found the Applicant guilty of criminal offenses of aggravated murder and criminal offense unauthorized ownership, control, possession or use of weapons and sentenced him to imprisonment of 22 (twenty-two) years, and a fine in the amount of 2000 (two thousand) euro.

17. On 26 February 2014, appeals against the Judgment [P. No. 301/09, PKR. No. 34/13] of 4 November 2013 of the Basic Court, were also filed by the Basic Prosecution in Prishtina and the Applicant. The first one filed an appeal due to the decision on the criminal sanction, proposing that the Court of Appeals modifies the Judgment of the Basic Court, by imposing a higher sentence of imprisonment and a fine on the Applicant. This request was also supported by the Appellate Prosecution through the document [PPA/I. No. 191/2014] of 25 March 2014. The second one, namely the Applicant, through his two defense counsels filed appeals on the grounds of essential violations of the provisions of criminal procedure, erroneous and incomplete determination of the factual situation, violation of criminal law and decision on punishment, proposing that the Court of Appeals modifies the challenged Judgment and acquit the Applicant in the absence of evidence or annul the challenged Judgment and remand the matter to the Basic Court for retrial. The second lawyer also

proposed that if the case is not remanded for retrial, the Court of Appeals will modify the challenged Judgment with respect to the legal qualification of the criminal offense by declaring the Applicant, if found, guilty of the criminal offense of murder in self-defense, as provided for in Article 146 (Murder) in conjunction with paragraphs 3 and 4 of Article 8 (Necessary Defence) of the PCCK..

18. On 14 May 2014, the Court of Appeals by Decision [PAKR. No. 178/2014] annulled the first instance judgment and remanded the case to the Basic Court for retrial.

19. According to the Court of Appeals, it was not disputable that on 2 January 2009 A.G. was deprived of life, but it was disputable if the deceased was killed with the Applicant's weapon or another weapon of the participants at the critical night. In this respect, the Court of Appeals justified the annulment of the Judgment of the Basic Court, *inter alia*, because: (i) the factual situation was not completely and correctly determined because the Basic Court found the accused guilty, namely the Applicants, based on the expertise that the Applicant's defence counsels challenged. According to the Court of Appeals, the Basic Court should correct the contradictions regarding the decisive facts, by accepting the defense proposal for the assignment of a new expertise made in accordance with Law No. 03/L-187 on Forensic Medicine (hereinafter: LFM); and (ii) without justification, the proposals for the defense of the accused, namely the Applicant, for hearing the certain witnesses, including police investigators and doctors who participated in conducting the victim's autopsy, were not approved.

20. The Court of Appeals, by its aforementioned decision, specifically recommended that the Basic Court, in retrial, should *inter alia*: (i) *"administer once again the evidence in this criminal matter which were proposed by the defense in relation to the adduce of new evidence relating to the new expertise which the Prosecutor did not challenge either, because the latter is not complete and pursuant to the Law on Agency on Forensic";* (ii) *"In the occasion of the reconstruction of the scene, the Court should summon the person who had conducted an autopsy, because it did not do it";* and *"as a piece of evidence it should administer the report of the police officer who was present during the autopsy and to hear other police officers who were present during the autopsy (...)".*

21. On 18 February 2016, in the retrial, the Basic Court in Prishtina by Judgment [PKR. No. 291/14] found the Applicant guilty of the criminal offenses of aggravated murder and unauthorized ownership , control, possession or use of weapons and sentenced him to 19 (nineteen) years of imprisonment and a fine of 2000 (two thousand) € . The Court of Appeals, the criminal offense of aggravated murder determined by paragraph 4 of Article 147 of the CCK, connected to Article 24 (Incitement) of the CCK. The accused, namely the Applicant, was also imposed the accessory punishment for the seizure of the automatic rifle, in accordance with Article 54 (Accessory Punishments) in conjunction with Article 60 (Confiscation of Objects) of the CPCK.

22. The Basic Court pronounced the aforementioned punishment after making the assessment of the evidence, based on the Decision of the Court of Appeals, including (i) the hearing of three senior specialists of the Forensic Traseology Department of the Kosovo Agency on Forensic (hereinafter: KAF); (ii) hearing of the forensic expert N.U.; and (iii) the hearing of the witnesses proposed by the Court of Appeals.

23. On 13 May 2016, appeal against the Judgment [PKR. No. 291/14] of 18 February 2016 of the Basic Court were filed by the Basic Prosecution in Prishtina and the Applicant. The former, filed the appeal due to the decision on a criminal sanction, proposing that the Court of Appeals modify the Judgment of the Basic Court by imposing a higher sentence of imprisonment on the accused, namely the Applicant. The second, namely the Applicant and his defense counsel, on the grounds of essential violations of criminal procedure provisions, erroneous and incomplete determination of factual situation, violation of criminal law and decision on punishment, proposing that the Court of Appeals modifies the challenged Judgment and acquit the Applicant in the absence of evidence or annul the challenged Judgment and remand the case for retrial to the Basic Court.

24. On 16 September 2016, the Court of Appeals, by Judgment [PAKR. No. 345/2016] partially approved the Applicant's appeal by modifying the first instance judgment regarding the legal qualification of the criminal offense and the decision on punishment, by requalifying the criminal offense of aggravated murder to the criminal offence of murder, provided by Article 146 of PCCK, for which he was sentenced to imprisonment of 16 (sixteen) years while the part of the challenged judgment in connection with second criminal offense of unauthorized ownership, control, possession or use of weapons and a fine, have remained unchanged.

25. On 14 January 2017, the Applicant and his defense counsel submitted two separate requests for protection of legality to the Supreme Court. The two requests for protection of legality were based on essential violations of the provisions of the criminal procedure and violation of the criminal law, with a proposal that the challenged judgment be annulled and the case be remanded for retrial.

26. Both requests for protection of legality were mainly built on the alleged violations of the LFM and Law No. 04/L-064 on Kosovo Agency on Forensic (hereinafter: LKAF) during the conduct of expertise in the Basic Court, stating, *inter alia*, that the taken actions and respective evidence of the forensic expert T.G. and ballistics expert H.K. represent inadmissible evidence to the court because they operate through private companies registered with the Ministry of Trade and Industry (hereinafter: the MTI) and that none of them is part of the Department of Forensic Medicine and KAF and that based on LFM, the forensic experts should only act under the authority of the Department of Forensic Medicine. Furthermore, the requests for protection of legality point out that the instructions of the Decision [PAKR. No. 178/2014] of 14 May 2014 of the Court of Appeals have not been implemented, especially in terms of the conduct of the new expertise and reconstruction of the scene of event,

including the participation in the process of the doctor who has conducted the autopsy.

27. On 1 March 2017, the State Prosecutor by submission [KMLP. II. No. 29/17] proposed to reject both requests for protection of legality as ungrounded.

28. On 3 July 2017, the Supreme Court by Judgment [Pml. No. 41/2017] rejected as ungrounded both requests for protection of legality filed against Judgment [PAKR. No. 345/2016] of the Court of Appeals of 16 September 2016 in conjunction with Judgment [PKR. No. 291/14] of the Basic Court in Prishtina of 18 February 2016.

Applicant's allegations

29. The Applicant alleges that Judgment [Pml. No. 41/2017] of 3 July 2017 of the Supreme Court, which rejected as ungrounded the requests for protection of legality against Judgment [PAKR. No. 345/2016] of 16 September 2016 of the Court of Appeals in conjunction with Judgment [PKR. No. 291/14] of 18 February 2016 of the Basic Court was rendered in violation of his constitutional rights guaranteed by Article 31 [Right to Fair Trial Impartial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

30. The Applicant builds his case on allegations of violation of the procedural safeguards guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, alleging a violation of the right to a reasoned court decision and the principle of equality of arms.

31. As regards the allegations of violation of the right to a reasoned court decision, the Applicant alleges that the challenged Judgment of the Supreme Court does not meet the standards of the reasoned decision because it does not address the following issues: (i) the expertise conducted in the Basic Court on the basis of which the accused, namely the Applicant, was found guilty and which is not based on the applicable law but based on "*only case file and literature*"; (ii) the impartiality of the witness N.U., who, according to the Applicant, before giving the evidence was in the office of presiding judge; (iii) non-hearing of the witness/main physician who performed the autopsy and non-reconstruction with the participation of the doctor who conducted the autopsy; (iv) impartiality of the Presiding Judge; and (v) the acceptance of the police report of 3 January 2010 as evidence to the Court, despite the fact that the latter did not contain protocol and was not signed by the witnesses.

32. In support of allegations of a violation of the right to a reasoned court decision, the Applicant refers to the case law of the Court in case KI22/16 (see, case of the Constitutional Court, Applicant *Naser Husaj*, Judgment of 9 June 2017); and the case law of the European Court of Human Rights (hereinafter: ECtHR) in Case *H. v. Belgium* (see, case of ECtHR, Application No. 8950/80, Judgment of 30 November 1987).

33. The Applicant also alleges a violation of the principle of equality of arms by referring to the case *Vidal v. Belgium* (see, ECtHR case, application no.

12351/86, Judgment of 28 October 1992) and case *Elsholz v. Germany* (see , ECtHR case, application no. 25735/94, Judgment of 13 June 2000).

34. Finally, the Applicant requests the Court that his Referral be declared admissible and Judgment [Pml. No. 41/2017] of 3 July 2017 of the Supreme Court in conjunction with the Judgment [PAKR. No. 345/2016] of 16 September 2016 of the Court of Appeals and Judgment of the Basic Court of 18 February 2016 [PKR. No. 291/14] be declared invalid and to order that his case be remanded for retrial.

Assessment of the admissibility of Referral

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

36. 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".*

37. The Court further refers to the admissibility requirements as prescribed by 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 establish:

> Article 47 of Law
> [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".

38. Regarding the fulfillment of these requirements, the Court notes that the Applicant is an authorized party, challenging an act of a public authority, namely the Judgment [Pml. No. 41/2017] of the Supreme Court of 3 July 2017, after exhaustion of all legal remedies provided by law. Exceptions to the last finding constitute two specific allegations of the Applicant, which were filed for the first time before this Court, for which a special reasoning was given. (See paragraphs 69-75 of this Resolution).The Applicant also clarified the rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines of Article 49 of the Law.

39. However, the Court should further assess whether the requirements established in Rule 39 of the Rules have been met. In this regard, the Court recalls the criteria established in item (b) of paragraph (1) and paragraph (2) of Rule 39 of the Rules of Procedure:

Rule 39
[Admissibility Criteria]

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

(...)

b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.

(...)

(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".

40. The Court initially reiterates that based on paragraph (2) of Rule 39 of the Rules of Procedure, it may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim. In this regard, the Court recalls the substance of the matter raised by the Applicant and the relevant allegations.

41. In the present case, five decisions of the regular courts are included, four of which have found or confirmed the Applicant's guilt for the murder of 2 January 2009. The Basic Court initially found the Applicant guilty of aggravated murder, sentencing him to 22 (twenty two) years of imprisonment. This decision of the Basic Court was annulled by the Court of Appeals and the case was remanded for retrial with specific recommendations relating to the

administration of evidence; conducting a new expertise based on the applicable law through which it would be specifically confirmed if the deceased was murdered with the gun of the Applicant and the hearing of certain witnesses. In the retrial, the Basic Court again found the Applicant guilty, but lowering the sentence from 22 (twenty two) to 19 (nineteen) years of imprisonment. The Court of Appeals futher confirmed the Applicant's guilt, by lowering the sentence to 16 (sixteen) years of imprisonment. Finally, the Supreme Court rejected the requests for protection of legality by confirming Judgment [PAKR. No. 345/2016] of 16 September 2016 of the Court of Appeals in conjunction with Judgment [PKR. No. 291/14] of 18 February 2016 of the Basic Court.

42. The Court recalls that the issue of expertise through which it was confirmed, according to the case file, the fact that the murder had occurred as a result of the weapon used by the accused, namely the Applicant, constitutes one of the most essential issues in the circumstances of the present case, a matter that was reviewed at all court instances and reflected in the relevant decisions.

43. The Court further recalls that the issue of expertise constitutes one of the main allegations raised before the Court, in relation to which the Applicant alleges that the rights to a reasoned court decision has been violated guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Court also recalls that beyond the issue of the expertise, the Applicant also alleges a lack of reasoning through the challenged Judgment of the Supreme Court also regarding the impartiality of the witness N.U.; the non-hearing of the witness/main doctor who performed the autopsy and failure to make reconstruction with the participation of the doctor who has conducted the autopsy; the impartiality of the presiding judge; and the acceptance of the police report of 3 January 2010 as an evidence in the court.

44. In addressing the Applicant's allegations, the Court initially states that the Applicants' substantive allegations relating to alleged violations of the procedural safeguards guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the right to a reasoned decision and equality of arms have been interpreted in detail through the case law of the ECtHR, in accordance with which the Court under Article 53 [Interpretation of the Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Accordingly, in interpreting allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECHR.

45. In this regard, the Court will examine the Applicant's allegations as to the alleged violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, initially with respect to allegations concerning the violation of the right to a reasoned court decision, to continue with allegations of violation of the principle of equality of arms. The Court will consider these allegations based on its respective case law and of the ECtHR and by applying the latter in the circumstances of the present case.

Regarding the right to a reasoned court decision

46. The Court notes that it already has a consolidated case law with regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. This case law was built based on the ECtHR case law, including, but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. In addition, the fundamental principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012; KI22/16, *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018; and KI143/16, *Muharrem Blaku and Others,* Resolution on Inadmissibility of 13 June 2018.

47. In principle, the case law of the ECtHR and that of the Court emphasize that the right to a fair trial includes the right to a reasoned decision and that the courts must "*show with sufficient clarity the grounds on which they based their decision*". However, this obligation of the courts cannot be understood as a requirement for a detailed answer to any argument. The extent to which the obligation to give reasons may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. The essential arguments of the Applicants are to be addressed and the reasons given must be based on the applicable law.

48. In this regard, the Court will elaborate whether the Applicant's allegations of lack of a reasoned court decision, namely of Judgment [Pml. No. 41/2017] of 3 July 2017 of the Supreme Court, in the circumstances of the present case, are in accordance with the procedural guarantees embodied in Article 31 of the Constitution and Article 6 of the ECHR. The Court will first address issues related to the disputed expertise throughout the courts instances, in order to proceed with the handling of other allegations of the Applicant.

(i) As to the allegations of lack of reasoning related to the contested "expertise"

49. The Court recalls that in the first trial in the Basic Court, completed by the Judgment [P. No. 301/09, PKR. No. 34/13] of 4 November 2013, the relevant court engaged two experts, one forensic and one of ballistics, on the basis of whose report, *inter alia*, found the accused, namely the Applicant, guilty of the respective criminal offense. During the court proceedings, according to the case file, the defense challenged the forensic and ballistic expertise, proposing to engage a competent institute to make a new expertise and to provide a professional opinion to prove the essential issue in the circumstances of the case, whether "*the death of the deceased A.G. can be linked to the shootings fired by the accused or the murder is the result of the shooting of another weapon fired by another person on the critical night*".

50. This allegation was also filed through an appeal to the Court of Appeals, where the defense of the accused, namely the Applicant, alleged that the abovementioned expertise could not serve as evidence before the court, based on Articles 152, 153 and 154 of the Provisional Criminal Procedure Code of Kosovo (hereinafter: the PCPCK), because forensic and ballistic expertise was not conducted in accordance with the LFM, considering that according to the allegation, the expertise should be carried out only by experts certified by the Department of KAF Forensics, while experts engaged by the Basic Court were registered as private company with the MTI and did not act under the authority of the abovementioned Department.

51. The Court recalls that the issue of expertise was one of the main reasons why the Court of Appeals annulled the Judgment of the Basic Court by the Decision [PAKR. No. 178/2014] of 14 May 2014 and remanded the case for retrial. The Court of Appeals had specifically recommended that in the retrial, the Basic Court should "*once again administer the evidence in this criminal case and adduce the evidence that have been proposed by the defense regarding the issue of new evidence about the new expertise, which was not challenged by the prosecutor, as the latter is incomplete and in accordance with the law on the forensic agency*".

52. The Basic Court, in the retrial, to determine the facts of the case and specifically to confirm the opinion given by the forensic and ballistic expert at the first trial in the Basic Court, also requested the opinion of KAF. The team, consisting of three senior specialists of the Department of Forensic Traseology, of KAF, confirmed the initial opinion of the contested experts. However, KAF Chief Executive, through the letter [AFK/2015-388] of 3 December 2015, challenged the opinion of three specialists of this Agency, emphasizing that the opinion of the relevant experts was qualified only as an analysis and not as expertise or a "*super-expertise*". The Basic Court qualified the latter as the personal opinion of the respective Chief Executive Officer.

53. The Court of Appeals, through its second decision in this case, namely Judgment [PAKR. No. 345/2016] of 16 September 2016, addressed again the issue of contested experts. The Court of Appeals stated that despite the allegations of the accused and his defense counsels, it cannot be concluded that the expertise of the challenged experts cannot be accepted as evidence in the court. The Court of Appeals further stated that on the basis of the PCPCK, applicable at the time of the commission of the criminal offense, namely Article 175 and paragraph 1 of Article 176 thereof, the expertise is engaged for the determination or for the assessment of any significant fact by a specialist who possesses the necessary professional knowledge and that this expertise is ordered by the court in writing upon the request of the public prosecutor, defense counsel or *ex officio*. The Court of Appeals referred to the reasoning of the Basic Court, according to which the experts were assigned by its order and based on the request of the public prosecutor.

54. The Court of Appeals, through its Judgment in that regard, also emphasized:

"Due to the fact that ballistics expert H.K. and that of Forensic T.G. are not experts of the Department of the Forensic and the Kosovo Agency on Forensic it cannot be concluded that their expertise is unacceptable as evidence, because such a thing was not required under the Criminal Procedure Code which was in force at the time these experts were appointed, nor under the new Criminal Procedure Code. Pursuant to Article 175 of the CPC (6 April 2004), which was in force at the time, the expert witnesses shall be engaged when the determination or assessment of an important fact calls for the finding and opinion of a specialist possessing the necessary professional knowledge, whereas according to Article 176 par. 1 of the same code, the court orders the expertise in writing based on the request of the public prosecutor, defense counsel or ex officio. From the case file it follows that these experts were engaged by the court order upon the request of the public prosecutor. Then it is alleged without any ground that these experts are not licensed because they conduct their activity as experts in their private firms with the permission of the respective Ministry".

55. The Court of Appeals further reasoned that the Basic Court had not decided solely based on the forensic and ballistic experts, but also based on KAF opinion, specifically concerning the determination of the type of weapon by which the deceased was killed. The Agency confirmed the opinion of the forensic and ballistics expert. In this respect, the Basic Court did not consider it necessary to provide additional expertise to determine the circumstances and the facts of the case. The Court of Appeals confirmed such a position of the Basic Court and, *inter alia*, noted the following:

"While, according to the experts of the Agency on Forensics, even according to the expert Dr. N.U. heard in the main trial, it stems the same conclusion according to the panel of this court there is no need to avoid dilemmas for a super expertise either outside the state or within a group of forensic and ballistic experts as claimed by the defence counsel of the accused".

56. Finally, the Supreme Court also dealt with the allegations of the Applicants raised by requests for protection of legality as regards the validity of the report of experts, forensic and ballistics experts, especially in the light of the allegations that they were private experts and do not belong to the KAF.

57. The Supreme Court, by Judgment [Pml. No. 41/2017] of 3 July 2017, in this regard, *among other things*, stated:

"As the second-instance court has correctly assessed, the allegation that the finding and opinion of the forensic expert Dr. T. G. and of the ballistics H.K. are unacceptable evidence, is not grounded. In the previous Criminal Procedure Code, Article 175, it is explicitly stipulated that the determination or assessment of an important fact calls for the finding and opinion of a specialist possessing the necessary professional knowledge, and further in accordance with Article 176, paragraph 1 of the same Code, an expert analysis shall be ordered in writing by the court on the motion

of the public prosecutor, the defence or ex officio. Pursuant to the provision of Article 137 of the CPCK, which is now in force, the selection of experts is at the disposal not only of the court, but also of the parties to the proceedings and it is not obligatory for the expert to be a part of a professional institution or public authority (under paragraph 4 of this Article , this is only one possibility, because this provision determines: "If possible and without creating a conflict of interest, experts shall be drawn from professional institutions or public entities which shall provide their expertise when called upon.

In the present case, both experts are persons who possess the necessary professional knowledge in the field of forensic, namely ballistics, and have many years of experience. The aforementioned expertise was ordered in writing by the court according to the proposal of the state prosecutor. Therefore, in this respect, no violation of the provisions of the criminal procedure was committed. On the other hand, the Criminal Procedure Code does not stipulate in any provision that expert witnesses should be employed in state institutions, but only be experts having the necessary professional knowledge in a particular field. Provisions of the Law 03/L-187 on Forensics, inter alia, prescribe the qualification of forensic experts, the types of forensic expertise, etc., but there is no provision, based on which, none other than physicians employed in this Institute can do the forensic expertise. Based on the above, the Supreme Court considers that the finding and opinion of these expert witnesses is evidence based on the provisions of the Criminal Procedure Code, is not an unacceptable evidence, while the abovementioned claims in both the requests for protection of legality are ungrounded.

58. In this regard, the Court notes that the Applicant's allegations that the Supreme Court did not reason the Applicant's allegations as to expertise or "*super-expertise*" as the Applicant refers, does not stand. This is because, as noted above, the regular courts have consistently dealt with and justified the admissibility and validity of the opinion of the forensic and ballistic expert in the first trial at the Basic Court and which, subsequently, in the second trial, namely in the retrial in the Basic Court, was also confirmed by the opinion of three senior KAF specialists.

59. The Court recalls that the PCPCK, applicable at the time of the commission of the criminal offense, in its Chapter XXII defines the general provisions for the experts. Pursuant to this Code, namely paragraph 1 of Article 176, the expertise is ordered by the court in writing upon the request of the public prosecutor, defense counsel or ex officio. Paragraph 2 of this article also states that in principle, experimentation is entrusted to a professional institution or public entity. The PCPCK did not necessarily determine that the experts who are determined by a court order should belong to a public institution. The same rule is defined by the new Criminal Procedure Code, namely the Criminal Procedure Code of the Republic of Kosovo, which through its Article 137, the Decision to Engage Expert, defines the same rule, not limiting the selection of the expert necessarily from a public body. On the other hand, LFM and LKAF do not contain specific provisions which would oblige a court to limit itself to their services in obtaining expert opinion.

60. Moreover, the Court notes that the concept of "*super-expertise*" referred to by the Applicant, is not defined either in the old Code, applicable at the time of the commission of the criminal offense or in the new Criminal Procedure Code. The Court of Appeals, when referring the case for retrial, referred to a "*new expertise*", and which was subsequently, according to regular court assessment, in retrial, made through the opinion of KAF specialists. During the court proceedings, the Applicant challenged this opinion of KAF specialists pointing out that the same is not an "*expertise*". This opinion was supported by the KAF Chief Executive. However, the regular courts have consistently emphasized that the opinion given by KAF and which supports the initial opinion of the forensic and ballistic expert, supported by other facts established in the present case, suffice to establish the guilt of the accused, namely the Applicant, in the circumstances of the present case.

61. In this regard, the Court recalls that, in the light of the right to a reasoned court decision guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, it is the obligation of the courts to address the essential arguments of the Applicants and the reasons given shall be based on the applicable law. The Court considers that, as regards the specific allegation, the regular courts, including the Supreme Court, which judgment is challenged before the Court, have fulfilled that obligation.

(ii) With regard to allegations of lack of reasoning related to the issue of "autopsy"

62. The Court recalls that the Applicant alleges that the Supreme Court did not reason the fact that in the retrial the chief physician who performed the autopsy, was not heard, namely Dr. M.G. The Court also recalls that the Court of Appeals, by its first decision, namely the Decision [PAKR. No. 178/2014] of 14 May 2014, which remanded the case for retrial, recommended that upon reconstruction, the Basic Court should summon the person who conducted the autopsy, not specifically referring to Dr. M.G., who according to the case file, was among the doctors who had led the conduct of autopsy. According to the case file, it results that in the retrial, the Basic Court heard Dr. N.U., who participated in the autopsy procedure together with Dr. M.G.

63. In this respect, the Basic Court, through its second Judgment, namely, the Judgment [PKR. No. 291/14] of 18 February 2016, *inter alia*, stated:

> *"He participated in the autopsy of the latter together with Dr. M.G. - Forensic Pathologist at that time while S.S., was technician of the autopsy who was present, he says that even the forensic photographer D.S. was present. After the end of autopsy, the autopsy report was compiled together with Dr. M., which report was signed by them, the autopsi report of 2 January 2009, and the report of autopsy for A. G. - Medical Examiner Office of 23 February 2009, in the English language version signed by Dr. M.G.and Dr. N.U.".*

64. The same Court also found as follows:

"The opinion of the forensic expert Dr. N.U. is in full compliance with the opinions and all the material evidence found in the case file as well as the opinion of the forensic expert Dr. T.G. and ballistics experts Prof. H.K., cited above."

65. The Supreme Court by Judgment [Pml. No. 41/2017] of 3 July 2017, also found that the hearing of Dr. N.U., who participated in the autopsy procedure, was sufficient to prove the circumstances of the present case. The Supreme Court, *inter alia*, found as follows:

"At a retrial, the first-instance court heard Dr. N.U. who was assistant to Dr. M.G. during the autopsy. He stated that the characteristics of the entrance and exit wounds in the body of the deceased were described in the autopsy record, that these characteristics resemble the wounds caused by a long-range firearms, but not in his domain, but of the ballistic expert, to declare about the weapons from which the wounds were caused".

66. In this regard, the Court recalls that, in the light of the right to a reasoned court decision guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, it is the obligation of the courts to address the essential arguments of the Applicants and the reasons given shall be based on the applicable law. The Court considers that, as regards the specific allegation, the regular courts, including the Supreme Court, which judgment is challenged before the Court, have fulfilled that obligation.

(iii) As to allegations of lack of reasoning related to "police report", "impartiality of witness N.U." and "impartiality of the presiding judge".

67. The Court recalls that the Applicant raises three allegations as to the lack of a reasoned court decision: (i) acceptance of the police report of 3 January 2010 as evidence to the Court; (ii) the impartiality of the witness N.U.; and (iii) the impartiality of the presiding judge.

68. As to the first allegation, the Court notes that, based on the case file, the Applicant's allegations regarding the acceptance of the police report which did not have protocol resulted to be incorrect. This finding is confirmed by the Judgment [PKR. No. 291/14] of 18 February 2016 of the Basic Court, which in this regard stated:

"(...) The written report of the investigating officer M. M. of 5 October 2008, which had no protocol, no signature and he had no authorization to compile any written report because the Police Officer Rr.B. has the authorization to compile an official report in writing, and who compiled the report. Therefore, the Court cannot trust a report that does not have anything to do with an official report, it has no protocol, it is not signed, contains technical errors where in the beginning it reads 5 October 2008 while in the content it can be seen that it is related to 3 January 2009, this Police Officer did not have official authorization to compile this report (...) "

69. With regard to the second and third allegations, the documents do not show that these two cases have been raised during the proceedings before the regular courts. In addition, the Court notes that according to the case file, it results that these two cases have not been brought before the Supreme Court either through requests for protection of legality.

70. In this respect, the Court refers to its case law and the case law of the ECtHR, as regards the criterion of exhaustion of legal remedies in the substantive meaning.

71. The Court initially notes that, while in the context of machinery for the protection of human rights, the rule of exhaustion of legal remedies must be applied with some degree of flexibility and without excessive formalism, this rule normally requires also that the complaints and allegations intended to be made subsequently at the cout proceedings should have been aired before the regular courts, at least in substance and in compliance with the formal requirements and time-limits laid down through the applicable law (See, ECtHR case, Jane *Nicklinson v. The United Kingdom* and *Paul Lamb v. United Kingdom*, Applications 2478/15 and 1787/15, 16 July 2015, paragraph 89 and the references therein).

72. More specifically, the ECtHR maintains the position that, in so far as there exists a legal remedy enabling the regular courts to address, at least in substance, the argument of violation of a right, it is that remedy which should be used. If the complaint presented before the Court has not been put, either explicitly or in substance, to the regular courts when it could have been raised in the exercise of a legal remedy available to the applicant, the regular courts have been denied the opportunity to address the issue, which the rule on exhaustion of legal remedies is intended to give. (See, ECtHR case, Jane *Nicklinson v. The United Kingdom* and *Paul Lamb v. United Kingdom*, cited above, paragraph 90 and the references therein).

73. Therefore, the Court reiterates that the exhaustion of legal remedies includes two important elements: (i) the exhaustion in the formal-procedural aspect, which implies the possibility of using a legal remedy against an act of a public authority, in a higher instance with full jurisdiction; and (ii) exhausting the remedy in a substantial aspect, which means reporting constitutional violations in "*substance*" before the regular courts so that the latter have the opportunity to prevent and correct the violation of human rights protected by the Constitution and the ECHR. The Court considers as exhausted the legal remedies only when the Applicants, in accordance with applicable laws, have exhausted them in both aspects. (See also the case of the Constitutional Court, KI71/18, Applicants *Kamer Borovci, Mustafë Borovci dhe Avdulla Bajra*, Resolution on Inadmissibility of 21 November 2018, paragraph 57).

74. Having regard to these principles and the circumstances in which, according to the case file, it follows that these specific allegations of the Applicant have been filed for the first time before the Court, it concludes that the Applicant did not give the opportunity to the regular courts, including the Supreme Court, to address these allegations and on that occasion, to prevent alleged violations

raised by the Applicant directly to this Court without exhausting legal remedies in their substance. (See, *mutatis mutandis*, the case of the Constitutional Court, KI118/15, Applicant *Dragiša Stojković*, Resolution on Inadmissibility of 12 April 2016, paras. 30-36).

75. Consequently, with regard to the second and third allegation of the Applicant in this dispute, namely (i) the allegation of the impartiality of the witness N.U.; and (ii) on the impartiality of the presiding judge, the Court finds that the latter should be rejected as inadmissible allegations on procedural grounds due to substantial non-exhaustion of all legal remedies as required by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

76. Finally, the Court also recalls that, in support of allegations of a violation of the right to a reasoned court decision, the Applicant refers to the case law of the Court in Case KI22/16 (cited above); and the case law of the ECtHR in the case *H. v. Belgium* (cited above).

77. In this regard, the Court notes that the case law referred to by the Applicant in support of the allegation of lack of reasoning of the court decision is already included, as elaborated in paragraph 46 of this resolution, in the Court case law regarding this issue and is regularly applied in the assessment of the Applicants' allegations as to the lack of a reasoned court decision. This case law also includes the case of ECtHR, *H. v. Belgium* and case KI22/16 of the Constitutional Court (see both cases cited above).

78. As to case KI22/16, however, the Court notes that it is not applicable in this case because the differences in the allegations raised in the assessment of the regular courts in both cases are different, and this is specifically because in KI22/16 the substantive argument raised by the Applicant was not addressed at all by the Supreme Court, which is not the case in the present case.

Regarding the principle of equality of arms

79. The Court also recalls that the Applicant alleges violation of the principle of equality of arms. The Court notes that while the Applicant alleges a violation of this principle, he does not provide concrete arguments as to how the proceedings in the circumstances of his case may have resulted in a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. However, the Court notes that the Applicant in this regard merely referred to cases of ECtHR, namely the case of *Vidal v. Belgium* (cited above), and *Elsholz v. Germany* (cited above).

80. The Court notes that, apart from the fact that the Applicant has mentioned and cited these two decisions, he did not elaborate their connection, factual and legal, with the circumstances of the present case. The Court emphasizes that the reasoning of other court decisions must be interpreted in the context and in light of the factual circumstances in which they were rendered. (see in this context the Judgment in Case KI48/18 of 4 February 2019, Applicants *Arban Abrashi and the Democratic League of Kosovo* (LDK), paragraph 275).

81. However, in this regard, the Court recalls that in the case *Vidal v. Belgium* (cited above), the Applicant *inter alia* complained that non- summoning of the four witnesses he had requested had resulted in denial of his sole opportunity to prove his innocence. The ECtHR agreed with his allegation and found that the rights of the defense were limited to the extent that the Applicant had not had fair and impartial trial. The latter happened due to the fact that when the appellate judges replaced the sentence - they had no fresh evidence other than the verbal statements given by the defendants and had taken their decision based on the case file. Moreover, the ECtHR has held that domestic courts in that case had not given any reason to reject the Applicant's request to hear the witnesses proposed by him.

82. In addition, the Applicant recalls that in case *Elshoz v. Germany* (*cited above*), the Applicant complained that the refusal to order an opinion of the expert of psychology and the absence of a hearing before the domestic court, had denied him the opportunity to show that denying access to his child was contrary to his son's interests. The ECtHR found that the proceedings before the first and second instance courts, in their entirety, did not meet the requirements of a fair trial, taking into account the lack of evidence from an expert in psychology and the fact that the regional court of the German state did not hold a hearing on this issue. Such expertise was considered necessary, *inter alia*, to determine the true will of a child of 6 years of age.

83. The Court notes that the circumstances of the cases referred to by the Applicant and which, *inter alia*, include in itself an unjustified refusal to hear the key witnesses in the first case and the lack of a hearing of an expertise which would confirm the will of the minor in question in the second case, do not coincide with the circumstances of the present case.

84. Accordingly, based on the foregoing and taking into account the characteristics of the present case, the allegations raised by the Applicant and the facts presented by him, also based on the standards established in its case law in similar cases and the case law of ECtHR, the Court considers that the Applicant has not substantiated his allegations that the relevant proceedings have been in any way unfair or arbitrary and that the challenged decision violated the Applicant's rights and freedoms guaranteed by the Constitution and the ECHR (see: *mutatis mutandis:* ECtHR case, *Shub vs. Lithuania*, No. 17064/06, Decision of 30 June 2009).

85. However, the Court recalls that the "*fair trial*" in civil and criminal proceedings, which is required by Article 6 is not a "substantive" fairness, but rather a "*procedural*" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court. (See ECtHR cases *Star Cate – Epilekta Gevmata and Others v. Greece,* No. 54111/07, Decision of 6 July 2010, *Donadze v. Georgia*, No. 74644/01, ECtHR decision of 7 March 2006, paragraphs 30-31).

86. In the circumstances of the present case, the Court considers that the Applicant has not sufficiently substantiated his allegations that during the court

proceedings he had not the benefit of the conduct of the proceedings based on adversarial principle; that he was not able to present the allegations and evidence he considered relevant to his case at the various stages of those proceedings; he was not given the opportunity to challenge effectively the allegations and evidence presented by the responding party; that the courts have not heard and considered all his allegations, and which, viewed objectively, were relevant for the resolution of his case, and that the factual and legal reasons against the challenged decisions were not presented in detail by the Basic Court, the Court of Appeals and the Supreme Court. Therefore, the Court considers that the proceedings, viewed in entirety, were fair (See the ECHR cases *Khan v. the United Kingdom* no. 35394/97, Decision of 4 October 2000).

87. Therefore, the Court reiterates that that it is not its task to deal with errors of fact or law allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution and the ECHR. The Constitutional Court may not itself assess the facts which have led the regular courts to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its jurisdiction. (See the ECtHR case *Perlala v. Greece*, No. 17721/04, of 22 February 2007, paragraph 25).

88. The Court further reiterates that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, cannot of itself raise an arguable claim of the violation of the right to fair and impartial trial (See, *mutatis mutandis*, ECtHR case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Decision of 26 July 2005, paragraph 21).

89. Therefore, the Court finds that the Applicant's Referral is manifestly ill-founded on constitutional basis because the Applicant does not prove and does not sufficiently substantiate his allegations and consequently, the latter does not fulfill the admissibility criteria established in paragraph (2) of Rule 39 of the Rules of Procedure.

90. In accordance with the reasoning of this Resolution, the Applicant's Referral is manifestly ill-founded on constitutional basis, with the exception of two specific allegations raised by the Applicant in the context of the allegations of lack of a reasoned court decision, namely the allegation concerning (i) the impartiality of the witness N.U.; and (ii) the impartiality of the presiding judge, which allegations are rejected as inadmissible on procedural grounds because of the non-exhaustion of all legal remedies and therefore do not meet the admissibility criteria set forth in paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Articles 47 and 48 of the Law and Rules 39 (1) (b) and 39 (2) of the Rules of Procedure, on 3 April 2019, 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; and

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Gresa Caka-Nimani Arta Rama-Hajrizi

[This translation is unofficial and serves for informational purposes only]