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

Prishtina, 10 June 2019
Ref. no.:RK 1371/19

# RESOLUTION ON INADMISSIBILITY

in

**Case No. KI13/19**

Applicant

**Fevzi Hajdari**

**Constitutional review of Judgment Pml. No. 322/2018 of the Supreme Court of 21 December 2018, and Judgment PAKR. No. 243/2018 of the Court of Appeals of 18 June 2018**

**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of:

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

## Applicant

1. The Referral was submitted by Fevzi Hajdari from Ferizaj (hereinafter: the Applicant).

## Challenged decision

2. The Applicant challenges constitutionality of Judgment Pml. No. 322/2018 of the Supreme Court of 21 December 2018, and Judgment PAKR. No. 243/2018 of the Court of Appeals of 18 June 2018.

## Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged judgments, which allegedly violate the Applicant's rights guaranteed by Article 31.2 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and par. 3 of Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

4. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure to suspend the execution of the challenged judgments until the Court renders a decision on his referral.

5. In addition, the Applicant requests that his identity be not disclosed, stating *"that the name and surname of the parties are personal data and there is no reason to disclose them to the public"*.

## Legal basis

6. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the 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] and 56 [Request for Interim Measures] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## Proceedings before the Court

7. On 23 January 2019, the Applicant submitted the Referral to the Court.

8. On 28 January 2018, the President of the Court appointed Judge Safet Hoxha, as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.

9. On 14 February 2019, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

10. On 12 March 2019, the Applicant submitted a letter of urgency to the Court, stating that *"the referral which he submitted is prima facie founded, and accordingly requested the Court to grant the interim measure in order that the judgments, which were rendered contrary to the ECHR, would not produce legal effect and, as would not be unfairly deprived of liberty"*.

11. On 12 April 2019, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

**Summary of facts**

12. The Applicant was employed in the Privatization Agency of Kosovo (hereinafter: PAK) in Prishtina, as a civil servant.

13. Based on the case file, it follows that the Police of Kosovo (hereinafter: the Police) on 16 August 2016, conducted a search of the Applicant's house due to a grounded suspicion that he committed a criminal offense of *"co-perpetration and accepting bribes under Article 428 paragraph 3 in conjunction with paragraph 1 and, in conjunction with Article 31 of the CCRK, as well as abusing official position or authority under Article 422 paragraph 1 in conjunction with Article 31 of the CCRK"*.

14. On that occasion, in the house of the Applicant, the Police found and seized 29 "*marked*" banknotes in denominations of 500 euro, which the person R.M. gave to the Applicant in the name of the service of the removal of a tax burden on the property purchased by his son from the PAK in 2014, with the purpose of enabling registration of the purchased property in the cadastre of immovable property.

15. On 20 September 2016, the Basic Prosecutor's Office in Prishtina - Department of Serious Crimes (hereinafter: the Prosecutor's Office) filed indictment PP/I no. 139/16, against the Applicant due to grounded suspicion of having committed the criminal offense of *"co-perpetration and accepting bribes under Article 428 paragraph 3 in conjunction with paragraph 1 and, in conjunction with Article 31 of the CCRK, as well as abusing official position or authority under Article 422 paragraph 1 in conjunction with Article 31 of the CCRK"*.

16. On 21 July 2017, the Basic Court - the Department of Serious Crimes in Prishtina (hereinafter: the Basic Court), rendered Judgment PKR. No. 522/2016, by which the Applicant was found guilty of the criminal offense of accepting bribes in co-perpetration under Article 428 paragraph 3 in conjunction with paragraph 1 and Article 31 of the CCRK, and sentenced him to an imprisonment of two (2) years, as well as a fine of 25,000 (twenty five thousand) euro.

17. By the same Judgment, the Basic Court acquitted the Applicant of charges that he committed a criminal offense in co-perpetration abusing of official position or authority under Article 422 paragraph 1 in conjunction with Article 31 of the CCRK, with the reasoning that *"the evidence presented in the court hearing did not establish that the accused also committed the criminal offense of abusing official position or authority under Article 422 paragraph 1 in conjunction with Article 31 of the CCRK"*.

18. Against Judgment PKR. No. 522/2016 of the Basic Court, the appeals to the Court of Appeals were filed by the Prosecutor and the defense counsel of the Applicant.

19. The Prosecutor stated in the appeal that the appeal was filed "*due to the acquittal part of the judgment, on the grounds of erroneous and incomplete determination of factual situation and violation of the criminal law, with the proposal that the appealed judgment be modified in the acquittal part and that the accused be found guilty of the criminal offense of abusing official position or authority in co-perpetration referred to in Article 422, paragraph 1, in conjunction with Article 31 of the CCRK, and be imposed sentence for this criminal offense according to the legal provisions*".

20. The defense counsel of the Applicant stated that he submitted the appeal on the grounds of "*essential violation of the criminal procedure provisions, erroneous and incomplete determination of factual situation, violation of the criminal law and the decision on punishment, with the proposal that the appealed judgment be modified and that the accused be acquitted of charges or the judgment be annulled and the case be remanded to the first instance court for retrial*".

21. On 1 December 2017, the Court of Appeals rendered Decision PAKR. No. 494/2017, which upheld the appeals of the Prosecution and defense counsel of the Applicant, and also filed *ex-officio*, annulled Judgment PKR. No. 522/2016, and remanded the matter to the Basic Court for retrial and decision-making. In its reasoning, the Court of Appeals stated:

> *"[...] as a result of essential violations of the provisions of the criminal proceedings, undoubtedly the first instance court did not determine the factual situation in a correct and complete manner, which is rightly stated not only by the appeals of the defence counsels of the accused that it is not clear what criminal offense was committed, but also by the appeal of the Basic the Prosecutor's Office in Prishtina, where it is alleged that this criminal-legal case is also about the criminal offense of abusing official position or authority referred to in Article 422 paragraph 1 in conjunction with Article 31 of the CCRK, which means that the conclusion of the first instance court as in the enacting clause of the appealed judgment cannot be accepted for the moment for which the first instance court also committed the violation of the criminal law, whereby it found guilty the latter of the criminal offense of accepting bribes under Article 428 paragraph 3 in conjunction with paragraph 1 and Article 31 of the CCRK, because without complete determination of factual situation the criminal law cannot be correctly applied".*

22. On 30 March 2018, the Basic Court in the repeated proceedings rendered Judgment PKR. No. 385/17, which in paragraph I of the judgment, found the Applicant guilty of the criminal offense of "*accepting bribes under Article 428 paragraph 1 in conjunction with Article 31 of the CCK*", and accordingly sentenced him to imprisonment for a term of 2 (two years), including the time spent in detention on remand as well as a fine of 25,000 (twenty thousand) euro. In the reasoning of the convicting judgment of the Basic Court stated:

*„[...] the court determined the factual situation in the judgment from the testimony of the witnesses in the court hearing, the injured - witness R. M., the witness O. N. reading the statement of the witness L.R.H., as well as the material evidence, the minutes of the search of the apartment and persons of 16.08.2016, certificates of temporary seizure of things of 16.08.2016. together with the police report from the Investigative Commercial Crime and Corruption Unit in Prishtina dated 30 August 2016, the sale and transfer contract of property under no. 4602 of 26.05.2014 of PAK, where in a capacity of a buyer, E.M. and the CD record of the accused Fevzi Hajdari at the time he received the money from the injured R.M., a report of the search of Directorate of Criminal Technique under case no. 2016KE246, along with photo album 2016KE246 of 16 August 2016, photo album from Forensic Unit, announcement of 18.08.2016 of the Criminal Technique Unit in Prishtina, case no. 2016KE246, for reimbursement of funds for the simulation of the criminal offense returned to the Police of Kosovo.*
*[...]*
*From these adduced evidence and facts during the court hearing, the court determined the factual situation as in the enacting clause of this judgment,... [...] the court notes that in the actions of the accused Fevzi Hajdari all elements of the criminal offense of bribery under Article 428 paragraph 3 in connection with paragraph 1 in conjunction with Article 31 of the CCK are manifested."*

23. By the same Judgment, the Basic Court in paragraph II of the enacting clause of the Judgment acquitted the Applicant of charges of having committed a criminal offense of "*abusing official position or authority under Article 422 paragraph 1 in conjunction with Article 31 of the CCRK*", with the reasoning:

> *"The court also assessed the defense of the accused Fevzi Hajdari (the Applicant) and found it as grounded only with regard to the allegation that in the factual situation as described in the enacting clause of the indictment, the two criminal offenses of bribery under Article 428 paragraph 3 in conjunction with paragraph 1 in conjunction with Article 31, and criminal offense of abusing official position or authority under Article 422 paragraph 1 in conjunction with Article 31 of the CCRK, since the criminal offense of accepting bribes under Article 428 paragraph 3 in conjunction with paragraph 1 in conjunction with Article 31 of the CCRK in this case is consumed from the criminal offense of abusing official position or authority under Article 422 paragraph 1 in conjunction with Article 31 of the CCRK."*

24. Against Judgment PKR. No. 385/17 of the Basic Court, the appeals with the Court of Appeals were filed by the Prosecutor and the defense counsel of the Applicant.

25. In the appeal, the Prosecutor stated that he files appeals on the grounds of erroneous determination of factual situation and the criminal law for the acquittal part of the judgment, with the proposal to the Court of Appeals, to approve this appeal and to modify the appealed judgment in the acquittal part

of the judgment and to find the accused guilty, and to impose the corresponding punishments, while for the criminal offense for which they were found guilty, to impose a more severe punishment.

26. The defense counsel of the Applicant stated in the appeal that he filed the appeal on the grounds of essential violation of the provisions of the criminal procedure, violation of the criminal law, erroneous and incomplete determination of factual situation and the decision on criminal sanction, with a proposal to the Court of Appeals to approve the appeal as grounded, to annul the appealed judgment, and to remand the case for retrial and reconsideration.

27. On 18 June 2018, the Court of Appeals rendered Judgment PAKR. No. 243/2018, which approved the appeal of the Applicant's defense counsel and *ex-officio* modified Judgment PKR. No. 385/2017 of the Basic Court, of 30 March 2018. By this Judgment, the Court of Appeals found that all elements of the criminal offense of fraud under Article 335 (2) of the Criminal Code in the actions of the Applicant, and accordingly, the Court of Appeals imposed a fine in the amount of 6.000 € (six thousand euro) and imprisonment of 8 (eight) months. The reasoning of the Judgment of the Court of Appeals reads:

> *"This court, by not accepting the findings of the first instance court regarding the legal characterization of the criminal offense, namely the criminal offense of accepting bribes, finds that in the actions of the accused there are all elements of the criminal offense of fraud. As far as the Applicant is concerned, the incriminating actions derive from the evidence from the case file belonging to the criminal offense of fraud since the accused, by presenting false facts, their concealment with an aim of unlawful benefit of property for himself, cheated injured Mr. Misini, promising to take away the tax burden in the PAK, knowing that such a thing is not possible not only for the actions to be taken for such a request by the injured party, but not by the accused, but also for the fact that the accused did not know anyone in that institution or had any information from someone within the PAK for the possibility of removing the tax burden".*

28. The Court of Appeals rejected the Prosecutor's appeal as ungrounded.

29. The Applicant's defense counsel filed the request for protection of legality with the Supreme Court against the Judgment of the Court of Appeals, alleging violation of the Criminal Code and violation of Article 6 paragraph 1.3 of the ECHR in conjunction with the reasoned judgment and the fact that he was convicted of having committed a criminal offense for which he is not accused.

30. The Prosecutor by letter KMLP. II. No. 228/2018, of 4 December 2018, proposed to the Supreme Court that the request for protection of legality of the Applicant be rejected as ungrounded.

31. On 21 December 2018, the Supreme Court rendered Judgment Pml. No. 322/2018, by which the Applicant's request for protection of legality was rejected as ungrounded. The Supreme Court found in the judgment:

*„In the request of the Applicant is alleged that with the characterization of the criminal offence, the Court of Appeals committed violation of the rights of the accused under Article 6.3 of the ECHR. In the present case, during the entire court proceedings, the convict was accused under the charge of accepting bribes from Article 428.1 of the CCRK. However, at the stage of rendering the Judgment, the Court of Appeals modified the classification of the criminal offense by convicting the Applicant of the criminal offense of fraud under Article 335.2 of the CCRK. The request further states that the criminal offense of fraud cannot be ex officio prosecuted as alleged, because of the excessive delays in the court proceedings, which is a violation of Article 6.1 of the ECHR... [...].*

*The Supreme Court finds that in relation to the Applicant's appealing allegations from the request for protection of legality of disregarding Article 6 paragraph 3 of the ECHR, is not grounded, because the rights of the convicted person in accordance with the standards laid down in Article 6.3 of the ECHR, have been respected, so that the convict and his defence counsel were given the opportunity to be an active part of the entire court proceeding. During the court trial or the minutes, it can be established that the convict and his defense counsel had equal opportunities with the prosecution party, namely the state prosecutor in the hearing and clarification of witnesses' testimonies, and to give their conclusions as to material evidence, and were duly summoned in accordance with the legal provisions, as well as they participated in the sessions of the second and first instance court, where they were also given the opportunity to make statements.*

*The Supreme Court also by assessing the Applicant's allegations and basing on the case file finds that the Court of Appeals modified the first instance judgment regarding the characterization of the criminal offense by finding that in the proceedings of the convicts there were all elements of the criminal offense of Fraud under Article 335 paragraph 2 of the CCRK. The Court of Appeals pursuant to Article 403, paragraph 1, subparagraph 1. 2 of the CPCRK has the right to modify the first instance judgment because it has differently assessed material evidence..."*

**Applicant's allegations**

32. The Applicant alleges all his allegations of violation of the rights and freedoms guaranteed by Article 31.2 of the Constitution and paragraph 3 of Article 6 of the ECHR, were reasoned in four (4) separate allegations, which he attempted to build through the case law of the Constitutional Court and case law of the European Court of Human Rights (hereinafter: the ECHR).

33. The Applicant relates his first allegation of violation of Article 6 of the ECHR to the unreasoned Judgment of the Court of Appeals. The Applicant considers that the Judgment of the Court of Appeals is not well reasoned in relation to the essential facts of the case.

34. The second allegation of violation of Article 6 of the ECHR refers to the fact that the Applicant was caught in a trap by the police collaborator, resulting in

the simulation of the criminal offense, accordingly, the evidence collected in that way cannot be accepted and considered by the courts.

35. The third allegation of violation of paragraph 3 of Article 6 of the ECHR is linked to the fact that the Court of Appeals re-qualified the criminal offense and the indictment, thus preventing him from adequate preparation of the defense.

36. The fourth allegation of violation of Article 6 of the ECHR refers to the fact that the court proceeding was delayed.

37. The Applicant requests the Court to find that there has been a violation of paragraph 3 of Article 6 of the ECHR because the Applicant's trial has been repeated twice in each instance, and also to declare invalid Judgment PML No. 322/2018 of the Supreme Court of 27 December 2018, by which the Supreme Court failed to correct the abovementioned constitutional violations. Furthermore, to declare invalid only a part of Judgment PAKR. No. 243/2018 of the Court of Appeals of 18 June 2018, by which the Applicant is adjudicated and is sentenced for the criminal offense of fraud, which does not appear in the indictment and which was not discussed during the trial.

38. The Applicant also requests the Court to impose an interim measure, because from the foregoing, and also from the case law of the ECtHR, is seen that the case is *prima facie* justified, accordingly the Applicant considers that the imposition of the interim measure would prevent him to serve unfairly the imprisonment sentence, and this would prevent irreparable damage also for the public interest.

39. Finally, the Applicant request that his identity should not be disclosed to the public, stating *"that the name and surname of the parties are personal data and that there is no reason for them to be disclosed to the public"*.

**Assessment of the admissibility of the Referral**

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

41. 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."*

42. The Court also examines whether the Applicant has met the admissibility requirements as defined by the Law. In this regard, the Court refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 48 [Accuracy of the Referral]

*"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*

Article 49 [Deadlines]

*"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."*

43. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (2) of the Rules of Procedure, which establishes:

*"(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."*

44. As regards the fulfillment of these requirements, the Court finds that the Applicant has submitted the referral in the capacity of an authorized party and that he challenges the act of the public authority, namely Judgment Pml. No. 322/2018 of the Supreme Court, of 21 December 2018, after exhausting all legal remedies. The Applicant also emphasized the rights and freedoms he claims to have been violated, in accordance with the requirements of Article 48 of the Law, and also filed the referral in accordance with the time limit prescribed in Article 49 of the Law.

45. Taking into account the essence of the Applicant's referral, the Court notes that in the referral he filed several allegations of violation of constitutional rights and freedoms in conjunction with Article 31 of the Constitution as well as violation of the special guarantees provided for in paragraph 3 of Article 6 of the ECHR.

46. Therefore, in the present case, the Court notes that it is the criminal proceedings in which the Applicant was found guilty and convicted of a criminal offense prescribed by law. Thus, in the present case, it was about the determination of the "ground of the criminal charge" against the Applicant, so Article 6 of the ECHR was applicable. Therefore, the Court should examine whether the challenged judgments violated the right of the Applicant to a fair trial in the way that he claims.

47. The Court finds that the Applicant in the referral classified his allegations of violation of Article 31 of the Constitution of Article 6 of the ECHR, into four separate allegations, which he reasoned in the referral separately. Consequently, the Court will examine all these allegations individually.

***Applicant's allegations regarding unreasoned Judgment of the Court of Appeals***

48. As regards the first allegation, the Court notes that the Applicant the violation of Article 6 of the ECHR relates to the fact that the Court of Appeals in the judgment, which found him guilty of the criminal offense of fraud did not reason in accordance with the principle and the standards of Article 6 of the ECHR.

49. The Constitutional Court emphasizes that, according to the established case law of the ECtHR and the case law of the Constitutional Court, Article 6, paragraph 1,of the ECHR, obliges the courts to, *inter alia*, reason their judgments. This obligation cannot, however, be understood as an obligation to state all the details in the judgment and to answer all the questions raised and arguments presented. The extent to which this obligation exists depends on the nature of the decision (see: ECtHR Judgment, *Ruiz Torija v. Spain*, of 9 December 1994, Series A, No. 303-A, paragraph 29, see case: no. KI72/12, *Veton Berisha i Ilfete Haziri*, judgment of 17.December 2012, par 61).

50. The ECtHR and the Constitutional Court in numerous decisions noted that, even though domestic courts have a certain margin of appreciation when choosing arguments and admitting evidence in a particular case, at the same time domestic courts are obliged to reason their decisions, by giving clear and comprehensible reasons on which they base their decisions. (see ECtHR judgment, *Suominen v. Finland*, of 1 July 2003, application no. 37801/97, paragraph 36).

51. Bringing the aforementioned paragraphs in relation to the present case, the Court notes that the Applicant's main allegation of violation of the right to a reasoned judgment relates to the fact that the Court of Appeals in the appeal procedure did not sufficiently reason in a clear way as to why it re-qualified the criminal offense. More specifically, the Court of Appeals in the reasoning of Judgment did not provide clear arguments for its conclusions that he committed a criminal offense of fraud, which would be clear, logical and understandable to him.

52. The Court finds that it is indisputable that the Court of Appeals approved the Applicant's appealing allegations and that, on that basis, it re-qualified the criminal offense. However, it is indisputable that the Court of Appeals made the requalification of the criminal offense only after comprehensive assessments of facts and evidence. The Court finds that the Court of Appeals provided clear conclusions in the judgment on why it considers that the actions of the Applicant contained elements of the criminal offence of fraud and not of the criminal offence of accepting bribes. In fact, the Court of Appeals concluded "[...] *that there are elements of the criminal offense of fraud in the actions of the accused, the incriminating actions result from the evidence as well as from the case files belonging to the criminal offense of fraud, as the accused was represented by false facts for the purpose of unlawful benefit of property for himself... [...].*"

53. Moreover, the Supreme Court in the request for protection of legality dealt with the issue of unreasoned judgment relating to the facts and evidence that led to re-qualification of the criminal offense. The Supreme Court concluded: *„The Court of Appeals has given sufficient legal reasons in connection with*

*the re-qualification which are accepted by this court. Thus, the fact remains that the Court of Appeals found that the conclusions of the first instance court were fair because they had support in the presented evidence and not only that they were correctly established but also completely and clearly reasoned and accepted by this court."*

54. Taking into account all the above, the Court finds as ungrounded the Applicant's allegations that the Court of Appeals did not sufficiently reason the judgment regarding the essential facts and evidence that led it to conclude that the Applicant had committed a criminal offense of fraud and that in this way Article 6 of the ECHR was violated.

***The Applicant's allegations concerning the simulation of the criminal offense***

55. The Court also finds ungrounded also the second allegation of the Applicant with regard to the simulation of the criminal offense and, because the Applicant initiated the same allegation before the Supreme Court. In this regard, the Supreme Court found *„that the Applicant's appealing allegation that simulation of the criminal offense by the police is inadmissible and unfounded evidence, because this evidence was permitted and was conducted in accordance with the order issued by the Basic Court in Prishtina under no. PNKR no. 143/2016, and in accordance with the legal provisions pursuant to Article 88 of the CCRK".*

56. In addition, the Court considers that a question of importance is whether the Kosovo Police can be deemed to have "joined" or "infiltrated" in the criminal activity rather than to have initiated it. In the present case, although the Kosovo Police had influenced the course of events, notably by giving banknotes to the private individual R.M, their actions must be treated as having "joined" the criminal activity rather than as having initiating it, because the initiative in the case had been taken by the private individual R.M. (see case: *Miliniene v. Lithuania*, application No. 74355/01, ESLJP, Judgment of 24 June 2008).

***Applicant's allegation of violation of paragraph 3 of Article 6 of the ECHR regarding the re-qualification of the criminal offense and allegedly the new indictment, by which he was not provided adequate time to prepare his defense***

57. As to the specific allegation, the Court finds that the Applicant, first of all, challenged the manner in which the Court of Appeals assessed the Prosecution's indictment and the existence of the criminal offense charged with, which, as it appears from the referral, the Applicant relates to violation of the right to defense, by which he should without delay be acquainted with the content of the new indictment, on which the Court of Appeals has decided, and consequently he would be able to prepare the defense, as provided for in the special guarantees foreseen in paragraph 3 of Article 6 ECHR.

58. First of all, the Court recalls that paragraph 3, of Article 6, of ECHR points to the need for special attention to be paid to the notification of the "accusation" to the defendant he is charged with. Particulars of the offence play a crucial

role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him (see, Judgment ECtHR, *Mattoccia v. Italy*, of 25 July 2000, para. 59. and 60).

59. The Court cannot fail to notice that the Supreme Court has paid particular attention to this appealing allegation of the Applicant, concluding: "*Therefore, in this case, we are not dealing with a new indictment on the basis of which the Applicant should have been given more time to prepare the defense as he considers, because here we are dealing with a completely different stage of the criminal proceedings, namely a legal remedy phase, where the procedure is clear and envisions all actions of the court before which is decided upon the legal remedy*".

60. Moreover, the Supreme Court finds that such a position was taken by the Court of Appeals under Article 403, paragraph 1, subparagraph 1. 2. of CPCK, which states:

Article 403 Modification of Judgment of Basic Court

*1. The Court of Appeals shall modify by a judgment the judgment of the Basic Court if it determines that the Basic Court had made erroneous or incomplete determination of facts, and for this purpose:*

*1.1. upon the request of the parties or acting ex officio, may hold a hearing to take new evidence or to repeat evidence in order to properly determine and assess the material facts; or;*

*1.2. may properly determine and assess the material facts without a hearing, if there is no need to take new evidence or to repeat new evidence.*

61. This Court also, based on the case file and the judgments of the regular courts, is of the opinion that during the entire criminal proceedings, the Applicant and his defense counsel were acquainted with the indictment and with the legal qualification of the criminal offense brought by the Prosecution in the indictment, they were familiar also with the content of the indictment and the evidence that the Prosecution had available to it. In the proceedings before the Court of Appeals, the Prosecution did not submit a new, modified or supplemented indictment with which the Applicant was not familiar, and moreover, the Court of Appeals did not decide upon the new indictment, but only during the appeal proceedings upon the same indictment, differently assessed the facts and evidence, which led to the conclusion that he committed a criminal offense of fraud.

62. The Applicant also had the opportunity, and that is what he did, to raise the question of flaws regarding the allegedly modified indictment before the Court of Appeals, if he considered that they existed, before the Supreme Court, that the Applicant had the opportunity to advance before the Supreme Court his defence in respect of the reformulated indictment and to challenge the judgment of the Court of Appeals in respect of all relevant legal and factual aspects, which is in accordance with the case law of the ECtHR (see ECtHR

judgment *Dallos v. Hungary*, para. 49-52, *Sipavičius v. Lithuania*, para. 30-33, *Pastor v. Ukraine*, para. 39-43, *I.H. and others v. Austria*, par. 36-38, *Juha Nuutinen v. Finland*, para 33).

63. Therefore, the Applicant and his defense counsel were at all times familiar with the indictment, had an active role and participated directly in both the proceedings before the Basic Court and in the proceedings upon legal remedies, namely filed appeals with the Court of Appeals and Supreme Court.

64. In the light of the foregoing, the Court considers that the regular courts have respected the procedural guarantees of the Applicants provided for in paragraph 3 of Article 6 of the ECHR.

***The Applicant's allegation regarding the length of the proceedings***

65. At the very beginning of the analysis of this appealing allegation, the Court finds that this Applicant's allegation has already been brought before the Supreme Court in the request for protection of legality. In this regard, the Court notes that the Supreme Court found that "*in the present case, the proceedings lasted for about 25 months. According to the assessment of the Supreme Court of Kosovo, the allegations of the convict (the Applicant) are ungrounded, as the judgment against which the request is filed contains no essential violations of the criminal procedure or violation of the criminal law*".

66. As to the opinion of this Court regarding a trial within a reasonable time, the Court notes that in accordance with the consistent case law of the ECtHR, the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the individual case, having regard to the criteria laid down in the ECtHR case-law, in particular, the complexity of the case, the conduct of the parties to the proceedings and of the competent court or other relevant authorities, and the importance of what is at stake for the Applicant in the litigation (see ECtHR Judgment, *Mikulić v. Croatia*, application number 53176/99 of 7 February 2002, Report number 2002-I, paragraph 38).

67. In the present case, the Court, taking into account all abovementioned criteria, found that the Applicant's criminal proceedings began on 20 September 2016 and ended by the Supreme Court Judgment of 21 December 2018, and that it lasted less than 2,5 years in total. The very fact that it is a criminal proceeding leads to the conclusion that it falls in the category of complex cases. However, in addition, the Court concludes that the Applicant and the regular courts had a very active role, which resulted in a total of 5 judgments and decisions, bringing the criminal proceedings to an end.

68. Based on the above, the Court concludes that the regular courts have not violated the right of the Applicant to the trial within a reasonable time under Article 6 of the ECHR.

69. Accordingly, the Court based on the following, considers that the regular courts have complied with their obligation under Article 31 paragraph 2 of the Constitution and paragraph 3 of Article 6 of the ECHR, which is why the

Applicant's allegations that the challenged decisions violated the right to a fair trial in that segment is ungrounded.

70. The Court finds that nothing in the case presented by the Applicant shows that the proceedings before the Court of Appeals and the Supreme Court were unfair or arbitrary for the Constitutional Court to be satisfied that the Applicant was denied any procedural guarantees, which would lead to a violation of the right to fair and impartial trial under Article 31 of the Constitution, namely Article 6 of the ECHR.

71. The Court reiterates that it is the Applicant's obligation to substantiate his constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see: case of the Constitutional Court No. K119/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

72. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

**Request for interim measure**

73. The Court recalls that the Applicant also requests the Court to impose an interim measure suspending the execution of the challenged judgments until the Court renders the decision on his referral.

74. The Court has just concluded that the Applicant's referral should be declared inadmissible on constitutional basis.

75. Therefore, pursuant to Article 27.1 of the Law, and in accordance with Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for interim measure should be rejected, because it cannot be the subject of review as the Referral was declared inadmissible.

**Request for non-disclosure of identity**

76. The Court recalls that the Applicant requested that his identity be not disclosed to the public, alleging "*that the name and surname of the parties are personal data and there is no reason to disclose them to the public*".

77. In this regard, the Court refers to Rule 32 (6) of the Rules of Procedure, which establishes:

> *"Parties to a referral who do not wish their identity to be disclosed to the public shall so indicate and shall state the reasons justifying such a departure from the rule of public access to information in the proceedings before the Court [...]."*

78. However, the Court notes that the Applicant did not state and present any evidence to justify his request for non-disclosure of his identity, and accordingly, this Applicant's request is dismissed as ungrounded.

## FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 48 of the Law and Rules 39 (2) and 57 (1) of the Rules of Procedure, in the session held on 12 April 2019, unanimously

## DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT unanimously the request for interim measure;

III. TO REJECT unanimously the request for non-disclosure of identity;

IV. TO NOTIFY this Decision to the Parties;

V. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

VI. This Decision is effective immediately.

**Judge Rapporteur** **President of the Constitutional Court**

Safet Hoxha


Arta Rama-Hajrizi

***This translation is unofficial and serves for informational purposes only.***