



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

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Prishtina, on 8 May 2018  
Nr. ref.: RK 1231/18

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI126/17**

Applicant

**A.K.**

**Constitutional review of Judgment PML. No. 83/2017 of the Supreme Court of  
Kosovo, of 26 May 2017**

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

composed of

Arta Rama-Hajrizi, President  
Ivan Čukalović, Deputy President  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge and  
Gresa Caka-Nimani, Judge.

### **Applicant**

1. The Referral was submitted by A.K. (hereinafter: the Applicant), who is represented by the lawyer Suad Kuraja.

## **Challenged decision**

2. The Applicant challenges Judgment [PML. No. 83/2017] of 26 May 2017 of the Supreme Court, which was served on him on 28 June 2017.

## **Subject matter**

3. The subject matter is the constitutional review of the abovementioned Judgment of the Supreme Court, which allegedly violates the rights and freedoms of the Applicant guaranteed by paragraphs 1 and 2 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with paragraph 2 of Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).
4. The Applicant requests the Constitutional Court (hereinafter: the Court) to impose an interim measure, through which the commencement of the execution of the imprisonment sentence would be suspended until a decision is taken by the Court.
5. The Applicant also requests that his identity in the proceedings before the Court is not disclosed, by reasoning that *“I do not want my case to be a topic of discussion (...) because my wife suffers from the disease with diagnosis [...]”*.

## **Legal basis**

6. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 22 [Processing Referrals], Article 27 [Interim Measures], Article 47 [Individual Requests] and Article 48 [Accuracy of the Referral] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law) and Rules 29 [Filing of Referrals and Replies], 54 [Request for Interim Measures] and 56 [Types of Decisions] of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

## **Proceedings before the Constitutional Court**

7. On 23 October 2017, the Applicant submitted the Referral to the Court.
8. On 25 October 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Ivan Čukalović and Bekim Sejdiu.
9. On 10 November 2017, the Court notified the Applicant about the registration of the Referral and requested him to submit to the Court a copy of the acknowledgment of receipt proving the date on which he was served with the challenged decision. On the same date, the Court sent a copy of the Referral to the Supreme Court.
10. On 16 November 2017, the Applicant submitted the requested document to the Court.
11. On 26 January 2018, the Applicant notified the Court that the execution of the imprisonment sentence against him began and requested the Court to consider his request for interim measure.



12. On 28 February 2018, 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

13. On 2 December 2014, the Applicant, in a capacity of the driver, hit person A.C. As a result of the injuries sustained in this accident, A.C. passed away.
14. On 23 March 2015, the Basic Prosecution filed Indictment [PP. II. No. 2928/14] against the Applicant for committing the criminal offense "*endangering public traffic*" pursuant to paragraph 9 of Article 378 of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK).
15. On 29 September 2016, the Basic Court, upon the guilty plea by the Applicant at the court trial, rendered the Judgment [P. No. 236/15], which found the Applicant guilty of committing the above-mentioned criminal offense and sentenced him to effective imprisonment for a term of one (1) year, including the time spent in the detention on remand, as specified in the referred Judgment.
16. Against this Judgment, the Applicant filed an appeal due to the decision on the penal sanction and due to the violation of the criminal law, proposing that the Court of Appeals modifies the Judgment [P. No. 236/15] of the Basic Court, so that the Applicant be sentenced with a more lenient or a conditional sentence. On the other hand, the Appellate Prosecutor, through the submission [PPA/II. No. 1676/2016], proposed that the appeal of the accused, namely the Applicant, be rejected as ungrounded.
17. On 28 February 2017, the Court of Appeals rendered Judgment [PA1. No. 1444/2016], which, *ex officio*, modified the Judgment of the Basic Court by re-qualifying the criminal offense committed by the Applicant, so that the latter was found guilty of the criminal offense "*endangering public traffic*" as defined in paragraph 9 of Article 378 in conjunction with paragraphs 6 and 1 of the same article of the CCRK, specifying, consequently, that the criminal offense was committed due to negligence. The Court of Appeals did not modify the decision on the sanction, and rejected the Applicant's appeal as ungrounded.
18. Against the Judgment of the Court of Appeals [PA1. No. 1444/2016], the Applicant submitted a request for protection of legality to the Supreme Court, on the grounds of essential violations of the provisions of the criminal procedure and violation of criminal law. On the other hand, the State Prosecutor through submission [KMLP. II. No. 58/2017] proposed that the appeal of the accused, namely of the Applicant, be rejected as ungrounded.
19. On 26 May 2017, the Supreme Court rendered Judgment [PML. No. 83/2017], which rejected the Applicant's request for protection of legality as ungrounded. The Supreme Court upheld the lower courts' decisions and responded to the arguments raised by the Applicant regarding alleged violations of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCRK).



20. On 28 August 2017, the Basic Court, based on the Law on Execution of Criminal Sanctions, issued Order [PED. No. 143/2017], ordering the Applicant to appear at the Correctional Center in Dubrava. The Applicant requested the Basic Court, to postpone the commencement of serving the imprisonment sentence.
21. On 14 September 2017, the Basic Court, by Decision [PED. No. 143/2017], rejected the Applicant's request as ungrounded, on the grounds that the latter does not meet the requirements established in the relevant provisions of the Law on Execution of Criminal Sanctions.
22. On 17 January 2018, the Applicant started to serve the imprisonment sentence at the Correctional Center in Dubrava.

### **Applicant's allegations**

23. The Applicant challenges Judgment [PML. No. 83/2017] of 26 May 2017 of the Supreme Court, alleging that this Judgment violates his rights guaranteed by paragraphs 1 and 2 of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 2 of Article 6 (Right to a fair trial) of the ECHR.
24. The Applicant alleges that his trial was not fair and impartial, because the challenged Judgment was rendered in violation of the provisions of the CCRK and CPRK.
25. In support of this allegation, the Applicant first alleges a violation of paragraph 2 of Article 137 in conjunction with item 2.1 of paragraph 2 of Article 384 of the CPRK, as allegedly, he was not given the opportunity to object the proposal of the expert to the pre-trial judge because, according to the allegation, he was not notified and consequently, only the prosecutor was given the possibility of this objection before the decision for the selection of the expert was made by the Court, thus resulting, according to the allegations, in an essential violation of the provisions of the criminal procedure, because the Court did not apply the provisions of CCRK or it applied them incorrectly.
26. Secondly, the Applicant alleges that the challenged Judgment was rendered in violation of item 7.1 of paragraph 7 of Article 233 of the CPRK on the negotiation of the guilty plea, because in this case, the defendant, namely the Applicant, could have been imposed a more lenient sanction, and given that such a provision was not applied, according to the Applicant, the provisions of the criminal procedure have been violated, thus influencing the legality of the court decision, as established in item 1.3 of paragraph 1 of Article 432 of the CPRK.
27. Thirdly, the Applicant considers that the challenged Judgment is in contradiction with Article 439 of the CPRK, because it is based on considerable doubts as to the accuracy of the decisive facts established, thus resulting in an essential violation of the provisions of the criminal procedure as provided by Article 384 of the CPRK.
28. Finally, the Applicant requests the Court that his Referral be declared admissible; the challenged Judgment of the Supreme Court be declared invalid; to order the Supreme Court to render a new Judgment through which it would annul the decisions of the Court of Appeals and of the Basic Court and remand the case for retrial.

## Admissibility of the Referral

29. To review the Applicant's Referral, the Court must first examine whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and as further specified by the Law and Rules of Procedure.
30. 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."*

31. The Court also examines whether the Applicant has met the admissibility requirements as established in the Law. In this respect, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of Referral] and 49 [Deadlines] of the Law, which provide:

Article 47  
[Individual Requests]

*"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*

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

Article 48  
[Accuracy of 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 (...)"*

32. As to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, who challenges an act of a public authority, namely the Judgment of the Supreme Court [PML No. 83/2017] of 26 May 2017, after having exhausted all legal remedies as determined by law. In this regard, the Applicant's Referral is in



compliance with the criteria established in paragraphs 1 and 7 of Article 113 of the Constitution and those of Article 47 of the Law. The Applicant has also clarified the fundamental rights and freedoms that he claims to have been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

33. In addition, the Court examines whether the Applicant has met the admissibility criteria established in Rule 36 [Admissibility Criteria] of the Rules of Procedure. Rule 36 (1) of the Rules of Procedure defines the criteria based on which the Court may consider the Referral, including the criterion that the Referral is not manifestly ill-founded. Specifically, Rule 36 stipulates that:

*“(1) The Court may consider a referral if:*

*[...]*

*(d) the referral is prima facie justified or not manifestly ill-founded.*

*(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*

*(d) the Applicant does not sufficiently substantiate his claim.*

*[...]”.*

34. The Court recalls that the Applicant alleges a violation of paragraphs 1 and 2 of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 2 of Article 6 (Right to a fair trial) of the ECHR, as he considers that his trial was not fair and impartial.
35. The Applicant bases his allegation of violation of his right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR on alleged violations of the provisions of the CCRK and the CPRK, in particular as it pertains to: a) the opportunity to challenge the expert's appointment in the pre-trial procedure; b) the length of the sentence imposed, taking into account the guilty plea; and c) the accuracy of the decisive facts upon which the challenged Judgment was rendered.
36. In this regard, the Court notes that the Applicant, in addition to the abovementioned violations of the Constitution and the ECHR, essentially alleges violation of Articles 137.2 in conjunction with 384.2.2.1; 233.7.7.1 in conjunction with 432.1.1.3 and 439 in conjunction with 384.2 of the CPRK.
37. The Court considers that the Applicant has built his case on grounds of legality, namely on the erroneous application and interpretation of the CCRK and CPRK. The Court recalls that these allegations pertain to the field of legality and as such do not fall within the jurisdiction of the Court, and, therefore, in principle, cannot be examined by the Court (See Case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, 18 December 2017, paragraph 35).



38. In addition, the Court considers that the Applicant did not substantiate that the proceedings before the Supreme Court or other regular courts, were unfair or arbitrary, or that his fundamental rights and freedoms protected by the Constitution and the ECHR were violated as a result of the incorrect application or interpretation of the abovementioned provisions of the CCRK and CPRK. The Court reiterates that the manner in which certain provisions of the applicable law are applied and interpreted into a concrete case, is a matter of legality. The Applicant failed to substantiate any constitutional matter with his arguments presented before this Court. (See Case KI56/7, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 36; Case KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility, of 8 August 2016, paragraph 44; and also see joined cases KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants *Arben Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku and Sami Lushtaku*, Resolution on Inadmissibility of 15 November 2016, paragraph 62).
39. Moreover, the Court considers that the Supreme Court has reasoned in detail and specifically addressed all the Applicant's allegations pertaining to the essential violations of the CPRK.
40. Firstly, as to the Applicant's allegation for violation of paragraph 2 of Article 137 of the CPRK in conjunction with item 2.1 of paragraph 2 of Article 384 of the same Code, because he was not notified and consequently, he was not permitted to object the proposed expert before the pre-trial judge before the decision on the selection of this expert was made, the Court notes that these allegations, within the meaning of Article 137 of the CPRK, are raised by the Applicant for the first time before the Court. It results from the case file submitted to the Court by the Applicant, that he never raised these allegations before the regular courts. Accordingly, the Applicant did not provide the regular courts with the opportunity to assess such allegations in accordance with the principle of subsidiarity and the substantive exhaustion of legal remedies, prior to filing the Referral with this Court.
41. In this regard, the Court recalls that the exhaustion rule (even in a substantive aspect) is based on the principle of subsidiarity and aims to provide the regular courts with the opportunity to prevent or remedy the alleged violation of the Constitution or the ECHR. (See case KI41/09, Applicant *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 21 January 2010, paragraph 16; see also case *Selmouni v. France*, ECtHR No. 25803/94, Judgment of 25 November 1996, paragraph 74).
42. Secondly, as to the Applicant's allegation for violation of item 7.1 of paragraph 7 of Article 233 of the CPRK on the negotiation of the guilty plea and the assessment of mitigating and aggravating circumstances, the Supreme Court stated:

*“In the present case, as it results from the case file, both courts assessed correctly and completely the circumstances stipulated by the provisions of Article 73 and 74 of the CCK and considering these circumstances, the court of the first instance did not find that in the present case there are grounds for applying the provisions for mitigating the sentence and through the institute of calculating the sentence within the meaning of the provisions mentioned above,*



*it individualized the sentence for what it provided reasons, which were confirmed by the court of the second instance, which are accepted by this Court as fair and lawful.”*

43. In addition, as to the specific allegation for violation of Article 233 of the CPCRK, the Supreme Court, *inter alia*, reasoned:
- “The allegation that the provisions of Article 233, paragraph 7.1 of the CCK, has been violated does not either stand. The above mentioned provision stipulates that when the defendant reaches a plea agreement during the main trial, a defendant may be sentenced to a minimum of ninety percent (90%) of the minimum possible imprisonment set for the criminal offense, therefore, this is only a legal opportunity and not an imperative provision. Therefore, it was up to the discretion of the court, within the circumstances assessed in the present case, to decide upon the eventual mitigation [...]”.*
44. Thirdly, and finally, the allegation that the challenged Judgment is in contradiction with Article 439 of the CPCRK, because it was rendered based on substantial doubts as to the accuracy of the decisive facts established, is addressed by the Supreme Court in its entirety throughout its decision, having addressed all allegations of the Applicant and having concluded that the request for protection of legality is ungrounded.
45. Consequently, the Court considers that the Applicant has had ample opportunities to present before the regular courts all allegations for violation of the CPCRK or other provisions of the criminal law. In this regard, the Court considers that his arguments have been properly heard and have been duly reviewed by the Court of Appeals and the Supreme Court; and the proceedings, viewed in their entirety, were fair and the decisions rendered were reasoned in detail. (See Case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 40).
46. The Court reiterates that it is not its role to deal with errors of facts or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that lead a regular court to issue one decision instead of another. If it were to be different, the Court would act as “fourth instance court”, which would result in exceeding the limitations provided for by its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See Case, *Garcia Ruiz v. Spain*, ECtHR, no. 30544/96, of 21 January 1999, paragraph 28; and see also, cases KI70/11, Applicants *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011; and KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, 18 December 2017, paragraph 41).
47. The Court further notes that the Applicant does not agree with the outcome of the proceedings before the regular courts, namely with the fact that the sentence imposed against him has not been further mitigated and that it will be executed as such. However, the dissatisfaction of the Applicant with the outcome of the proceedings cannot in and of itself raise an arguable claim of the violation of the right



to fair and impartial trial. (See, *mutatis mutandis*, case *Mezotur - Tiszazugi Vizigazdalkodasi Tarsulat v. Hungary*, ECtHR No. 5503/02, Judgment of 26 July 2005, paragraph 21; and see also Case KI56/17, Applicant *Lumturije Murtezaj*, Resolution of Inadmissibility of 18 December 2017, paragraph 42).

48. The Court notes that the Applicant did not explain how and why the Judgment of the Supreme Court may have violated his constitutional rights. He merely stipulated that there has been a violation of his constitutional rights, but all his allegations have been based on alleged violations of the provisions of the CCRK and CPCRK, without proving their connection on a constitutional level. The Applicant did not provide any *prima facie* evidence which would indicate a violation of his constitutional rights with regard to equal protection before the law or providing a fair and impartial trial. (See Case, *Trofimchuk v. Ukraine*, ECtHR No. 4241/03, Judgment of 28 October 2010, paragraphs 50-55).
49. As a result, the Court considers that the Applicant has not substantiated the allegations that the relevant proceedings were in any way unfair or arbitrary, and that the challenged Judgment violated the rights and freedoms guaranteed by the Constitution and the ECHR. (See *mutatis mutandis*, *Shub v. Lithuania*, ECtHR No. 17064/06, Decision of 30 June 2009).
50. Therefore, the Court finds that the Applicant's Referral does not meet the admissibility requirements established in the Rules of Procedure, because the Referral is manifestly ill-founded on constitutional basis, considering that the presented facts do not in any way justify the alleged violation of a constitutional right and that the Applicant does not sufficiently substantiate his allegation of a constitutional violation.
51. In sum, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and, in accordance with Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, it is to be declared inadmissible.

#### **Request for interim measure**

52. The Court recalls that the Applicant also requested the Court to impose an interim measure, which would suspend the commencement of the execution of the imprisonment sentence until a decision is taken by the Court.
53. The Court reiterates the finding that the Applicant's Referral was declared inadmissible as manifestly ill-founded. Therefore, in accordance with the abovementioned findings and in accordance with Article 116 (2) of the Constitution, Article 27 (1) of the Law and Rule 55 (4) of the Rules of Procedure, the request for interim measures is rejected as ungrounded.

#### **Request for non-disclosure of identity**

54. The Court recalls that the Applicant requested the non-disclosure of his identity to the public, by reasoning that "*I do not want my case to be a topic of discussion ... because my wife suffers from the disease with the diagnosis [...]*".

55. In this regard, the Court refers to Rule 29 (6) of the Rules of Procedure, which provides that:

*“The party filing the referral may request that his or her identity not be publicly disclosed and shall state the reasons for the request. The Court may grant the request if it finds that the reasons are well-founded.”*

56. Taking into account the Applicant's allegation that the publicity of his case in the community where he or she lives may, even indirectly, affect his family, based on Rule 29 (6) of the Rules of Procedure, the Court approves as grounded the Applicant's request for non-disclosure of his identity publicly. (See case KI53/17, Applicant X, Resolution on Inadmissibility of 30 October 2017, paragraphs 5 and 44-46; see also case KIo4/17, Applicant Z.K., Decision to strike out the Referral of 11 August 2017, paragraphs 16-20).

### **FOR THESE REASONS**

The Constitutional Court of the Republic of Kosovo, pursuant to Articles 113 (1) and (7) and 116 (2) of the Constitution, Articles 27 (1) and 48 of the Law, Rules 29 (6), 36 (1) (d), 36 (2) (d) as well as 55 (4) of the Rules of Procedure, in the session held on 28 February 2018, unanimously

### **DECIDES**

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for interim measure;
- III. TO APPROVE 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; and
- VI. This Decision is effective immediately.

**Judge Rapporteur**

  
Gresa Caka-Nimani



**President of the Constitutional Court**

  
Arta Rama-Hajrizi