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

Prishtina, on 7 June 2017
Ref. No.: AGJ 1248/18

Judgment

In

Cases No. KI146/17, KI147/17, KI148/17, KI149/17 and KI150/17

Applicants

Isni Thaçi, Zeqir Demaku, Fadil Demaku, Nexhat Demaku, and Jahir Demaku

Constitutional review of Judgment PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo of 19 July 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 KI146/17 was submitted by Isni Thaçi from Prishtina, represented by Artan Qerkini, the Law Firm "Sejdiu & Qerkini" L.l.c.; Referral KI147/17 was submitted by Zeqir Demaku from Gllogoc, represented by Bajram Tmava, lawyer from Prishtina; Referral KI148/17 was submitted by Fadil Demaku from Gllogoc; Referral KI149/17 was submitted by Nexhat Demaku from Gllogoc; and Referral KI150/17 was submitted by Jahir Demaku from Gllogoc, represented by Mexhid Syla, lawyer from Prishtina (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge Judgment PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 19 July 2017.

3. The Applicants Isni Thaci (KI146/17), Zeqir Demaku (KI147/17) and Jahir Demaku (KI150/17) were served with the challenged Judgment on 22 August 2017, while Applicants Fadil Demaku (KI148/17) and Nexhat Demaku (KI149/17), were served with challenged Judgment on 19 August 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which has allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

5. The Applicant Jahir Demaku (KI150/17) also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely to "*suspend the execution of the Judgment of the Supreme Court of Kosovo*" PML. KZZ. No. 322/2016 of 19 July 2017.

Legal basis

6. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing of the Referrals], 27 [Interim Measures] 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 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 8 December 2017, the Applicant Isni Thaçi submitted the Referral (KI146/17) to the Court.

8. On 11 December 2017, the Applicants Zeqir Demaku (KI147/17), Fadil Demaku (KI148/17) and Nexhat Demaku (KI149/17) submitted the Referrals to the Court.

9. On 12 December 2017, the Applicant Jahir Demaku (KI150/17) submitted the Referral to the Court.

10. On 15 December 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur in respect of the Referral KI146/17

and the Review Panel composed of Judges Altay Suroy (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.

11. On the same date, pursuant to Rule 37.1 of the Rules of Procedure, the President of the Court ordered the joinder of Referrals KI147/17, KI148/17, KI149/17 and KI150/17, with Referral KI146/17. By this order, it was decided that the Judge Rapporteur and the composition of the Review Panel be the same as that decided by the President on the appointment of the Judge Rapporteur and the Review Panel in Case KI146 /17.

12. On 19 December 2017, the Court notified the Applicants about the registration and joinder of the Referrals and requested the representatives of the Applicants Zeqir Demaku (KI147/17) and Jahir Demaku (KI150/17) to submit to the Court the power of attorney to represent the abovementioned Applicants before the Court.

13. On 20 December 2017, the Court sent a copy of the Referrals to the Supreme Court and requested from the Basic Court in Mitrovica (hereinafter: the Basic Court) to submit the acknowledgment of receipt indicating the date on which the Applicants were served with the challenged decision of the Supreme Court.

14. On 22 December 2017, the representatives of the Applicants Zeqir Demaku (KI147/17) and Jahir Demaku (KI150/17) submitted to the Court the requested powers of attorney on 19 December 2017.

15. On 5 January 2018, the Basic Court submitted to the Court the acknowledgment of receipts indicating the date on which the Applicants had received the challenged decision, as requested by the Court on 20 December 2017.

16. On 22 February 2018, the Court requested from the Applicants to inform the Court if they have used any other legal remedy to challenge the Judgment of the PML. KZZ. No. 322/2016 of the Supreme Court.

17. On 26 February 2018, the Applicants Isni Thaçi, Fadil Demaku and Nexhat Demaku, informed the Court that the they have filed requests for Review of Criminal Procedure regarding the Judgment of the Basic Court P.nr.58/14 and attached the above requests.

18. On 28 February 2018, the Applicant Jahir Demaku informed the Court that besides the Referral to Court, no other legal remedy has been used to challenge the Judgment of the PML. KZZ. No. 322/2016 of the Supreme Court.

19. On 6 March 2018, the Court requested from EULEX to submit to the Court the modalities/rules/guidelines for Case Allocation for EULEX Judges (hereinafter, the Guidelines on Case Allocation) issued pursuant to the Law no. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo of 3 June 2008.

20. On 14 March 2018, the Applicants Isni Thaçi, Fadil Demaku and Nexhat Demaku, informed the Court that the requests for Review of Criminal Procedure regarding the Judgment of the Basic Court P.nr.58/14 was rejected by the Basic Court. They also informed that Court that they do not intend to appeal against that decision.

21. On 26 March 2018, EULEX submitted the Guidelines on Case Allocation to the Court.

22. On 30 May 2018, the Review Panel considered the Report of the Judge Rapporteur and, by majority, made a recommendation to the full Court to declare the Referral admissible and to assess the substance of the Referral.

23. On the same day, the Court approved by majority the admissibility of the Referral. Judges, Almiro Rodrigues and Snezhana Botusharova voted against the admissibility.

24. On the same day, the Court voted by majority to find a violation. Judge Gresa Caka-Nimani has a concurring opinion. Judges Almiro Rodrigues and Snezhana Botusharova voted against the finding of violation.

25. The Judgment may be complemented by dissenting and concurring opinions.

Summary of facts

26. On 8 November 2013, the EULEX Prosecutor of the Special Prosecution Office of the Republic of Kosovo (SPRK Prosecutor) filed an Indictment (No. PPS88/11) against the Applicants and some other persons on the grounded suspicion that 1998 they had committed the criminal offenses sanctioned by Article 152 [War Crimes in Serious Violation of Article 3 Common to the Geneva Conventions] in conjunction with Article 31 [Co-perpetration] of the Criminal Code of the Republic of Kosovo (CCRK).

27. On 27 May 2015, the Basic Court rendered Judgment (P58/14), which found the Applicants guilty of the above-mentioned criminal offenses, and sentenced them as follows: Isni Thaçi, Zeqir Demaku and Jahir Demaku with 7 (seven) years of imprisonment each, while Fadil Demaku and Nexhat Demaku with 3 (three) years of impressment each.

28. The Applicants filed an appeal against the Judgment of the Basic Court (P58/14) of 27 May 2015, on the grounds of essential violations of the criminal procedure provisions, violation of criminal law, incomplete and erroneous determination of factual situation and decision on criminal sanction. The Applicants challenged, *inter alia*, the composition of the trial panel of the Basic Court and the testimonies of expert witnesses C. B. and M.G., namely the failure to appear in the Court of expert M.G.

29. The appeal was also filed by the SPRK Prosecutor, because of the decision on the criminal sanction, requesting to increase the punishment adequately to all Applicants.

30. On 14 September 2016, the Court of Appeals through Judgment (PAKR No. 456/15) rejected the appeals of the SPRK Prosecutor and of the Applicants and upheld the Judgment of the Basic Court (P58/14). The Court of Appeals *ex officio* modified the Judgment of the Basic Court regarding the Applicants Isni Thaci, Zeqir Demaku and Jahir Demaku considering the criminal offense for which they were convicted as the criminal offense in continuation. In addition, the Court of Appeals modified the sentences imposed by the Basic Court in relation to Isni Thaqi from 7 (seven) years to 6 (six) years and 6 (six) months and for Applicants Zeqir Demaku and Jahir Demaku from 7 (seven) years to 6 (six) years for each.

31. In relation to the evidence of the experts, the Court of Appeals reasoned, *inter alia*, that the testimony of the expert C. B. in the Basic Court is entirely reliable with respect to all the injuries relating to witness A. As to the allegation that the expert M. G. did not give any testimony before the Basic Court, the Court of Appeals noted that he was only involved as an expert to conduct the examination of the intimate parts of the witness by a person of the same gender, and that after the examination he described his observations including the photos, while their assessment has been provided by expert C. B.

32. Also, as regards the allegation where the Applicant alleges that the regular courts took the testimonies of witnesses A. and K. contrary to the principle *in dubio pro reo*, the Court of Appeals had reasoned that witness A. had no symptoms of any mental illness. Therefore there was no doubt regarding his testimony. According to the Court of Appeals, the unique appearance of acute psychosis does not reduce the overall credibility of the witness A. Furthermore, the Court of Appeals concluded that the statement of witness A. was fully supported by the statement of witness K. as well as the testimony of the expert C.B.

33. The Applicants filed requests for protection of legality with the Supreme Court against the Judgment of the Basic Court (P58/14) and Judgment of the Court of Appeals (PAKR No. 456/15), on the grounds of essential violations of the provisions of the criminal procedure and violations of the criminal law. The Applicants alleged, among others that, the trial panel of the Basic Court was composed in violation of EULEX rules; two members of the trial panel had conflict of interest, consequently based on this, the applicants proposed taking new evidence – testimony of witnesses M.S; the testimonies of expert witnesses C. B. and M.G., where not properly taken, namely stating the failure to appear in the Court of expert M.G.; and, the declaration of witness B. as a "hostile witness" was in violation of Criminal Procedure Code (hereinafter, the CPC)

34. On 19 July 2017, the Supreme Court, through Judgment (Pml. KZZ. No. 322/2016), rejected as ungrounded the requests for protection of the legality of

the Applicants against the Judgment of the Basic Court and the Judgment of the Court of Appeals.

35. Firstly, on the Applicants' objections on the application of the rules on the selection of the trial panel in the Basic Court, the Supreme Court reasoned as follows:

> *"[...]*
> *The Panel agrees with the Court of Appeals Judgement that there has not been a roster for assignment of EULEX judges to the cases at the relevant time. According to the guidelines for case allocation for EULEX judges in criminal cases in district courts, applicable at the time of the appointment of Judge [A.A.G], [her appointment] was not based on a specific schedule. The Guidelines merely clarify the structure of EULEX Judges in district courts and prescribe the general principles that are applicable regarding case allocation. Moreover, Judge [A.A.G] was assigned to the case pursuant to the decision dated on 29 May 2014 by the acting president of EULEX judges, who at that time was authorized to take this decision. In addition, EULEX Judge [A.A.G] was a legitimately appointed EULEX judge at the level of the first instance at the time.*
> *[...]*
> *Therefore, the Panel is of the opinion that the appointment of a Judge [A. A.G.] cannot be qualified as a violation of Article 384 (1.1) or Article 384 (1.2) of the CPC. The Panel notes that even if there has been a violation of the EULEX internal regulation (while the alleged violations do not constitute a violation of the relevant law - as is the request in question that the CPC has been violated) then it would be a matter of discretion within the EULEX disciplinary/administrative authorities [...].*

36. Secondly, the Supreme Court reasoned its decision regarding the request for new evidence to prove that the conflict of interest between the judges of the Basic Court and the issue of testimony of expert M.G., *inter alia*, as follows *"none of the [...] provisions of [the Criminal Procedure Code of Kosovo] include any procedural possibility under which the Supreme Court may hold an open hearing with the parties present or hold a hearing in order to gather new evidence".*

37. Thirdly, with regard to declaring witness B as a "hostile witness", the Supreme Court held that: *[...] Although the CPC does not recognize as such the terminology of a 'hostile witness', CPC in Article 123 (2) provides for the possibility of questioning witnesses if the witness has given a different testimony from the testimony given during the interview in the pre-trial procedure, which constitutes an essentially approximation to the concept of "hostile witness".*

38. On 18 October 2017, the Applicants Fadil Demaku and Nexhat Demaku filed the Request for Review of Criminal Procedure with the Basic Court in Mitrovica.

39. On 21 November 2017, the Applicant Isni Thaçi filed the Request for Review of Criminal Procedure with the Basic Court in Mitrovica.

40. The Applicants Fadil Demaku, Nexhat Demaku and Isni Thaçi, in their requests for Review of Criminal Procedure, requested from the Basic Court pursuant to Article 423 (1.13) of the CPC, among others, to allow taking of new evidence, namely the testimony of M.S. and email correspondences between the EULEX judges and personnel which would reveal that the composition of trial panel of the Basic Court was irregular and which would prove that the trial panel of the Basic Court was bias.

41. On 12 February 2018, the Basic Court rejected as unfounded the Request for Review of Criminal Procedure regarding the Judgment of the Basic Court P.nr.58/14 filed by the Applicants Isni Thaçi, Fadil Demaku and Nexhat Demaku. With regard to the allegations of the applicants on the composition of the panel, the Basic Court found that those allegations *"have been raised with the Court of Appeals and the Supreme Court"*. Therefore, the Basic Court concluded that those allegations do not constitute new elements for the purpose of Article 423 of CPC, to allow review of the criminal procedure.

Applicant's allegations

42. The Applicants claim a violation of their individual rights, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR.

Allegations of Applicant Isni Thaçi (KI146/17)

43. The Applicant Isni Thaçi complains at the outset that *"[A]ppointment of [A. A. G.] in the trial panel of this case was done contrary to the procedures, policies and rules for [assigning the members] of trial panels. [...] According to the applicable list, she was not the next EULEX judge on the list to be assigned to this case. Contrary to this list, she was chosen by [presiding judge D. S.] as a member of the panel because she was his girlfriend and because he wanted her to advance in her career, thus he enabled her to adjudicate a war crime case. [A. A.G.] thereafter joined a higher instance court in Kosovo."*

44. The Applicant Isni Thaçi, furthermore, alleges that *"The relationship between the two judges [D. S.] and [A. A. G] constitutes conflict of interest about which the defence did not have any knowledge."* The Applicant learned about this conflict of interest only *"in November 2016 [when] the defence [of the Applicant] received a number of emails from EULEX employees that reflect irregularities in the formation of the trial panel [and] reflect the bias of this body. For these reasons [...] it was requested through a request for protection of legality that the President of the Assembly of EULEX Judges [M.S.] be heard in the capacity of a witness"*, but this, according to the Applicant, was not allowed by the Court.

45. The Applicant Isni Thaçi, also emphasizes that *"[a]lthough the allegations of irregularities in the formation of the trial panel and its bias were quiet serious and documented with material evidence, the Supreme Court rejected to deal with this problem because according to it this [Supreme] Court has no duty to gather evidence in the procedure upon the request for protection of legality"*, adding that based on the right to fair and impartial trial, *"both the appointment of judges and the formation of trial panels should be done to guarantee the independence of the judicial system."*

46. The Applicant Isni Thaçi also alleges that in his case the principle of equality of arms has also been violated because *"Forensic Medicine Experts [C. B.] and [M.G.] jointly examined witness A regarding the injuries alleged by him. In the [regular courts] only expert [C. B.] was heard. Although the defence had insisted that the expert [M. G.], who had drafted the expertise together with the expert [C.B.], be called to the trial, a deaf ear was turned to this request of defence"*.

47. Regarding this allegation, the Applicant Isni Thaçi explains that *"the statement of the expert [M.G.] is considered and was read in the main trial without meeting the legal conditions [...]. Also, by this action article 341.3 of the CPC was also violated because the party that did not propose the expert was not given the opportunity to make the expert's cross-examination regarding the report, analysis, education, experience, or basis of his expertise"*.

48. The Applicant Isni Thaqi (KI146/17) also claims that witness B was declared a "hostile witness" without a legal basis since CPC does not recognize the institute of a "hostile witness". Article 2 of the CPC stipulates that "*A criminal sanction may be imposed on a person who has committed a criminal offence only by a competent, independent and impartial court in proceedings initiated and conducted in accordance with the [CPC]*", whereas, *"the [Supreme] Court's finding that it should be allowed the witness B is considered as a "hostile witness" is not grounded based on Article 6 of the [ECHR], because the [ECHR] does not protect the rights of state authorities, as it is in fact the State Prosecution, but protects human rights in relation to the state authorities"*.

Allegations of Applicants Zeqir Demaku (KI147/17), Fadil Demaku (148/17) and Nexhat Demaku (KI149/17)

49. The Applicants Zeqir Demaku, Fadil Demaku and Nexhat Demaku allege that the "Supreme *Court did not at all take into consideration the request of defense counsels to hear as a witness the judge [M. S.] within the meaning of paragraph 4 of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. [...] The ECHR establishes that the right to a fair hearing guaranteed to the individual through Article 31 of the Constitution and Article 6 of the ECHR includes the right to have a reasoned decision."* According to the applicant Zeqir Demaku, Fadil Demaku and Nexhat Demaku, the reasoning requires *"explanations with convincing and well-constructed reasons for the decision taken in each individual case which should include both, the legal*

criteria and the factual elements in support of the decision. The Supreme Court did not reasoned its decision and this constitutes an arbitrary decision that violates the right of the party to fair and impartial trial".

50. The Applicants Zeqir Demaku, Fadil Demaku and Nexhat Demaku allege that the Supreme Court also *"abused the witness immunity by not initiating any immunity removal procedure, according to the request of [M. S.] to be treated as a witness, with the sole purpose of shedding light on the truth. This constitutes a violation of the equality of arms because, as stated by the International Criminal Tribunal for the former Yugoslavia, the functional immunity of a state official does not include immunity against the obligation to testify what the official has seen or heard in the exercise of his official functions".*

51. The Applicants Zeqir Demaku, Fadil Demaku and Nexhat Demaku also emphasize that *"[...] the principle of impartiality has been violated by the fact that the composition of the trial panel was such that [...] there were two members who had a pure conflict of interest",* emphasizing further that *"the impartiality of a court under Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR must be determined according to a subjective test, namely based on personal conviction and conduct of a judge in a particular case and also according to the objective test, i.e. whether the judge has provided sufficient guarantees to exclude any legitimate doubts in this respect".*

52. They also allege violation of internal rules of EULEX when assigning judges in the trial panel, without having a predetermined schedule impacts directly constitutional rights of the applicants namely the right to fair and impartial trial. They emphasis that *"no court in Europe, including the ECtHR would allow such arbitrariness - assigning judges in the panels without having a schedule for such assignments".*

53. The Applicants Zeqir Demaku, Fadil Demaku and Nexhat Demaku further allege that *"due to the written nature of the procedure neither the Applicant nor the lawyer could have been aware of the conflict of interest until they had received the decision of the Supreme Court. Therefore, it cannot be concluded that the right to determine the rights by an "impartial tribunal" has been waived".*

54. The Applicants Zeqir Demaku, Fadil Demaku and Nexhat Demaku allege that *"[...] the correspondence that was disclosed between EULEX officials, also broadcasted on RTK in several shows, shows that [CPC] or [CCRK] have been violated to the detriment of [the Applicants]. This correspondence also includes insulting words like "Albanians are animals." In addition, the e-mail content also reveals two [presiding judge's statement]: "If I will adjudicate the Drenica case, and find the latter guilty I will be able to find a good job in the European Union bodies ",* or even the statement *"If the Drenica II case is adjudicated then the negotiations with Serbia will continue without problems".*

Allegations of Applicant Jahir Demaku (KI150/17)

55. The Applicant Jahir Demaku alleging a violation of Article 31 of the Constitution and Article 6 of the ECHR emphasizes that *"the request of the presiding judge for the appointment of [A. A.G] as a member of the trial panel intended to enable the presiding judge to accomplish his purposes as stated outside the main trial, [...] that "if he convicts these accused, he may find a job wherever he wants in Europe", and other statements that make it clear that the latter has prejudiced the case and it was previously determined that the accused in this criminal case should be found guilty under any condition regardless of whether there is evidence or not".*

56. The Applicant Jahir Demaku also alleges that *"the intentions of the Presiding Judge, Judge [D. S.] were proved by his actions during the trial, by declaring as hostile witnesses in violation of the law all witnesses who did not testify in favor of the indictment, by assessing the evidence unilaterally and to the detriment of [the Applicants], by entirely ignoring the principle in dubio pro reo, or in case of suspicion in favor of the accused, by trusting witnesses A. and K., despite the finding that "it was clear that those witnesses A. and K. did not have experience in providing an accurate and well-structured version of the events, therefore their statements contain stagnations and gaps attributed by the panel to the limited witness reporting capabilities".*

57. The Applicant Jahir Demaku alleges that the Supreme Court *"rejected, without giving any reason, to question [...] [M. S.], which allegation was primary and was emphasized during the proceedings before the Kosovo regular court, abused the witness's immunity by not initiating any immunity removal procedure at his request [M. S.] to be treated as a witness, with the sole purpose of shedding light on the truth".*

58. The Applicant Jahir Demaku also emphasizes that *"the principle of impartiality was violated by the fact that the composition of the trial panel was such that in its composition there were two members who had a pure conflict of interest".* In addition, the Applicant Jahir Demaku also alleges that the *"violation of internal rules of EULEX, [during assignment of judges in the trial panels] had a direct impact on the constitutional rights of fair and impartial trial"* of the Applicants.

59. The Applicant Jahir Demaku in relation to the request for imposition of interim measure emphasizes that *"[d]eprivation of liberty such as the case with Mr. Jahir Demaku may result in the permanent and irreparable consequences on the applicant because during his detention on remand and now while serving his sentence, he is experiencing a serious mental and psychological condition, especially after being informed of the irregularities that are manifested in the court proceeding against him".* According to him, *"the words said by the presiding judge for the Drenica II, case where the Applicant is one of the convicts, constitutes a violation of Article 23 (Human Dignity) of the Constitution of Kosovo, according to this article "human*

dignity is inviolable and is the basis of all human rights and fundamental freedoms".

60. Finally, all Applicants request the Court to declare their referrals admissible, to hold that their right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR has been violated, and to annul the Judgment of the Supreme Court.

Assessment of the admissibility of Referral

61. The Court first examines whether the Referrals have fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

62. 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".*

63. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

> *"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. [...]".*

64. Regarding the foregoing, the Court finds that the Applicants filed the referrals as authorized parties, submitted the Referrals within the time limits specified in Article 49 of the Law and after exhaustion of all legal remedies provided by law.

65. In addition, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides that:

> *"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."*

66. In addition, the Court refers to paragraph (1) (d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which provide:

> *(1) "The Court may consider a referral if:*
> *[...]*
> *(d) the referral is prima facie justified or not manifestly ill-founded.*

67. Regarding the fulfillment of this requirement, the Court notes that the Applicants have accurately specified what rights, guaranteed by the Constitution and the ECHR have been violated to their detriment, by the alleged unconstitutionality of judicial proceedings.

68. In addition, having examined the Applicant's complaints and observations, the Court considers that the Referrals raise serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The Referral cannot, therefore, be regarded as being manifestly ill-founded within the meaning of the Rule 36 (1) (d) of the Rules, and no other ground for declaring it inadmissible has been established (See, for example, the *Case of A and B v, Norway,* [GC], applications nos. 24130/11 and 29758/11, Judgment of 15 November 2016, paragraph 55 and also see mutatis mutandis Case No. KI132/15, *Visoki Dečani Monastery,* Judgment of the Constitutional Court of the Republic of Kosovo of 20 May 2016).

Merits of the Referral

69. The Court recalls that the Applicants allege that the challenged decision violated their right to a fair and impartial trial, particularly as regards to the assignment of the judges in the trial panel of the Basic Court and the reasoning of the decisions.

All Applicants allege that:

i) The Supreme Court did not properly address the issue of the composition of the trial panel at the Basic Court, because it was assigned in contradiction with the rules for assigning EULEX judges to the trial panels, thus violating their right to a fair and impartial trial;

ii) The Supreme Court refused to take the testimony of [M.S.] regarding the irregularities in the composition of the trial panel of the Basic Court and did not justify its decision in this regard and did not address the issue of a conflict of interest between the panel members of the Basic Court.

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iii) The regular courts declared Witness B. as a "hostile witness" in violation of the law and gave trust to the witnesses A. and K., contrary to the principle *in dubio pro reo*, although the court found that witnesses A. and K. had no experience in delivering an accurate and well-structured version of the events.

The Applicant Isni Thaçi, alleges that:

iv) The forensic expert, M.G., was not questioned during the court procedure, thus violating the principle of equality of arms and contradictoriness of the proceedings.

70. In this regard the Court refers to the provisions of Article 31 of the Constitution and Article 6 of the ECHR, which establish:

"Article 31 [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]"

Article 6 (Right to a fair trial)

1. *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*
[...]"

71. The Court also refers to the provisions of relevant legislation:

Criminal Procedure Code

Article 384 [Substantial Violation of the Provisions of Criminal Procedure]

1. There is a substantial violation of the provisions of criminal procedure if:
1.1. the court was not constituted in accordance with the law or [...];

Article 432 [Grounds for filing a request for protection of legality]

1. A request for protection of legality against a final judicial decision or against judicial proceedings which preceded the rendering of that decision may, after the proceedings have been completed in a final form, be filed in the following instances:
[...]
1.2. on the ground of a substantial violation of the provisions of criminal procedure provided for in Article 384, paragraph 1, of the present Code; or
1.3. on the ground of another violation of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision.
2. A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor

against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon.

[...]

Law No. 03/l-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo of 3 June 2008

Article 2 [General authority of EULEX judges]

[...]

2.6 Upon consultation with the Head of the Justice Component, the President of the Assembly of the EULEX Judges and the Chief EULEX Prosecutor will propose, respectively, to the Assembly of the EULEX Judges and to the Assembly of the EULEX Prosecutors, modalities on case selection and case allocation based on pre-determined objective criteria and procedural safeguards that will be consistent with the applicable law. These modalities that will be endorsed by the Assembly of the EULEX Judges and of the EULEX Prosecutors will ensure the respect of the independence and the impartiality of the EULEX judges and the autonomy of the EULEX Prosecutors in the discharge of their functions.

Article 3 [Jurisdiction and competences of EULEX judges for criminal proceedings]

[...]

3.2 The President of the Assembly of EULEX Judges will assign any EULEX judge to the respective stage of the criminal proceeding investigated or prosecuted by the SPRK, according to the modalities on case selection and case allocation developed by the Assembly of the EULEX Judges and in compliance with this law.

Guidelines for case allocation for EULEX judges in criminal cases in district courts

[...]

II. 1. Legal background

Case allocation of the EULEX judges will be carried out in accordance with the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law No. 03/L-053), hereinafter LoJ.

These guidelines are to elaborate the prescriptions on case allocation provided by the aforementioned law.

II. 2. Principles

• Transparency

Case allocation must be transparent to actors and non-actors in the justice system.

• Objectivity

Everyone should know in advance where and by which judge s/he will be tried (Judges do not select cases).
• Flexibility
The specific wording conditions and the number of EULEX judges and legal disqualifications pursuant to PCPCK must be taken into account.
• Sustainability
Case allocation system should be an example of a good justice administration to which local judges could (should) adhere in order to achieve the goals of an independent, transparent and efficient justice administration.
• Equality of the workload of judges"
[...]

III.3. Case allocation system
[...]
3.1. Within the section cases will be allocated to the judges following the numeral system where every third case coming to the section will be allocated to judge A, every third case to judge B and every third case to judge C (no 1 to judge A, no 2 to judge B, no 3 to judge C, no 4 to judge A and so forth). For exceptional reasons (for instance quality and complexity of the case and number of cases entrusted to each judge), the selecting judge can allocate the selected cases in another way than mentioned before.
[...]
5.3. EULEX judges are deployed to the Supreme Court or to one or more District Courts. Deployment of EULEX judges to more than one District Court will respond to the necessity of substitution in exceptional cases. In these cases the EULEX judge will have his main sit in a district Court and will act as natural substitute of another EULEX judge in another District Court.

[...]
5.5. On call/duty system will be established for urgent situations between the courts linked above in order to ensure that a judge is available for urgent situations. The term of the on call duty is one week at the time including weekends. The proposal of the rotation system shall be forwarded by the Heads of the War Crimes Sections of the respective District Courts to the President of the Assembly of EULEX Judges no less than one month before.
[...]"

i) Composition of the Trial Panel of the Basic Court

72. The Court will initially address the allegation (*i*) that the Supreme Court did not properly address the issue of the assignment of judges in the trial panel of the Basic Court, because this was done in violation of the rules for assigning EULEX judges in trial panels.

73. The Court reiterates that, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."*

Right to a reasoned decision

74. The Court recalls that, according to the case law of the European Court of Human Rights (hereinafter: ECtHR), the right to a fair hearing includes the right to a reasoned decision.

75. According to its established case-law, the ECtHR considers that based on the principles of the proper administration of justice, the decisions of courts and tribunals should adequately state the reasons on which they are based. (See *Tatishvili v Russia*; ECtHR, application no. 1509/02, Judgment of 22 February 2007, paragraph 58; *Hiro Balani v. Spain*, ECtHR, application no. 18064/91, Judgment of 9 December 1994, prg 27; *Higgins and Others v. France*, ECtHR, application no. 134/1996/753/952, Judgment of 19 February 1998, para. 42, *Papon v France,* ECtHR, application no. 54210/00, Judgment of 7 June 2001).

76. In addition, the ECtHR has held that authorities enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6(1) of the ECHR, but the courts must "*indicate with sufficient clarity the grounds on which they based their decisions*". (See *Hadjianastassiou v. Greece*, ECtHR, application no. 12945/87, Judgment of 16 December 1992, paragraph 33).

77. According to the ECtHR case law, an essential function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice. (see *mutatis mutandis*, *Hirvisaari v. Finland*, ECtHR, application no. 49684/99, para. 30, 27 September 2001; see also, *Tatishvili v. Russia*, ECtHR, application no. 1509/02, Judgment of 22 February 2007, paragraph 58).

78. Although the courts are not obliged to address all claims submitted by the Applicants - they must however - address claims that are central to their cases and which are raised in all stages of the proceedings (see case *IKK Classic*, Judgment of 9 February 2016, paragraph 53).

79. The Court reiterates that the right to obtain a court decision in conformity with the law includes the obligation for the courts to provide reasons for their rulings with reasonable grounds at both procedural and substantive level. (See case *IKK Classic*, Judgment of 9 February 2016, paragraph 54).

80. The extent to which this duty to give reasons applies, according to the ECtHR case law, may vary according to the nature of the decision and must be

determined in the light of the circumstances of the case. (*García Ruiz v Spain*, [GC], application no. 30544/96, Judgment of 21 January 1999. prg 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, para. 27; *Higgins and Others v. France,* ECtHR, application no. 134/1996/753/952, Judgment of 19 February 1998, paragraph 42).

81. The Court reiterates that the justification of the decision must state the relationship between the findings on the merits and considerations on the proposed evidence on the one hand, and the legal conclusions of the court, on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them. (Constitutional Court Case No. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; see also Case No. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58).

Application of the above standards in the case of the Applicants

82. The Court recalls that under Article 384, paragraph 1.1 of the CPC there is a substantial violation of the provisions of criminal procedure if, among others, the court was not constituted in accordance with the law.

83. The Court also recalls that according to Article 2.6 of the Law no. 03/l-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo of 3 June 2008 (applicable on the time when the trial panel was composed), the Assembly of EULEX Judges and EULEX Prosecutors will endorse the modalities on case selection and case allocation based on pre-determined objective criteria and procedural safeguards that will be consistent with the applicable law and which will ensure the respect for the independence and the impartiality of the EULEX judges and the autonomy of the EULEX Prosecutors in the discharge of their functions.

84. In this regard, the Guidelines for Case Allocation for EULEX judges in criminal cases in district courts (hereinafter: the Guidelines) issued pursuant to the Law No.03/l-053, elaborate the principles that will guide the allocation of EULEX judges to criminal cases, including the principles of transparency, objectivity, flexibility, sustainability and equality of the workload of judges.

85. In addition, the Court notes that the Guidelines issued pursuant to the Law No. 03/L0053, in sub-rule 3.1, foresee specific rules on how cases will be divided within sections - following a numerical system where every third case coming to the section will be allocated to judge A, B and C respectively.

86. The Court also recalls that the Guidelines allow that for exceptional reasons the selecting judge can allocate the specific cases in a different way than according to the numerical system mentioned above, however, that carries with it a duty to justify the exceptional reasons, such as complexity of the case and number of cases entrusted to each judge. The Guidelines also foresee how judges assigned to one district court can substitute in another district court in case it is

necessary based on the priority list of courts as well as the 'on call/duty system' for urgent situations based on a rotation system that must be set not less than one month before.

87. In this regard, the Court recalls that the Supreme Court, when addressing the issue raised by the Applicants, regarding the implementation of the internal rules and schedule of EULEX for assigning judges to the cases, reasoned that *"there has not been a roster for assignment of EULEX judges to the cases at the relevant time. According to the Guidelines for Case Allocation for EULEX judges [...] the appointment of Judge [A.A.G], was not based on a specific schedule. The Guidelines merely clarify the structure of EULEX Judges in district courts and prescribe the general principles that are applicable regarding case allocation. Moreover, Judge [A.A.G] was assigned to the case pursuant to the decision dated on 29 May 2014 by the acting president of EULEX judges, who at that time was authorized to take this decision. In addition, EULEX Judge [A.A.G] was a legitimately appointed EULEX judge at the level of the first instance at the time. [...] Therefore, the Panel is of the opinion that the appointment of a Judge [A. A.G.] cannot be qualified as a violation of Article 384 (1.1) or Article 384 (1.2) of the CPC. The Panel notes that even if there has been a violation of the EULEX internal regulation (while the alleged violations do not constitute a violation of the relevant law - as is the request in question that the CPC has been violated) then it would be a matter of discretion within the EULEX disciplinary/administrative authorities."*

88. In this respect, the Court reiterates that it is not its task to consider whether the Supreme Court correctly interpreted the applicable law (legality) but to assess whether the Supreme Court infringed individual rights and freedoms protected by the Constitution (constitutionality) (see, for example, Case No. KI72/14, Applicant *Besa Qirezi,* Judgment of 4 February 2015, para.65).

89. Moreover, on this point, as a general rule, the establishment of the facts of the case and the interpretation of the law are a matter solely for the regular courts whose findings and conclusions in this regard are binding on the Court. However, where a decision of a regular court is clearly arbitrary, the Court can and must call it into question. (See *Sisojeva and Others v. Latvia,* [GC], application no. 60654/00, Judgment of 15 January 2007, para. 89. See also case *IKK Classic,* Judgment of 9 February 2016, paragraph 47).

90. The Court notes that the Supreme Court dismissed the arguments of the Applicants for violation of the rules for assigning judges in trial panels, stating that the President of EULEX judges is authorized by law to assign judges in such cases. The Supreme Court, in its reasoning, also stated that even if there was a violation of EULEX rules on assignment of the judges in criminal cases, since there is no violation of provisions of the CPC on the composition of trial panels, there is no violation of the Applicants' rights.

91. Thus, the Court notes that the reasoning of the Supreme Court was mainly limited to a possible violation of the CPC and did not consider other applicable

norms relevant for assigning the judges in the trial panels, as requested by the Applicants. In addition, the Court notes that in its reasoning the Supreme Court did not explain why the CPC had not been violated.

92. Consequently, the Court considers that the Supreme Court reasoned that a failure to follow the Guidelines for assigning the cases to EULEX judges does not impact the Applicants' rights as long as the alleged violations do not constitute a violation of the CPC itself.

93. The Court notes that the Supreme Court based this conclusion on the consideration that *"[...] even if there has been a violation of the EULEX internal regulation [...] then it would be a matter of discretion within the EULEX disciplinary/administrative authorities [...]."*

94. As such, the Court understands that, ultimately, the Supreme Court considered that the EULEX Guidelines were an internal matter of EULEX and, therefore, were not a part of the legislative framework of Kosovo. Nevertheless, according to Court's case law, all judges, including the EULEX judges, have an obligation to apply laws duly adopted by the Assembly of the Republic of Kosovo and consequently, the legislation deriving from it (see, *mutatis mutandis*, Case No. KI25/10, Applicant: *Kosovo Privatization Agency,* Judgment of 31 March 2011, para. 61 and 62).

95. Furthermore, the Court notes that the Supreme Court reasoned that, based on the EULEX Guidelines, the President of EULEX judges has full discretion to assign judges to the panels, regardless of any specific rules contained in the Guidelines.

96. As such, the Court understands that the Supreme Court considered that the Guidelines only contain general principles which do not restrict the discretionary authority of the President of EULEX judges in appointing judges to specific trial panels.

97. However, the Court recalls that the Law no. 03/l-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo specifies that case allocation and appointment of judges shall be based on *"pre-determined objective criteria and procedural safeguards."*

98. In these circumstances, the Court finds that, by failing to take into account the entire body of rules applicable to the appointment of judges to trial panels, the Supreme Court has failed to reason its decision regarding the appointment of judges to trial panels based on *"pre-determined objective criteria and procedural safeguards,"* as foreseen in Law no. 03/l-053.

99. In particular, the Court finds that the Supreme Court has failed in its duty to sufficiently link the applicable rules to the facts of the case, as required by the right to a reasoned decision under the right to a fair trial.

100. The Court considers that, if the Supreme Court had addressed the Applicants' allegations regarding the composition of the trial panel, based on relevant legislation pertaining to assigning the judges in the trial panels and in the light of *"pre-determined objective criteria and procedural safeguards,"* as required by the Law no. 03/l-053 and other relevant norms, that would be in compliance with the proper administration of justice.

101. It is not the Court's role to examine to what extent the allegations of the applicants in the procedures in the regular courts are reasonable. However, the procedural fairness requires that the essential allegations that parties raise should be answered properly by the regular courts in compliance with the requirements for a fair trial (see, *mutatis mutandis*, Constitutional Court Case No. KI22/16, *Naser Husaj*, Judgment of 9 June 2017, para. 47). What is at stake is the confidence which the courts in a democratic society must inspire in the public (see, *Volkov v. Ukraine*, par. 106, ECtHR Judgment of 2013 and see De Cubber v. Belgium, 26 October 1984, para. 26, Series Ano. 86).

102. Therefore, the Court finds that the Supreme Court violated the Applicants' right to a reasoned decision, because of the failure to provide a thorough assessment and justification, as to whether or not the entire body of applicable legal provisions was complied with when assigning judges in the trial panel of the Applicants' case.

103. Consequently, the Court concludes that there has been a violation of the right to a fair trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

104. The Court notes that this conclusion refers to the alleged Constitutional violation. Therefore, the Court confirms that the findings contained in this Judgment do not prejudge the outcome of proceedings in respect of the Applicants' case or with respect to their guilt or innocence.

105. As to the other allegations of the Applicant, the Court considers that they predominantly raise questions of legality and not of constitutionality and that the Supreme Court has provided detailed reasoning on all of these questions in its Judgment.

Request for interim measure

106. The Court recalls that the Applicant Jahir Demaku (KI150/17) also requests the Court to render a decision on the imposition of interim measure, namely the prohibition on the execution of the Judgment of the Supreme Court.

107. Given that the Court has found a violation of the Applicant's rights as protected by Article 31 of the Constitution and Article 6 of the ECHR, it does not consider it necessary to consider the Applicant's request for granting of interim measures.

Conclusion

108. In conclusion, the Court finds that by failing to provide a thorough assessment and justification, as to whether or not the entire body of applicable legal provisions was complied with when assigning judges in the trial panel of the Applicants' case in the Basic Court, the Supreme Court Judgment, PML. KZZ. No. 322/2016 of 19 July 2017, violated the Applicants' right to a reasoned decision, and thereby violated the Applicants' right to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

109. In accordance with the Rule 74(1) of the Rules, the Judgment of the Supreme Court, PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo of 19 July 2017, is declared invalid and the case is remanded to the Supreme Court for reconsideration.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law, and Rule 56.1 of the Rules of Procedure, in the session held on 30 May 2018 by majority

DECIDES

I. TO DECLARE the Referral admissible for assessment of merits;

II. TO HOLD that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution and paragraph 1 of Article 6 [Right to a Fair Trial] of the European Convention on Human Rights;

III. TO DECLARE invalid the Judgment PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo of 19 July 2017;

IV. TO REMAND the Judgment of the Supreme Court for reconsideration in conformity with the judgment of this Court;

V. TO ORDER the Supreme Court to inform the Court, within six months of the publication of this Judgment, in accordance with Rule 63 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;

VI. TO REMAIN seized of the matter pending compliance with that order;

VII. TO ORDER that this Judgment be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VIII. TO DECLARE this Judgment effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi