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

Prishtina, on 11 June 2018
Ref. No.: RK 1276/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI34/18

Applicant

Albert Berisha

Request for constitutional review of Judgment PML. No. 225/2017 of the Supreme Court, of 18 December 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 Albert Berisha from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment PML. No. 225/2017 of the Supreme Court of 18 December 2017, in conjunction with Judgment PAKR. No. 518/2016 of the Court of Appeals of 4 May 2017 and Judgment PKR. No. 263/15 of the Basic Court of 29 April 2016.

Subject matter

3. The subject matter is the constitutional review of the abovementioned court decisions, which allegedly violated the Applicant's rights and freedoms as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) and Article 5 (Right to liberty and security) of the European Convention on Human Rights (hereinafter: the ECHR).

4. The Applicant also requests the Constitutional Court (hereinafter: the Court) to *"impose an interim measure, because he considers that he has been unfairly deprived of his liberty as a result of the adoption of unconstitutional court decisions."*

Legal basis

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

Proceedings before the Court

6. On 8 March 2018, the Applicant submitted the Referral to the Court.

7. On 9 March 2018, the President of the Court appointed Judge Selvete Gërxhaliu- Krasniqi as Judge Rapporteur, and the Review Panel, composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.

8. On 13 March 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 13 March 2018, in accordance with Rule 37 (1) of the Rules of Procedure, the President ordered the joinder of the Referral registered under number KI37/18, with the Applicant's Referral registered under number KI34/18.

10. On 19 March 2018, the Applicant submitted a letter to the Court requesting not to join his Referral with the Referral registered under number KI37/18.

11. On 22 March 2018, in accordance with Rule 37 (3) of the Rules of Procedure, the President ordered the severance of the Applicant's Referral registered under number KI34/18 from the Referral registered under number KI37/18.

12. On 17 May 2018, the Applicant submitted to the Court additional arguments in support of his Referral.

13. The Court, in accordance with Rule 30 (3) (Registration of Referrals and Filing deadlines) of the Rules of Procedure, did not take into consideration the additional arguments submitted by the Applicant on 17 May 2018.

14. On 23 May 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

15. On 11 August 2014, the Kosovo Police Service (hereinafter: the KPS), arrested the Applicant on the grounds of a reasonable suspicion that he had committed the criminal offense of *„Organization and participation in a terrorist group"*, under Article 143, paragraph 2 of the Criminal Code of Kosovo (hereinafter: CCK).

16. On 26 August 2014, the Applicant, in the presence of the defense counsel assigned to him *ex officio*, was interrogated by the police. The Applicant gave the following statement: *„[...] On 6 October 2013, I headed from Pristina to Istanbul and from there I went to Hatay where I stayed for one day and then I travelled to the city of Kilis near the Turkish-Syrian border. On the next day, with the assistance of a Turkish citizen, I crossed the border illegally and entered Syria, namely the city of Tal Rivat where I was deployed at a base in the vicinity of Aleppo, then I was asked why I went there whom I told that I want to help the Syrian people and I do not want to become part of Al Qaeda ... ".*

17. On 7 May 2015, the Special Prosecutor of Kosovo (hereinafter: the Prosecutor) submitted to the Basic Court in Prishtina - Department for Serious Crimes (hereinafter: the Basic Court), the Indictment PPS. No. 26/2015, against the Applicant for the commission of the criminal offense of *„Organization and participation in a terrorist group"*, under Article 143 paragraph 2 of the CCK.

18. During the hearing before the Basic Court, the Applicant maintained his innocence, stating that: *„[...] the purpose of his departure to Syria was to help the Syrian people against the Assad regime and had no intention of joining terrorist groups, he deliberately participated in the group Ahra al-Sham, which was an opposition group that was not part of terrorist organizations, was not on the blacklist of the US State Department."*

19. In the closing statement before the Basic Court, the Applicant's defense counselstated that,, *„The Special Prosecutor failed to confirm his allegation that the accused Albert Berisha committed the criminal offense of*

Organization and participation in a terrorist group under Article 143, paragraph 2 of the CCK."

20. In the closing arguments before the Basic Court, the Prosecutor stated that, *„[...] some of the accused pleaded guilty to the criminal offences they were accused of; therefore, he did not engage in the assessment of evidence for these accused, but only assessed the evidence for the accused who were not pleading guilty."*

21. On 29 April 2015, the Basic Court rendered Judgment PKR. No. 263/15, by which the Applicant was found guilty of committing a criminal offense, and sentenced him to 3 years and 6 (six) months.

22. In the reasoning of Judgment PKR. No. 263-15, the Basic Court stated that, *„The Court did not give trust to the accused Albert Berisha, nor to the defense thesis of his lawyer, that allegedly the accused Albert Berisha was not aware of the situation in Syria, that he went there to help the civilian population. [...] „The position of the accused Albert Berisha, that he was in Syria only for a short time, does not acquit him of criminal liability, his statements given during the investigation and at the main hearing are contradictory to each other.*
[...]
When determining the punishment for the accused, the court took into account all mitigating and aggravating circumstances affecting the type and level of punishment, pursuant to Article 73 of the CCRK."

23. The Applicant filed an appeal with the Court of Appeals against Judgment PKR. No. 263/15 of the Basic Court, stating:

> *a) „That the Judgment contains an essential violation of the provisions of the criminal procedure because the enacting clause of the Judgment is incomprehensible and contradictory, and that he was convicted based upon his own statement.*
>
> *b) That in the judgment the factual situation was erroneously and incompletely determined,*
>
> *c) That the sentence is unfair, because he was unjustly convicted on the basis of facts that have not been established."*

24. On 4 May 2016, the Court of Appeals rendered Judgment PAKR. No. 518/2016, by which the Applicant's appeal was rejected as ungrounded.

25. Judgment PAKR. No. 518/2016 of the Court of Appeals reads:

> *a) „As regards the Applicant's allegations of violation of the provisions of the criminal procedure, the first instance court found the accused (Applicant) guilty based on his statement given to the police, the Court further states that according to the legal provisions it was determined that the [Applicant's] statements could be used as evidence (Article 125, paragraph 3 of the Criminal Procedure Code) in criminal proceedings."*

b) "The [Applicant], both in the police and at the court hearing, stated the fact that he was in Syria but categorically denied that he intended to join any terrorist organizations. In fact, at the court hearing, the accused said that he heard from various portals and social networks about the presentation of Lavdrim Muhaxheri and that he knew that he was part of the organization of the Islamic State and the organization "ISIS", and for this reason he decided to join the group „Ahra Al Sham."

c) "The Court considers that the determination of the punishment against the accused was done in accordance with the general rules for the calculation of punishment, in accordance with Article 73 of the CCK, so that the sentences that were imposed against them are proportionate to the social danger of the committed criminal offense."

26. The Applicant filed a request for protection of legality with the Supreme Court against Judgment PAKR. No. 518/2016 of the Court of Appeals, on the grounds of *"violation of the principle of equality of arms between the parties to the proceedings, because the court did not approve his proposal for hearing the witnesses, thus violating the principle of fair and impartial trial of Article 31 of the Constitution and Article 6 of the European Convention of Human Rights."*

27. On 18 December 2017, the Supreme Court rendered Judgment PML. No. 225/2017, by which the Applicant's request for protection of legality was rejected as ungrounded. The reasoning of the judgment emphasizes:

"The Court assesses that the enacting clause of the judgment of the first instance court in relation to the accused is clear and contains all information about the time, place, manner of execution of the criminal offense, as well as other data that represent the essential elements of the committed criminal offense. In this criminal case, it was not disputed that, at the critical time, as described in the operative part of the first instance court, the Applicant was in Syria, and the fact that he was there to join a terrorist formation."

28. Regarding the allegation of a violation of the principle of *„equality of arms"*, because the Basic Court did not approve the Applicant's proposal for the examination of the police officers who had conducted his initial interrogation, the Supreme Court stated: *„This court considers that, as correctly concluded by the court of first instance, it is not necessary to hear the proposed witnesses, as the official persons (police officers) have interviewed the convict about the circumstances of the criminal offence, while as for his allegation of having been promised not to be included in the indictment, based on the case file, this allegation results to be ungrounded because this convict was not declared a cooperative witness as required by the provision of Article 236 of the CPCK, hence the principle of equality of parties to the proceedings has not been violated."*

Applicant's allegations

29. The Applicant alleges that the entire proceedings before the regular courts, including the examination stage before the police, were in violation of his constitutional rights, as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR, *"because both the national law (CPCK) and the ECHR stipulate that encouraging a suspect to make a statement", "by making promises to him," or "by exerting any pressure," is deemed invalid."*

30. The Applicant considers that the courts violated the principles of the presumption of innocence and the equality of arms, since at all stages of the proceedings they prejudged his guilt for the alleged criminal offense. The courts excluded the constitutional principles that the indictment must be based on reasonable and sufficient evidence, and that the burden of proof falls on the prosecution. Accordingly, they deprived the Applicant of his right to be presumed innocent unti proven guilty, while by refusing to hear the only witnesses that he had proposed, they placed him in an unequal position vis-a-vis the authorities that accuse him.

31. The Applicant also considers that his right to a reasoned court decision was violated, because the courts' decisions are not logical, are not in the prescribed form, are not clear in their content and contain contradictions.

32. The Applicant also alleges that his detention is not based upon a conviction by a competent court, in violation of Article 5 (Right to liberty and security) of the ECHR as a consequence of the violation his right to a fair trial as protected by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR.

33. The Applicant a request to declare the Referral admissible, to impose an interim measure, to find that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR, and, as a consequence, a violation of Article 5 (Right to liberty and security) of the ECHR.

Assessment of the admissibility of Referral

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

35. 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.*

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

> *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.*

37. In this regard, the Court considers that the Applicant is an authorized party, that he exhausted all legal remedies and filed the Referral within the prescribed deadline.

38. However, the Court also refers to Article 48 [Accuracy of the Referral] of the Law, which states:

> *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.*

39. In addition, the Court takes into account Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresees:

> *(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.*

40. The Court notes that the Applicant first alleges that the challenged judgments violated his rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR, and, as a result of these violations, violated Article 5 (Right to liberty and security) of the ECHR.

41. At the outset, the Court recalls 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."*

42. In this regard, the Court recalls Article 31 [Right to a Fair and Impartial Trial] of the Constitution, which states:

> *"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*
> *[...]"*

43. Similarly, Article 6 (Right to a fair trial), of ECHR stipulates:

" 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.
[...]"

44. The Court notes that the main issue has to do with the determination of a criminal charge against the Applicant, and therefore, the Applicant in the proceedings in question enjoys the guarantee of the right to a fair trial under Article 31 [Right to Fair and Impartial Trial] and Article 6 (Right to a fair trial) of the ECHR.

45. The Applicant essentially alleges that his right to a fair trial has been violated. He bases his allegation on (i)the fact that the challenged judgments are based on his statement given in the pre-trial proceedings, which were used as evidence during the main trial. In this respect, (ii) the Applicant alleges that the rights to conduct his defense were violated because his right to remain silent and not to contribute to his own incrimination was violated, and (iii) because the courts did not allow him to call witnesses in his defense, and (iv) because the impugned judgments do not contain sufficient reasoning and explanations on decisive facts. In the opinion of the Applicant, all of the foregoing lead to the conclusion that he was not ensured the guarantees of a fair trial. Furthermore, (v) the Applicant alleges that serving the sentence on the basis of these court judgments is not lawful, because the court's violated his rights to a fair trial, and thereby serving his sentence is not based on a conviction by a competent court, as protected by Article 5(1) of the ECHR.

46. The Court, first of all, recalls the case law of the European Court of Human Rights (hereinafter: the ECtHR), according to which, *the question whether the accused had a fair procedure must be considered based on of the proceedings as a whole* (see ECtHR, *Monnell and Morris v. the United Kingdom*, Application No. 9562/81; 9818/82 of 2 March 1987, Series A, No. 115, pp. 21, paragraph 54).

i) On the use of the Applicant's statements in evidence

47. Regarding the Applicant's allegation, *„[...] that the challenged judgments are based on evidence, namely on his statement [to the police], and without a careful and comprehensive assessment of other evidence"*, the Court first recalls its case law and that of the ECtHR, according to which it is not its role to consider how the regular courts determined the factual situation or the application of the substantive law unless, and to the extent that, it puts into question the rights and freedoms protected by the Constitution and the ECHR. Therefore, it cannot act as a *„fourth-instance court"* (see: *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, paragraph 65. See also: *mutatis mutandis* case KI86/11, Applicant: *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

48. The Court recalls that Article 6 of the ECHR guarantees the right to a fair trial, but it does not lay down any rules on the use of evidence as such, which is therefore primarily a matter for regulation under national law (see ECtHR

Judgment *Schenk v. Switzerland*, No. 10862/84, 12 July 1988, para 45- 46, and ECtHR Judgment T*eixeira de Castro v. Portugal*, report 1998-IV paragraph 34, of 9 June 1998).

49. Therefore, as a matter of principle, the Court considers that its role is not to determine whether a particular kind of evidence in a court can be acceptable or not, or whether the Applicant is guilty or not. To this end, the question to be answered is whether the proceedings as a whole, including the way the evidence was taken, was fair. This includes also the consideration of the „unlawfulness" in question, also where the violations of other rights of the ECHR are concerned, (see the EctHR Judgment, *Bykov v. Russia*, application No. 4378/02, paragraph 89, of 10 March 2009, and the ECtHR Judgment *Lee Davies v. Belgium*, application No. 18704/05 paragraph 41 of 28 June 2009).

50. Furthermore, the Court recalls that it will not review the question as to which evidence of the parties to the proceedings the courts gave more trust based on of a free court assessment (see, the ECtHR Judgment *Doorson v. Netherlands*, application 1996/II, paragraph 78 of 6 March 1996).

51. However, the ECtHR has also 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. (ECtHR case *Suominen v. Finland*, application no. 37801/97, paragraph 36, Judgment of 1 July 2003).

52. The Court notes that in the reasoning of the first instance judgment it is stated, *inter alia*, that some of the key evidence on which the conclusion of the existence of the criminal offense and the criminal liability of the Applicant was based is precisely the testimony he gave to the police. In that statement the Applicant described in detail the actions he had taken in Syria, which the regulart courts have assessed as esenital elements which without a doupt show the existence of the criminal offense, and his criminal liability.

53. In this regard, the Court notes that the Applicant gave his statement to the police in the presence of his defense counsel assigned to him *ex officio*. This leads to the conclusion that during the entire proceeding he had access to legal assistance from which he could benefit, and could be made aware of the consequences that arise or may arise from his statement in the further course of the criminal proceedings.

54. The Court further notes that Article 261 of the CCK provides for the possibility that the statements made in the previous proceedings may be used as evidence during the main trial:

55. Article 261 Prior Statements Used at Main Trial of the CCK, states:

"[...]

2. Pretrial interviews may be used as evidence in accordance with Article 123 paragraph 2 of the present Code.

3. Pretrial testimony may be used as evidence in accordance with Article 123 paragraph 3 of the present Code."

56. In this regard, the Court notes that the regular courts gave extensive conclusions,providing reasons, and indicating the relevant legal provisions, as to why the Applicant's statement in pre-trial proceedings was used as evidence. The Court does not consider that the reasoning provided by the regular courts was arbitrary.

ii) Regarding the prohibition against self-incrimination

57. The Applicant alleges that his right to freedom from self-incrimination was violated because his statement made to the police during the investigation was used against him in court during the criminal trial.

58. The Court recalls Article 10 [Notification on the Reasons for the Charges, Prohibition against Self-incrimination and Prohibition against Forced Confession] of the CPC, which states:

"1. At his or her arrest and during the first examination the defendant shall be promptly informed, in a language that he or she understands and in detail, of the nature of and reasons for the charge against him or her.

2. The defendant shall not be obliged to plead his or her case or to answer any questions and, if he or she pleads his or her case, he or she shall not be obliged to incriminate himself or herself or his or her next of kin nor to confess guilt. This right is not implicated when a defendant has voluntarily entered into an agreement to cooperate with the state prosecutor.

3. Forcing a confession or any other statement by the use of torture, force, threat or under the influence of drugs, or in any other similar way from the defendant or from any other participant in the proceedings shall be prohibited and punishable."

59. The Court also recalls that the right to a fair trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, provides certain minimum guarantees for any person charged with a criminal offence, which includes the right to freedom from self-incrimination, according to the ECtHR case law (see ECtHR Judgment, *Saunders v. United Kingdom*, application No. 19187/91, para. 68 and 69, of 17 December 1996, as well as the ECtHR *John Murray v. United Kingdom*, application 18731/91, paragraph 45, of 8 February 1996).

60. In this regard, the right of a person not to incriminate himself assumes that in the criminal proceedings the prosecutor is required to prove his case against the accused without using the evidence obtained through the *method of coercion and repression*, contrary to the will of the accused. The right not to incriminate oneself is primarily concerned with the will of the accused party not to make a statement, namely the right to remain silent already applicable to the first examination of the suspect (see ECtHR Judgment, *Saunders v. United Kingdom*, application No. 19187/91, para. 68 and 69, of 17 December

1996, as well as the ECtHR *John Murray v. United Kingdom*, application 18731/91, paragraph 45, of 8 February 1996).

61. Finally, the right to silence is not absolute, and in assessing whether the proceedings infringed the very essence of the guarantees of against self-incrimination, the ECtHR, makes its assessment based on: a) *the nature and degree of coercion*, b) *the existence of any relevant protective measure,* and c) *the use of the evidence obtained in this manner* (see ECtHR *John Murray v. United Kingdom,* application 18731/91, paragraph 45, of 8 February 1996).

62. The Court notes the Applicant's allegation that *„his right to defense and guarantees in respect of protection against mere incrimination has been violated, as his statement was used in evidence".*

63. On this point, the Court first of all emhasizes that when assessing whether the proceedings were fair as a whole, it should be borne in mind whether the rights of the defense have been respected. In that regard, the Court shall assess whether the Applicant had the opportunity to challenge the lawfulness of the evidence and to object to the use of such evidence (see ECtHR *Szilagyi v. Romania*, application 30164/04 of 17 December 2013).

64. In addition, the quality of the evidence must be taken into account, including whether the circumstances in which it was obtained indicate a suspicion as to its reliability or accuracy (see ECtHR *Lisica v. Croatia* judgment, application 20100/06, paragraph 49, of 25 February 2010).

65. Moreover, the problem of justice will not necessarily occur where the evidence obtained is not supported by other material, it should be noted that when the quality of the evidence was very sound and admitted no doubt, the need for further evidence to support it decreased (see, the ECtHR Judgment, *Lee Davies v. Belgium*, application 18704/05 para. 42 of 28 June 2009, as well as the ECtHR Judgment *Bykov v. Russia*, Application No. 4378/02 paragraph 90, of 10 March 2009).

66. In the present case, the Court notes that the regular courts have reached their conclusions, giving sufficient reasoning that this Court does not consider arbitrary, that the Applicant's statement given to the police was obtained in a lawful manner. In addition, prior to giving his testimony, the Applicant voluntarily and consciously in the presence of his defense counsel waived the right not to answer the questions of the competent officers in charge of the investigation, and not to rely upon his right to remain silent.

67. Moreover, at no stage in the proceedings before the Basic Court, Court of Appeals or the Supreme Court, was the Applicant able to prove that he was exposed to any kind of pressure by the police due to the fact that he was in police custody. The Applicant also did not have any objections to the appointment of the defense counsel assigned to him *ex officio*, and in that sense *„there were protective measures"* in the light of the above principles.

68. It also follows from the facts of the case that the Applicant before the statement given to the police, consulted his defense counsel without the

presence of other persons. Moreover, the Applicant also had sufficient time when he gave the testimony before the Basic Court in consultation with his defense counsel, to prepare a defense to challenge his previous statement given to the police, concluding that the Applicant was not denied the opportunity to challenge the use of his statement as evidence.

69. Finally, as noted by the Basic Court, by careful analysis of the statement made by the Applicant before the police and the statement he made in his defense before the Basic Court, it was established that they differ to a sufficient extent to confirm the fact that the Applicant is aware of the criminal offense he had committed and that he has decided to defend himself, but that *„[...] the court did not give trust to the accused Albert Berisha and neither to the defence thesis of his lawyer brought before the Basic Court...“* .

70. Based on the foregoing, the Court finds the Applicant's allegations of alleged violations of the right to defense and guarantees with regard to protection against self-incrimination are ungrounded.

iii) Regarding the denial to hear defense witnesses

71. Further, in relation to the Applicant's allegations, *„that the principle of equality of the parties to the court proceedings was violated, because the courts did not want to accept the witnesses he proposed[...]“*, the Court finds them as ungrounded, since the Applicant made the same arguments also before the Court of Appeals and the Supreme Court, where he received detailed answers to his allegations, for which the courts provided the legal basis.

72. The Court cannot fail to note that the Supreme Court in Judgment PML. No. 225/2017, specifically responded to the Applicant why the Basic Court in Judgment PKR. No. 263/15 rejected the request to hear two KP officers, who interrogated the Applicant in the presence of the defense counsel during the course of the investigation, stating that *„[...] that it is not necessary to examine the proposed witnesses because they, as officers (police officers), have interviewed the convict about the circumstances of the criminal offense, whereas as to his allegation that he was promised not to be included in the indictment, this is ungrounded ...“*

iv) Regarding the right to a reasoned decision

73. As regards the Applicant's allegation of a violation of the right to a fair trial *“[...] because the judgments of the courts are not logical, in the prescribed form, they are not clear in content and that they have contradictions“*, the Court emphasizes that, according to the established case law of the ECtHR, Article 6, paragraph 1, of the ECHR, it is obligatory for 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 (see: ECtHR Judgment, *Ruiz Torija v. Spain*, of 9 December 1994, Series A, No. 303-A, paragraph 29, see Decision of ECtHR, *Harutyunyan v. Armenia*, of 5 July 2005, application number 36549/03).

74. The Court also notes that, according to the position taken by the European Commission on Human Rights, *the final decisions of the appellate courts do not have to contain exhaustive reasoning, but the one which the court deems relevant and well-founded* (see: *Decision of the European Commission on Human Rights*, 8769/07 of 16 July 1981 , OI 25).

75. In essence, the Court notes that the Applicant tries to justify the alleged violation by stating that *"[...] the court did not logically link the legal framework and the factual situation. Courts instead of explaining the core of their decision, they ask hypothetical questions - which are irrelevant for a court decision."*

76. The Court also notes that the Applicant repeated the same appealing allegations before the Supreme Court, to which the court in Judgment PML. no. 225/2017 replied, stating that: *"The Court considers that the enacting clause of the first instance judgment in a relation to the accused are clear and contain all information about the time, place, manner of execution of the criminal offense, as well as other data that represent the core elements of the committed criminal offense. In the reasoning of the two judgments, legal reasons for all the the items of the Judgment were provided."*

77. The Court finds these allegations of the Applicant to be ungrounded and not constitutionally unjustified. This is because the Basic Court and Court of Appeals in their judgments gave clear reasons for their decisions, both regarding the established factual situation and the application of the substantive law, which this Court does not consider arbitrary.

78. For the reasons set out above, the Court concludes that the Applicant's allegation of a violation of the right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, is manifestly ill-founded on a constitutional basis.

v) Regarding the right to liberty and security

79. As regards the Applicant's allegations concerning the violation of Article 5 (Right to liberty and security), of the ECHR, the Court notes that the Applicant claims that, because he was not provided with a fair trial, therefore his detention is not based on a "conviction by a competent court" as required by Article 5 of the ECHR. The Applicant alleges that he is being punished by judgments which are unconstitutional, which is why his sentence of imprisonment is also unconstitutional.

80. First of all, the Court recalls that the ECtHR states that Article 5, paragraph (1) item (a) of the ECHR allows the deprivation of liberty *„after conviction by a competent court"*. The ECtHR states that the word 'after' does not simply mean that the 'detention' must follow the 'conviction' at the same point of time: in addition, the 'detention' must result from, 'follow and depend upon' or occur 'by virtue of' the 'conviction'" (see the ECtHR Judgment, B. v. Austria, application No 11968/86 of 28 March 1990, paragraph 38).

81. The Court finds that, under the legislative framework of Kosovo, the proceedings leading to a criminal conviction against the Applicant were conducted by courts lawfully and regularly established in Kosovo. Furthermore, there is nothing in the procedures applied by the regular courts to call into question their „competence" under the law or the Constitution.

82. Therefore, the Court finds that the Applicant was convicted by a *"competent court"* which conducted a comprehensive procedure that resulted in the establishment of criminal liability and *"rendering of a final judgment"* which sentenced the Applicant to imprisonment (see the ECtHR Judgment, *B. v. Austria*, application No 11968/86 of 28 March 1990).

83. The Court concludes that the Applicant's conviction by a competent court was entirely sufficient to justify his detention in compliance with the requirements of Article 5 of the ECHR, and the Applicant's allegations of a violation of Article 5 ECHR are to be rejected as manifestly ill-founded on a constitutional basis.

Conclusions

84. Bearing in mind all of the above, including the circumstances of the caseand the reasoning provided in the challenged decisions, the Court does not see any arbitrariness in the application of the substantive law in the Applicant's criminal trial. The Courtalso does not find any elements that would indicate irregularity or arbitrariness in rendering the challenged decisions to the detriment of the Applicant.

85. Accordingly, the Court considers that nothing in the case presented by the Applicant indicates that the proceedings before the regular courts were unfair or arbitrary in order for the Constitutional Court to conclude that the core of the right to fair and impartial trial has been violated, or that the Applicant was denied any procedural guarantees, which would lead to a violation of the right to a fair trial under Article 31 of the Constitution or Article 6 of the ECHR.

86. The Court considers 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. That assessment is in accordance with the jurisdiction of the Court (see: case of the Constitutional Court No. K119/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, Resolution on Inadmissibility of 5 December 2013).

87. However, the Court finds that the Applicant did not substantiate his allegation, nor has he demonstrated that there has been a violation of his rights.

88. The Court further considers that it cannot act as a "fourth instance court".

89. In conclusion, the Court finds that the Applicant's allegations of a violation of the right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, and of the right to liberty and security as guaranteed by Article 5 of the ECHR, are manifestly ill-founded on a constitutional basis.

90. Therefore, the Applicant's Referral as a whole is manifestly ill-founded on a constitutional basis and is to be declared inadmissible in accordance with Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

Request for interim measure

91. The Court recalls that the Applicant also requested the Court to impose an interim measure *"because he considers that he was unjustly deprived of his liberty as a result of rendering unconstitutional court decisions."*

92. In this regard, the Court refers to Article 27 [Interim Measures] of the Law, which provides:

> *1." The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest."*

93. The Court also refers to Rule 55 (4) of the Rules of Procedure, which specifies:

> *" Before the Review Panel may recommend that the request for interim measures be granted, it must find that:*
>
> *(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
> *(...)*
> *If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application."*

94. The Court reiterates the conclusion that the Applicant's Referral was declared inadmissible, as manifestly ill-founded, because the Applicant has not provided any *prima facie* evidence on the admissibility of the Referral.

95. Therefore, 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 measure is rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 (1 and 7) of the Constitution, Articles 27.1 and 47.2 of the Law, and Rules 36 (1)(d) and 36 (2)(d), 55 (4), and 56 (2) of the Rules of Procedure, at its session held on 23 May 2018,

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measures;

III. TO NOTIFY this Decision to the parties;

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

V. TO DECLARE this Decision effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi