



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

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Prishtina, on 26 August 2019  
Ref. no.:AGJ 1415/19

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

## **JUDGMENT**

in

**Case No. KI128/17**

Applicant

**Naser Husaj**

**Constitutional review of Judgment Rev. No. 170/2017 of the Supreme Court  
of Kosovo of 23 August 2017**

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

composed of:

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

#### **Applicant**

1. The Referral was submitted by Naser Husaj, a lawyer from Peja (hereinafter: the Applicant).

## **Challenged decision**

2. The Applicant challenges the constitutionality of Judgment [Rev. No. 170/2017] of the Supreme Court of the Republic of Kosovo of 23 August 2017 (hereinafter: the Supreme Court) in conjunction with Judgment [CA. No. 3235/2013] of 6 September 2016 of the Court of Appeals and Judgment [C. No. 171/07] of 12 March 2013 of the Basic Court in Prishtina (hereinafter: the Basic Court).

## **Subject matter**

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

## **Legal basis**

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 31 May 2018, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

## **Proceedings before the Court**

6. On 1 November 2017, the Applicant submitted the Referral to the Court.
7. On 3 November 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges: Ivan Čukalović, Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
8. On 8 November 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues was terminated. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Čukalović was terminated.

10. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.
11. On 22 August 2018, as the mandate as judges of the Court of four abovementioned judges was over, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision No. GJR. KI128/17 on the replacement of Judge Rapporteur and Gresa Caka-Nimani was appointed as Judge Rapporteur. Whereas, on 25 October 2018, the President of the Court rendered Decision No. KSH. KI128/17 on the replacement of the Presiding of the Review Panel and the Presiding was appointed: Arta Rama-Hajrizi.
12. On 29 July 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.
13. On the same date, the Court unanimously found that Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

### **Summary of facts**

14. It follows from the case file that the Applicant was practicing a profession of a lawyer and at the same time was a member of the Kosovo Bar Association (hereinafter: the Bar Association).

### *With regard to criminal and administrative proceedings*

15. During the period he was practicing as a lawyer, the criminal proceedings were initiated against the Applicant for the criminal offense of fraud established in paragraph 1 of Article 140 of the Criminal Law of Kosovo.
16. On 3 July 2002, the Municipal Court in Peja (hereinafter: the Municipal Court) by Judgment [P. No. 155/2002] found the Applicant guilty of committing the criminal offense of fraud established by the Provisional Criminal Code of Kosovo (hereinafter: PCCK), imposing a sentence of 9 (nine) months of imprisonment, provided that within 2 (two) years he does not commit any other criminal offense.
17. On an unspecified date, the Applicant filed an appeal against the abovementioned Judgment of the Municipal Court, on the grounds of essential violations of the criminal procedure provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law.
18. On 5 August 2002, the Bar Association, based on Article 46 of the Law on the Bar and other Legal Assistance of 24 December 1979 (hereinafter: the Law on the Bar), suspended, by Decision, suspended the right to practice the Applicant's profession, until the completion of the disciplinary proceedings and criminal

proceedings against him. The Applicant filed a claim for administrative conflict with the Supreme Court against this Decision.

19. On 21 April 2004, the District Court in Peja (hereinafter: the District Court), by Judgment [AP. No. 1/2003] rejected the Applicant's appeal as ungrounded and upheld the abovementioned Judgment of the Municipal Court.
20. According to the case file, on the same date, namely on 21 April 2004, the Bar Association, by Decision No. 111, terminated the suspension measure against the Applicant and allowed the continuation of the practice of the relevant lawyer. The Bar Association reasoned that (i) the criminal proceedings against the Applicant was completed by the Judgment of the District Court; and (ii) the disciplinary procedure was not conducted.
21. Against the abovementioned Judgment of the District Court, the Applicant filed a request for protection of legality with the Supreme Court.
22. On 16 December 2004, the Supreme Court, deciding on the administrative conflict upon the claim of the Applicant, by Judgment [A. No. 442/2002] annulled the Decision of the Bar Association, *inter alia*, on the grounds that (i) it was contrary to the applicable Law of the General Administrative Procedure; (ii) it was issued based on erroneous and incomplete determination of the factual situation; and (iii) did not contain sufficient reasoning.
23. On 18 March 2005, the Supreme Court by Judgment [PKL. No. 16/2004] partially approved the Applicant's request for protection of legality and modified the abovementioned Judgment of the District Court only with regard to the legal qualification of the criminal offense, stating that the actions of the accused, namely of the Applicant, satisfy the elements of the criminal offense of fraud, as stipulated by paragraph 1 of Article 261 (Fraud) of the KCCP.

#### *Regarding civil procedure*

24. According to the case file, it results that on 28 February 2005, the Applicant initiated the claim against the Bar Association for compensation of damage. The Municipal Court, by Decision [C. No. 286/05] of 22 March 2005, declared itself incompetent with respect to its territorial jurisdiction, ordering the case to be referred in competence of the Municipal Court in Prishtina. The Applicant against this Decision filed appeal. The District Court, by Decision [CA. No. 121/05] of 4 December 2006, rejected as ungrounded the Applicant's appeal, upholding the Decision of the Municipal Court regarding the territorial jurisdiction.
25. Through the request for compensation of damage, the Applicant sought compensation for material and non-material damage. In respect of the former, he requested that the Bar Association pays the amount of € 210,000 in respect of the lost profit, while in respect of the latter, he requested that the Bar Association pays

the amount of € 510,000 for the violation of moral and professional integrity, including 4.5% interest rate from 27 April 2004.

26. On 12 March 2013, the Basic Court by Judgment [C. No. 171/07] rejected the Applicant's statement of claim, reasoning, *inter alia*, that the requirements laid down in Articles 154 (Foundations of Liability), 155 (Injury or Loss), 189 (Common Damage and Profit Lost) and 198 (Particular Provisions For Redressing Property Damage in Case Of Insult to One's Honour And Spreading False Statements) of the Law on Obligational Relationship of 30 March 1978 (hereinafter: the LOR).
27. On an unspecified date, the Applicant challenged the abovementioned Judgment of the Basic Court before the Court of Appeals, on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law, with the proposal that the appealed Judgment be modified or annulled and the case be remanded to the first instance court for retrial.
28. On 2 February 2015, the Applicant filed a criminal report with the State Prosecution against Judge A.B., Judge in the Basic Court, Judge Q.A., Judge in the Court of Appeals, and against Judges of the Supreme Court, M.R., G.S., E.H. for the commission of the criminal offenses of (i) unlawful enactment of judicial decisions provided for in Article 432 and (ii) conflict of interest as defined in Article 424 of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK). The criminal report concerning the judges of the Supreme Court was related, *inter alia*, to their participation in a panel which by Judgment [Rev. No. 335/2015] of 14 December 2015, rejected the Applicant's request for revision as ungrounded in another case of the Applicant.
29. On 6 September 2016, the Court of Appeals by Judgment [CA. No. 3235/2013] rejected the Applicant's appeal and upheld the Judgment of the Basic Court.
30. On an unspecified date, the Applicant filed a revision against the aforementioned Judgment of the Court of Appeals with the Supreme Court, on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law.
31. On 23 August 2017, the Supreme Court by Judgment [Rev. No. 170/2017] upheld the Judgment of the Court of Appeals and rejected the Applicant's revision as ungrounded.

### **Applicant's allegations**

32. The Applicant alleges that the Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court violated his fundamental rights and freedoms guaranteed by

Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

33. With regard to the allegations of a violation of Article 31 in conjunction with Article 6 of the ECHR, the Applicant alleges that the challenged Judgment of the Supreme Court was rendered by a partial court, because a part of the decision-making panel was also Judge G.S., against whom the Applicant filed a criminal report on 2 February 2015, in conjunction with the Judgment [Rev. No. 335/2015] of the Supreme Court of 14 December 2015 and which thereafter, namely on 9 June 2017, was declared invalid by the Court in case No. KI22/16. (See Case of Court No. KI22/16 with Applicant *Naser Husaj*, Judgment of 9 June 2017).
34. Finally, the Applicant requests the Court to declare his Referral admissible, and that the challenged Judgment of the Supreme Court be declared invalid, by remanding the case for retrial.

### **Admissibility of the Referral**

35. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and the Rules of Procedure.
36. In this respect, the Court refers to paragraphs 1 and 7, of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

*“1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*

*[...]*

*“7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law”.*

37. The Court further refers to the admissibility requirements as further specified in the Law. In that regard, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

#### **Article 47 [Individual Requests]**

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

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

Article 48  
[Accuracy of the Referral]

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

Article 49  
[Deadlines]

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

38. As to the fulfillment of these criteria, the Court considers that the Applicant is an authorized party and challenges an act of a public authority, namely Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms which have allegedly been violated in accordance with Article 48 of the Law and has submitted the Referral in accordance with the deadlines foreseen in Article 49 of the Law.
39. The Court also finds that the Applicant's Referral meets the admissibility requirements established in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible based on the requirements laid down in paragraph 3 of Rule 39 of the Rules of Procedure.
40. Moreover, and finally, the Court considers that this Referral is not manifestly ill-founded on constitutional basis as established in paragraph 2 of Rule 39 of the Rules of Procedure and, therefore, it must be declared admissible. (See also case of ECtHR *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144).

**Relevant Constitutional and Legal Provisions:**

**Constitution of the Republic of Kosovo**

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..*

*[...]*

## **European Convention on Human Rights**

### **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.*

*[...]*

## **LAW No. 03/L-006 ON CONTESTED PROCEDURE**

### **CHAPTER III**

#### **EXCLUSION OF THE JUDGE FROM THE CASE**

##### **Article 67**

*A judge may be excluded from the legal matter:*

*a) if he or she is itself a party, a legal representative or authorized representative or is a co-creditor or codebtor or obliged for repay or if in the same issue he or she has been examined as a witness or as an expert;*

*b) if he or she is the spouse, the extramarital partner, a relation by blood in a direct line to any degree or in a collateral line to the fourth degree or a relation by marriage to the second degree to the defendant, or his or her legal representative or authorized representative;*

*c) if he or she is a legal guardian, ward, adopted child, adoptive parent, foster parent or foster child of the defendant, or his or her legal representative or authorized representative;*

*d) if in the same case he or she has taken part in rendering a decision of a lower court or any other body or has taken part in mediation procedure;*

*e) if he or she has taken part in a matter for which was made a judicial settlement, and the claim that has been filed requests annulment of such a settlement;*

*f) if he or she is a shareholder or a member of the commercial association which is a party in the initiated procedure;*

*g) if there are other circumstances that challenge his or her impartiality.*

## **Merits**

41. The Court recalls that the Applicant was found guilty of the criminal offense of fraud in July 2002 by the Municipal Court. As a result of this Judgment, the Bar Association suspended his right to practice the profession of a lawyer. During 2004, three relevant decisions related to the criminal proceedings against the Applicant and also the administrative proceedings concerning the Decision of the Bar Association were rendered. First, the District Court upheld the Judgment of the Municipal Court in respect of the criminal offense of fraud. Secondly, as a result of this Judgment, the Bar Association terminated the measure of suspension of practicing the profession against the Applicant. Thirdly, the Supreme Court, acting upon the Applicant's appeal, declared the Decision of the Bar Association unlawful. The Court notes, however, that the latter was annulled by the Bar Association before the relevant Judgment of the Supreme Court regarding the administrative proceedings, based on the Judgment of the District Court regarding the criminal proceedings. In 2005, the Supreme Court upheld the judgments of the lower instance courts concerning the criminal offense of fraud, thus completing the criminal proceedings against the Applicant.
42. As of 2005, the Applicant sued the Bar Association for compensation of material and non-material damage as a result of the Decision, which suspended his right to practice his profession. His request for compensation of damage was rejected through three Judgments of the regular courts, namely Judgment [C. No. 17110] of 12 March 2013 of the Basic Court, upheld by Judgment [CA. No. 323/2013] of 6 September 2016 of the Court of Appeals and Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court. The latter is challenged by the Applicant before the Court, challenging the composition of the relevant decision-making Panel, in which the President of the Panel was Judge G.S., against whom the Applicant in 2015 filed a criminal report with the State Prosecution Office. According to the Applicant, the participation of Judge G.S. in the Panel of the Supreme Court, results in violation of his right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
43. The Court notes that the criminal report against Judge G.S., according to the case file and the Applicant's allegations, relates to her participation in the decision-making Panel of the Supreme Court regarding the Judgment [Rev. No. 335/2015] of 14 December 2015 of the Supreme Court and which the Court, on 9 June 2017, in the case KI22/16 declared invalid.

44. In this respect, the Court initially notes that the subject matter which the Court dealt with in case KI22/16 regarding the constitutional review of Judgment [Rev. No. 335/2015] of the Supreme Court of 14 December 2015 and the subject matter in the present case, regarding the constitutional review of Judgment [Rev. No. 170/2017] of the Supreme Court of 23 August 2017, are different and unrelated. In the former, namely in case KI22/16, the case concerned a certificate of ownership, while the Applicant's allegations before the Court related to the participation of Judge Q.A. in the Panel of the Court of Appeals and against whom the Applicant also filed a criminal report. In the present case, the Applicant alleged that the Panel of the Supreme Court, of which Judge G.S. was an integral part, rejected the Applicant's request for revision, by Judgment [Rev. No. 335/2015] of 14 December 2015, without justifying the Applicant's allegations of partial trial at the appeal level, due to the participation of Judge Q.A. at the respective Panel.
45. By Judgment in case KI22/16, the Court declared the Judgment of the Supreme Court invalid on the grounds of an unreasoned judicial decision in contravention of the guarantees enshrined in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, specifically because the Supreme Court did not address the Applicant's allegations regarding the participation of Judge Q.A. in decision-making in the Court of Appeals. (See, case KI22/16, cited above, paragraphs 39, 45, 46, 50 and 51).
46. Therefore, the Court notes that the Judgment of the Court in case KI22/16 declared invalid the Judgment [Rev. No. 335/2015] of the Supreme Court of 14 December 2015, only in respect of the lack of reasoning of the court decision. The Judgment of the Court in case KI22/16 is in no way related to the composition of the decision-making panel of the Supreme Court nor to the participation of Judge G.S. in its composition.
47. Moreover, unlike case KI22/16 in which the Applicant alleged that the Supreme Court did not reason the participation of Judge Q.A. in the decision-making in the Court of Appeals, because he filed a criminal report against the latter, in the circumstances of the present case, the Applicant challenges the participation of Judge G.S. in the Panel of the Supreme Court and against whom the Applicant also filed a criminal report.
48. In this regard, the Court notes that the Applicant's allegations that the Judgment [Rev. No. 170/2017] of the Supreme Court of 23 August 2017 was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because the decision-making panel of the Supreme Court was allegedly biased due to the participation of Judge G.S., will be examined based on the case law of the European Court of Human Rights (hereinafter: hereinafter: the ECHR), in accordance with which, the Court based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

49. In this regard, the Court first recalls that the impartiality of a tribunal under Article 31 of the Constitution in conjunction with Article 6 of ECHR, based on the consolidated case law of the ECtHR, must be determined according to (i) a subjective test, that is on the basis of the personal conviction and behaviour of a particular judge implying that a judge may have had personal prejudice or bias in a particular case; and (ii) an objective test, that is ascertaining whether the court, *inter alia*, its composition offered guarantees sufficient to exclude any legitimate doubt in this respect (See, *inter alia*, ECtHR cases, *Miracle Europe KFT v. Hungary*, Judgment of 12 April 2015, paragraphs 54 and 55, *Gautrin and Others v. France*, Judgment of 20 May 1998, paragraph 58, *San Leonard Band Club v. Malta* Judgment of 29 July 2004, paragraph 58, *Thomann v. Switzerland*, Judgment of 10 June 1996, paragraph 30, *Wettstein v. Switzerland*, Judgment of 21 December 2000, paragraph 42, *Korzeniak v. Poland*, Judgment of 10 January 2017, paragraph 46; and case of the Court KIO6/12, with Applicant *Bajrush Gashi*, Judgment of 9 May 2012, paragraph 45).
50. More specifically, as regards the subjective test, based on the ECtHR case law, personal impartiality of a judge must be presumed until there is proof to the contrary. (See, *inter alia*, ECtHR cases, *Mežnarić v. Croatia*, Judgment of 30 November 2005, paragraph 30; *Padovani v. Italy*, Judgment of 26 February 1993, para. 26; *San Leonard Band Club v. Malta*, cited above, paragraph 59; *Hauschildt v. Denmark*, Judgment of 24 May 1989, paragraph 47; *Driza v. Albania*, Judgment of 13 November 2007, paragraph 75; and *Korzeniak v. Poland*, cited above, paragraph 47). As regards the type of proof required to prove such a thing, the ECtHR, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons. However, to decide whether in a concrete case there are sufficient grounds to determine that a certain judge is not impartial, the standpoint of the applicant is important but not decisive. (See, *inter alia*, ECtHR case, *De Cubber v. Belgium*, Judgment of 26 October 1984, para. 25). However, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the ECtHR. (See, ECtHR cases, *Kyprianou v. Cyprus*, cited above, paragraph 119; *Micallef v. Malta*, Judgment of 15 October 2009, paragraphs 93-94; and *Tozicka v. Poland*, Judgment of 24 July 2012, paragraph 33).
51. Furthermore, according to the case law of the ECtHR, while in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the criteria and requirement of objective impartiality of the court provides a further important guarantee. (See case of ECtHR *Micallef v. Malta*, cited above, paragraphs 95 and 101). It must be noted, that in the vast majority of cases raising impartiality issues, the ECtHR has focused and found violations in the aspect of the objective test of the impartiality of the court. (see also case of ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*, Judgment of 6 November 2018, paragraph 146; and *Korzeniak v. Poland*, cited above, paragraph 48).

52. As to the objective test, the Court notes that based on the ECtHR case law, when it is applied on a trial panel, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise legitimate doubts as to impartiality of the court. In this respect even appearances may be of a certain importance or, in other words, "*justice must not only be done, it must also be seen to be done*". (In this context, see, *inter alia*, ECtHR case, *De Cubber v. Belgium*, cited above, paragraph 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. (See, *inter alia*, ECtHR cases, *Castillo Algar v. Spain*, Judgment of 28 October 1998, paragraph 45; *San Leonard Band Club v. Malta*, cited above, paragraph 60; and *Golubović v. Croatia*, cited above, paragraph 49). Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. (See, ECtHR case, *Micallef v. Malta*, cited above, paragraph 98).
53. Furthermore, based on the case law of the ECtHR, the situations within which issues may arise regarding the lack of impartiality may be of (i) functional nature and (ii) personal. The first one relates to the exercise of various functions within a judicial proceeding by the same person or hierarchical or other nature between the judge and other actors in the particular judicial process. With regard to the latter, the level and nature of this connection should be examined. These situations of a functional nature may include examples of cases in which were carried out (i) advisory and judicial functions (in this context, see, *inter alia*, cases of ECtHR *Procola v. Luxembourg*, Judgment of 8 September 1995 , paragraph 45, *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraph 200; *Sacilor Lormines v. France*, Judgment of 9 November 2006, paragraph 74); (ii) judicial and extra-judicial (in this context, see, *inter alia*, ECtHR case, *McGonnell v. the United Kingdom*, Judgment of 8 February 2000, para. 52-57); and (iii) various court cases. In this context, the ECtHR emphasizes that the assessment of whether the participation of the same judge at different stages of the trial may have resulted in a violation of the requirements related to the impartiality of the court, should be assessed case by case and depending on the circumstances of each case . The second, namely, issues of personal nature, are mainly related to the conduct of a judge regarding a case or the existence of links with one of the parties or his/her representative in one case. (See further in this context, ECtHR Guide of 31 December 2018, on Article 6 of the ECHR, Right to a fair trial (civil aspect), Part III. Institutional Requirements, C. Independence and Impartiality, 3. The Impartial Court).
54. The Court also notes that, based on the ECtHR case law, the assessment of court's impartiality under a subjective and objective test implies that, it must be determined whether in a given case there is a legitimate reason to fear that a particular judge and/or trial panel lacks impartiality. However, beyond legitimate doubts, according to ECtHR case law, it is more important to determine whether this fear can be held to be objectively justified.( See, *inter alia*, ECtHR cases, *Mežnarić v. Croatia*, cited above, paragraph 31; *Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, paragraph 58; *Wettstein v. Switzerland*, cited above, paragraph 44; *San Leonard Band Club v. Malta*, cited above, paragraph

60; *Korzeniak v. Poland*, cited above, paragraph 49 and *Tozicka v. Poland*, cited above, paragraph 33).

55. In the light of these general principles and their application in the circumstances of the present case, the Court recalls that the Applicant alleges that the fact that Judge G.S. participated in the rendering of the challenged Judgment of the Supreme Court, resulted in rendering this Judgment by a partial court, in violation of his right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Court will initially consider the Applicant's allegations under the criteria established by the ECtHR case law regarding the subjective test.
56. In this context, the Court recalls that (i) the judge's personal impartiality must be presumed until there is a proof to the contrary; (ii) the latter may be established, *inter alia*, by facts which would prove that a judge shows hostility or ill will for personal reasons; and that (iii) in examining whether there can be legitimate doubts regarding a relevant judge as to his/her impartiality, the Applicant's views are relevant but not decisive.
57. In this regard, the Court recalls that the Applicant alleges that Judge G.S. was biased, because the Applicant filed a criminal report against the latter in 2015. The Applicant, according to the case file in his criminal report, alleged that a number of judges, including Judge G.S., rendered unlawful judicial decisions.
58. The Court initially notes that, in addition to the fact that the Applicant has filed the relevant criminal report against Judge G.S., he has not presented any further argument to the Court that the respective Judge may have shown ill will or hostility towards the Applicant, the necessary evidence to overturn the presumption of impartiality of a judge based on ECtHR case law.
59. In addition, the nature of the criminal report relates to the decision-making of Judge G.S., namely, and allegedly, the issuance of unlawful judicial decisions provided for in Article 432 and in the conflict of interest set forth in Article 424 of the CCRK. The Court also notes that based on the case file, the criminal report was filed on 2 February 2015 and consequently still has not been decided by the relevant Panel regarding the Judgment [Rev. No. 335/2015] of 14 December 2015 of the Supreme Court, related to which, with respect to Judge G.S., the Applicant filed this criminal report.
60. The Court notes that the addressing and assessment of the Applicant's criminal report is within the competence of other institutions of the Republic of Kosovo, however, it also emphasizes the submission of criminal reports against judges as a result of the parties' dissatisfaction with the outcome of the court decisions, and without the support of other facts and circumstances, which could objectively justify legitimate doubts about a court's impartiality in its decision-making, cannot in itself substantiate allegations of an Applicant of the impartiality of a court, nor overturn the presumption of the impartiality of a judge.

61. As noted above, in assessing the impartiality of the respective judge, an Applicant's view is important but not decisive. The Court considers that in the case file and moreover, in the assessment of the challenged Judgment [Rev. No. 170/2017] of the Supreme Court of 23 August 2017, where the President of Panel was Judge G.S., there is no indication that could result in legitimate and objectively justifiable doubts that Judge G.S. in rendering the challenged Judgment, acted with prejudice or personal animosity towards the Applicant. Accordingly, the Court notes that in rendering the Judgment [Rev. No. 170/2017] of the Supreme Court of 23 August 2017, no fact can support the finding that Judge G.S., in the circumstances of the present case, was not impartial within the meaning of the subjective test.
62. The Court recognizes the fact that it is difficult to find and present arguments and evidence which could overturn the presumption of impartiality of the judge under the subjective test. The ECtHR has recognized the same fact and, which as a result, beyond the application of the subjective test, in assessing the claims of the applicants, also applies the principles of the objective test, as an additional guarantee to determine whether a particular decision has been taken by an impartial tribunal. (See in this case, ECHR cases, *Pullar v. the United Kingdom*, Judgment of 10 June 1996, paragraph 32; *Micallef v Malta*, Judgment of 15 October 2009, paragraph 95; and *Korzeniak v. Poland*, cited above, paragraph 49).
63. Therefore, the Court will further assess the impartiality of the court, in the circumstances of the present case, also within the meaning of the objective test, and consequently, on the basis of the ECtHR case law, will examine whether (i) there are facts and circumstances sufficient and which may raise legitimate doubts as to the impartiality of the court; and (ii) these doubts about the impartiality of the court in the circumstances of the present case may be objectively justified.
64. Initially, the Court notes that the fact that in a panel of the Supreme Court participated a Judge as a Presiding Judge against whom the Applicant filed a criminal report presents a circumstance which may raise legitimate doubts about impartiality of the court. However, the Court must assess whether these doubts, in the circumstances of the present case, are objectively justified.
65. In this context, the Court recalls that the ECtHR consolidated case law with regard to the application of the objective test has determined that a party's allegations of impartiality of the court may be of a functional or personal nature. As noted above, the first one, in principle, relates to the exercise of the different functions of a judge in the same court process; while the second relates, in principle, to the conduct of a judge or the existence of connection with one of the parties or his/her representatives in a case.
66. The Court notes that in the circumstances of the present case, Judge G.S. and none of the other members of the Panel, and who rendered the challenged

Judgment of the Supreme Court have exercised different functions within the same court process. Moreover, the Applicant does not allege, and the circumstances of the case do not result that there have been connections of a personal nature with the Applicant.

67. However, the Court also recalls the fact that the ECtHR held that organizational issues are relevant in assessing the impartiality of a court. (See in this context the case of the ECHR, *Piersack v. Belgium*, Judgment of 1 October 1982, paragraph 30). In this respect, the existence of procedures that ensure impartiality, namely, the rules and procedures that also regulate the withdrawal/recusal of a judge, are relevant factors. The court must therefore consider such rules that ensure impartiality when assessing whether a court is impartial.
68. In this respect, the Court recalls that Chapter III of Law No. 03/L-006 on Contested Procedure (hereinafter: the LCP) regulates the recusal of a judge from trial. Article 67 of this law defines the circumstances under which a judge cannot proceed the consideration of a legal case and should therefore be excluded with or without the request of the party.
69. With regard to the first possibility, namely the exclusion of a judge at the request of the party, the Court notes that Article 68 of the LCP sets forth the obligation of the party to seek the dismissal of a judge in the event of the circumstances set out in Article 67 of the same law. Article 68 allows any party, in justifying the request, to name in advance a judge who cannot participate in rendering a decision due to the existence of the circumstances referred to in Article 67 of this Law. Article 69 of the LCP specifically determines the cases where such a request is not allowed, including in those circumstances, where the exclusion of a number of judges is required and which results in the court being unable to reach a decision. The latter is also supported by the case law of the Court and of the ECtHR. (See, Resolution on Inadmissibility Court of 19 December 2016 in Case KI108/16 with Applicants *Bojana Ivković, Marija Perić and Miro Jaredić*, paragraphs 34, 35 and 36 and the references used therein).
70. In this respect, the Court first notes that the Applicant has not filed a request for the exclusion of Judge G.S. However, the Court recognizes the fact that the proceedings relating to the examination of an application of a request for revision do not provide for a public procedure in which the Applicant may participate because it is based solely on written submissions. Therefore, in similar cases the Court held in principle that the Applicants cannot be held responsible for not requesting the exclusion of a judge because they could not have been aware, until they received the court's decision, that the judge concerned was part of in the Panel of the Supreme Court.
71. The Court notes, however, that regardless (i) whether or not the Applicant may have been aware of the composition of the Supreme Court Panel, and in particular the participation of Judge G.S. in it; and (ii) the fact that the Applicant has not filed a request for recusal of the relevant judge, each judge should seek his or her

own recusal from the decision-making, if the circumstances foreseen in Article 67 of the LCP exist.

72. In this regard, the Court recalls the second possibility established by the LCP, namely the obligation of each judge, as set out in paragraph 1 of Article 71 of the LCP, to notify the President of the Court and request recusal from the decision-making if the circumstances set forth in Article 67 of the LCP exist. The Court notes, however, that, in the circumstances of the present case, the Applicant does not substantiate any of the circumstances stipulated in Article 67 of the LCP and on the basis of which Judge G.S. should have requested her own exclusion from her participation in the Panel of the Supreme Court which resulted in rendering the challenged Judgment.
73. The Court reiterates that the mere fact that the Applicant filed a criminal report against Judge G.S., and unsupported by other circumstances and arguments, is not sufficient to determine that Judge G.S. was biased under the subjective test of the impartiality of the court and that the Panel of the Supreme Court that rendered the challenged Judgment was biased in terms of the objective test of the impartiality of the court. It follows that the Court must find that the doubts of the Court's impartiality in the circumstances of the present case are not objectively justified.

## **Conclusions**

74. The Court notes that the independence and impartiality of the court, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the issues raised by the Applicant in the circumstances of the present case, are essential constitutional issues.
75. In the circumstances of the present case, the Court found that Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court was rendered by an impartial tribunal within the meaning of the subjective and objective test established by the case law of the European Court of Human Rights and therefore, in accordance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, because (i) despite the fact that the President of the Panel which rendered the challenged Judgment was a judge against whom the Applicant filed a criminal report, no other evidence or argument of the Applicant invalidates the presumption of impartiality of the respective judge; and, moreover, (ii) despite the fact that the participation of the respective judge in the Panel of the Supreme Court may have raised legitimate doubts of the Applicant as to the impartiality of the court, in the Court's assessment, the assessment based on the principles and criteria established by the relevant case law of the ECtHR, these doubts, in the circumstances of the present case, are not objectively justified.

## **FOR THESE REASONS**

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 47 and 48 of the Law and Rule 59 (1) of the Rules of Procedure, on 29 July 2019, unanimously

## **DECIDES**

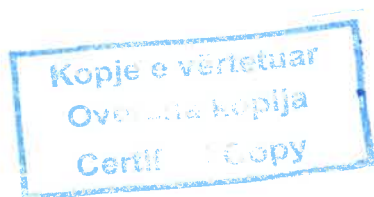
- I. TO DECLARE the Referral admissible;
- II. TO HOLD that Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- V. This Judgment is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Gresa Caka-Nimani

Arta Rama-Hajrizi



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