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

Prishtina, on 26 August 2019
Ref.no.:AGJ 1421/19

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JUDGMENT

in

Case No. KI187/18 and KI11/19

Applicant

Muhamet Idrizi

Constitutional review of the Judgment PML.no.226/2018 of the Supreme Court of Kosovo of 16 October 2018 and Judgment PML.no.293/2018 of the Supreme Court of Kosovo of 3 December 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral KI187/18 was submitted by Shemsedin Pira, lawyer from Gjilan as the representative of Muhamet Idrizi, residing in the Municipality of Viti/a; whereas the Referral KI11/19 was submitted personally by Muhamet Idrizi (hereinafter: the Applicant).

Challenged decision

2. The decision challenged by Referral KI187/18 is Judgment [PML.nr.226/2018] of 16 October 2018 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), while the decision challenged by Referral KI11/19 is Judgment [PML.nr.293/2018] of 3 December 2018 of the Supreme Court.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgments. In Referral KI187/18, the Applicant did not specify precisely what fundamental rights and freedoms guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution) he claims to have been violated by the challenged judgment. Whereas, in Referral KI11/19, the Applicant alleges that the regular courts have violated his fundamental rights and freedoms guaranteed by Articles 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the European Convention on Human Rights (hereinafter: ECHR).

4. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely "to stop the commencement of serving the sentence imposed [on him] by Judgment PKR. No. 107/2012" of 22 November 2017 of the Basic Court in Gjilan (hereinafter: the Basic Court), pending the resolution of the case at the Court.

Legal basis

5. 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 on the Constitutional Court of the Republic of Kosovo, no. 03 / L-121 (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).

Proceedings before the Court

6. On 30 November 2018, the Applicant, through his representative, submitted the Referral KI187/18 to the Court.

7. On 12 December 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and a Review Panel composed of Judges: Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban.

8. On 4 January 2019, the Court notified the Applicant's representative and the Supreme Court about the registration of Referral KI187/18.

9. On 14 January 2019, the Applicant submitted the Referral KI11/19 to the Court.

10. On 17 January 2019, pursuant to paragraph (1) of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, the President of the Court

ordered the joinder of Referral KI11/19 with Referral KI187/18. By this order, it was decided that the Judge Rapporteur and the composition of the Review Panel be the same as the Judge Rapporteur and Review Panel appointed by the President in case KI187/18.

11. On 22 January 2019, the Court notified the Applicant's representative, the Applicant, and the Supreme Court about the registration of Referral KI11/19 and the joinder of the respective Referrals.

12. On 28 May 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously decided that the decision on the Applicants' Referrals should be postponed for review at one of the subsequent sessions.

13. On 28 May 2019, the Applicant requested from the Court to impose the interim measure, namely, to stop the commencement of serving the sentence imposed on the Applicant by Judgment [PKR.nr.107/2012] of the Basic Court of 22 November 2017, until his case be decided by the Court.

14. On 29 July 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare Referral KI187/18 inadmissible, whereas Referral KI11/19 to be declared admissible and considered based on its merits.

15. On the same date, the Court unanimously ascertained that Judgment [PML. no. 293/2018] of the Supreme Court of 3 December 2018 is inconsistent 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

16. On 29 December 2008, the District Prosecutor's Office in Gjilan (hereinafter: the District Prosecution) submitted the Indictment [PP.nr.168 / 08] against the Applicant, on the grounded suspicion that he has in co-operation with Sh.I. and being assisted by the E.I., committed the offense foreseen under Article 147 (Aggravated Murder) in conjunction with Articles 20 (Attempt) and 23 (Co-perpetration) and Article 328 (Unauthorized Ownership, Control, Possession or Use weapons) of the Provisional Criminal Code of Kosovo (hereinafter: PCCK), after having attempted to deprive of life R.E. and Sh.E. on 2 September 2008.

17. On 8 June 2009, the District Court in Gjilan (hereinafter: the District Court), by Judgment [P.nr.25/2009] acquitted the Applicant of the abovementioned charges, whereas the person alleged to have had assisted in the commission of the offence, namely, E.I. was acquitted of the charge of committing the offence provided for in Article 147 of the PCCK, and found him guilty of committing the offense provided for in Article 328 of the PCCK.

18. The District Prosecution acting against the aforementioned Judgment of the District Court filed an appeal with the Supreme Court on the ground of substantial violations of the provisions of the criminal procedure and incomplete and erroneous determination of the factual situation, with the proposal that the

case be remanded for retrial. The Applicant and E.I. submitted a response to the District Attorney's appeal, requesting that it be rejected as ungrounded.

19. On 7 March 2012, the Supreme Court, by Decision [AP.nr.393/2012], approved the appeal of the District Prosecutor as grounded and annulled the Judgment of the District Court [P.nr.25/2009] in the part concerning the Applicant and remanded the case for retrial.

20. On 22 November 2017, the Basic Court, through Judgment [PKR.nr.107/2012], found the Applicant guilty of committing the offence provided for in Article 147 (Aggravated Murder) in conjunction with Article 20 (Attempt) and 23 (Co-perpetration) of the PCCK and sentenced him to 3 (three) years imprisonment. Whereas, the charge of committing the offence provided for in Article 328 (Unauthorized Ownership, Control, Possession or Use of Weapons) of the PCCK was rejected. By the same Judgment, the accused E.I., was acquitted of the charge.

21. The Applicant and the Basic Prosecutor's Office in Gjilan (hereinafter: the Basic Prosecution) submitted appeals against the aforementioned Judgment. The first, namely the Applicant, due to the substantial violations of the provisions of criminal procedure, the incomplete and erroneous determination of factual situation, the violation of criminal law and the decision on criminal sanction; while the second, namely the Basic Prosecution, due to the acquittal part of the Judgment concerning the accused E.I., and due to the substantial violations of the provisions of the criminal procedure and in relation to the criminal sanction for the criminal offence for which the applicant was found guilty.

22. On 19 April 2018, the Court of Appeals by Judgment [PAKR.nr.108/2018], rejected the appeals of the Basic Prosecution and the Applicant and confirmed the abovementioned Judgment of the Basic Court, respectively, Judgment [PKR.nr.107/2012] of 22 November 2017.

23. The Applicant and his defence counsel filed separate requests for the protection of legality with the Supreme Court against Judgment [PAKR. no.108/2018] of the Court of Appeals in relation to Judgment [PKR.nr.107/2012] of the Basic Court, due to the substantial violations of the provisions of criminal procedure and the violation of criminal law. In their requests they alleged, inter alia, that the Basic Court, by changing the description of the criminal offence and finding that the Applicant has "committed the criminal offence with currently unknown persons", had exceeded the scope of the charge contrary to the provisions of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCRK). The State Prosecutor, through a submission [KMLP.nr.155/2018], submitted a response to the requests for protection of legality, proposing that they be rejected as unfounded.

24. On 18 October 2018, the Supreme Court, acting on a request for protection of legality filed by the Applicant's defence counsel, through Judgment [PML.nr.226/2018] rejected as ungrounded this request for protection of legality filed against Judgment [PAKR.no.108/2018] of the Court of Appeals in relation to Judgment [PKR.nr.107/2012] of the Basic Court.

25. On 3 December 2018, the Supreme Court, acting on a request for protection of legality filed by the convicted person, namely the Applicant, through Judgment [PML. no. 293/2018] rejected as ungrounded also this request for protection of legality against Judgment [PAKR.nr.108/2018] of the Court of Appeals concerning the Judgment [PKR.nr.107 / 2012] of the Basic Court.

Applicant's allegations

Allegations raised through Referral KI187/18

26. In the context of the present Referral, the Applicant has not clarified precisely what fundamental rights and freedoms guaranteed by the Constitution he claims to have been violated by Judgment [PML.nr.226/2018] of the Supreme Court of 16 October 2018.

27. The Applicant alleges that the challenged Judgment was rendered in substantial violation of the provisions of criminal procedure, in particular: (i) item 1.10 of paragraph 38 of Article 384 (Substantial violation of the provisions of criminal procedure) due to exceeding the scope of the indictment; (ii) item 1.12 of paragraph 1 of Article 384; and (iii) paragraph 1 of Article 360 (Subjective Identity and Object of Judgment over the Indictment) of the CPCRK.

Allegations raised through Referral KI11/19

28. In the Referral KI11/19 the Applicant alleges that the Supreme Court through Judgment [PML.nr.293/2018] of 3 December 2018, has violated his fundamental rights and freedoms guaranteed by Articles 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the ECHR.

29. The Applicant specifically alleges that his rights to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been violated because (i) the challenged Judgment has been issued contrary to paragraph 2 of Article 39 (Basis for Disqualification of Judges) of the CPCRK, because one of the judges of the District Court Trial Panel, namely the Judge R.R., who issued the Judgment [P.nr.25/09] of 8 June 2009, has also participated as a member of the Supreme Court Panel when deciding on the request for protection of legality through Judgment [PML.nr.293/2018] of 3 December 2018; and (ii) his representative did not properly defend him during the trial process and, according to the Applicant, he has carried out the defence in violation of para.7 of Article 11 of the Law on the Bar No. 03/L-117 of 25 March 2009 (hereinafter: the Law on Bar), because there was a conflict of interest, a fact for which the Applicant was not informed. According to the Applicant, the lawyer in case of Sh.P., has been also a defence counsel for the R.E. person in another criminal case, who, he has also been the main witness in the criminal proceedings against the Applicant. Furthermore, according to the Applicant's allegations, the lawyer in question has reflected evident and continuous negligence during his defence.

30. The Applicant also alleges that the challenged Judgment was issued contrary to the provisions of the CPCRK because (i) the courts had exceeded the scope of the

initial indictment in violation of item 10 of paragraph 1 of Article 384 of the CPCRK, by pronouncing the accused, respectively the Applicant, guilty of the criminal offense of attempted aggravated murder in co-perpetration of *"with several other persons, currently unknown"*, while the alleged co-perpetrators involved in the initial indictment were acquitted of charges. Investigation against the first person, respectively SH.I., was terminated by the Ruling [PP.nr.168/08 and 231/09] of 26 July 2011 of the District Public Prosecutor's Office, whereas the second person, namely E.I., was acquitted of the charge by Judgment [PKR.nr.107/2012] of the Basic Court of 22 November 2017.

31. Lastly, the Applicant requests from the Court to declare his Referral admissible; annul all decisions of the regular courts and remand his case to the first instance court for retrial.

Admissibility of the Referral

32. The Court recalls that in the present case, two referrals have been submitted for constitutional review of the respective Judgments. The first, respectively, Referral KI187/18 was submitted by the Applicant's defence counsel and it seeks the constitutional review of Judgment [PML.nr.226/2018] of the Supreme Court of 16 October 2018. Whereas the second, respectively, Referral KI11/19 has been submitted by the Applicant himself and it seeks constitutional review of Judgment [PML.nr.293/2018] of the Supreme Court of 3 December 2018. The Court will further examine the admissibility of the two referrals separately.

Regarding the admissibility of the Referral KI187/18

33. With regard to the Referral KI187/18, the Court first examines whether the admissibility criteria established by the Constitution and further specified in the Law and Rules of Procedure have been met.

34. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provide:

> *"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 the exhaustion of all legal remedies provided by law".*

35. In addition, the Court also examines whether the Applicant has fulfilled the admissibility requirements as set out in the Law. In this respect, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of 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 [...]."

36. As to the fulfilment of these criteria, the Court considers that the Applicant in respect of Referral KI187 / 18 is an authorized party, challenging an act of a public authority, namely Judgment [PML.nr.226/2018] of 16 October 2018 of the Supreme Court, after having exhausted all legal remedies provided by law. In this regard, the Applicant's Referral complies with the criteria set out in paragraphs 1 and 7 of Article 113 of the Constitution and Article 47 of the Law. The Applicant has also submitted the Referral in accordance with the deadline foreseen in Article 49 of the Law.

37. However, in assessing whether the Applicant has fulfilled the admissibility criteria laid down by law, the Court also refers to Article 48 of the Law, which specifies the Applicant's obligation to accurately specify in his Referral submitted with the Court what fundamental rights and freedoms he claims to have been violated.

38. The same criteria are clearly set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39, paragraph (1) (d) provides:

> *(1) The Court may consider a referral as admissible if:*
>
> *(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.*

39. In this context, the Court emphasizes that in order to consider a Referral as meeting the admissibility criteria, the Applicant is required to accurately clarify in his Referral what fundamental rights and freedoms he claims to have been violated and to adequately present facts and allegations for violation of constitutional rights or provisions (in this context see, the Court's case KI91/17, *Enver Islami*, Resolution of Inadmissibility of 22 November 2018, paragraph 31).

40. The Court notes that the Applicant in Referral KI187/18 has not clarified what fundamental rights and freedoms he alleges to have been violated by the act of public authority, namely Judgment [PML. no. 266/18] of the Supreme Court of 16 October 2018, which he challenges in the Court. Furthermore, the Applicant does not accurately clarify the facts and allegations for violation of constitutional rights.

41. Consequently, Referral KI187/18 is in compliance with the criteria set out in paragraphs 1 and 7 of Article 113 of the Constitution and Articles 47 and 49 of the Law. However, this referral does not meet the admissibility criteria as set out in Article 48 of the Law and item (d) of paragraph 1 of Rule 39 of the Rules of Procedure.

42. In conclusion, pursuant to Article 48 of the Law and Rule 39 (1) (d) of the Rules of Procedure, Referral KI187/19 is inadmissible.

Regarding the admissibility of the Referral KI11/19

43. As regards the fulfilment of the admissibility criteria stipulated by the Constitution and the Law elaborated above, the Court finds that the Applicant in relation to Referral KI11/19, is an authorized party challenging an act of a public authority, namely Judgment [PML.nr.293/2018] of 3 December 2018 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant has also clarified the rights and freedoms which he claims to have been violated pursuant to the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set forth in Article 49 of the Law.

44. Consequently, the Court therefore finds that the Applicant's Referral also meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure. It cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure.

45. Moreover, and finally, the Court considers that this Referral is not manifestly ill-founded as established in paragraph (2) of Rule 39 of the Rules of Procedure and should therefore be declared admissible (see also the case of European Court of Human Rights, *Alimuçaj v. Albania*, Application no. 20134/05, Judgment of 9 July 2012, paragraph 144).

The merits of the case in respect of Referral KI11/19

46. In addressing the merits of this Referral, the Court recalls that by Judgment [P.nr.25/2009] of the District Court of 8 June 2009, the Applicant was initially acquitted of the charges of committing the offence under Article 147 (Aggravated Murder) in conjunction with Articles 20 (Attempt) and 23 (Co-perpetration) of the PCCK. This Judgment was annulled by Ruling [AP. no. 393/2012] of the Supreme Court of 7 March 2012 and the case was remanded for retrial. In 2017, by Judgment [PKR.nr.107/2012] of the Basic Court, the Applicant was sentenced to 3 (three) years of imprisonment for having committed the aforementioned criminal offence. Two other persons, namely, SH.I. and E.I., who allegedly were co-perpetrators of the criminal offence, were acquitted of the charges during the proceedings of regular courts.

47. The Judgment of the Basic Court was confirmed by the Court of Appeals. Two requests for the protection of legality were filed with the Supreme Court against the said judgment. The first request was filed by the Applicant's defence counsel, and subsequently the Judgment [PML.nr.226/2018] of 18 October 2018 rejecting the request as unfounded was rendered by the Supreme Court. The second request was submitted by the Applicant himself, as a result of which the Judgment [PML.nr.293/2018] of 3 December 2018 which as well rejected the request for assessment of legality as unfounded was issued by the Supreme Court.

48. With respect to the latter, namely Judgment [PML.nr.293/2018] of the Supreme Court of 3 December 2018, the Court recalls that the Applicant alleges that the said Judgment (i) violates Article 31 of the Constitution in conjunction with Article 6 of the ECHR because it was issued by a biased court; (ii) his defence counsel had acted contrary to the Law on Bar, thereby harming his interests; and (iii) the challenged Judgment has been issued in violation of certain provisions of the criminal procedure.

49. In dealing with the Applicant's first allegation relating to the right to a fair and impartial trial, the Court will apply the case law of the European Court of Human Rights (hereinafter: ECtHR), on the basis of which, under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, as to the interpretation of the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the ECtHR case law.

50. In this aspect, the Court recalls that the impartiality of a court under Article 31 of the Constitution in conjunction with Article 6 of the 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 a 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 itself, inter alia, its composition has offered sufficient guarantees 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 KI06/12, with Applicant *Bajrush Gashi*, Judgment of 9 May 2012, paragraph 45).

51. 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, paragraph 26; *Morel v. France*, paragraph 41; *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, in deciding whether in a specific case there is sufficient basis to determine that a particular judge is not impartial, the Applicant's point of view is important but not decisive (see, inter alia, the case of the ECtHR, *De Cubber v. Belgium*, Judgment of 26 October 1984, paragraph 25). However, the principle that a court shall be presumed to be free from prejudice or personal bias is for a long-established in the case law of ECtHR (see ECtHR cases, *Kyprianou v. Cyprus*, cited above, paragraph 119; *Micallef v Malta*, Judgment of 15 October 2009, paras 93-94; and *Tozicka v. Poland*, Judgment of 24 July 2012, paragraph 33).

52. Furthermore, according to the case law of ECtHR, while in some cases it may be difficult to find facts with which to rebut the presumption of a judge's subjective impartiality may be invalidated, the criteria and requirements for objective impartiality establish an additional guarantee for an impartial judgment (see the ECtHR case *Micallef v. Malta*, cited above, paragraphs 95 and 101). It should be noted that in the vast majority of cases raising impartiality issues, the ECtHR has focused and found violations in terms of objective test (see also the case of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*, Judgment of 6 November 2018, paragraph 146; and *Korzeniak v. Poland*, cited above, paragraph 48).

53. 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 may be sufficient facts which may raise doubts as to impartiality of the court. In this respect appearance/perception may also be important, because *"justice must not only be implemented, but it must be seen to be implemented"* (in this context, see, *inter alia*, the case of ECtHR, *De Cubber v. Belgium*, cited above, paragraph 26). The essential issue is the confidence which the courts in democratic society must inspire in 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 may be a legitimate reasons to suspect a lack of impartiality must

withdraw from decision-making (see ECtHR case, *Micallef v Malta*, cited above, paragraph 98).

54. Furthermore, based on the case law of the ECtHR, situations in which issues of impartiality may arise regarding the lack of impartiality may be (i) of a 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 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 have been exercised in the same case (for this context, see, inter alia, ECtHR cases *Procola v. Luxembourg*, Judgment of 8 September 1995 paragraph 45; *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraph 200; and *Sacilor Lormines v. France*, Judgment of 9 November 2006, paragraph 74); (ii) judicial and extrajudicial (in this context, see, *inter alia*, the ECtHR case, *McGonnell v. the UnitedKingdom*, Judgment of 8 February 2000, paras 52-57); and (iii) various court cases. In this context, the ECtHR emphasizes that the assessment of whether the participation of the same judge in different stages of the trial may have resulted in a violation of the requirements related to the impartiality of the court must be assessed, should be assessed case-by-case basis and depending on the circumstances of each case. Whereas 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 a case (in his context for more details see, ECHR Guidelines of 30 April 2019 on Article 6 of the ECHR, Right to a Fair Trial (criminal aspect), Part IV. General Guarantees: Procedural Criteria, C. Independence and Impartiality, 2. The Impartial Court, a. Criteria for assessing impartiality).

55. In applying these general principles to the circumstances of the present case, the Court first recalls that the Applicant alleges precisely the exercise of the various functions of a judge within a same judicial process, respectively the fact that Judge R.R. had participated as a member of the trial panel also in (i) issuing the Judgment [P.nr.25/09] of 8 June 2009 of the District Court; and (ii) issuance of Judgment [PML.nr. 293/2018] of the Supreme Court of 3 December 2018, and which, according to the Applicant, has resulted in a violation of his right to a fair and impartial trial.

56. In this context and based on the case law of the ECtHR, the Court will first examine the Applicant's allegations concerning the impartiality of the court under the criteria of subjective test.

57. The Court reiterates that as regards the subjective test, the personal impartiality of the judge must be presumed until proven otherwise. The Applicant has not presented any evidence which could put in doubt the impartiality of Judge R.R. Consequently, the Court finds that in issuing Judgment [PML.nr.293/2018] of 3 December 2018, no fact can support the finding that the court has not been impartial in terms of subjective test.

58. Consequently, in accordance with the principles of the case law of ECtHR, and as an additional guarantee of the circumstances of the present case, the Court

will examine the Applicant's allegations under the criteria of objective test and consequently, (i) whether the circumstances of the present case may raise legitimate doubts on the part of the Applicant about the impartiality of the court; and if this is the case (ii) if these doubts are objectively justified. Determination of these issues is done in each case separately (in this context see, 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; and *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).

59. In this respect, and as stated above, the exercise of various functions within the same judicial process by the same judge, and which relates to the circumstances of the particular case, presents categories of issues of a functional nature which are relevant in the assessment of the impartiality of a court. In suchlike cases, the ECtHR has in principle held that there are legitimate doubts as to the impartiality of the court (see, *inter alia*, the case of the ECtHR, *Korzeniak v. Poland*, cited above, paragraphs 51 and 52). The Court as well will hold the same position. Consequently, based on the case law of the ECtHR, the Court will in the following assess whether such doubts, in the circumstances of the present case, can be objectively justified.

60. In terms of assessing legitimate doubts in the context of circumstances where a judge has exercised more than one function within the same judicial case, two categories of cases are relevant. First, special attention should be paid to the characteristics of the law and the rules applicable to a particular case (see, *inter alia*, ECtHR cases, *Warsicka v. Poland*, Judgment of 16 January 2007, paragraph 40; *Toziczka v. Poland*, Judgment of 24 July 2012, paragraph 36; and *Korzeniak v. Slovakia*, cited above, paragraph 50). In this context, the ECtHR has emphasized that organizational issues are also important (see, *inter alia*, the case of the ECtHR, *Piersack v. Belgium*, Judgment of 1 October 1982, paragraph 30). For example, the existence of procedures that ensure impartiality, namely the rules and procedures that also govern the withdrawal/exclusion of a judge, are relevant factors (see ECtHR cases, *Pfeifer and Plankl v. Austria*, Judgment of 25 February 1992, paragraph 6; *Oberschlick v. Austria (no. 1)*, Judgment of 23 May 1991, paragraph 50; and *Pescador Valero v. Spain*, Judgment of 24 September 2003. paragraphs 24-29). Secondly, it is necessary to assess whether the interrelationship between the issues relating to the content dealt with by the same judge at different stages of the proceedings is so close/evident that it casts doubt on the impartiality of the judge who participated in the decision-making during these stages. This determination is also made on a case-by-case basis and taking into account their specific characteristics and circumstances (see, inter alia, the ECtHR cases, *Warsicka v. Poland*, cited above, paragraph 40; *Toziczka v. Poland*, cited above, paragraph 36; and *Korzeniak v. Slovakia*, cited above, paragraph 50).

61. In this respect, the Court, in the light of the ECtHR case law elaborated above, must first address the legal and regulatory issues. The Court recalls that the procedures governing the withdrawal / exclusion of a judge from decision-making are of a particular importance.

62. In this context, the Court notes that in the Applicant's case in the proceedings which concern the requests for protection of legality, the Supreme Court has applied the provisions of the CPCRK. The mentioned Code, in Articles 39 and 40 it specifically regulates the circumstances in which judges are excluded from the decision-making process. The Court emphasizes that paragraph 2 of Article 39 of the CPCRK, which the Applicant alleges, provides that *"A judge shall be excluded as the single trial judge, presiding trial judge, a member of the trial panel, a member of the appellate panel or Supreme Court panel if he or she has participated in previous proceedings in the same criminal case, except for a judge serving on a special investigative opportunity panel"*.

63. This wording of the aforementioned Article of the CPCRK, which puts the emphasis on the participation of a judge in "previous proceedings in the same criminal case", differs from the content of Articles 40 and 41 of the previous Code of Criminal Procedure, namely the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK), wherein the circumstances of the exclusion of judges in this context were more limited. More specifically, item 5 of paragraph 1 of Article 40 of the PCPCK stated that a judge shall be excluded from the exercise of judicial functions in a particular the case *"if in the same case he or she has taken part in rendering a decision which is being challenged by an appeal"*.

64. In this context, the Court notes that the legislator, by adoption of the new Code of Criminal Procedure, incorporated a more comprehensive provision in terms of exclusion of a judge from exercising various functions in the same criminal process. The Court also emphasizes that the provisions of the CPCRK manifest the legislator's concern to remove all reasonable doubts as to the impartiality of the court (in this context, see the case of the Court KI06/12, with Applicant: *Bajrush Gashi*, cited above, paragraph 49; and the case of the ECtHR *Oberschlick v. Austria*, cited above, paragraph 50).

65. The Court should also point out that in the circumstances of the present case, that in the time period between the Judge R.R. having taking part in the District Court Panel, respectively, in the issuance of Judgment [P.nr.25/2009] of 8 June 2009, and his participation in the panel of the Supreme Court, namely, the issuance of Judgment [PML.nr.293/2018] of 3 December 2018, through Ruling [AP. no. 393/2012] of the Supreme Court of 7 March 2012, the Applicant's case had been remanded for retrial. In the new trial, Judge R.R. had participated only in the Supreme Court panel which reviewed the request for protection of legality against Judgment [PAKR.nr.108/018] of the Court of Appeals of 19 April 2018. However, the Court notes that the content of paragraph 2 of Article 39 of the CPCRK, namely *"the participation in previous proceedings in the same criminal case"*, which is applicable in the circumstances of the present case, is inclusive and has forced Judge R.R. to be excluded from decision-making in the respective panel of the Supreme Court.

66. The Court also notes that in such circumstances, the disqualification of a judge is not necessarily dependent on the parties' request in the proceedings. On the basis of the provisions of the CPCRK, the judge himself should seek disqualification from decision-making. This is stipulated in Articles 39 to 42 of the CPCRK, and is also supported by the ECtHR case law, which, by emphasizing

the importance of the perception and confidence that courts have to reflect in public in a democratic society, have repeatedly stated that any judge who believes that his or her participation in a court case may raise doubts about the impartiality of the court should be excluded from decision-making.

67. Moreover, the Court also recalls that the procedure relating to the protection of legality does not provide for a public procedure in which the Applicant may participate. This procedure is based on written submissions only. Therefore, due to the written nature of the proceedings, neither the Applicant nor his defence counsel could have known until the Supreme Court had rendered the decision that the same judge who was part of the trial panel in the District Court has also taken part in the panel of the Supreme Court decided on his request for protection of legality. Therefore, the responsibility for not excluding the respective judge cannot be attributed to the Applicant and it cannot be concluded that he has waived the right to have his case decided by an impartial court (in this context, see the case of the Court KI06/12, Applicant: *Bajrush Gashi*, cited above, paragraph 36, and the case of the ECtHR, *Oberschlick v. Austria*, cited above, paragraph 51).

68. The Court recalls that the issue of whether the number of judges to decide on the requirements for the protection of legality is sufficient or not is a matter entirely under the jurisdiction, and for discussion, if necessary, between the judiciary and other responsible bodies. The primary responsibility for the proper administration of justice rests with the relevant institutions, and organizational issues cannot be used as a justification for disregarding the Constitution (in this context, see the Court's case, KI06/12, Applicant: *Bajrush Gashi*, cited above, paragraph 51; and case KO4/11, Applicant: *Supreme Court of Kosovo*, Constitutional Review of Articles 35, 36, 37 and 38 of the Law on Expropriation of Immovable Property, No. 03 / L-139, Judgment of 1 March 2012).

69. Consequently and in such circumstances, the Court must find that legitimate doubts as to the impartiality of the court arise as a result of the exercise of the various functions of a judge within a same judicial process are objectively justified. The Court must also ascertain that in issuing the Judgment [PML.nr.293/2018] of 3 December 2018, the court has not been impartial in terms of objective test and that, consequently, the Applicant's right to fair and impartial trial by a tribunal as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated.

70. As stated above, the Court recalls that in the context of assessing the impartiality of the court, beyond legal and regulatory issues, the link between substantive issues dealt with by the same judge at different stages of the proceedings is also relevant. However, given that the Court has already ascertained that in the circumstances of the present case, doubts about impartiality are objectively justified, it considers that it is not necessary to examine other aspects of the impartiality of the court in the terms of the objective test.

71. The Court notes that this conclusion concerns exclusively the challenged Judgment of the Supreme Court, namely Judgment [PML. no. 293/2018] of 3 December 2018, from the point of view of the impartiality of the court in the

sense of objective test, and in no way it relates to or has prejudiced the outcome of the merits of the case.

72. The Court recalls that the Applicant has raised also other allegations regarding the Judgment [PML. no. 293/2018] of 3 December 2018 of the Supreme Court. The Applicant refers to a violation of Article 30 [Rights of the Accused] of the Constitution, while in relation to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, he also alleges that (i) his defence counsel had acted contrary to the Law on Bar, thus damaging his interests; and (ii) the challenged judgment was issued in violation of certain provisions of the criminal procedure.

73. As regards Article 30 of the Constitution, the Court notes that the mere mentioning of Articles of the Constitution is not sufficient to build an allegation for a constitutional violation. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (in this context, see the Court's case KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33). Whereas, given the fact that the Court has already found that the relevant Judgment was issued in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, by declaring this Judgment invalid and consequently remanding the case back to the Supreme Court, it will not consider the other allegations of the Applicant relating to these Articles.

74. Finally the Court notes that by this Judgment, it has declared invalid only one of the Judgments of the Supreme Court, namely the Judgment [PML.nr.293 /2018] of 3 December 2018, issued as a result of the request for protection of legality of the defendant, respectively the Applicant, filed against the Judgment [PAKR.nr.108/2018] of the Court of Appeals of 19 April 2018. While it did not address the allegations regarding the Judgment [PML.nr.226/2018] of the Supreme Court of 18 October 2018, because as regards the constitutional review of the said Judgment it has declared the Referral inadmissible. This result of the constitutional review of two Judgments of the Supreme Court that deal with the requests for protection of legality filed against the same Judgment of the Court of Appeals derives from the fact that the Supreme Court, in the circumstances of the present case, has treated separately the requests for protection of the legality filed by the defendant and his defence counsel, by deciding through two Judgments.

75. The Court notes that the CPCRK in Article 433 (Persons Authorized to File Requests for Protection of Legality) provides that the persons authorized to file a request for protection of legality, are the Chief State Prosecutor, the defendant and his or her defence counsel. The CPCRK does not specifically foresee whether the requests for protection of legality filed by the above-mentioned authorized persons, and in the circumstances of the present case, filed separately the defendant and his defence counsel, must necessarily be dealt with together in a single decision by the Supreme Court. In case of their separate treatment, each of the decisions of the Supreme Court has a respective effect on the decision which is challenged by the extraordinary legal remedy.

Request for Interim Measure

76. The Court recalls that the Applicant has requested the imposition of interim measures seeking to suspend the commencement of the execution of his prison sentence until a decision is rendered by the Court.

77. In relation to his request for interim measures the Applicant states: *"Given that the sentenced person is awaiting the decision of the Constitutional Court of the Republic of Kosovo regarding his referral, by this request I request from the Court to impose the interim measure and stop the commencement of serving the sentence imposed by Judgment PKR no. 107/2012 of 22.11.2017, pending the resolution of this matter".*

78. In this respect, the Court initially recalls that pursuant to Article 27 (Interim Measures) of the Law, the Court may order interim measures in a case which is a subject of proceeding (i) if such measures are necessary to avoid any risk or irreparable damages; or (ii) if such an interim measures is in the public interest. These criteria are further specified in paragraph (4) of Rule 57 of the Rules of Procedure.

79. The Court reiterates that in the circumstances of the present case, the Court declared the Referral of the Applicant for Constitutional Review of Judgment [PML.nr.226/2018] of 16 October 2018 inadmissible, whereas it declared invalid the Judgment [PML.nr.293/2018] of 3 December 2018, by remanding the same to the Supreme Court for reconsideration. Consequently, the Supreme Court, pursuant to this Judgment, will once again consider the request for protection of legality filed by the defendant, namely the Applicant with the Supreme Court against the Judgment of the Court of Appeals. The Court notes that the latter, namely Judgment [PAKR.nr.108/2018] of the Court of Appeals of 19 April 2018 is final and enforceable pursuant to Article 485 (Finality and Enforceability of Decisions) of the CPCRK and, in the circumstances of the present case, until decided otherwise by the Supreme Court pursuant to the provisions of Article 418 (Extraordinary Legal Remedies) of the CPCRK.

80. This Judgment of the Court has declared invalid only the Judgment [PML.nr.293/2018] of 3 December 2018 of the Supreme Court and does not directly affect the legal effect which, under the applicable law, produces the Judgment [PAKR.nr.108/2018] of 19 April 2018 of the Court of Appeals in relation to Judgment [PKR. no. 107/2012] of 22 November 2017 of the Basic Court. Therefore, pursuant to Article 27.1 of the Law and Rule 57 (4) of the Rules of Procedure, the Applicant's request for interim measures must be rejected.

Conclusions

81. In the circumstances of the present case, the Court has found that Judgment [PML. no. 293/2018] of 3 December 2018 of the Supreme Court has been issued in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because (i) it has been issued by the composition of a Panel, contrary to the respective provisions of the criminal procedure, and the case law of the ECtHR and the Court, since in that panel has taken part a judge who was also part of the decision making in earlier stages of the same criminal case, namely he has participated as a member of the Trial Panel in the District Court when it was decided on the criminal charge against the Applicant and has been also a member of the Panel when deciding on the Applicant's request for protection of legality in the Supreme Court; and in such circumstances, (ii) legitimate doubts about the court's lack of impartiality are objectively justified.

82. Whereas, the Court has declared inadmissible the Referral of the Applicant's defence counsel for the Constitutional Review of Judgment [PML. no. 226/2018] of the Supreme Court of 16 October 2018 because it did not meet the admissibility criteria stipulated by Article 48 of the Law and item (d) of paragraph (1) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law, and Rule 59 (a) of the Rules of Procedures, in its session held on 29 July 2019, unanimously

DECIDES

I. TO DECLARE the Referral KI187/18 as inadmissible;

II. TO DECLARE the Referral KI11/19, admissible for a review based on the merits;

III. TO HOLD that in the Judgment PML.nr.293/2018 of 3 December 2018 of the Supreme Court there have been violations of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1, Article 6 (Right to a Fair Trial) of the European Convention on Human Rights;

IV. TO DECLARE INVALID the Judgment of the Supreme Court of Kosovo, PML.nr.293/2018, of 3 December 2018;

V. TO REMAND the Judgment of the Supreme Court, PML.nr.293/2018, of 3 December 2018, for reconsideration in accordance with the Judgment of this Court;

VI. TO ORDER the Supreme Court, pursuant to Rule 66 (4) of the Rules of Procedure, to notify the Court, within six (6) months of the publication of this Judgment, about the measures taken to implement the Judgment of this Court;

VII. TO REJECT the request for interim measure;

VIII. TO REMAIN strongly engaged in this matter pending the compliance with this order;

IX. TO ORDER that this Judgment be notified to the parties, and pursuant to Article 20.4 of the Law, be published in the Official Gazette;

X. TO DECLARE that 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.