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

Prishtina 3 February 2020
Ref. no.:AGJ 1509/20

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JUDGMENT

in

Case No. KI14/18

Applicant

Hysen Kamberi

Constitutional review of
Judgment PML. No. 241/2017 of the Supreme Court of Kosovo
of 5 December 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 Hysen Kamberi, residing in the village Slivova, Municipality of Ferizaj, represented by Selman Bogiqi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Serious Crimes Department of the Basic Court in Ferizaj (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 Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution); Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR) and Article 10 (Full equality to a fair and public hearing) of the Universal Declaration of Human Rights (hereinafter: the Universal Declaration).

4. The Applicant also requests the Court that his identity be not disclosed.

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 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).

6. 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 will refer to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Court

7. On 31 January 2018, the Applicant submitted the Referral to the Court.

8. On 5 February 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

9. On 9 February 2018, the Court notified the Applicant about the registration of the Referral and requested him to submit the completed referral form, power

of attorney and the acknowledgment of receipt of the Judgment which he challenges. A copy of the Referral was also sent to the Court of Appeals.

10. On 28 February 2018, the Applicant submitted the documents requested by the Court.

11. On 13 April 2018, the Court requested the Applicant to submit to the Court two more decisions of the regular courts, namely Decision [AP. No. 347/2003] of 24 February 2004 of the Supreme Court in conjunction with Judgment [P. No. 424/2002] of 17 January 2003 of the District Court in Prishtina (hereinafter: the District Court).

12. On 27 April 2018, the Applicant submitted to the Court the requested documents and Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court.

13. On 16 June 2018, the term of office of the Judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the term of office of the judges: Altay Suroy and Ivan Čukalović ended.

14. On 2 July 2018, the Court requested the Basic Court to submit to the Court the full case file.

15. On 23 July 2018, the Basic Court submitted to the Court the relevant file.

16. 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.

17. On 14 May 2019, as the mandate of the four abovementioned judges to serve as judges of the Court ended, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision KSH. KI14/18 on the appointment of the new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Radomir Laban and Remzije Istrefi-Peci.

18. On 11 December 2019, the Judge Rapporteur presented the preliminary report before the Review Panel and it was unanimously decided to request the Applicant's representative to notify the Court of the status of enforcement of Judgment [P.nr. 162/2004 PR1] of 2 December 2016 of the Basic Court. On 13 December 2019, the Court requested from the Applicant's representative the abovementioned information.

19. On 20 December 2019, the Applicant submitted to the Court the requested clarification stating that (i) the Applicant had been in detention on remand from 20 October 2002 until 17 January 2003; while (ii) "*he was not summoned to serve the sentence for the remainder of the judgment of conviction*".

20. On 15 January 2020, the Review Panel reviewed the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

21. On the same date, the Court voted by majority that (i) the Referral is admissible; and that (ii) Judgment [PML.nr.241/2017] of 5 December 2017 of the Supreme Court in conjunction with Judgment [PAKR.nr.55/2017] of 13 July 2017 of the Court of Appeals and Judgment [P.nr.162/2004 PR1] of 2 December 2016 of the Basic Court, are incompatible 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. Judge Selvete Gërxhaliu- Krasniqi voted against the admissibility of the Referral and the findings of the abovementioned constitutional violations. The judgment will be supplemented by her dissenting opinion.

Summary of facts

22. On 18 November 2002, the District Public Prosecutor's Office in Prishtina filed an Indictment [PP. No. 774/2002] against the Applicant and others, based on the grounded suspicion that they had committed the criminal offense of trafficking in persons as set forth in paragraph 1 of Article 2 (Trafficking in Persons) in conjunction with paragraph 1 of Article 1 (Definitions) of UNMIK Regulation No. 2001/4, On the Prohibition of Trafficking in Persons in Kosovo (hereinafter: UNMIK Regulation).

23. On 17 January 2003, the District Court by Judgment [P. No. 424/2002] found the Applicant guilty of committing the criminal offense which he was charged with, and sentenced him to imprisonment of 3 (three) years. According to the case file, it follows that the statements of the injured/witnesses V.K; V.S; N.M; L.B; B.V; T.K., citizens of Moldavia and Ukraine and A.M. were taken during the investigation stage, and that the factual situation was determined based on the statements of the abovementioned witnesses who were not present at the court hearing.

24. On an unspecified date, the Applicant filed an appeal with the Supreme Court against the aforementioned Judgment, alleging essential violations of the provisions of criminal procedure, erroneous determination of factual situation, violation of criminal law and the decision on punishment. The Public Prosecutor, on the other hand, by the letter [PPA. No. 347/2003] of 8 October 2003, proposed that the defense counsel's appeals be rejected as ungrounded, thereby upholding the aforementioned Judgment of the District Court.

25. On 24 February 2004, the Supreme Court, by Decision [AP. No. 347/2003] quashed the Judgment of the District Court and remanded the case for retrial, considering that it contains substantial violations of the provisions of the criminal procedure. The Supreme Court in its reasoning, *inter alia*, stated that, "a common factual description of all the accused, given that they are not co-executors", results in a vague enacting clause of the respective Judgment.

26. On 2 December 2016, the Basic Court, by Judgment [P. No. 162/2004 PR1] found the Applicant guilty of committing the criminal offense of Trafficking in Persons, sentencing him to imprisonment of two (2) years. According to the case file, the Basic Court based the abovementioned Judgment on (i) the testimonies of witnesses V.K; V.S; N.M; and A.V, given to the investigating judge on 7 November 2002 and the statement of witness A.M given to the investigating judge on 17 October 2002; and (ii) "*in part on the defense of accused S.R given in the court hearing*". The witnesses were not present during the court hearing. According to the Judgment of the Basic Court, the testimonies of the aforementioned witnesses, given in the investigative procedure before the investigating judge, was admitted as evidence at the main trial based on item 1 of paragraph 1 of Article 368 of the Provisional Criminal Procedure Code (hereinafter: hereinafter: PCPC), according to which the minutes on the statements of witnesses according to the decision of the trial panel may be read, *inter alia*, when the interrogated persons cannot be found or their access to court is impossible. During the court hearing the Applicant stated that (i) the reading of the statements of the witnesses in the court hearing is contrary to Article 368 of the PCPC; and (ii) the testimonies of the injured/witnesses could not be challenged by him either during the investigation procedure or at the court hearing. Finally, based on the case file, it follows that the State Prosecutor in the Serious Crimes Department of the Basic Prosecution in Ferizaj, following the completion of the court review modified the Indictment [PP. No. 774/2002] of 18 November 2002, accusing the Applicant and others of the criminal offense of Trafficking in Persons in co-perpetration.

27. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the aforementioned Judgment of the Basic Court, alleging essential violations of the provisions of criminal procedure, erroneous determination of factual situation, violation of the criminal law and the decision on punishment, on proposal to annul the challenged Judgment and remand the case for retrial. The Applicant specifically alleged that the challenged Judgment was rendered in violation of Article 262 (Evidence as a Basis of Guilt) of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCRK) because he was found guilty on the basis of evidence which he was not able to challenge at any stage of the criminal proceedings through the examination of relevant witnesses. On the other hand, the Appellate Prosecutor, through the submission [PPA/I. No. 67/2017], proposed that the Applicant's appeal be rejected as ungrounded.

28. On 13 July 2017, the Court of Appeals by Judgment [PAKR. No. 55/2017] rejected as ungrounded the Applicant's appeal and upheld the Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Basic Court. In relation to the Applicant's allegation regarding the impossibility of challenging the evidence, the Court of Appeals held that based on Article 368 of the CPCK, the minutes on witness statements can be read when the interrogated persons cannot be found or their access to court is impossible.

29. On an unspecified date, the Applicant filed a request for protection of legality with the Supreme Court against Judgment [PAKR. No. 55/2017] of 13 July

2017 of the Court of Appeals, alleging essential violation of the criminal procedure provisions and violation of the criminal law. The Applicant reiterated the same allegations he filed in his appeal with the Court of Appeals. On the other hand, the State Prosecutor, through submission [KMLP. II. 166/2017] proposed that the appeal of the accused, namely the Applicant, be rejected as ungrounded.

30. On 5 December 2017, the Supreme Court by Judgment [PML. No. 241/2017] rejected the request for protection of legality as ungrounded. The Supreme Court in its Judgment, *inter alia*, stated that there were no obstacles to the reading of evidence because the proceedings against the Applicant were conducted under the Law on Criminal Procedure of the Former Yugoslavia (No. 26/86) and in accordance with Article 333 thereof, the witness testimonies can be read if witnesses are unable to appear before the court.

Applicant's allegations

31. The Court recalls that the Applicant alleges that the challenged Judgment of the Supreme Court is rendered in breach of his fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution; Article 6 (Right to a fair trial) of the ECHR; and Article 10 (Full equality to a fair and public hearing) of the Universal Declaration.

32. The Applicant alleges in substance that he was convicted on the basis of evidence which he was not able to challenge at any stage of the criminal proceedings, contrary to his fundamental rights and freedoms guaranteed by paragraphs 1 and 4 of Article 31 of the Constitution in conjunction with paragraphs 1 and point d of paragraph 3 of Article 6 of the ECHR.

33. Specifically, the Applicant alleges that the challenged Judgments were rendered in violation of (i) paragraph 1.8 of Article 384 (Substantial Violation of the Provisions of Criminal Procedure) of the CPCRK, because they are based on inadmissible evidence; (ii) paragraph 1.3 of Article 338 (Reading of other previously entered statements) of the CPCRK, because instead of directly interrogating the witness, the record on his previous testimony can only be read when the parties agree ; and (iii) paragraph 1 of Article 262 of the CPCRK, according to which the court does not find the accused guilty by relying on evidence which cannot be challenged by the defendant or the defense counsel at any stage of the criminal proceedings.

34. Finally, the Applicant requests the Court to declare the Referral admissible; to declare invalid the challenged Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court in conjunction with Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals and Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Basic Court, remanding the case for retrial.

Assessment of admissibility of the Referral

35. The Court first examines whether the Referral has fulfilled the admissibility requirements, established by the Constitution, foreseen by the Law and further specified by 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 establish:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

37. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

> Article 47 of Law
> [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 regards the fulfillment of these criteria, the Court finds that the Applicant filed the Referral in the capacity of the authorized party, challenging an act of a public authority, namely the Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court, after exhausting all legal remedies provided by

law. The Applicant has also clarified the fundamental rights and freedoms, which he claims to have been violated in accordance with Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

39. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph 1 of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements established in paragraph 3 of Rule 39 of the Rules of Procedure.

40. Furthermore and at the end, the Court considers that the Referral cannot be considered as manifestly ill-founded as provided for by paragraph (2) of Rule 39 of the Rules of Procedure and therefore, it is to be declared admissible. (See, in this context, the case of the ECtHR, *Alimuçaj v. Albania*, Judgment of 9 July 2012, paragraph 144).

Relevant legal provisions

The 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.
(...)

4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
(...)

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
(...)

3. Everyone charged with a criminal offence has the following minimum rights:
(...)
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(...)

Criminal Procedure Code No. 04/L-123 of the Republic of Kosovo of 2012

Article 260
Consideration of Admissible Evidence at Main Trial

1. Once the single trial judge or presiding trial judge excludes evidence in accordance with Article 249 of the present Code, that evidence may only be considered by the court upon retrial if the decision by the single trial judge or presiding trial judge to exclude is reversed on appeal.

2. Evidence may be considered by the single trial judge or the trial panel during the main trial if it is not excluded under Article 249 or is not inadmissible under Article 259 of the present Code..

3. The single judge, presiding judge or a member of the trial panel, shall assess the credibility, relevance and probative value of evidence that is admitted under paragraph 2 of the present Article.

Article 262
Evidence as a Basis of Guilt

1. The court shall not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings.

2. The court shall not find the accused guilty based solely, or to a decisive extent, upon statements given by the defendant to the police or the state prosecutor.

3. The court shall not find the accused guilty based solely, or to a decisive extent, on testimony given by a single witness whose identity is anonymous to the defence counsel and the accused.

4. The court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

Article 338
Reading of other previously entered statements

1. Except in cases provided for in the present Code, records containing the testimony of witnesses, the co-accused or participants who have already been convicted of the criminal offence as well as records and other documents regarding the findings and opinions of expert witnesses may be read according to a decision of the trial panel only in the following cases:

1.1. if the persons who have been examined have died, become afflicted with mental disorder or disability or cannot be found, or if their appearance before the court is impossible or involves considerable difficulties due to old age, illness or other important reasons;
1.2. if the witnesses or expert witnesses refuse to testify at the main trial without lawful reasons; or
1.3. if the parties agree that the direct examination of a witness or expert witness who has failed to appear, irrespective of whether he or she has been summoned or not, be replaced by reading the records of his or her previous examination.

2. Records of previous examinations of persons exempt from the duty to testify may not be read if such persons were not summoned to the main trial or if they exercised their right not to testify at the main trial. If such persons exercised their right not to testify at the main trial after they had already been examined or if they did not come to court when summoned, the record of their prior examination shall be inadmissible evidence.

3. The reasons for the reading of the record shall be indicated in the record of the main trial and during the reading it shall be announced whether or not the witness or expert witness took the oath.

Article 384
Substantial Violation of the Provisions of Criminal Procedure

1. There is a substantial violation of the provisions of criminal procedure if:

(...)
1.8 the judgment was based on inadmissible evidence;
(...)

2. Substantial violation of provisions of criminal procedure shall be considered if during the course of criminal proceedings, including pretrial proceedings, the court, the state prosecutor or the police:
2.1. omitted to apply a provision of the present Code or applied it incorrectly; or
2.2. violated the rights of the defense; and this influenced or might have influenced the rendering of a lawful and fair judgment.

Provisional Criminal Procedure Code of Kosovo of 2003

Article 157

(1) The court shall not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings.
(2) The court shall not find the accused guilty based solely, or to a decisive extent, upon statements given by the defendant to the police or the public prosecutor (Article 156 paragraph 1 of the present Code).
(3) The court shall not find the accused guilty based solely, or to a decisive extent, on testimony given by a single witness whose identity is anonymous to the defence counsel and the accused.
(4) The court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness. (Articles 298 through 303 of the present Code).

Article 368

(1) Except in cases provided for in the present Code, records containing the testimony of witnesses, the co-accused or participants who have already been convicted of the criminal offence as well as records and other documents regarding the findings and opinions of expert witnesses may be read according to a decision of the trial panel only in the following cases:

1) If the persons who have been examined have died, become afflicted with mental disorder or disability or cannot be found, or if their appearance before the court is impossible or involves considerable difficulties due to old age, illness or other important reasons;
2) If the witnesses or expert witnesses refuse to testify at the main trial without lawful reasons; or
3) If the parties agree that the direct examination of a witness or expert witness who has failed to appear, irrespective of whether he or she has been summoned or not, be replaced by reading the records of his or her previous examination.

(2) Records of previous examinations of persons exempt from the duty to testify (Article 160 of the present Code) may not be read if such persons were not summoned to the main trial or if they exercised their right not to testify at the main trial. If such persons exercised their right not to testify at the main trial after they had already been examined or if they did not come to court when summoned, the record of their prior examination shall be inadmissible evidence. Article 154 of the present Code shall apply mutatis mutandis.

(3) The reasons for the reading of the record shall be indicated in the record of the main trial and during the reading it shall be announced whether or not the witness or expert witness took the oath.

Law on Criminal Procedure of Former Yugoslavia (No. 26/86)

Article 333

(1) Except in cases specified in the present Code, records containing the statements of witnesses, the co-defendants or already convicted participants in the criminal offense, as well as records and other documents regarding expert witness findings and opinions may be read pursuant to ruling of the Trial Chamber only in the following cases:

1) if the persons who gave the statements have died, become afflicted with mental illness or cannot be found, or if their appearance before the court is impossible or involves considerable difficulties due to old age, illness or other important reasons;
2) if the witnesses or expert witnesses refuse to testify at the trial without legal cause.

(2) With the consent of the parties, the Panel may decide that the records of the previous testimony of the witness or expert witness or his written findings and opinion be read, although the witness or expert witness is not present, regardless of whether he has been summoned to the trial or not. Exceptionally, after the interrogation of the parties, the Panel may decide that even without the consent of the parties, the records of testimony of the witness or expert witness given at the previous trial before the same Chair of the Panel be read, although the term referred to in Article 305, Paragraph 3 has expired, or that the written findings and opinion of the specialised institution or state authority whose expert fails to appear at the trial be read, provided that the Panel finds that in connection with other examined evidence it is necessary to be informed on the contents of the records or written findings and opinion. After the records or written findings and opinion have been read and parties' objections have been heard (Article 335), the Panel shall, taking into account other examined evidence, decide whether to examine the witness or expert witness directly.

(3) Records of the previous testimony given by persons granted exemption from the duty to testify (Article 227) may not be read if those persons have not been summoned to the trial at all or if, before the first interrogation at the trial, they have availed themselves of their right to refuse to testify. After the presentation of evidence, the Panel shall decide that such records be excluded from the files and be kept separately (Article 83). The Panel shall proceed in the same way with respect to other records and information referred to in Article 83 of the present Code if a decision on their exclusion has not been previously rendered. An interlocutory appeal may be filed against the ruling of the exclusion of the records. After the ruling becomes final, the excluded records and information shall be sealed in a separate cover and handed over to the investigative judge to keep them apart from other files and they may not be examined or used in the course of the proceedings. The exclusion of records and information must be performed before the file is submitted to the higher Court upon an appeal filed against the verdict.

(4) The provision of paragraph 3 of this Article shall not apply in respect of the minutes which the trial panel has ruled pursuant to Article 84 of this Law for use in the main trial. The reasons for reading the records shall be stated in the records of the trial, and in the course of reading, it shall be stated whether the witness or expert witness had taken an oath.

Merits

41. The Court initially recalls that the Applicant was found guilty of the criminal offense of trafficking in human beings established in paragraph 1 of Article 2 of UNMIK Regulation. Based on the indictment filed in 2002, the Applicant was initially found guilty by the Judgment of the District Court, but which was quashed by the relevant Decision of the Supreme Court. In the retrial, the Applicant was again found guilty by a Judgment of the Basic Court, which, after the rejection of the appeal and the request for protection of legality, was upheld by the Court of Appeals and the Supreme Court, respectively. The Court recalls that even in the retrial, the Applicant was found guilty on the basis of the testimonies of witnesses who were not present during the main trial. This fact was challenged by the accused, namely the Applicant in all court proceedings. The regular courts rejected his allegations based on the procedural provisions applicable throughout his court proceedings, namely Article 333 of the Criminal Procedure Code of the former Yugoslavia; Article 368 of the PCCK and Article 338 of the CPCRK, according to which the reading of the testimony of witnesses may be allowed at the court hearing by a court decision, if the relevant witnesses cannot be found or their appearance before the court is impossible. The Applicant also files the same allegations before the Court, noting that his constitutional rights were violated, because he was found guilty by the regular courts, based on the evidence of witnesses in absentia and consequently, never having the opportunity to examine the latter and challenge their arguments.

42. The Court notes that the circumstances of the present case relate to the Applicant's right to question witnesses against him, a right guaranteed by paragraph 4 of Article 31 of the Constitution. The right of an accused to examine witnesses against him is also guaranteed by item d of paragraph 3 of Article 6 of the ECHR. (For more details on the right to examine witnesses, see ECHR Guide on Article 6 of the ECHR (Criminal limb) of 30 April 2019; Part VI. Specific Guarantees; B. The rights of the defence (Article 6, paragraph 3); 4. Examination of witnesses (Article 6, paragraph 6) 3 (d)).

43. The Court further notes that the procedural guarantees embodied in paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR reflect specific aspects of the right to a fair and impartial trial, established in paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR. In their review, the European Court of Human Rights (hereinafter: the ECtHR) looks at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interests of the public and the victims in proper prosecution and, where necessary, to the rights of witnesses. (See, *inter*

alia, in this regard, the case of the ECtHR, *Schatschaschwili v. Germany*, Judgment of 15 December 2015, paragraphs 100-101). With regard to the latter, namely witnesses, the Court recalls that based on the ECtHR case law, the term "*witness*" has an autonomous meaning in the ECHR system, regardless the classifications under national law. According to the ECHR, where a statement/deposition may serve to a material degree as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by paragraph 1 and item d of paragraph 3 of Article 6 of the ECHR apply.

44. The Court recalls that the circumstances of the present case include (i) the right of the accused, namely the Applicant, to examine witnesses against him; and (ii) decisions of the regular courts, which allegedly were rendered based on witnesses who were absent in the court hearing. Both of these cases were elaborated in detail through the ECtHR case law, and in particular in two cases of the Grand Chamber of the ECtHR, namely cases *Al-Khawaja and Tahery v. the United Kingdom*, Judgment of 15 December 2011; and *Schatschaschwili v. Germany*, cited above.

45. Therefore and following this, based on its obligation under Article 53 [Interpretation of Human Rights Provisions] of the Constitution to interpret the fundamental rights and freedoms in accordance with the ECtHR case law, the Court will (i) elaborate the general principles of the ECtHR case law concerning the absence of witnesses in the court hearing and the relevant inability of the accused and his defense counsel to question the latter, a right guaranteed by the Constitution and the ECHR; and (ii) apply the same principles in the circumstances of the present case, in order to assess whether the Applicant has, in its entirety, has been a subject to fair and impartial trial.

(I.) General principles regarding the right of the accused to examine witnesses against him

46. The Court initially reiterates that based on the case law of the ECtHR, given that the admissibility of evidence, is in principle a matter of regulation by law and of the national courts, based on paragraphs 1 item d of paragraph 3 of Article 6 of the ECHR, it only examines whether the proceedings, in their entirety, have been conducted in a fair manner. (See ECHR, *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Schatschaschwili v. Germany*, cited above, paragraph 101; and *Seton v. the United Kingdom*, Judgment of 12 September 2016, paragraph 57). These provisions, however, incorporate the presumption against the use of extrajudicial evidence against the accused in criminal proceedings. The same applies when such evidence may be in favor of the defense.

47. Furthermore, based on item d of paragraph 3 of Article 6 of the ECHR and the relevant case law of the ECtHR, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument (See the ECtHR case *Al-Khawaja and Tahery v. the United Kingdom,* cited above, paragraph 118; *Schatschaschwili v. Germany,* cited above, paragraph 101; and *Seton v. the*

United Kingdom, cited above, paragraph 57). Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings. (See ECtHR cases *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Hümmer v. Germany*, Judgment of 19 July 2012, paragraph 38; *Lucà v. Italy*, Judgment of 27 February 2001, paragraph 39; *Solakov v. the former Yugoslav Republic of Macedonia*, Judgment of 31 October 2001, paragraph 57; and *Schatschaschwili v. Germany,* cited above, paragraph 105). However, the ECtHR, also stated that the use of the statements obtained during police inquiry and judicial investigation at a hearing is not in itself in contradiction with paragraph 1 and item d of paragraph 3 of Article 6 of the ECHR, provided that the rights of the defense are respected. As a general rule, the accused and his or her defense should have adequate opportunity to challenge and question the relevant witness, either when the latter made a statement or at a later stage of the court proceedings. (See ECHR cases *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Trampevski v. the former Yugoslav Republic of Macedonia*, Judgment of 10 July 2012, paragraph 44; and *Schatschaschwili v. Germany*, cited above, paragraph 105).

48. The ECtHR also reiterated that considering the importance of the right to a fair administration of justice in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice, then that measure should be applied. (See the ECtHR case, *Van Mechelen and Others v. the Netherlands*, Judgment of 23 April 1997, paragraph 58). Possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial. (See, *inter alia*, the ECtHR case, *Tarău v. Romania*, Judgment of 24 February 2009, paragraph 74).

49. Considering the importance of the right of the accused to examine witnesses against him, a considerable case law of the ECtHR is focused on cases where witnesses have not participated in the court hearing, thus preventing the accused and his defense, questioning them, and challenging relevant arguments. Among other things, in the cases of the ECtHR, *Al-Khawaja and Tahery v. the United Kingdom* and *Schatschaschwili v. Germany*, it has established the general principles applicable to such cases, and the test, known as the *Al-Khawaja and Tahery test*, which should be applied by the courts in all cases where witnesses have not participated in the court hearing.

50. Based on these cases, the ECtHR has developed principles applicable in the circumstances of the absence of witnesses at the court hearing, but also the abovementioned test, including the manner in which it was applied..

51. Regarding general principles, the ECtHR noted that (i) the Court should first examine the preliminary question, namely whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance; (ii) when a witness has not

been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort; (iii) admitting as evidence statements of absent witnesses results in a potential disadvantage for the criminal defendant, who, in principle, should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at a later stage in the proceedings; (iv) according to the "*sole or decisive rule*", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted; (v) however, as item d of paragraph 3 of Article 6 of the ECHR should be interpreted in a holistic examination of the fairness of the proceedings, "*sole or decisive rule*" should not be applied in an inflexible manner; and (vi) in particular, where a hearsay statement is "*sole or decisive rule*", against a defendant, its admission as evidence will not automatically result in a breach of paragraph 1 of Article 6 ECHR. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of the relevant evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case. (See ECHR Guide on Article 6 of the ECHR (Criminal limb) of 30 April 2019; Part VI. Specific Guarantees; B. The rights of the defence (Article 6, paragraph 3); 4. Examination of witnesses (Article 6 paragraph 3 (d)); ii. Non-attendance of witnesses at trial).

52. Whereas, with regard to the test developed in the case of *Al-Khawaja and Tahery*, to assess the compatibility with the guarantees embodied in item d of paragraph 3 of Article 6 of the ECHR, based on the case law of the ECtHR, it is necessary to consider three basic issues, in each case where the statements of absent witnesses in the trial were admitted as evidence in court. The court must consider whether (i) there were reasonable grounds for the non-attendance of the witness at the court hearing and, consequently, the admission of the extrajudicial testimonies of the absent witness as evidence in court; (ii) the testimony of the absent witness is the *"sole or decisive"* basis for the conviction of the accused; and (iii) there is sufficient counterbalancing factor, including strong procedural safeguards, to compensate for the disadvantage of the defense as a result of the admission of extrajudicial evidence and to ensure that the trial, in its entirety, was fair. (See ECHR Guide on Article 6 of the ECHR (Criminal limb) of 30 April 2019; Part VI. Specific Guarantees; B. The rights of the defence (Article 6, paragraph 3); 4. Examination of witnesses (Article 6 paragraph 3 (d)); ii. Non-attendance of witnesses at trial; and see also the cases of the ECHR *Schatschaschwili v. Germany*, cited above, paragraph 107; and *Seton v. the United Kingdom*, cited

above, paragraph 58). The Court will further elaborate the three cases identified in more detail.

(i) Good reason for non-attendance of a witness at trial

53. In the light of the ECtHR case law, the reasons which have resulted in non-attendance of a witness at the trial must be justified. The rationale for the absence of a witness, based on the ECtHR case law, is considered to be a preliminary question, and is therefore the first issue to be considered by the court, and before any consideration as to whether the testimony of the absent witness is "*the sole or decisive*" based on the "*single or decisive*" rule. According to the ECtHR, when witnesses do not attend to give live evidence, there is a duty to enquire whether their absence is justified. (See ECtHR cases, *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 120; and *Gabrielyan v. Armenia*, Judgment of 10 April 2012, paragraphs 78, 81-84).

54. The issues surrounding the good reason of the absence of witness have been clarified beyond the ECtHR case, *Al-Khawaja and Tahery v. the United Kingdom*, and also in the case of the ECtHR *Schatschaschwili v. Germany*. According to the latter, the lack of good reason for the non-attendance of a witness could not, of itself, be decisive for the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness of a trial. The Court notes that the ECtHR case law has evolved in terms of finding violations in cases where there has been no good reason for the lack of a witness at trial. While initially violations were found only on this fact, later, the reasonableness of the absence was considered only as one of the factors to be considered in assessing the fairness of the process as a whole. (For a superficial description of the matter, see, *inter alia*, the case of ECHR *Schatschaschwili v. Germany*, cited above, paragraphs 111-113).

55. The case law of the ECtHR recognizes various cases why the appearance of a witness in the court hearing cannot be accomplished. But insofar as it is relevant to the circumstances of the present case, in the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence. (See ECHR cases, *Karpenko v. Russia*, Judgment of 13 March 2012, paragraph 62; *Damir Sibgatullin v. Russia*, Judgment of 24 April 2012, paragraph 51; *Pello v. Estonia*, Judgment of 12 April 2007, paragraph 35; *Bonev v. Bulgaria*, Judgment of 8 June 2006, paragraph 43; *Tseber v. the Czech Republic*, Judgment of 22 November 2012, paragraph 48; *Schatschaschwili v. Germany*, cited above, paragraph 119; *Bobeş v. Romania*, Judgment 9 July 2013, paragraph 39; and *Vronchenko v. Estonia*, Judgment of 18 July 2013, paragraph 58). The fact that a court was not able to locate the relevant witness or the fact that this witness was not in the state in which the proceedings are conducted is not a sufficient reason to satisfy the requirements of item d paragraph 3 of Article 6 of the ECHR. (See, in this regard, the ECtHR cases, *Gabrielyan v. Armenia*, cited above, paragraph 81; *Tseber v. the Czech Republic*, cited above, paragraphs 48 and 78; *Lučić v. Croatia*, Judgment of 27

February 2014; *Schatschaschwili v. Germany*, cited above, paragraph 120; *Seton v. the United Kingdom*, cited above, paragraph 61; *Tseber v. the Czech Republic*, cited above, paragraph 48; and *Kostecki v. Poland*, Judgment of 4 June 2013, paragraphs 65 and 66). The latter requires that the relevant states should take concrete steps to enable the accused to cross-examine the witness against him. (See the ECtHR case, *Schatschaschwili v. Germany*, cited above, paragraph 120; *Gabrielyan v. Armenia*, cited above, paragraph 78; *Tseber v. Czech Republic,* cited above, paragraph 48; and *Kostecki v. Poland,* cited above, paragraph 65 and 66).

56. According to the case law of the ECtHR, it is not for the latter to compile a list of specific measures which the domestic courts must have taken in order to secure the attendance of a relevant witness, however, it is clear that the relevant authorities must have actively searched for the witness with the help of domestic authorities including the police and must, have resorted to international legal assistance where a witness resided abroad. Moreover, the need for all reasonable efforts on the part of the authorities to secure the witness's attendance at trial further implies careful scrutiny by domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness. (See the ECtHR case, *Schatschaschwili v. Germany*, cited above, paragraphs 120 and 121).

57. Good reason for the absence of a witness must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at trial. In such a case, it follows that there was a good reason for the court to admit the untested statements of the absent witness as evidence. (See the ECtHR case, *Schatschaschwili v. Germany*, cited above, paragraphs 119 and 122).

(ii) The importance of the testimony for the conviction

58. An issue concerning admission into evidence of statements of witnesses who did not attend the trial arises only if the witness statement is the "*sole*" or "*decisive*" evidence, or it "*carried significant weight*" in the accused conviction. (See the ECtHR casea, *Seton v. the United Kingdom*, cited above, paragraph 58; *Sitnevskiy and Chaykovskiy v. Ukraine*, Judgment of 10 November 2016, paragraph 125; and *Schatschaschwili v. Germany*, cited above, paragraph 123).

59. Based on the ECtHR case law, the "*sole*" evidence is to be understood as the only evidence against the accused. The term "*decisive*" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is "*decisive*" will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as decisive. The evidence that carries "*significant weight*" is such that its admission may have handicapped the defence in the trial. (See, moreover in this regard, See EtCHR Guide on Article 6 of the ECHR (Criminal limb) of 30 April 2019; Part VI.

Specific Guarantees; B. The rights of the defence (Article 6, paragraph 3); 4. Examination of witnesses (Article 6 paragraph 3 (d)); ii. Non-attendance of witnesses at trial; b. The importance of the witness statement for the conviction; see also the ECHR case, *Schatschaschwili v. Germany,* cited above, paragraphs 116 and 123).

60. The Court notes that the foundations of the "*sole or decisive rule*" are laid down in case *Unterpertinger v. Austria* (Judgment of 24 November 1986), which establishes the rationality of the relevant test: whether the conviction of the accused is based solely or mainly on the evidence of a witness whom the accused could not examine because of his absence, his rights of defense have been limited. Furthermore, in case *Doorson v. the Netherlands* (Judgment of 26 March 1996), the ECtHR further developed its case law, noting that, even where the court finds that there is good reason for the absence of a witness at trial, a conviction based on the "*sole or decisive*" evidence of this witness, would not be fair and would result in a breach of the procedural safeguards guaranteed by paragraph 1 and item d of paragraph 3 of Article 6 of the ECHR.. However, in case *Al-Khawaja and Tahery v. the United Kingdom*, the ECtHR found that the admission as evidence of the statement of a witness who had been absent from the trial and whose pre-trial statement was the sole or decisive evidence against the defendant did not automatically result in a breach of paragraph 1 of Article 6. (See ECtHR case, *Schatschaschwili v. Germany*, cited above, paragraph 128). It reasoned that applying this rule in an inflexible manner would run counter to the traditional way in which it approached the right to a fair hearing under Article 6 of the ECHR, namely to examine whether the proceedings as a whole had been fair. However, the admission of such evidence, because of the inherent risks for the fairness of the trial, constituted a very important factor to balance through the counterbalancing factors. (See ECtHR cases, *Schatschaschwili v. Germany*, cited above, paragraph 106; and *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraphs 126, 128 and 147).

61. In this regard, as it is not for the Court to act as a court of fourth instance, its starting-point for deciding whether the conviction of an accused was based solely or to a decisive extent on the depositions of an absent witness is the judgments of the domestic courts. (See, in this regard, case of ECtHR *Kostecki v. Poland*, cited above, paragraph 67; and *Horncastle and Others v. the United Kingdom*, Judgment of 16 December 2014, paragraphs 141 and 150). The Court however, based on the ECtHR case law, must (i) review the assessment of the regular courts regarding the weight of the evidence given by an absent witness and ascertain for itself whether the assessment of the regular courts was unacceptable or arbitrary; and (ii) make its own assessment of the weight of the evidence given by an absent witness if the regular courts did not indicate their position on that issue or if their position is not clear. (Shih, in this regard, the ECHR Guide on Article 6 of the ECHR (Criminal limb) of 30 April 2019; Part VI. Specific Guarantees; B. The rights of the defence (Article 6, paragraph 3); 4. Examination of witnesses (Article 6 paragraph 3 (d)); ii. Non-attendance of witnesses at trial; b. The importance of the witness statement for the conviction, paragraph 466; and see also the cases of the ECtHR, *Schatschaschwili v. Germany*, cited above, paragraph 124; *McGlynn v. United*

Kingdom, Judgment of 16 October 2012, paragraph 23;*Tseber v. the Czech Republic*, cited above, paragraphs 54 and 56; and *Fąfrowicz v. Poland*, Judgment of 17 April 2012, paragraph 58).

(iii) Counterbalancing factors

62. The need for the existence of counterbalancing factors in order to ensure a fair assessment of the credibility of evidence in cases where the latter is decisive for the conviction of the accused has also been addressed in the cases of the ECtHR, *Al-Khawaja and Tahery v. United Kingdom* and *Schatschaschwili v. Germany*. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would initially depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair. These counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence. (See the ECtHR case *Schatschaschwili v. Germany*, cited above, paragraphs 126-131).

63. In case *Schatschaschwili v. Germany*, the ECtHR identified certain elements that may be relevant in this context and as follows: (i) whether the domestic courts approached the untested evidence of an absent witness with caution, having regard to the fact that such evidence carries less weight, and whether they provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available (see ECtHR cases, *Przydział v. Poland*, Judgment of 24 May 2016, paragraph 53; and *Dastan v. Turkey*, Judgment of 10 October 2017, paragraph 31); (ii) existence of a video recording of the absent witness's questioning at the investigation stage, so that the court, prosecution and defense create relevant impressions on the credibility of the testimony; (iii) availability at trial of corroborative evidence supporting the untested witness statement, such as statements made at trial by persons to whom the absent witness reported the events immediately after their occurrence; (iv) further factual evidence, forensic evidence and expert reports; (v) description of events by other witnesses, in particular if such witnesses are cross-examined at trial;; (vi) the possibility for the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial, or, where appropriate, in the pre-trial stage of the proceedings (see ECtHR case, *Paić v. Croatia*, Judgment of 29 March 2016, paragraph 47); and (vii) possibility for the accused or defence counsel to question the witness during the investigation stage. (See, in the context of this paragraph, ECtHR cases, *Palchik v. Ukraine*, Judgment of 2 March 2017, paragraph 50; *Al-Khawaja and Tahery v. United Kingdom*, cited above, paragraph 156; *Schatschaschwili v. Germany*, cited above, paragraphs 126-131; *Brzuszczyński v. Poland*, Judgment of 17 September 2013, paragraphs 85-89; *Chmura v. Poland*, Judgment of 3 April 2012, paragraph 50; *D.T. v. the Netherlands*, Judgment of 3 April 2012, paragraph 50; *Rosin v. Estonia*, Judgment of 19 December 2013, paragraph 62; and *González Nájera v. Spain*, Judgment of 11 February 2011, paragraph 54).

64. In essence, based on the ECtHR case law, the accused must be afforded the opportunity to give his or her own version of the events and to cast doubt on

the credibility of the absent witness. However, this cannot, of itself, be regarded a sufficient counterbalancing factor to compensate for the handicap under which the defence laboured. (See ECtHR case *Palchik v. Ukraine*, cited above, paragraph 48). Moreover, domestic courts must provide sufficient reasoning when dismissing the arguments put forward by the defence. (See ECtHR case, *Prăjină v. Romania*, Judgment of 7 January 2014, paragraph 58). Also, in some instances, an effective possibility to cast doubt on the credibility of the absent witness evidence may depend on the availability to the defence of all the material in the file related to the events to which the witness' statement relates. (See ECtHR case, *Yakuba v. Ukraine**, Judgment of 12 February 2019, paragraphs 49-51; and *Schatschaschwili v. Germany,* cited above, paragraph 131).

(iv) The relationship and order of consideration of three issues identified by Al-Khawaja and Tahery test

65. As regards the relationship, the ECtHR considers that the application of the principles developed in case *Al-Khawaja and Tahery* in its subsequent case-law discloses a need to clarify the relationship between the abovementioned three steps of the *Al-Khawaja and Tahery* test when it comes to the examination of the compliance with the ECtHR of a trial in which untested incriminating absent witness evidence was admitted. It is clear that each of the three steps of the test must be examined if – as in *Al-Khawaja and Tahery* – the questions in step one, namely whether there was a good reason for the non-attendance of the witness at trial and two, namely whether the evidence of the absent witness was the "*sole*" or "*decisive*" basis for the defendant's conviction, are answered in the affirmative. The Court is, however, called upon to clarify whether all three steps of the test must likewise be examined in cases in which either the question in step one or that in step two is answered in the negative. (See, in this context, and moreover, paragraph 110 of case *Schatschaschwili v. Germany*). The ECtHR case law has evolved in this respect, but in case *Schatschaschwili v. Germany*, it has determined that in principle all three cases must be examined in order to assess the fairness of a procedure in its entirety, accordingly, that the issue of counterbalancing factors should also be considered in cases where there may have been a justifiable reason for the absence of witnesses in the court hearing or even if this evidence has not been "*sole*" or "*decisive*". (See, in this context, the ECtHR explanation in paragraphs 110 to 116 of the case *Schatschaschwili v. Germany*).

66. Regarding the order, the ECtHR notes that in *Al-Khawaja and Tahery v. United Kingdom*, the requirement that there be a good reason for the non-attendance of the witness (first step), and for the consequent admission of the evidence of the absent witness, was considered as a preliminary question which had to be examined before any consideration was given as to whether that evidence was "*sole*" or "*decisive*". The term "Preliminary", in that context, may be understood in a temporal sense: the trial court must first decide whether there is good reason for the absence of the witness and, if yes, as a consequence, the evidence of the absent witness may be admitted. Only once that witness evidence is admitted can the trial court assess, at the close of the

trial and having regard to all the evidence adduced, the significance of the evidence of the absent witness and, in particular, whether this evidence is the "*sole*" or "*decisive*" basis for convicting the defendant (second step). It will then depend on the weight of the evidence given by the absent witness how much weight the counterbalancing factors (third step) will have to carry in order to ensure the overall fairness of the trial. (See, in this context, and moreover, paragraph 117 of case *Schatschaschwili v. Germany*).

67. Therefore, it will, as a rule, be pertinent to examine the three steps of the *Al-Khawaja and Tahery* test. They are interrelated and, taken together, serve to establish whether the criminal proceedings have, as a whole, been fair. It may therefore be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or the unfairness of the proceedings. (See more on the report and the order of issues identified for the *Al-Khawaja dhe Tahery* test, the ECtHR case *Schatschaschwili v. Germany*, cited above, paragraphs 110-118).

(II.) Application of these principles to the circumstances of the present case

68. The Court initially reiterates that the guarantees embodied in paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR, based on the case law of the ECtHR, are assessed in the light of the fair trial and impartial in its entirety. Moreover, as noted above, the issues concerning the admissibility of evidence are, in principle, issues of law and, consequently, of the assessment of the regular courts. However, before an accused can be convicted, he must have the opportunity to challenge the evidence at some stage of the criminal proceedings and question the witnesses against him. Exceptions are possible, but they should be strictly necessary. The circumstance in which such an exception may be necessary and which is relevant to the circumstances of the present case is that the witnesses cannot attend the trial because, among other things, they cannot be found. However, in such cases, based on the case law of the ECtHR, the relevant court should take positive steps and take reasonable measures to ensure the presence of witnesses in the judicial process.

69. In order to assess whether a trial which was conducted without the presence of witnesses, in its entirety, was fair, as noted above, the ECtHR developed the *Al-Khawaja and Tahery* test, and on the basis of which, the following three issues should be addressed: (i) there was a good reason for the witness's non-attendance at the trial and, consequently, the admission of the extrajudicial evidence of the absent witness as evidence in court; (ii) the testimony of the absent witness is the "*sole or decisive*" basis for the conviction of the accused; and (iii) there are sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the disadvantage of defense as a result of the admission of extrajudicial testimony.

70. In applying such a test in the circumstances of the present case, the Court recalls the ECtHR view that matters relating to testimonies in a court hearing

are in principle a matter of law and of the regular courts. However, based on the case law of the ECtHR, the Court should (i) review the assessment of the regular courts of the importance of testimony of the absent witness and decide whether that assessment of the regular courts is inadmissible or arbitrary; and (ii) assesses the importance of the testimony of a witness who was not present at the trial, if the regular courts have not clarified their position on the matter or if such clarification is unclear.

(i) As to the good reasons for the absence of the witness at trial

71. The Court first reiterates that, based on the case law of the ECtHR, the reasons which have resulted in non-attendance of a witness at the trial must be good. Assessing the reasonableness of a witness's absence is a preliminary question, and is therefore the first issue to be considered by a court.

72. As noted above, and relevant to the circumstances of the present case, the fact that the courts are unable to locate the relevant witness or the fact that this witness is not found in the state in which the proceedings are conducted is not a sufficient reason to fulfill the requirements of paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR. In such a case, the relevant authorities should make reasonable efforts to ensure their presence in court and should take concrete steps to enable the accused to examine the witness. (See ECtHR case *Schatschaschwili v. Germany*, cited above, paragraph 120). As noted above, these measures include but are not limited to cooperation with the police, and international legal assistance, when, as far as relevant to the circumstances of the present case, a witness lives abroad.

73. The Court recalls that in the circumstances of the present case the Applicant's case was initially adjudicated in the District Court and which, by Judgment [P. No. 424/2002] of 17 January 2003, found him guilty. Based on the case file, the factual situation was determined based on the deposited statements of seven (7) witnesses. None of them had been present at the court hearing. This Judgment was quashed by Decision [Ap. No. 347/2003] of 24 February 2004 of the Supreme Court on matters not related to the absence of witnesses in the main trial, and the Applicant's case was remanded for retrial.

74. In the retrial, the Applicant was found guilty by Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Basic Court. Based on the case file, the factual situation was determined based on the deposited statements of four (4) absent witnesses; partly another witness, also absent; and partly in the statements of the other accused, namely, S.R.

75. According to the Basic Court, the use of these statements as evidence in the court hearing, pursuant to item 1 of paragraph 1 of Article 368 of the PCPCK, in cases where the persons examined "*cannot be found or if their appearance before the court is impossible*". The Basic Court, by the relevant Judgment, more specifically stated:

"The witnesses' testimonies of V.K, V.S, N.M, B.V dhe A.M, given in the investigation procedure before the investigation judge were read and as evidences were used in the court hearing in compliance with Article 368 paragraph 1 subparagraph 1 of CCK, because the appearance of witnesses in the court hearing in order to testify was impossible for the fact that the four witnesses – injured parties are citizens of a foreign country and we do not know their residing addresses, whereas for the witness A.M it was found that is not present in Kosovo".

76. The Court recalls that the impossibility of the accused, namely the Applicant to examine the witnesses against him, was raised through an appeal, namely the request for protection of legality, and was therefore considered by the Court of Appeals and the Supreme Court.

77. In the present case, the former, namely the Court of Appeals, reasoned as follows:

"it is evident that during the time the investigations were launched and during the time this matter was adjudicated for the first time, the criminal procedure law of former Yugoslavia was applied. ... According to this law, the minutes on testimonies of the witnesses could be read in cases when they are not able to appear in the court as this matter was remanded for retrial in compliance with the legal transitional provisions of the Criminal Procedure Code of 2013, the case was adjudicated according to the procedural code of 2004, whereas the court in accordance with the provision of Article 368, paragraph 1 of CPCK has read the minutes on statements of the injured parties who could not be brought to the court in the trial process because they are citizens of another country and their addresses were not known and in such cases pursuant to paragraph 1 of this provision, their statements may be read without consent of the parties".

78. Whereas, the second, namely the Supreme Court, stated that:

"the allegation of the defence counsels of the convicts Hysen Kamberi [...] is not grounded that the statements of the injured parties [...] were read in violation of Article 260 of the PCCK, for the facts as the reasons are given for this legal basis by the first and second instance courts, the proceedings in this criminal case have fixed and was conducted under the old law (of the former Yugoslavia) and therefore these statements could have been read under Article 333 paragraph 1 item 1 of CPC (338 paragraph 1 item 1.1 of the applicable code), so there were no legal obstacles to their reading".

79. The Court also notes that in the initial trial against the Applicant the provisions of the Criminal Code of the former Yugoslavia were applied, pursuant to Article 333, according to which, the statements of absent witnesses can be read at the court hearing only by a court decision, *inter alia*, in cases where witnesses cannot be found or their appearance before the court is not possible. The retrial was based on the provisions of the PCPCK, which based on

Article 368 thereof, provides the same possibility. The same applies to Article 338 of the CPCRK.

80. Therefore, the Court notes that, as the regular courts have found, the relevant procedural provisions enable the admission of testimonies of witnesses in the court hearing, if it is impossible to appear before the court. However, based on paragraph 4 of Article 31 of the Constitution, in conjunction with item d of paragraph 3 of Article 6 of the ECHR, and the relevant case law of the ECtHR, there must be a good reason for this impossibility of witnesses to attend in the trial and that the relevant courts need to take concrete steps to secure their presence in the court hearing.

81. The reasoning given by the Basic Court, and upheld by the Court of Appeals and Supreme Court, states that "*the appearance of these witnesses in the court hearing in order to testify was impossible for the fact that the four witnesses – injured parties are citizens of a foreign country and we do not know their residing addresses, whereas for the witness A.M it was found that is not present in Kosovo*".

82. The Court notes that in view of the importance of the right of an accused to challenge evidence and to examine witnesses against him at any stage of the proceedings, such reasoning is not consistent. This is also the case through the ECtHR case law, and according to which, specifically, the fact that the domestic court was unable to locate the relevant witness or the fact that this witness was not found in the state in which the proceedings are conducted, is not a sufficient reason to meet the requirements of paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR.

83. To illustrate the inconsistency of such a finding of the regular courts, the Court will next present the assessment of the ECtHR in two similar cases as to whether the absence of witnesses at the court hearing was based on a good reason. In the former, the ECtHR found that there was one, while in the second it did not. More specifically, as follows:

84. In the case of *Schatschaschwili v. Germany*, the ECtHR found that there was a good reason for the absence of two witnesses in the court hearing. In this case, witnesses O. and P., two Latvian nationals, were the victims and witnesses of an aggravated theft while temporarily living in Germany, engaging in prostitution activities. During the investigation procedure, they were questioned several times by the police and the prosecution. With the beginning of the court proceedings, the relevant regional court in Germany had initially contacted the relevant witnesses who refused to appear before the court on the grounds of health and serious emotional and psychological conditions. The court rejected their reasoning as ungrounded and further, the same court had given some alternatives to the relevant witnesses as an opportunity to appear before the court. The latter refused. The German court, based on the mechanisms of international legal assistance, in cooperation with the relevant authorities of the State of Latvia, had organized the possibility for witnesses to appear and be questioned in a court in Latvia in order to secure the accused

right to examine relevant witnesses. The scheduled court hearing was canceled a few days before the hearing based on the health certificates of the relevant witnesses. The German court further suggested to the Latvian authorities that the health status of the witnesses be verified by a public health official or that they be compelled to testify at the trial. The public authorities of the state where the witnesses were located had no further cooperation. Consequently, the relevant regional court in Germany, based on the procedural provisions of the Code of Criminal Procedure, accepted the evidence of the relevant witnesses given at the investigation stage as evidence in the trial. In examining the grounds and reasonableness of the absence of witnesses O. and P. in this judicial process, in which they were not the only witnesses, the ECtHR found that the relevant court had taken reasonable steps to ensure their presence at the trial and that, consequently, in the circumstances of the present case, there was a good reason to admit the evidence of witnesses O. and P. at the court hearing. (For the facts of the case, see paragraphs 11 to 53, and for the assessment of whether there was a good reason for the absence of witnesses O. and P. in the trial, see paragraphs 132-140 of case *Schatschaschwili v. Germany*). The Court puts emphasis on the fact that in the present case, the ECtHR found a violation of Article 6 of the ECHR, finding that (i) there were a good reason for the absence of witnesses at the trial, thus responding to the first step in affirmative manner; (ii) the testimony of the relevant witnesses was "*sole*" and "*decisive*", affirmatively responding to the second step; whereas (iii) there were no sufficient counterbalancing factors in the court hearing to compensate for the disadvantage in which the defense was placed as a result of extrajudicial evidence.

85. On the other hand, in case *Seton v. the United Kingdom*, the ECtHR found that the relevant court had not taken all the appropriate measures, and therefore there was no good reason for the absence of a witness in the relevant trial. The case relates to a murder, the accused for whom he had refused to testify, while the relevant court had admitted as evidence in court, *inter alia* and among other witnesses, also the calls and telephone conversations of the accused. In this case, the relevant court had sufficient information from prison officials that the accused had refused to attend the trial, and the latter had not taken any additional steps to ensure his presence in the trial. The ECtHR in this Judgment also distinguished between the right to attend a trial and the right to examine witnesses in relation to the right not to incriminate themselves and consequently to remain silent. In such a circumstance, when the court was satisfied only with the fact that the accused refuses to take part in the trial, and had taken no further action to secure his presence at the trial, the ECtHR found that there was no good reason for the non-attendance of the witness/accused in the trial, pointing out that, consequently, the circumstances of the present case fail to meet the first requirement of the *Al-Khawaja and Tahery* test (For the facts of the case, see paragraphs 3 to 38, whereas regarding the assessment if there was a good reason for the absence of a witness in the main trial, see paragraphs 61 and 62 of case *Seton v. the United Kingdom*). The Court emphasizes that in the present case, the ECtHR did not find a violation of Article 6 of the ECHR, although (i) there was no good reason for the absence of witnesses at the trial, thus responding to the first step negatively; (ii) the testimony of the relevant witnesses was not "*sole*"

or "*decisive*", responding negatively to the second step; and that (ii) there were sufficient counterbalancing factors in the judicial process to compensate for the disadvantage in which the defense was placed as a result of extrajudicial evidence.

86. In contrast to the case law of the ECtHR, and the circumstances of the case of the Grand Chamber of the ECtHR *Schatschaschwili v. Germany*, and similarly to the circumstances of the case *Seton v. the United Kingdom*, in the circumstances of the present case, from the case file it does not follow that the regular courts have taken or justified any concrete steps to ensure the presence of witnesses at the court hearing. The Court notes that beyond referring to the relevant provisions of the applicable procedural codes throughout the examination of the case against the Applicant, the decisions of the regular courts do not result in the later taking any concrete steps in support of the finding that the presence of witnesses in the trial cannot be secured. As noted above, based on the case law of the ECtHR, the fact that the witnesses are out of the state in which the court proceedings are conducted is not sufficient and does not constitute a good reason for their absence in the judicial process. Moreover, it does not follow from the case file that the regular courts have taken any action to contact the police or to access international legal assistance mechanisms, nor have they provided any additional justification for the absence of witnesses in the trial, and consequently limiting the right of the accused to examine witnesses against him. As explained above, the ECtHR not necessarily finds violations of Article 6 of the ECHR solely on the fact that the witnesses were not present at the trial, but it analyzes whether there is a good and justified reason for their absence.

87. The Court reiterates that, based on the reasoning of the regular courts, in the circumstances of the present case, this is not the case. Consequently, the Court must find that in the circumstances of the present case, there is no good reason for the non-attendance of the witnesses in the trial, and it follows that the first step of the *Al-Khawaja and Tahery* test has not been fulfilled. However, and as stated above, such a finding does not necessarily result in a violation of paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR. To reach such a finding, the Court must also consider the other two aspects of the *Al-Khawaja and Tahery* test, whether (i) the testimony of the absent witness is the "*sole or decisive*" basis for the conviction of the accused; and (ii) there are sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the disadvantage of the defense as a result of the admission of the testimony of the absent witnesses.

(ii) As to the importance of the testimony for conviction

88. The Court initially recalls that the admission as evidence of the statements of witnesses who did not attend the court hearing raises a particularly important issue as to whether the witness statement is the "*sole*" or "*decisive*" or whether the latter "*carried significant weight*" in the conviction of the accused. In such circumstances, other or supporting evidence gain significant weight. The

stronger the other incriminating evidence is, the less likely it is that the testimony of the absent witness will be treated as "*sole*" or "*decisive*".

89. The Court also reiterates that based on the ECtHR case law, in determining the weight of the evidence given by the absent witness and, in particular, whether the evidence was the sole or decisive basis for the conviction of the accused, the Court has regard, in the first place, to the regular courts' assessment. This approach is in line with, *inter alia*, the case *Schatschaschwili v. Germany*. (Concerning the assessment of whether the testimony of the absent witness was sole or decisive for the conviction of the accused, see paragraphs 141-144 of case *Schatschaschwili v. Germany*). In this case, the ECtHR first examined the assessment of the regular courts, namely the relevant German Regional Court, which had considered witnesses O. and P. as key witnesses for the prosecution, but its decision was based also on further evidence. On the other hand, the prosecution reasoned that the evidence of the abovementioned witnesses was neither "*sole*" nor "*decisive*". The ECtHR in this case stated that the domestic courts had determined that the evidence of witnesses O. and P. were not "*sole*" but failed to determine whether this evidence was "*decisive*", that is, whether that evidence was of such importance that they are determinant of the outcome of the case. Beyond examining the assessment of the domestic courts, the ECtHR itself assessed the importance of the evidence of witnesses O. and P. for the conviction of the accused, and in this regard, it focused on assessing the strength of other incriminating evidence. In relation to the latter, the ECtHR emphasized (i) the testimony of witnesses E. and L., namely, the neighbor and friend of the witnesses who had been informed about the event; (ii) the testimony of the accused himself; (iii) geographical data and telephone conversation recordings; and (iv) GPS data indicating the movement of the car of the accused. However, the ECtHR noted that despite these testimonies, the testimonies of witnesses O. and P., whose examination was impossible by the accused and his defense throughout the trial, were "*decisive*" to the conviction of the accused. . Moreover, according to the ECtHR, the other evidence used by the domestic courts was "*either hearsay evidence or merely circumstantial technical and other evidence which was not conclusive as to the robbery and extortion as such*". On the other hand, in case *Seton v. the United Kingdom*, the domestic courts as well as the ECtHR held that the absence of the accused at trial, namely the lack of his testimony at the trial, constituted neither "sole" nor "*decisive*" evidence, because other evidence against him was "*overwhelming*". (As to the assessment of whether the testimony of the absent witness was the sole or decisive for the conviction of the accused, see paragraphs 63-64 of the case *Seton v. United Kingdom* and references used therein).

90. In assessing whether, in the circumstances of the present case, the testimony of absent witnesses is "*sole*" or "*decisive*" for the conviction of the accused, namely the Applicant, the Court based on the ECtHR case law will initially consider the assessment and the reasoning of the regular courts, and will then proceed with its assessment of the importance of the testimony of the absent witnesses in the conviction of the Applicant.

91. In this respect, the Court first recalls that the factual situation in the Applicant's retrial before the Basic Court was based on (i) the testimonies of witnesses V.K; V.S; N.M; and B.A; all absent in the court hearing; (ii) "*partially*" on the testimony of witness A.M, also absent in the court hearing; and (iii) "*partially*" on the testimony of the accused S.R given at the court hearing.

92. In this context, the Court recalls that the Basic Court itself found that the Applicant's conviction was based on the testimony of absent witnesses. The only other evidence referred to by the Basic Court, and given at the trial, is that of accused S.R. In this respect, the Court also recalls that the Basic Court itself stated that its decision was only "*partially*" based on this evidence. In view of its importance, the Court will quote in full the relevant statement of the accused S.R., below:

> *"In his statement given to the investigation judge on 05.11.2002, that the owner of the business premise "Arizona" was Hysen Kamberi and later the owner of the business premise was [I.R.], also stated that following the orders of [I.V.], the girls that used to work in that business premise were transported with his taxi vehicle up to the bridge on the exit point of Ferizaj to sign the contract, but on the way Ismet has again ordered him to transport girls in the direction of Brezovica, however the girls didn't agree about this thus following their intervention they were returned to the their apartment in Ferizaj".*

93. The Court recalls that the accused, namely the Applicant, raised his allegations of a violation of his right to fair and impartial trial as a result of his inability to challenge the testimonies of absent witnesses even before the Court of Appeals, through appeal and also before the Supreme Court through a request for protection of legality, and both courts dismissed the respective allegations, referring to the relevant provisions of the applicable procedural codes, based on which, *inter alia*, the admission of the witness testimony who cannot be found is possible.

94. However, based on the foregoing statement, the Court notes that (i) the latter is the only evidence against the accused given at the court hearing; (ii) all other evidence against the accused was given by witnesses who were not present at the trial and, consequently, whose evidence the accused could not challenge at any stage of the criminal proceedings; (iii) the Basic Court itself determines that it based its decision only "*partially*" on the statement of the accused S.R.; moreover, the Basic Court refers only to one more testimony, namely the victims' defense counsel from the Office for the Protection of Victims of Violence, who merely states that "*he joins the closing argument submitted by the State Prosecutor*".

95. The Court in this context notes that the Basic Court, but neither the Court of Appeals nor the Supreme Court, have determined whether the testimony of the absent witnesses is "*sole*" nor whether it is "*decisive*" for the conviction of the accused. The reasoning of the Basic Court and upheld by the Court of Appeals and the Supreme Court in no way assesses the relationship between the

testimonies of absent witnesses and the incriminating weight of the testimony of the other accused S.R and the statement of the Victim Advocate. The first evidence in fact only refers to the Applicant as the owner of the relevant premise, while regarding the second statement, the decision of the Basic Court only states that the latter is attached to the prosecutor's statement, without giving any further explanation as to how it is "incriminating" for the accused, namely the Applicant.

96. In this respect, the Court recalls the ECtHR case law, based on which, in the event that the regular courts did not assess the importance of the testimony of absent witnesses and the incriminating weight of other evidence in the trial for conviction of the accused , the Court itself must assess the relevance of the testimony of witnesses who were not present at the main trial and the incriminating weight of the other evidence.

97. The Court reiterates that (i) the accused, namely the Applicant, at no stage of the criminal proceedings had the opportunity to challenge the evidence of the absent witnesses; (ii) the Basic Court itself held that the conviction of the accused is based only *"partially"* on the testimony of the accused S.R .; (iii) the Court recalls that the incriminating weight of the other evidence should have a particular weight in cases where the main witnesses did not attend the trial, while the testimony of the accused S.R given at the court hearing did not in fact accuse the Applicant of the commission of the criminal offense for which he was convicted. As noted above, this evidence only refers to the Applicant as the owner of the "Arizona" premise; whereas (iv) the case file and the reasoning of the Basic Court also include statements challenging the factual ownership of the Applicant's respective premise and any connection with the activities of this premise, including the statement of I.R and the Applicant himself. The Court does not challenge the fact that the testimonies of absent witnesses accuse the Applicant of the criminal offense for which he was convicted, but, based on the ECtHR case law, emphasizes the importance of the weight of other evidence in case the accused did not have the opportunity to challenge this evidence throughout the trial and was convicted based on extrajudicial evidence given by these witnesses.

98. The Court in this context also recalls the case *Schatschaschwili v. Germany* and in which, as explained above, in spite of a large number of other evidence, the Court declared the evidence of witnesses O. and P. as "*sole and decisive*" evidence for the Applicant's conviction, *inter alia*, because these witnesses were the only ones with direct knowledge of the events which resulted in the charge and conviction of the respective Applicant.

99. The Court also emphasizes the fact that, beyond the ECtHR case law, the procedural provisions of the relevant Criminal Codes themselves lay down the same restrictions as to the conviction of a defendant based on a decisive evidence which cannot be challenged by the defendant or his defense counsel during questioning during any phase of criminal proceedings. This restriction is set out in paragraph 1 of Article 157 of the PCPC and paragraph 1 of Article 262 of the CPCRK. The decisions of the regular courts did not justify the circumstances of the concrete case from the perspective of these Articles, nor

did they clarify the relationship between them and Articles 368 of the PCPC and 338 of the CPCRK, respectively. Furthermore, the regular courts also disregarded Articles 15 (Treatment of victims of trafficking in human beings in criminal investigation and proceedings) and 19 (Ensuring safety of the victims or witnesses) of Law no. 04 / L-218 on the Preventing and Combating of Trafficking in Human Beings and Protecting Victims of Trafficking which, despite emphasizing the specific treatment to be given to these victims/witnesses throughout the trial in order to prevent their re-victimization, and listing of a number of procedural options to achieve this purpose, the abovementioned law does not stipulate that these victims/witnesses in trafficking cases cannot be interrogated at least indirectly at any stage of criminal proceedings by the defense counsel of the accused and that the latter may be found guilty on the basis of only their read statements even if they are the "*sole*" and "*decisive*" evidence against him.

100. Consequently and in the same line of argument and in particular considering the lack of other evidence with incriminating weight in the trial, the Court must find that the testimonies of witnesses who did not attend the court hearing are "*decisive*" and "*carried significant weight*" in the conviction of the accused, namely the Applicant.

101. However, the Court reiterates, based on the case law of the ECtHR, that the admission as evidence of the statements of absent witnesses, even if such evidence is "*sole*" or "*decisive*" against the accused, does not automatically result in a violation of paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR.

102. The ECtHR, through its case law, has determined that the admission of such evidence, and taking into account the risks it reflects to a fair trial, is very important factor and which must be balanced by counterbalancing factors. Accordingly, and thereafter, the Court will consider the third remaining issue of the *Al-Khawaja and Tahery* test, namely the counterbalancing factors in the Applicant's trial.

(iii) Counterbalancing factors

103. The Court initially reiterates that the extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair. These counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence. Therefore, considering that the Court has already held that in the circumstances of the present case, the testimonies of the absent witnesses are "*sole*" and "*decisive*" for the conviction of the accused, namely the Applicant, it must analyze the existence of other counterbalancing factors in this trial, in order to ensure the credibility of the testimonies of the absent witnesses.

104. In this regard, the Court recalls that the ECtHR noted that even in cases where a hearsay statement is the sole or decisive evidence against a defendant, its

admission as evidence will not automatically result in a breach of paragraph 1 of Article 6 of the ECHR. However, in such cases, the respective court must be subjected to the strongest procedural safeguards. The most essential question in each case is whether there are sufficient counterbalancing factors in place that enable the reliability of the respective evidence. This would permit a conviction to be based on such evidence only if it is sufficiently reliable. (See case of ECtHR *Schatschaschwili v. Germany*, cited above, paragraph 147).

105. Moreover, the general principles elaborated above identify a number of important measures in this context, and which could serve as counterbalancing factors. One of the first important measures is for the regular courts to approach this evidence carefully and provide detailed reasoning as to the credibility of the evidence. Another important measure is the existence of any video recording of this evidence. Moreover, the existence of additional evidence which could indirectly confirm the testimony of absent witnesses is also relevant. Another important element is the possibility for the defense of the accused to contact in writing the absent witnesses. Finally, it is quite important that the accused and his defense have had any opportunity to challenge the evidence of absent witnesses at any stage of the criminal proceedings, including the investigation phase. (See case of ECtHR *Schatschaschwili v. Germany*, cited above, paragraph 147).

106. Also, in assessing the counterbalancing factors, based on the ECtHR case law, the Court should consider some of the following issues: (i) the court's approach to extrajudicial evidence; (ii) the existence and weight of other incriminating evidence; and (iii) measures and procedural safeguards which have made it possible to compensate for the disadvantage created by the inability of the accused to examine witnesses against him. (See, in this regard, the ECtHR approach in case *Schatschaschwili v. Germany*, cited above, paragraph 120).

107. With regard to the first issue, the Court notes that the decisions of the regular courts do not contain any reasoning as to the diligence required in the assessment of this evidence, considering the fact that the accused and his defense, and also the trial panel itself, did not have the opportunity to ask questions and analyze the behavior of witnesses at the court hearing and to create a clear impression regarding the credibility of witnesses. Moreover, the decisions of the regular courts do not contain a detailed reasoning as to the credibility of this evidence.

108. As to the second issue, namely the existence and weight of the other incriminating evidence, the Court points out three issues. First, as stated above, the Judgment of the Basic Court is based on the testimony of five (5) witnesses who were not present at the trial, and who, the accused and his defense counsel, never had the opportunity to examine. Having regard to the nature of the criminal offense , which the Applicant is charged with, the ECtHR also holds that the relevant authorities should have in mind that witnesses might not be present at the main trial, and that they should have given the opportunity to the defense counsel of the accused, to confront witnesses at the investigation stage. (See ECtHR case *Schatschaschwili v. Germany*, cited above, paragraph 157; *Vronchenko v. Estonia*, cited above, paragraph 60; and

Rosin v. Estonia, Judgment of 19 December 2013, paragraph 57). Secondly, the Court notes that the Victims' Advocate from the Office for the Protection of Victims of Violence, S.T, was present at the trial and only stated that he joins the statement filed by the State Prosecutor. Thirdly, the Basic Court has also stated that it based its decision *"partly"* on the testimony of the accused, S.R. As noted above, this evidence is not particularly incriminating and the regular courts, including the Supreme Court, have in no way reasoned how such evidence counterbalances the fact that their decisions were based on the testimony of absent witnesses. The Supreme Court, in its Judgment, has stated in this context the following:

> *"In particular, the court assessed the depositions of the heard witnesses which it considered credible because they found support in other evidence and partly in the convictions' defense, for which pages 13-17 provided legal reasons".*

109. However, as noted above, it follows that (i) the Judgment of the Basic Court was based on the testimony of the absent witnesses; (ii) has itself stated that it is based only *"partially"* on the testimony of the accused, S.R, the only testimony given at the court hearing; (iii) never refers to the content of the statement of the Office for the Protection of Victims of Violence; and (iv) the regular courts, including the Supreme Court, have not clarified how the other evidence obtained at the trial supports the extrajudicial evidence on the basis of which they have found the Applicant guilty.

110. Finally, and with regard to the third case, namely the measures and procedural safeguards which made possible the compensation for the disadvantage created by the inability of the accused to examine the witnesses against him, the Court notes that (i) the accused, namely the Applicant had the opportunity to present his version regarding the criminal charge against him; however (ii) the latter did not have the opportunity, at any stage of the criminal proceedings, to confront the witnesses against him, the *"decisive"* evidence, based on which he was found guilty.

111. The Court, in terms of counterbalancing factors, notes that the Basic Court, in addition to the testimonies of absent witnesses, had some additional evidence concerning the criminal offense for which the Applicant was found guilty. However, the Court notes that the regular courts had in no way clarified the relationship between the testimonies of the absent witnesses and other incriminating evidence, and moreover, had not taken any procedural measures nor provided additional reasoning during the court hearing, measures which would have compensated for the disadvantage created by the accused, namely the Applicant, being unable to directly examine the witnesses against him. Therefore, the Court must find that the counterbalancing factors were not sufficient to enable a fair assessment of the credibility of the extrajudicial evidence on the basis of which the Applicant was convicted.

112. Finally, having regard to the circumstances of the present case, it was held that (i) there was no good reason for the non-attendance of the witnesses in the trial thereby making impossible to the accused, namely the Applicant, to

challenge the testimonies and examine the witnesses against him; (ii) the testimonies of absent witnesses is the "*sole*" and "*decisive*" basis for the conviction of the accused, namely the Applicant; and (iii) there is no sufficient counterbalancing factor, including strong procedural safeguards, which could compensate for the disadvantage created to the accused and his defense as a result of the inability to examine the relevant witnesses, the Court states that all three conditions of the ECtHR test, *Al-Khawaja and Tahery*, have been fulfilled, and consequently, the procedural guarantees embodied in paragraph 4 of Article 31 of the Constitution in conjunction with item 6 of paragraph 3 of Article 6 of the ECHR have not been complied with; and, as a consequence, the proceedings as a whole, have not been fair, contrary to paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR. The Court notes that this finding is not related to and does not prejudice the guilt or innocence of the Applicant.

Conclusions

113. Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court in conjunction with Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals and Judgment [P. No. 162/ 2004 PR1] of 2 December 2016 of the Basic Court, were rendered contrary to the procedural safeguards guaranteed by paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR, because the witnesses against the accused, namely the Applicant, did not attend the court hearing and the Applicant and his defense were not able to examine the witnesses against him at any stage of the criminal proceedings.

114. The Court throughout this Judgment clarified that the non-attendance of witnesses at the trial and the inability of an accused and his defense to examine the relevant witnesses, despite the crucial importance of these two aspects, does not necessarily result in a violation of paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, because the fairness of a proceeding must be assessed in its entirety. However, given the crucial importance of these rights, the courts, based on the ECtHR case law, namely the test known as *Al-Khawaja and Tahery*, must establish whether (i) there was a good reason for the non-attendance of witnesses at the trial; (ii) whether the testimony of these witnesses is the "*sole*" or "*decisive*" basis for the conviction of the accused; and (iii) whether there was sufficient counterbalancing factor. The Court in this Judgment clarified that, in the circumstances of the present case, none of these conditions has been fulfilled.

115. Therefore, the Court found that Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court in conjunction with Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals and Judgment [P No. 162/2004 PR1] of 2 December 2016 of the Basic Court, are incompatible with the procedural guarantees set out in Article 31 of the Constitution and Article 6 of the ECHR.

Request for non-disclosure of identity

116. The Court notes that the Applicant in his Referral also requested that his identity be not disclosed.

117. The Applicant in relation to the request for non-disclosure of identity reasons as follows *"The reasons are personal to the Applicant. The referral was filed by the lawyer Selman Bogiqi"*.

118. In this respect, the Court refers to paragraph 6 of Rule 32 (Filing of Referrals and Replies) of the Rules of Procedure, which provides:

> *"(6) Parties to a referral who do not wish their identity to be disclosed to the public shall so indicate and shall state the reasons justifying such a departure from the rule of public access to information in the proceedings before the Court. The Court by majority vote authorizes non-disclosure of identity or grants it without a request from a party. When non-disclosure of identity is granted by the Court, the party should be identified only through initials or abbreviations or a single letter".*

119. Based on the reasoning presented by the Applicant, the Court considers that the request for non-disclosure of the identity is not justified and as such, it is not a basis to grant it. (See the case of the Court, KI74/17, Applicant *Lorenc Kolgjeraj*, Resolution on Inadmissibility of 5 December 2017).

120. Therefore, the Applicant's request for non-disclosure of identity is to be rejected.

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 (1) (a) of the Rules of Procedure, in the session held on 15 January 2020, with majority of votes

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE invalid Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court of the Republic of Kosovo;

IV. TO DECLARE invalid Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals of Kosovo;

V. TO DECLARE invalid Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Serious Crimes Department of the Basic Court in Ferizaj;

VI. TO REMAND the case for retrial in the Serious Crimes Department of the Basic Court in Ferizaj, in accordance with the findings of this Judgment;

VII. TO ORDER the Serious Crimes Department of the Basic Court in Ferizaj to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court;

VIII. TO NOTIFY this Judgment to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

IX. 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.