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

Prishtina, on 01 October 2020
Ref.No.:RK 1622/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI01/19

Applicant

Fatos Rizvanolli

Constitutional review of Judgment PML. No. 242/2017 of the Supreme Court of Kosovo, of 30 April 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Fatos Rizvanolli (hereinafter: the Applicant), represented by attorney at law Besnik Berisha from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment PML.No.242/ 2017 of the Supreme Court of Kosovo,of 30 April 2018, in conjunction with Judgment PAKR. No.100/2017 of the Court of Appeals, of 23 May 2017 and the Judgment PKR-65/16 of the Basic Court in Ferizaj, of 18 January 2017.

3. The challenged Judgment [PML.No.242/2017] of the Supreme Court was served on the Applicant on 14 September 2018.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged decisions, which allegedly have violated Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 33.1 [The Principle of Legality and Proportionality in Criminal Cases], 36 [Right to Privacy] and 54 [Judicial Protection of Rights], of the Constitution of the Republic of Kosovo in conjunction with Articles 6 (Right to a fair trial), 7 (No punishment without law) and 8 (Right to respect for private and family life) of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

5. The Referral is based on Article 113.1 and 7 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo [hereinafter: the Constitution], Articles 22 [Processing of Referrals] and 47 [Individual Request] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 4 January 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 9 January 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (presiding), Radomir Laban and Nexhmi Rexhepi (members).

8. On 14 February 2019, the Applicant was notified about the registration of the Referral and was requested to submit evidence on the date of receipt of the challenged decision. On the same date, a copy of the Referral was sent to the Supreme Court.

9. On 3 February 2020, the Court requested the case file from the Basic Court in Ferizaj. On 5 February 2020, the Basic Court in Ferizaj submitted the case file to the Court.

10. On 1 July 2020, the Review Panel considered the report of the Judge Rapporteur Bekim Sejdiu, and by the majority of votes, voted against the proposal of the Judge Rapporteurl to declare the Referral admissible and to consider the case on the bais of its merits.

11. On the same date, the Judge Rapporteur pursuant to Rule 58 (4) [Deliberations and Voting] of the Rules of Procedure requested from the President of the Court to appoint another Judge, from the majority of the Review Panel, to prepare the Resolution on Inadmissibility.

12. On the same date, pursuant to the above rule, the President of the Court appointed Judge Radomir Laban, as one of the judges of the Review Panel, to prepare the Resolution on Inadmissibility.

13. On 2 September 2020, Judge Radomir Laban presented the Resolution on Inadmissibility before the Court.

Summary of facts

A) PROCEDURES FOR OBJECTING THE EVIDENCE AND DISMISSING THE INDICTMENT

14. On the basis of the case file it results that, on 10 April 2014, the Special Prosecution of the Republic of Kosovo (hereinafter: the Special Prosecution) issued a ruling to initiate investigations against the Applicant and several other persons (S.T., I.B., Y.B., I.K., A.R., B.B., J.R., Sh.K., J.K., B.Sh., A.F., L.K., L.K., F.K., H.K., I.K., Z.Q.,), due to reasonable suspicion that the above-mentioned persons had committed the criminal offences : *Recruitment for terrorism*, provided by Article 139 of the Criminal Code of Kosovo; *Inciting national, religious or ethnic hatred, discord or intolerance*, provided by Article 147 of the Criminal Code of Kosovo; *Organization and participation in a terrorist group*, provided by Article 143, para.2 of the Criminal Code of Kosovo; *Incitement to commit a terrorist offence*, provided by Article 141 of the Criminal Code of Kosovo.

15. On 24 March 2016, the Special Prosecution Office submitted to the Basic Court in Ferizaj - Department for Serious Crimes (hereinafter: the Basic Court) the Indictment PPS.No.39/2014, against the Applicant, for the criminal offence of *Recruitment for terrorism in co-perpetration*, provided by Article 139, in conjunction with Article 31, of the Criminal Code of Kosovo.

16. On an unspecified date, the Applicant objected the admission of evidence and requested the dismissal of the indictment, in the Basic Court.

17. On 30 May 2016, the Basic Court, by Decision PKR.No.65/2016, rejected as unfounded the request for dismissal of the indictment and the objection of the evidence, submitted by the Applicant's defense.

18. On an unspecified date, the Applicant had filed an appeal with the Court of Appeals, alleging essential violations of the provisions of criminal procedure (Article 384 paragraph 1 item 1.7 and 1.12 and paragraph 2 item 2.1 of the CPCK) , as well as erroneous and incomplete determination of the factual situation, by proposing to the Court of Appeals in Prishtina, to amend the appealed decision and approve the objection of the evidence and the request for dismissal of the indictment.

19. On 20 June 2016, the Court of Appeals, by Decision Pn. no.454 / 16, rejected as unfounded the Applicant's appeal and confirmed the decision of the Basic Court PKR. No. 65/2016, of 30 May 2016.

20. On 20 June 2016, the Special Prosecution, relying on Articles 240.1 and 252.5 of the Criminal Procedure Code No. 04/L-123 (hereinafter: the CPC), filed with the Basic Court the amended indictment against the Applicant. , due to the criminal offense: *Recruitment for terrorism in co-perpetration*, as per Article 139 in conjunction with Article 31 of the Criminal Code of the Republic of Kosovo (hereinafter: CCK). By this indictment, the Applicant was charged with the same criminal offence but with a more extensive description.

21. On an unspecified date, the Applicant had objected the admission of evidence requesting the dismissal of the amended indictment, in the Basic Court in Ferizaj.

22. On 5 August 2016, the Basic Court in Ferizaj, through Decision PKR.no. 65/2016, rejected as unfounded the Applicant's request to object the evidence and dismiss the indictment.

23. On an unspecified date, the Applicant filed an appeal against the decision of the Basic Court, alleging essential violations of the provisions of criminal procedure and erroneous and incomplete determination of the factual situation, by proposing to Court of Appeals in Prishtina, to amend the appealed ruling and the objection of the evidence and approve the request for dismissal of the indictment.

24. In the above-mentioned appeal, the Applicant stated: *"[...] the appealed decision is contradictory, unclear, not well reasoned and was not drafted in accordance with Article 370 para.7 of the CPCK, since all the evidence attached in support of the indictment do not substantiate the well-founded suspicion that the client had called for or encouraged any other person to become a member of the terrorist group ISIS, to take part in the commission of the terrorist offence or the activity of a terrorist group, therefore in the absence of evidence to support a well-founded suspicion and due to legal inadequacy and inadmissibility of evidence such as: official memorandum No. Ref.06/1-03/330/2016, of 24.05 .2016, minutes on the interview of Witness I.S., authorization from the Economic Bank,*

Video recording of Prishtina Airport, Retroactive ordinance, lack of Ordinance for obtaining the video recording and the communications transcripts between Fatos Rizvanolli and L.M. and UGJK No.34/14, of 15.03.2016, Confirmation of the Vehicle Registration Center, statement of I.B., notification of termination of the rent agreement and notification to the Kosovo Police by N.SH. "Auto Prishtina", the defense counsel considers that the indictment against his client results to be contrary to the law and without sufficient evidence for proceeding further."

25. On 25 August 2016, the Court of Appeals, a trial panel composed of Judges H.H., D.M. and Xh.A., by Decision PN.No.609/16, rejected as unfounded the Applicant's appeal filed against the decision of the Basic Court No.65/2016, of 5 August 2016.

26. The Court of Appeals, among other things, explained that: *"According to the assessment of the Court of Appeals, the above appeal claims are unfounded. Because, the Court of first instance by the challenged ruling on dismissal of the indictment has taken care according to the statements from the objections to assess and correctly provide sufficient reasons that the indictment filed by the Basic Prosecution in Ferizaj, contains sufficient evidence to support the well-grounded suspicion that the accused has committed the criminal offence with which he is charged, while now there are no convincing arguments or arguments that contain any of the legal grounds for which the indictment may be dismissed, as required by the provisions of Article 250 par. 1 subpara.1.1,1.2,1.3 and 1.4 of the CPCK [...][...] The Court of first instance has provided extensive reasons regarding the grounded suspicion concerning the disputed evidence and has correclty established that there are sufficient admissible evidence in the legal-procedural aspect, by basing upon upon the evidence which are contained in the case file that in the actions described in the indictment, now there exist essential elements of the criminal offence with which the accused has been charged [...] whereas the allegations of the defense counsel of the accused are now unfounded to have these evidence declared as admissible evidence, while in essence none of them contains any proof that would prove the contrary of the indictment, in order for the requests for dismissal of the indictment to have a legal basis".*

B) MAIN TRIAL AND LEGAL REMEDY PROCEDURES

27. On the basis of the case file it is noticed that there were several court hearings held in the Basic Court, respectively on 08.04.2016, 14.04.2016, 04.07.2016, 11.10.2016, 04.11.2016, 25.11.2016, 21.12.2016, 22.12. 2016, 29.12.2016 and 30.12.2016.

28. Meanwhile, from the Applicant's Referral it is noted that on 29 December 2016, the Special Prosecution had again amended the indictment, by specifying its enacting clause and charging the Applicant with the criminal offence *"Participation in terrorist groups"*, provided by Article 113, 2 of the CCK, in conjunction with Article 23 of the CCK.

29. On 18 January 2017, the Basic Court, by Judgment PKR-65/16, found the Applicant guilty and sentenced him to imprisonment in lenght of 7 (seven) years, for the criminal offence "Recruitment for terrorism in coperpetration and continuation", from Article 139, in conjunction with Article 31 of the CCK. In the sentence imposed on the Applicant was calculated the time spent in detention on remand, from 16 March 2016.

30. This Judgment, amogn other things, reasoned as follows: *"... on the basis of evidence presented at the main trial it was established that the accused during the time period from 2011-2014, in co-perpetration with the now convicts ZQ and IB, has called upon other persons to take part in committing terrorist acts and has supported the terrorist activities of ISIS and Al Nusra organization, by propagating and posting on electronic equipment-computers, photographs with content and calls for jihad [...] by all the presented and assessed evidence, it has been established that the accused during the time period 2011-2014 in order to support and facilitate terrorist activities for persons who participated in the wars in Syria, as members of organizations ISIS and Al Nusra, has provided funding and material resources to facilitate the actions of these individuals who have participated in these organizations, thus making available to them the use of his vehicles which these persons have used for traveling and for engaging in activities of these terrorist organizations [...] Defendant Fatos Rizvanolli, was acquitted of charges concerning the counts 2, 3 and 5 of the indictment for the criminal offence committed in continuation and in co-perpetration organization, support and participation in groups as it has not been proven that the defendant has committed this criminal offence".*

31. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the aforementioned Judgment, alleging essential violations of the procedural provisions, erroneous and incomplete determination of the factual situation, violation of criminal law and the decision on the criminal sanction, by proposing to have the appeal approved, and the challenged judgment amended so that the Applicant is acquitted of the charge, or alternatively the judgment to by annulled and the case to be remanded to the court of first instance for retrial.

32. On 23 May 2017, the Court of Appeals, by Judgment PAKR.no.100/2017, rejected as unfounded the Applicant's appeal and confirmed the Judgment of the Basic Court, PKR-65/16, of 18 January 2017.

33. The Court of Appeals, among other things, reasoned that: *"[...] all the photographs posted on his electronic equipment - computer and telephone, calls for jihad, parts of the Quran, photos of the war in Syria resulting from the notification report - analysis of the examination of electronic equipment of the accused bearing the number no. ref 06/1-03 /385-2016 of 14.07.2016 lead to the sole conclusion that the accused in co-perpetration with the now convicts ZQ and IB has called upon other persons to participate in the commission of terrorist acts and has supported the terrorist activities of the organizations "ISIS" and "AL Nusra" as correctly concluded by the court of first instance. Then, the very*

fact that the accused has made available for use his cars to the persons ShA, SH, ZQ, LM and IB, which they have used for traveling, and that these persons were engaged in the activities of terrorist organizations, a fact by which it is established that all rented cars were a property of the business "Auto Market" in 2014 that thereupon passed into the ownership of NTSH "Tosi", whereas based on the books for registration of the business activities of these companies it results that records were kept on all rented cars and the sale and purchase of other cars, but no records were kept on the cars rented to the above-mentioned persons. It is more than clear that the accused in his actions has consumed the element of another criminal offense - providing funds or material resources to persons who participated in the war in Syria as members of terrorist organizations (ISIS and AL NUSRA)."

34. On an unspecified date, the Applicant filed a request for protection of legality with the Supreme Court, against the aforementioned Judgments of the Court of Appeals and the Basic Court, alleging that they were characterized by essential violations of the provisions of criminal procedure and violations of the criminal law, by proposing to have the challenged judgments amended so that he be acquitted of the charge, or alternatively the judgments to be annulled and the case to be remanded to the court of first instance for retrial.

35. In sum, the main allegations and arguments presented in the request for protection of legality were that *"The Judgment of the Court of Appeals contains essential violations of the provisions of the Criminal Procedure, because the Court of Appeals has failed to provide clear, logical, legal and coherent reasons for the rejection of the allegations made by the Defense, in the appeal filed against the Judgment of the Basic Court, as well as to indicate which violations of the law it has examined ex officio. Acting in this way, the Court of Appeals has failed to elaborate and reason justly and correctly, the reasons for which the Appeal against the Judgment has been filed, as well as to elaborate specifically and precisely that there is no violation of Article 394.1 of the CPC, consequently including in its Judgment essential violations of the provisions of criminal procedure."*

36. Further in this Referral, the Applicant stated that in his appeal with the the Court of Appeals, he had argued that the Judgment of the Basic Court was based entirely on inadmissible evidence (by mentioning each of them separately).

37. On 30 April 2018, the Supreme Court, by Judgment Pml.no.242/2017, rejected as unfounded the Applicant's request for protection of the legality, filed against the Judgment of the Basic Court, PKR-65/16, of 18 January 2017 and Judgment of the Court of Appeals, PAKR.no.100/2017, of 23 May 2017.

38. The Supreme Court reasoned that *"The judgment of the first instance contains reasons on the decisive facts and as to why a fact is considered established or unproven. This judgment assessed the defense of the convict and each piece of*

evidence administered separately and in conjunction with each other, as required by the provision of Article 361.para.2. of the CPCK."

39. Further, the Supreme Court addressed separately the allegations and arguments raised by the convict (Applicant), regarding the following issues: a) whether the Applicant is the owner of the vehicle rental firm "Tosi" , as well as whether through this firm was provided support by the provision of vehicles in service, to persons suspected or convicted of terrorism (ShA, SH, ZQ, LM and IB); b) whether the Applicant has enabled the trip to Syria for the persons PB, ShK, HD, KM and IB; c) whether the court of first instance has based its judgment also on the statement of IB given not only in the main trial but at the police; d) the admissibility as evidence of the material with propaganda content in support of the terrorist activities of ISIS and Al Nusra; e) expanding of the indictment by the State Prosecutor; f) admissibility as evidence of court orders for implementation of covert measures; h) confiscation of the Applicant's belongings; i) erroneous application of the criminal law relating to the sentence imposed on the Applicant. In relation to these allegations raised in the request for protection of legality, the Supreme Court did not find any violation by the lower courts.

Applicant's allegations

40. The Applicant alleges that the decisions of the regular courts violated Articles 31 [Right to Fair and Impartial Trial], 32[Right to Legal Remedies], 33.1 [The Principle of Legality and Proportionality in Criminal Cases], 36 [Right to Privacy] and 54 [Judicial Protection of Rights] of the Constitution.

41. The Applicant articulates the violation of the above-mentioned constitutional provisions by alleging violations of: (i) the principle of a reasoned judicial decision, violation of the right to appeal in the substantial sense, violation of the principle of free evaluation of evidence in proceedings criminal, the degree of the principle of impartiality of the court, violation of the right to hear witnesses in connection with the violation of the adversarial principle; (ii) the use of evidence in unlawful manner and in violation of constitutional rights; (iii) violation of the right to privacy; (iv) the consecutive violation of the rights of the defense, of the principle of equality of arms, and of the principle *in dubio pro reo*, and; (v) violation of the principle of no punishment without law.

Allegation for a violation of the right to a reasoned decision

42. As for the right to a reasoned court decision, the Applicant alleges that the Supreme Court: (i) has completely disregarded a significant number of essential violations; (ii) has failed to assess the legality of the allegations by failing to provide any response; (iii) has completely arbitrarily distorted and camouflaged the content of the case file, which has resulted in an open contradiction between the reasoning of the judgment and the case file; and, (iv) has failed to logically and coherently link the applicable rules to the facts of the case, as required by the right to a reasoned decision.

43. In order to support the allegation for a reasoned decision, the Applicant refers to cases KI72/12 and KI135/14 from the case law of the Court and some cases from the case law of the ECtHR, *Hiro Balani v. Spain, Hirvisaari v. Finland, Tatishvili v. Russia*, etc.

Allegation for a violation of the principle of impartial tribunal

44. As for the principle of impartiality of the court, the Applicant alleges: *"The Court of Appeals of Kosovo, when reviewing the Appeal against the Judgment of the Basic Court, has violated the principle of impartiality, due to the unlawfulness of the composition of the trial panel, because the presiding judge, Judge H.H., as well as the referring judge D.M., had previously participated in the same criminal procedure, on the occasion of the confirmation of the Indictment against Mr. Fatos RIZVANOLLI on 25.08.2016, in the same capacity".*

45. The Applicant also alleges: "*As it results, Judge HH has taken part in the trial panel twice in the capacity of the Presiding Judge in which the appeals against the Decision on confirmation of the Judgment of the Basic Court in Ferizaj were reviewed, respectively. In the same way, also Judge DM has taken part in the trial panel twice as a referring judge and member, trial panels that have reviewed the appeals against the Decision on confirmation of the Indictment and against the Judgment of the Basic Court in Ferizaj [...] In the above mentioned factual circumstances it results that Judges HH and DM have reviewed and basically resolved the criminal case against Mr. Fatos RIZVANOLLI, by manifesting their conviction regarding his guilt."*

46. The Applicant further alleges: "*Judges HH and DM, in conformity with Article 39.2 of the CPC, should have informed the Court of Appeals ex officio of the necessity of their exclusion from the composition of the trial panel reviwing the Appeal filed against the Judgment of the Basic Court in Ferizaj, precisely because of their participation in the same criminal case in an earlier decisive phase, for the reason that the Decision PN. No.609/16, of 25.08.2016, constituted an official letter included in the case file documents".*

47. The Applicant alleges that also another judge, MM, had adjudicated his case before, for which he states: *"Judge MM was first involved in the criminal case against Mr. Fatos RIZVANOLLI on the occasion of issuing the Decision PN.No.454/16, of 20.06.2016, whereby was rejected as unfounded the appeal filed by the defense of Mr. Fatos RIZVANOLLI against the first Decision of the Basic Court regarding the dismissal of the Indictment and the objection of the evidence [...] Although Judge MM did not participate in the review of the aforementioned Appeal, based on reliable and protected information in possession of the authprized representative of Mr. Fatos RIZVANOLLI, in accordance with Law 04/L-043 on Protection of Informants, it results that the concrete case of Mr. Fatos RIZVANOLLI was treated and decided by a single judge, precisely ONLY by Judge MM, who also drafted the Judgment of the Court*

of Appeals PAKR.No. 100/2017, which confirmed the guilty verdict pronounced by the Basic Court in Ferizaj [...] despite our inability to reveal the identity of the informant, due to the substantial guarantees provided by the aforementioned legislation, the Constitutional Court can use its direct access, by ensuring the necessary technical information on WHO has drafted the Judgment PAKR.No.100/2017, on WHICH computer was it drafted, and consequently WHO has handled and de facto decided the the criminal case against Mr. Fatos RIZVANOLLI".

48. In order to support the allegation for violation of the principle of impartiality of the court, the Applicant refers to case no. KI06/ 12 from the case law of the Court and several cases from the case law of the ECtHR, *Kyprianou v. Cyprus, Piersack v. Belgium, Grieves v. United Kingdom*, etc.

Allegation for violation of the right to hear witnesses ZQ and ShA

49. As for the right to hear witnesses (adversarial principle), the Applicant alleges that during the criminal proceedings the regular courts violated the constitutional right guaranteed by Article 31.4 of the Constitution, due to the refusal to hear the witnesses ZQ and ShA.

50. The Applicant alleges: *"The constitutional right of Mr. Fatos RIZVANOLLI to call the relevant witnesses in relation to the incriminating facts with which he was charged, has been systematically violated at all stages of the criminal proceedings, including the pre-trial procedure, the trial in the first instance, the decision on the appeal in the second instance, and the decision-making upon the extraordinary legal remedy at the Supreme Court of Kosovo."*

51. The Applicant alleges: *"that the refusal of the Basic Court to hear the witness ZQ is unlawful because the name of the witness in question is mentioned in the indictment as a person with whom the Applicant has cooperated in the commission of criminal offenves". The name of the witness ZQ is also present in point I of the enacting clause of the judgment of the basic court, which is also fully upheld by the court of appeals."*

52. In this respect, the Applicant points out the reasoning of the Basic Court for refusing to hear the witness ZQ: *"... The proposal to have ZQ heard as a witness is rejected as his presence and hearing as a witness will not be the subject of a criminal case and that the actions of the indictment in this case have no relation or relevance to the actions of the accused."*

53. The Applicant also points out the relevant part of the indictment (PPS no. 39/2014) relating to the witness ZQ: *"... intentionally with the defendants ZQ, I.B. and S.T. has participated in the commission of terrorist acts and in the activities of the terrorist group ... ". The Applicant adds: "This finding of the Basic Court, which is unlawfully and illogically accepted by the Court of Appeals and is completely ignored by the Supreme Court, comes into contradiction with the*

content of the indictment PPS. no. 39/2014, submitted on 20.06.2016, on the basis of which the main trial was held."

54. In view of the foregoing, the Applicant concludes: "*For these reasons, the reasoning of the Basic Court on the rejection of the proposal to call ZQ as a witness, which is also supported by the Court of Appeals, is arbitrary and seriously violates the right of Mr. Fatos RIZVANOLLI to call witnesses who can shed light on the facts, a right which is guaranteed by Article 31.4 of the Constitution of the Republic of Kosovo*".

55. Whereas as for the refusal of the Basic Court to hear the witness ShA, the Applicant alleges: *"In the same way, even though in point I of the enacting clause of the judgment of the basic court, which is fully accepted by the Court of Appeals, Mr. Fatos RIZVANOLLI is charged with an incriminating action of making available, on 17.10.2011, a vehicle of type "Toyota", with license plates 01-877-CF, in favor of the person ShA, the Basic Court has rejected the defense proposal to call Mr. ShA in the capacity of a witness with the reasoning that "his presence in court and securing his testimony directly in the court, is very difficult and impossible", thus distorting the request of the defense, without providing even a single reason as to why his testimony is impossible to be secured, as well as without making even a single effort to summon Mr. ShA as a witness."*

56. The Applicant states that his defense did not request for witness ShA to testify by being physically present but via the video link. The Applicant adds that the refusal to hear the witness ShA was arbitrary on which occassion the Basic Court stated: *"His presence in the Court and securing his testimony directly in the Court is very difficult and impossible."*

57. In view of the foregoing, the Applicant alleges: "*The Basic Court, even though it knew the whereabouts of ShA, because it possessed an Extradition Report to Macedonia for him, did not make a single effort to establish a contact with the Macedonian authorities and to secure his testimony via the video link, in complete contradiction with [...] the procedural guarantees of Article 6.3 of the ECHR."*

58. In this respect, the Applicant adds: *"The refusal of the Basic Court was categorical and immediate, without having made the slightest attempt to at least establish a contact with the Macedonian authorities, as well as to request through legal aid, obtaining of the testimony of Shukri Ali via the video link."*

59. With respect to the refusal of the courts to hear witnesses ZQ and ShA, the Applicant adds: *"While on the one hand the Basic Court charges and convicts Mr. Fatos RIZVANOLLI for actions with incriminating relevance, which are accepted in entirety as such by the Court of Appeals, on the other hand, in a completely arbitrary manner, it prohibits Mr. Fatos RIZVANOLLI to call the witnesses, who can shed light on the facts for which Mr. Fatos RIZVANOLLI has been convicted."*

60. To support the allegation for the right to have the witnesses ZQ and ShA heard, the Applicant refers to case no. KI78/12, where, among other things, the Court had determined: *"The Constitutional Court has noted that persons alleging a violation of Article 6.3.d of the ECHR must prove that not only were they not allowed to call a certainwitness, but also that the hearing of the witness was absolutely necessary in order to establish the truth and that the failure to hear the witness violated the rights of the defense and the fairness of the proceedings as a whole."*

61. In this respect the Applicant concludes: *"In the present case, of Mr. Fatos RIZVANOLLI, are met all the aforementioned conditions, dictated by the case law of the ECHR and the Constitutional Court of Kosovo, as he was made unable to hear the witnesses ZQ and ShA, whose hearing was absolutely necessary to establish the facts included in the enacting clause of the indictment, for which he was later found guilty and sentenced to 7 years of imprisonment, which resulted in the restriction of the right of defense and affected the fairness of the criminal proceedings conducted against him, as a whole".*

62. In order to support the allegation for violation of the adversarial principle, the Applicant refers to case no. KI78/12 from the case law of the Court as well as to some cases from the ECtHR case law, *Al Khawaja and Tahery v. The United Kingdom, Tarau v. Romania, Graviano v. Italy, etc.*

Allegation for the use of evidence obtained in unlawful manner

63. As regards the use of obtained evidence in unlawful manner, the Applicant alleges: *"The Appeal Defense has confused the evidence challenged by the Defense, by erroneously assessing and treating the admissibility of the evidence requested during the main trial on 4.11.2016, with Prot.No. 3002, issued by the Directorate for Vehicle Registration on 23.11.2016 [...] The Defense has requested the exclusion of the Confirmation of the Civil Registration Agency, Directorate for Vehicle Registration Prot. No. 1159, of 27.05.2016 and not the exclusion of the Confirmation of the Civil Registration Agency, Directorate for Vehicle Registration, Prot. Nr. 3002, of 23.11.2016."*

64. In this regard, the Applicant states: *"The Court of Appeals either did not understand well for which evidence the exclusion was requested, despite the fact that the request was very detailed, or it wanted to reject at all costs this allegation of the Defense, by allegedly confusing it with another piece of evidence, provided during the main trial, despite the difference in dates, respectively 27.05.2016 and 23.11.2016."*

65. The Applicant also alleges that the above-mentioned evidence were reviewed outside the legal deadline: "It is inadmissible evidence because it was obtained AFTER THE LEGAL DEADLINE ALLOWED TO COMPLETE THE INVESTIGATIONS (Article 159 of the CPC - Investigation started on 10.04.2014 and legally this deadline has finished with the filing of the Indictment, respectively

no later than on 10.04.2016) and WITHOUT any Order or Ruling by the Presiding Judge for collecting new evidence (Article 288 of the CPC*)"*.

66. In support of the above allegation, the Applicant has submitted two tables in order to reflect the difference between the two pieces of evidence.

67. The Applicant further alleges: *"In the appeal filed against the Judgment of the Basic Court, the defense had submitted that the Notification Report-Analysis of the examination of electronic equipment, with Ref. No. 06 / 1-03 / 385-2016, of 14.07.2016, listed under ordinal number 2, was inadmissible evidence, as it did not meet the requirements of Article 138 CPC and Article 147 CPC."* The Applicant stated that the objection against the evidence in question was based on (i) the lack of authorization of the body that had performed the expertise; (ii) the absence of substantive requirements under Articles 138 and 147 of the CPC.

68. As to the foregoing, the Applicant adds: *"In view of the Notification Report - Analysis of the examination of electronic equipment with Ref. No. 06/1-03 / 385-2016, of 14.07.2016, it results that the expertise was NOT PERFORMED by the Kosovo Forensic Agency, as a body authorized by the Special Prosecution to perform the expertise, but by the Investigation Sector of the Directorate against Terrorism, a body that pertains the organigram of another state institution, namely the Kosovo Police and that has NEVER been AUTHORIZED by the Prosecution to perform the expertise of the equipment found at the Trading Enterprises NTSH "Tosi" and "AutoMarket"*.

69. The Applicant states: *"The Kosovo Forensic Agency and the Investigation Sector of the* Directorate *against Terrorism, which operates under the Kosovo Police, ARE TWO DIFFERENT BODIES, with different and separate responsibilities [...] Investigation Sector of the Directorate against Terrorism at the Kosovo Police DID NOT HAVE ANY AUTHORIZATION to perform the expertise of electronic equipment."*

70. The Applicant alleges that the Court of Appeals has contradictorily found that both bodies: the Kosovo Forensic Agency and the Investigation Sector of the Kosovo Police Counter-Terrorism Directorate have been authorized by the Prosecutor.

71. The Applicant also alleges that the challenged evidence "*has a substantial lack of mandatory data, provided by Articles 138 and 147 of the CPC."* The Applicant would like to bring to the attention of the Court that Article 138.3 of the CPC stipulates: *"an expert's report that does not compy with this Article shall not be admissible."*

72. The Applicant alleges that the objected expertise has substantial deficiencies in the mandatory data provided for in Articles 138 and 147 of the CPC, which include, inter alia: (i) the identity of the expert and the identity of the investigation (Article 138, par. 1, subpara. 1.1 CPC); (ii) the question material to either the the guilt or

innocence of the defendant or the extent og harm caused by the criminal offence (Article 138 par. 1, sub-par. 1.2 CPC); (iii) the expert's specialized training or experience, why t is relevan, and how current the training or experience is the (Article 138, paragraph 1, sub-paragraph 1.3 of the CPC); (iv) a description of the analysis (Article 138, par. 1, sub-par. 1.5 CPC); (v) an explanation that the analytical practices are generally accepted within the expert's field or has a scientific or technical basis (Article 138, par. 1, subpara. 1.6 CPC), etc..

73. In view of the above, the Applicant adds: *"In our opinion, the Court of Appeals has not read the content of the challenged document at all, because it is absurd and not at all logical that, if on the one hand, the content of the challenged Expertise by the Defense, lacks all the above data, while on the other hand, the substantial data that are missing are considered as present and genuine in a non-existent and contradictory way, by the Court of Appeals"*

Allegation for the statement of witness IB

74. As to the statement of witness IB, the Applicant states*: "In the appeal filed against the Judgment of the Basic Court, the defense of Mr. Fatos RIZVANOLLI had submitted that the Statement of I.B., given to the Police on 27.05.2015, listed under ordinal number 12, was inadmissible evidence, because the statement was given in the capacity of a suspected person and that, pursuant to Article 123.5 of the CPC, the statements of the defendant can be used as evidence ONLY against him, but not against other defendants."*

75. In this respect, the Applicant points out the reasoning of the Court of Appeals regarding the testimony of IB: "*it stands the fact that the court has rejected the Prosecutor's proposal to read the statement of I.B. given at the Police on 23.07.2015 and despite the fact, that the court bases the judgment upon this statement, it can not be stated that the Judgment is based on inadmissible evidence, **because this statement has not even been administered**, and basing of the Judgment in this statement does not make the judgment legally unstable when considering the fact that this statement is not the sole decisive evidence on which the Judgment is based, respectively the single evidence, because the Court's conclusion regarding the guilt of the accused is based on an abundance of evidence."*

76. As regards the above-mentioned reasoning of the Court of Appeals, the Applicant states*: "This assessment of the Court of Appeals, which is also fully upheld by the Supreme Court, is erroneous, unlawful, and consequently arbitrary, because the Defense of Mr. Fatos RIZVANOLLI has never submitted that the Judgment is made legally unstable simply by the physical presence in the case file of IB's statement, given at the Police on 23.07.2015, but it is made such by the USE and BASING of the Judgment upon this statement, which was rejected and was never administered as evidence during the main trial against Mr. Fatos RIZVANOLLI [...] Since the statement of IB, given at the Police on 23.07.2015, WAS NEVER PROCESSED AS EVIDENCE DURING THE MAIN TRIAL, it should not have*

been used in the Judgment of the Basic Court… […]such an essential violation by the Basic Court, contrary to the procedural obligation under Articles 257.3 and 361.1 of the CPC, should not have been tolerated at all by either the Court of Appeals or the Supreme Court, moreover it should have not been camouflaged and legitimized, as done by the courts in question which have acted in arbitrary and unlawful manner […] on the basis of the content of the case file, it results that the SOLE EVIDENCE, which confirms point II of the enacting clause of the Judgment of the Basic Court, which is also upheld in its entirety by the Court of Appeals and the Supreme Court, is exactly and exclusively the Statement of IB, given at the Police on 23.07.2015, which the Basic Court decided not to administer as evidence during the main trial against Mr. Fatos RIZVANOLLI."

Allegation for violation of the right to privacy

77. As regards the violation of the right to privacy, the Applicant alleges: "*In the present case of Mr. Fatos RIZVANOLLI, his Defense, during the entire course of the criminal proceedings conducted against him, has consistently challenged the legality and constitutionality of the following Ordinances, requesting their severance from the case file: (i) Ordinance for Covert photographic or video surveillance in private places, of 10.04.2014; (ii) Ordinance for covert photographic or video surveillance in private places and covert monitoring of conversations in private places, of 10.04.2014; (iii) Ordinance for metering of telephone calls dated 10.04.2014; Ordinance for the implementation of covert and technical measures of surveillance and investigation of 10.04.2014; (iv) Order for covert measures, interception of communications, reading of SMS messages and metering of telephone calls, of 08.05.2015; (v) Ordinance for the extraction of the register of telephone calls and SMS messages, of 13.05.2014; (vi) Order for covert measures, Interception of communications, Reading of SMS messages and Metering of telephone calls, of 22.12.2014.*"

78. In view of the foregoing, the Applicant adds: *"Such evidence have been challenged due to their unconstitutionality, because the Court has failed to apply the PROCEDURAL OBLIGATION FROM ARTICLE 88 CPC, as it HAS NOT EXPLAINED THE REASONS HOW AND WHY the information obtained through a covert investigative measure, is likely to assist in the investigation of the criminal offense and WHY the investigation could not be conducted through other less intrusive investigative means […] The authorized representative of Mr. Fatos RIZV ANOLLI respectfully submits that the unlawfulness of the Ordinances for authorizing and implementing covert measures of investigation and surveillance, has resulted in violation of the right to privacy, under Article 36.3 of the Constitution of the Republic of Kosovo, and inter alia Article 8 of the ECHR, due to the failure of the courts to justify the necessity and proportionality of the measures in question […] all the above-mentioned ordinances lack the reasoning on how and why the information provided through the covert measure is likely to assist in the investigation of criminal offenses and why the investigation could not be conducted through other less intrusive action".*

79. The Applicant alleges that the courts have violated Article 36.3 of the Constitution and Article 8 of the ECHR due to failure to comply with the legal provisions of Articles 88 of the CPC and 4 of the Law on Interception of Electronic Communications No. 05 / L-030.

80. In support of his allegation that the above-mentioned orders are not reasoned, the Applicant has cited all the orders. For example, the Ordinance on the extraction of the register of telephone calls and SMS messages, of 13.05.2014, orders: "*The pre-trial judge, having assessed the merits of this application, found that the information provided through this measure is likely to assist in the investigation of criminal offense and would not be able to obtained by any other investigative action without unreasonable difficulty or potential danger to others.*"

81. In support of his allegation for violation of Article 36.3 of the Constitution and Article 8 of the ECHR, the Applicant refers to the case law of the ECtHR, *Dragojević v. Croatia, Bašić v. Croatia* and *Roman Zakharov v. Russia*.

Allegation for violation of the right No punishment without law

82. As to the right no punishment without law guaranteed by Article 33.1 of the Constitution and Article 7 of the ECHR, the Applicant alleges: "Description of the circumstances and decisive facts in points I and II of the enacting clause of the Judgment of The Basic Court, which is fully accepted by the regular courts, DOES NOT CORRESPOND TO ANY CONSTITUENT ELEMENT OF THE CRIMINAL OFFENSE Recruitment for terrorism, under Article 139 of the CCK [...] From the enacting clause of the Judgment of the Basic Court, as well as in the entirety of its reasoning, which is approved by the Court of Appeals and the Supreme Court, it results that the Basic Court has failed to show WHO, WHEN, HOW and FOR WHAT, did Mr. Fatos RIZVANOLLI call upon them".

83. With respect to the above, the Applicant adds: "The legal qualification of the offence as Recruitment for Terrorism in co-perpetration, from Article 139 in conjunction with Article 31 of the CC, is legally unstable, unclear and arbitrary because, even though the actions of z. Fatos RIZVANOLLI, in the entirety of the enacting clause and reasoning of the Judgment of the Basic Court, which is fully upheld by the Court of Appeals and the Supreme Court, are considered to have been committed in co-perpetration with the G.O. and I.B., in the final Judgment whereby these two persons have been convicted (namely Z.Q. and I,B.), the name of Mr.Fatos RIZVANOLLI is not mentioned at all and it does not even results that there has been administered the evidence in which the name of Mr. Fatos RIZVANOLLI was mentioned.

84. The Applicant alleges that the regular courts, inter alia, did not reason: (i) why at the time of renting the vehicles the persons Sh.A., S.H., L.M., Z.Q., I.B. and I.B., have been considered members of the terrorist organizations ISIS and Al Nusra; (ii) the concrete circumstances of how they have been aware of their terrorist activity and what was the link of the rented vehicles with these terrorist activities

was; and, (iii) the Applicant's direct awareness and intent to assist members of the terrorist organizations ISIS and Al Nusra (a necessary condition for guilt and an essential subjective element of the offence).

85. The Applicant concludes: "The above failures of the regular courts have resulted in a violation of Article 6 of the CCK, as well as the principle Nullum Crimen Sine Lege and Nulla Poena Sine Lege, because in the actions of Mr. Fatos RIZVANOLLI, included in the enacting clause of the guilty verdict, is not formed any element of the criminal offence for which he was found guilty and sentenced."

86. In support of his allegations, the Applicant refers to the case law of the ECtHR, *Engel and others v. The Netherlands, Coëme and others v. Belgium, Del Rio Prada v. Spain*, etc.

Relevant legal provisions

CRIMINAL PROCEDURE CODE No. 04/L-123

Article 88
Intrusive Covert and Technical Measure of Surveillance

1. Covert photographic or video surveillance, covert monitoring of conversations in public places, metering of telephone calls or disclosure of financial data may be ordered
against a particular person or place if:
1.1. there is a grounded suspicion that a place is being used for, or such person has committed a criminal offence which is prosecuted ex officio or, in cases in which attempt is punishable, has attempted to commit a criminal offence which is prosecuted ex officio; and
1.2. the information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.
2. Metering of telephone calls or disclosure of financial data may also be ordered against
a person other than the suspect, where the criteria in paragraph 1 subparagraph 1.1 of the present Article apply to a suspect and the precondition in paragraph 1 subparagraph 1.2 of the present Article is met and if there is a grounded suspicion that:
2.1. such person receives or transmits communications originating from or intended for the suspect or participates in financial transactions of the suspect; or
2.2. the suspect uses such person's telephone.
3. Covert monitoring of conversations in private places, search of postal items, interception of telecommunications, interception of communications by a computer network, controlled delivery of postal items, the use of tracking or

positioning equipment, a simulated purchase of an item, a simulation of a corruption offence or an undercover investigation may be ordered against a particular person, place or item if:
3.1 there is a grounded suspicion that a place or item is being used for, or such person has committed or, in cases in which attempt is punishable, has attempted to commit a criminal offence listed in Article 90 of this Code.
3.2. the information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.
4. The search of postal items, the interception of telecommunications or the interception
of communications by a computer network may also be ordered against a person other than the suspect, where the criteria in paragraph 3 subparagraph 3.1 of the present Article apply to a suspect and the precondition in paragraph 3 subparagraph 3.2 of the present Article is met and if there is a grounded suspicion that:

4.1. such person receives or transmits communications originating from or intended for the suspect; or

4.2. the suspect is using such person's telephone or point of access to a computer system.

Article 123
Pretrial Interviews, Pretrial Testimony and Special Investigative Opportunities

[…]

5. Statements provided by a defendant in any context, if given voluntarily and without coercion, are admissible during the main trial against that defendant, but not codefendants. Such statements may not serve as the sole or as a decisive inculpatory evidence for a conviction.

Article 138
Report of the Expert

1. An expert's report shall contain:
1.1. the identity of the expert and the identity of the investigation.
1.2. the question material to either the guilt or innocence of the defendant or the
extent of harm caused by the criminal offence,
1.3. the expert's specialized training or experience, why it is relevant, and how
current the training or experience is,
1.4. a description of the evidence that was analyzed,

1.5. a description of the analysis, including relevant photographs, drawings, summary charts, x-rays, images, laboratory results or other relevant scientific or technical information,
1.6. an explanation that the analytical practices are generally accepted within the expert's field or has a scientific or technical basis, and
1.7. a conclusion with the expert's opinion answering the question in paragraph 2 of this Article, or explaining why the question could not be answered.
2. An expert may not express an opinion in his or her report on the guilt or innocence of a defendant.
3. An expert's report that does not comply with this Article shall not be admissible.
4. The expert's report shall be entered into the case file.
5. The expert's report shall be disclosed to the defendant or defence counsel, and to the
injured party no less than five (5) days prior to a session of pre-trial testimony by that
expert, but no later than ten (10) days after the report was received from the expert by the state prosecutor.

Article 147
Computer Analysis

1. Any examination or analysis under this Article shall be subject to the rules of expert analysis and testimony under Articles 136-142 of the present Code.
2. For computer equipment, electronic storage media, or similar equipment that are lawfully obtained through a court order or by consent, the state prosecutor may authorize a police officer or expert to examine, analyze and search for information or data contained within the computer equipment, electronic storage media or similar device.
3. The authorized police officer or other expert shall have education, training or experience in forensic computer analysis and searching.
4. The authorized police officer or other expert shall issue an expert report with their findings in compliance with Article 138 of this Code that shall also include the following information:
4.1. the authorized police officer or other expert shall describe the computer equipment, data storage equipment, or specific computer files examined, including any identifying names, numbers, or exhibit tags.
4.2. the authorized police officer or other expert shall describe where and how the computer equipment, data storage equipment or specific computer files were obtained by the police.
4.3. the authorized police officer or other expert shall describe the chain of custody of the computer equipment, data storage equipment or specific computer files.
4.4. the authorized police officer or other expert shall describe specific factual information for which he or she has been authorized to search on the computer equipment, data storage equipment or specific computer files.

4.5. the authorized police officer or other expert shall describe the steps taken in keeping with the most current practices in the field of computer forensics to reliably and accurately accomplish the search, including but not limited to steps taken to protect against the loss of files, decrypt files, retrieve deleted files, or obtain metadata about computer files or emails.
4.6. the authorized police officer or other expert shall describe the results of his or her search and shall attach an electronic copy of the computer files that are relevant to the searches.

CHAPTER XVI
EVIDENCE

Neni 257
General Rules of Evidence

1. The rules of evidence set forth in the present Article shall apply in all criminal proceedings before the court and, in cases provided for by the present Code, to proceedings before a state prosecutor and the police.
2. Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe.
3. The court cannot base a decision on inadmissible evidence.
4. In any questioning or examination it is prohibited to:
4.1. impair the defendant's freedom to form his or her own opinion and to express what he or she wants by ill-treatment, induced fatigue, physical interference, administration of drugs, torture, coercion or hypnosis;
4.2. threaten the defendant with measures not permitted under the law;
4.3. hold out the prospect of an advantage not envisaged by law; and
4.4. impair the defendant's memory or his or her ability to understand.
5. The prohibition under paragraph 4 of the present Article shall apply irrespective of the consent of the subject of the questioning or examination.
6. If questioning or examination has been conducted in violation of paragraph 4 of the
present Article, no record of such questioning or examination shall be admissible.

CRIMINAL CODE OF THE REPUBLIC OF KOSOVO No. 04/L-082

Article 139
Recruitment for terrorism

Whoever solicits another person to commit or participate in the commission of a terrorist offense, to participate in the activities of a terrorist group or to provide funds or material resources shall be punished by imprisonment of five (5) to fifteen (15) years.

Article 31
Co-perpetration

When two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offense.

LAW ON INTERCEPTION OF ELECTRONIC COMMUNICATIONS No. 05/L -030

Article 4
Basic Principles of Interception

1. The basic guiding principles in case of interceptions pursuant to this Law are:
1.1. the respect for human rights and fundamental freedoms recognized and guaranteed by the Constitution and the European Convention on Human Rights and Freedoms, including the interpretation by the European Court of Human Rights through its judicial practice;
1.2. the prohibition of interception without a respective decision by the court. A lawful interception is considered only such interception for which a lawful order has been issued by the competent court to authorize interception.
2. In taking the decision for interception, the competent court is obliged to take into account:
2.1. the essence of rights and freedoms of persons for whom a request for interception has been made;
2.2. the significance and necessity for interception, and proportionality;
2.3. the nature, means and the extent of interception;
2.4. the relationship between the aim to be achieved and the possibility of achieving it through employing other investigative methods; and
2.5. secrecy and objectivity in the process of interception.
3. In taking the decision towards a request for interception and before authorizing interception as an investigative tool or for the collection of

information, the competent court shall ensure that other investigative actions for the collection of information have been exhausted.
4. Based on the Constitution of Kosovo whereby freedom of expression and of the media are safeguarded, thus constituing a human rights standard in a democratic society, the competent court is obliged to respect and protect the journalists rights to protect the sources of information and not to disclose protected sources of information during the exercise of their functions as foreseen with the Law on the Protection of Journalism Sources and the Kosovo Criminal Code in the context of freedom of expression and information of the public as guaranteed by the European Convention on Human Rights and Freedoms and the judicial practice of the European Court of Human Rights on the protection of sources of journalists.

Assessment of the admissibility of the Referral

87. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and Rules of Procedure.

88. 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."

89. In the following, the Court also whether the Applicant has fulfilled the admissibility criteria as defined by Law. In this respect, the Court first refers to Article 47[Individual Requests] , 48 [Accuracy of the Referral] and 49 [Deadlines], which provide:

Article 47 of the 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..."

90. The Court also refers to Rule 39 (1) (b) and (2) of the Rules of Procedure, which provide:

"(1) The Court may consider a referral as admissible if:

[...]

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,

(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

91. The Court finds that the Applicant is an authorized party, he has exhausted all legal remedies provided by law, for all the main allegations (except for the allegation for the composition of the trial panel of the Court of Appeals), in accordance with Article 113.7 of the Constitution, and has submitted the Referral in accordance with the deadline provided for in Article 49 of the Law. The Applicant has also precisely clarified the rights and freedoms which he alleges to have been violated and the acts of the public authorities which he is challenging, in accordance with the criteria of Article 48 of the Law.

92. The Court notes the Applicant's allegations that the decisions of the regular courts have violated his rights guaranteed by the following constitutional articles: 31 [Right to Fair and Impartial Trial], 32 [Right to Remedies Legal], 33.1 [The Principle of Legality and Proportionality in Criminal Cases], 36 [Right to Privacy] and 54 [Judicial Protection of Rights], of the Constitution of the Republic of Kosovo in conjunction with Articles 6 (Right to a trial), 7 (No punishment without law), 8 (Right to respect for private and family life) of the ECHR.

93. The Court will address individually each of these allegations, relating to the right to fair and impartial trial, the right to privacy and the principle of no punishment without law.

94. In the following, the Court will address the Applicant's allegations regarding the right to a fair and impartial trial, the right to privacy and the principle of no punishment without law by applying the case law of the ECtHR, on the basis of which the Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

Allegations for violation of the right to fair and impartial trial

95. The Court notes that the Applicant alleges that the decisions of the regular courts in his case violated several components of the right to fair and impartial trial: (i) the principle of the impartiality of the court; (ii) the right to hear the witnesses and the principle of equality of arms; (iii) use of evidence obtained in unlawful manner; and, (iv) the right to a reasoned decision.

In relation to the allegation for violation of the right to an impartial tribunal

96. The Court notes the Applicant's allegation that the Court of Appeals (Decision PN. No.609/16, of 25 August 2016) violated the principle of impartiality, as the presiding judge, Judge H.H., as well as the referring judge D.M., had previously participated in the same criminal proceedings, on the occasion of the confirmation of the Indictment against the Applicant, in the same capacity.

97. The Court notes that the allegation on impartiality of the trial panel of the Court of Appeals was raised for the first time in the Constitutional Court.

98. The Court notes that in accordance with the principle of subsidiarity, the Constitutional Court cannot assess an allegation or a case that has not been raised and assessed beforehand by the regular courts (see the case of the Constitutional Court No.KI89/15, Applicant *Fatmir Koci*, Resolution on Inadmissibility, of 22 March 2016, paragraph 35).

99. The principle of subsidiarity requires the Applicant to exhaust all procedural opportunities in the proceedings before the regular courts, in order to prevent a constitutional violation or to remedy such violations once they have occurred. Consequently, the Applicant is responsible when his case is declared inadmissible by the Constitutional Court, if he fails to avail himself of the opportunities in the proceedings before the regular courts (see the case of the Constitutional Court No. KI24/16, Applicant *Avdi Haziri*, Resolution on Inadmissibility of 16 November 2016, paragraph 39 and references cited therein).

100. Consequently, this allegation is declared inadmissible due to the non-exhaustion of the legal remedies in the proceedings before the Supreme Court.

Allegation for refusal to hear witnesses ZQ and ShA

General principles from the ECtHR case law

101. The criterion for having good reasons for the absence of a witness is a preliminary issue that must be considered before any assessment can be made as to whether the evidence was a "sole" or "decisive" evidence. Whenever witnesses are not present at the trial, there is an obligation to enquire whether their absence is justified (*Al Khawaja and Taheri v. The United Kingdom*, [DHM], para. 120).

102. In this context, although the function of the ECtHR is not to express an opinion on the importance of the evidence adduced, failure to justify not questioning or summoning a witness may constitute a limitation of the rights of the defense which is incompatible with the guarantees of a fair and impartial trial (*Bocos Cuesta v. the Netherlands*, para. 72).

103. Articles 6 (1) and 3 (d) of the ECHR provide that courts must take positive steps to enable the accused to examine or have examined prosecution witnesses and to have the right to invite and question witnesses in his favor, under the same conditions as the prosecution witnesses (*Trofimov v. Russia*, para. 33 and *Cafagna v. Italy*, para. 42).

104. In the event of inability to examine witnesses due to absence, the courts should make reasonable efforts to secure their presence (*Karpenkov v. Russia*, para. 62; *Damir Sibgatullin v. Russia*, para. 51; *Pello v. Estonia*, para. 35; *Bonev v. Bulgaria*, para. 43; *Tseber v. Czech Republic*, para. 48; *Lučić v. Croatia*, paras. 79-80). It is not for the Court to compile a list of specific measures which the regular courts must have taken in order to have made all reasonable effort to secure attendance of the witness whom they have ultimately deemed unreachable. However, it is clear that they should have actively searched for the witness with the help of public authorities, including the police, and must have, as a rule, resorted to international legal assistance where a witness resided abroad and such mechanisms were available. In addition, the need for reasonable efforts on the part of the courts to secure the witness's attendance at trial further implies careful scrutiny by the regular courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness (*Schatschaschwili v. Germany* [DHM], paragraphs 121-122).

105. From the Court's point of view on the fact there must exist good reasons for the absence of the witness, which means that the court must have a good factual and legal basis for not securing the attendance of the witness at the trial. If there was good reason for the absence of the witness in that sense, then, there was good reason, or justification, for the court of fact to admit the untested statements of the absent witness as evidence (*Schatschaschwili v. Germany* [DHM], paragraph 119).

106. There are a number of reasons why a witness may not be present at the trial, such as absence due to death or fear (*Mika v. Sweden* (judgment), paragraph 37; *Ferrantelli and Santangelo v. Italy*, paragraph 52; *Al-Khawaja and Tahery v. the*

United Kingdom [DHM], paras 120-125), absence for health reasons (*Bobeş v. Romania*, paragraphs 39-40; *Vronchenko v. Estonia*, paragraph 58), or when the witness is unreachable (*Schatschaschwili v. Germany* [DHM)], paragraphs 139-140; *Lučić v. Croatia*, paragraph 80), including his detention abroad (*Štefančič v. Slovenia*, paragraph 39).

Application of general principles to the circumstances of the present case

107. The Court notes the Applicant's allegation for refusal to hear as a witness Zeqirja Qazimi: *"that the refusal of the Basic Court's to hear the witness ZQ is unlawful because the name of the witness in question is mentioned in the indictment as a person with whom the Applicant has "cooperated in the commission of criminal offences". The name of the witness ZQ is also present in point I of the enacting clause of the judgment of the Basic Court, which is also accepted in its entirety by the Court of appeals."*

108. The Court also notes the Applicant's allegation for refusing to have ShA heard as a witness*: "In the same way, even though in point I of the enacting clause of the judgment of the Basic Court, which is also accepted in its entirety by the Court of Appeals, Mr. FATOS RIZVANOLLI is charged with an incriminating action of making available, on 17.10.2011, a vehicle of make "Toyota" with license plates 01-877-CF to the person ShA, the Basic Court has rejected the proposal of the defense to summon Mr. ShA as a witness with the reasoning that "his attendance at court and securing of his presence for testifying directly in Court, is very difficult and impossible [...] The Basic Court even though it was aware of the location of ShA, because it possessed an Extradition Report to Macedonia, did not make a single effort to contact the Macedonian authorities and obtain his testimony via the video link, in complete violation of the procedural guarantees of Article 6 (3) of the ECHR".*

109. As regards refusal to hear as witnesses ZQ and ShA, the Court emphasises the rationale of the Court of Appelas: "*It is also obvious that even though the court refused the proposal of the defence to hear witnesses ZQ and ShA, it did not give reasons in this respect, however from the minutes of judicial deliberation it results that the court has given its reasons when refusing such proposal, which reasons this court approves as just and it is not necessary to make assessment in this respect"* (see line 23, page 6 of the Judgment of the Court of Appeals PAKR. No. 100/2017, of 23 May 2017).

110. In this respect, the Court notes that in the Minutes of the Resumption of the Main Trial PKR.65/16 of 4 November 2016, it appears that the Applicant's defense counsel requested that the persons ZQ, BK and BR be heard as witnesses, whereas the State Prosecutor had stated that he objects the proposal the defense because the persons proposed to be heard as witnesses have a direct interest in assisting the Applicant and that their bias is argued by their status in various criminal proceedings, some of whom are suspected and some accused of various acts of

terrorism. The trial panel, following a brief consultation, decided to, inter alia, approve the proposals of the Applicant's defense counsel to have heard in the capacity of witness the persons BK and BR. The Trial Panel rejected the hearing of ZQ on the grounds: *"Whereas, the proposal to hear ZQ as a witness is rejected, as his presence and hearing as a witness will not be the subject of the criminal case and that the claims of the indictment in this case don't have any connection or relevance to the actions of the accused"*.

111. The Court considers that the decisions of the regular courts regarding the allegation for hearing as witnesses the persons ZQ and ShA do not appear to be tainted by arbitrariness or disproportionality because the Basic Court has found the "right balance" by accepting the hearing of the persons BK and BR proposed by the Applicant's defense, on the one hand, while it has refused to hear the persons ZQ and ShA, on the other hand. The Court also considers that the Court of Appeals and the Supreme Court were able to further elaborate on the issue of witness hearing - but this in itself does not make the process unconstitutional because, on the basis of the available documents, it results that the Applicant has received in substance a response to his allegation for violation of Article 31.4 of the Constitution in conjunction with Article 6 (3) (d) of the ECHR.

112. As a general rule, it pertains to the regular courts to assess the evidence before them as well as the relevance of the evidence that the Applicant seeks to adduce. Article 31.4 of the Constitution and Article 6 (3) (d) of the ECHR leave this to the regular courts, again as a general rule, to assess whether it is necessary to call witnesses. These articles do not require the presence and questioning of any witness in the interest of the accused (Applicant); their essential purpose is the full equality of arms in criminal proceedings (see, the ECtHR cases, *Perna v. Italy*, Judgment of 6 May 2003, paragraph 29; *Murtazaliyeva v. Russia*, Judgment of 18 December 2018, paragraph 139; *Solakov v. former Yugoslav Republic of Macedonia*, Judgment of 31 October 2001, paragraph 57). Article 31 of the Constitution and Article 6 of the ECHR do not grant to the accused (the Applicant) the unlimited right to secure the appearance of witnesses in court. It is normally for regular courts to decide whether it is necessary or advisable to hear a witness (see ECtHR, *SN v. Sweden*, Judgment of 2 July 2002, paragraph 44; *Accardi and Others v. Italy*, Decision on Admissibility, of 20 January 2005).

113. Consequently, this allegation must be rejected as manifestly ill-founded.

Allegation for the testimony of the witness IB

114. The Court notes the reasoning of the Court of Appeals regarding the statement of witness IB: *"[...] fourthly, there stands the fact that the court rejected the Prosecutor's proposal to read the statement of IB given at the police on 23.05.2015 and despite this fact the court basis the judgment in this statement, but from this it can not be stated that the judgment is based on inadmissible evidence, for the reason that this statement was not even administered, whereas basing of the judgment on this statement does not makes the judgment legally*

unstable given the fact that this statement is not the single decisive evidence on which the judgment is based, respectively the sole evidence, because the court's conclusion regarding the guilt of the accused is based on a series of evidence" (see, the Judgment of the Court of Appeal PAKR 100/2017, of 23 May 2017).

115. The Court also points out the reasoning of the Supreme Court regarding the statement of witness IB: *"One of the allegations in the request for protection of legality was that the court of first instance has based its judgment on the statement of IB given not only in the main trial but also at the police, even though in the minutes of the main trial dated 04.11.2016 the same has been declared inadmissible evidence. Having assessed this allegation, the Supreme Court finds that in the minutes of the main trial dated 04.11.2016 the statement of witness IB was not declared inadmissible evidence but the prosecutor's proposal to read it was rejected. More specifically, on page 11 of the said minutes, it was concluded that "the proposal to read and use as evidence the statement of the defendant IB given in the pre-trial procedure on 23.07.2015 is rejected, based on Article 123.para.5 and in connection with Articles 263 and 261 of the CPCK". Moreover, the mentioned person has given a statement at the main trial and it was the right of the court to compare it with the previous statement, while this evidence was not the sole evidence on which the court has based upon when rendering the judgment."*

116. The Court also reiterates the Applicant's allegation regarding the statement of witness IB: ""*This assessment of the Court of Appeals, which is also fully upheld by the Supreme Court, is erroneous, unlawful, and consequently arbitrary, because the Defense of Mr. Fatos RIZVANOLLI has never submitted that the Judgment is made legally unstable simply by the physical presence in the case file of IB's statement, given at the Police on 23.07.2015, but it is made such by the USE and BASING of the Judgment upon this statement, which was rejected and was never administered as evidence during the main trial against Mr. Fatos RIZVANOLLI […] Since the statement of Ilir Berisha, given at the Police on 23.07.2015, WAS NEVER PROCESSED AS EVIDENCE DURING THE MAIN TRIAL, it should not have been used in the Judgment of the Basic Court… […]such an essential violation by the Basic Court, contrary to the procedural obligation under Articles 257.3 and 361.1 of the CPC, should not have been tolerated at all by either the Court of Appeals or the Supreme Court, moreover it should have not been camouflaged and legitimized, as done by the courts in question which have acted in arbitrary and unlawful manner […] on the basis of the content of the case file, it results that the SOLE EVIDENCE, which confirms point II of the enacting clause of the Judgment of the Basic Court, which is also upheld in its entirety by the Court of the Appeals and the Supreme Court, is exactly and exclusively the Statement of IB, given at the Police on 23.07.2015, which the Basic Court decided not to administer as evidence during the main trial against Mr. Fatos RIZVANOLLI*".

117. As regards the issue of the administration of evidence, the Court notes that the Constitution and the ECHR do not lay down rules for the admission of evidence as such (see *Mantovanelli v. France*, ECtHR, appeal no. 21497/93, Judgment of 18

March 1997, in paragraph 34). Admissibility of the evidence and the way in which it should be assessed, which are primarily matters for regulation by the national law and the courts of general jurisdiction (see *Garcia Ruiz v. Spain* [DHM], Application No. 30544/96, Judgment of 21 January 1999, paragraph 28). The same applies to the burden of evidentiary value of the evidence and the burden of proof (*Tiemann v. France and Germany* (cf.). Regular courts must also assess the relevance of the proposed evidence (see the case of *European Center 7 Srl and Di Stefano v. Italy* [DHM], Application No. 38433/09, Judgment of 7 June 2012, paragraph 198).

118. However, it is the Court's duty under the Constitution and the ECHR to determine whether the proceedings as a whole are fair, including the way of obtaining evidence (see *Elsholz v. Germany* [DHM], Appeal No. 25735/94, Judgment of 13 July 2000, in paragraph 66). The Court must therefore determine whether the evidence has been presented in such a way as to guarantee a fair trial (see the Case *Blücher v. Czech Republic*, ECtHR, Appeal No.58580/00, Judgment of 11 January 2005, para. 65).

119. On the basis of the content of the Referral it results that: (i) the Basic Court has rejected the prosecutor's proposal to read the statement of witness IB; (ii) the Basic Court has concluded that the statement of witness IB given at the Police on 23.07.2015 cannot be used as evidence based on Article 123.5 [Pretrial Interviews, Pretrial Testimony and Special Investigative Opportunities] of the CPC in conjunction with Articles 261 [Prior Statements Used at Main Trial] and 263 [Notice of Corroboration] of the CPC.

120. In view of the above, the administration as evidence of the statement of witness Ilir Berisha - in itself - has not prejudiced the criminal proceedings in its entirety which has not resulted in a violation of the procedural guarantees of Article 31.4 of the Constitution in conjunction with Article 6 (1) and (3) (d) of the ECHR.

121. Consequently, this allegation must be rejected as manifestly ill-founded.

Allegation for evidence no. 1159 of the Civil Registration Agency-Directorate for Vehicle Registration

122. The Applicant alleges that evidence no. 1159 of the Civil Registration Agency-Directorate for Vehicle Registration is: (i) inadmissible evidence because it was obtained outside the legal deadline provided by Article 159 of the CPC; and that, (ii) the Court of Appeals has confused evidence no. 1159 with proof no. 3002, both obtained from the Civil Registration Agency-Directorate for Vehicle Registration.

123. In view of thw above, the Applicant states: "*The Appeal Defense has confused the evidence challenged by the Defense, by erroneously assessing and treating the admissibility of the evidence requested during the main trial of 4.11.2016, with Prot. No. 3002, issued by the Directorate for Vehicle Registration on 23.11.2016 [...] The Defense has requested the exclusion of the Confirmation of the Civil*

Registration Agency, Directorate for Vehicle Registration Prot. No. 1159, of 27.05.2016 and not the exclusion of the Confirmation of the Civil Registration Agency, Directorate for Vehicle Registration, Prot. Nr. 3002, of 23.11.2016"[…] It is inadmissible evidence because it was obtained AFTER THE LEGAL DEADLINE ALLOWED TO COMPLETE THE INVESTIGATIONS (Article 159 of the CPC - Investigation was initiated on 10.04.2014 and legally this deadline has finished with the filing of the Indictment, respectively no later than on 10.04.2016) and WITHOUT any Order or Ruling by the Presiding Judge for collecting new evidence (Article 288 of the CPC)".

124. With regard to the above allegations, the Court of Appeals had reasoned: *"[…] First, there stands the fact that the Confirmation of the Civil Registration Agency, the Directorate for Vehicle Registration is evidence obtained after the completion of the investigation, but from this it cannot be concluded that this evidence is inadmissible as claimed groundlessly by the defense counsel because this evidence was obtained during the main trial. Because it results from the case file, respectively the minutes of the main trial (dated 4.11.2016) that after the administration of evidence on the question posed by the court to the parties whether they have a proposal to supplement the evidentiary proceedings, the Prosecutor has requested that in the context of evidence no.16 -books for keeping records for rented cars of the Enterprise NT SH. "Tosi" and NTSH "Automarket" be submitted to the court, five original folders in order to prove the authenticity and originality of these documents respectively of the parts which they have proposed and other parts, whereas the defense counsel has proposed for the Court to obtain from the Center for Vehicle Registration the list of all vehicles registered in the name of the Enteprise NTSH "Tosi" for the period of time indicated in the indictment, while despite the fact that the Prosecutor has objected such a proposal on the grounds that it is unnecessary for the reason that the relevant information regarding the charge, have been provided to the court.The court, respectively the trial panel by a ruling has approved the proposal of defense counsel, for what in conformity with article 66 of the CPC it has made a request (7. 11.2016) to this Center to send to it the list of all vehicles registered in the name of the Enterprise NTSH "Tosi" for the period of time as requested by the defense counsel. Given this fact respectively the fact that this evidence was administered during the main trial at the request of the defense counsel for which the court has rendered a ruling it is groundlessly alleged that it is inadmissible because for its provision there does not result any request of the Prosecution for its admission or rejection or order of the presiding judge on its admission or rejection. According to the provision of article 288 para.1 of the CPC, the parties, the defense counsel and the injured party, even after the scheduling of the main trial, may request that new witnesses and experts be summoned to the main trial or that new evidence be collected. Whereas, according to para.2 the court approves the request when it considers that it is grounded respectively the right of the defendant in the trial may be harmed by rejecting the request, whereas, only in cases when it rejects the request it does so by order because this order according to para. 3 of the above article can be appealed within 48 hours. In the present case, the court has approved the*

proposal of defense counsel to issue this evidence by a ruling, while by a request it has addressed to the competent body and on the basis of the sole fact that the court has addressed to a competent body by a request, it can not be concluded that it is inadmissible" (see Judgment of the Court of Appeals, PAKR No. 100/2017, of 23 May 2017, pg.4, line 41).

125. The Court notes that the regular courts have administered the challenged evidence by basing upon Article 288 [Requests after Main Trial Scheduled] and Article 66 [Obligations of public bodies] of the CPC, which obliges other competent bodies to provide the necessary assistance to the courts participating in criminal proceedings, especially in matters concerning the investigation of criminal offences or location of perpetrators.

126. As for the Applicant's allegation for erroneous interpretation of Article 159 of the CPC, the Court in its case law in case no.KI13/16 had specified: *"The Court considers that the Applicant bases his allegation on the erroneous interpretation of Article 159 of the CPC made by the Supreme Court, in relation to the Special Prosecutor having filed the indictment 2 (two) years after the initiation of the investigations. This procedural argument pertains to the domain of legality and as such does not fall under the jurisdiction of the Constitutional Court and, therefore, cannot be reviewed by the Court. On the other hand, the Court highlights that the "failure to comply with the deadline provided by domestic law does not in itself contravene Article 6, paragraph 1 of the Convention"* (see the case of the Constitutional Court No. KI13/16, Applicant, *Armend Selimi*, Resolution on Inadmissibility of 22 November 2016, paragraph 37, and see also, *mutatis mutandis*, ECtHR case, *Mitkus v. Latvia*, Appeal No. 7259/03, Judgment of 2 October 2012, paragraph 88).

127. As for the Applicant's allegation for the assessment or exclusion of one piece of evidence in place of another, the Court notes that it is not its duty to deal with errors of law allegedly made by the regular courts (legality), unless and in so far as such errors may have infringed the rights and freedoms protected by the Constitution (constitutionality). The Court may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would mean disregarding of the limits imposed on its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see the case KI13/19, cited above, paragraph 39 and the references mentioned therein).

128. Consequently, this allegation must be rejected as manifestly ill-founded.

Allegation for examination of electronic equipment

129. The Applicant alleges that the electronic equipment were examined by a body not authorized by the Prosecution.

130. In view of the above, the Applicant states: *"In view of the Notification Report - Analysis of the examination of electronic equipment bearing the Ref. No. 06/1-03 / 385-2016, of 14.07.2016, it results that the expertise was NOT PERFORMED by the Kosovo Forensic Agency, as a body authorized by the Special Prosecution to conduct the expertise, but by the Investigation Sector of the Directorate against Terrorism , a body that falls under the organizational chart of another state institution, namely the Kosovo Police and which has NEVER been AUTHORIZED by the Prosecution to perform the expertise of equipment found at the Enterprise NTSH "Tosi' and "AutoMarket" [...] The Kosovo Forensic Agency and the Investigation Sector of the Directorate against Terrorism, which operates under the Kosovo Police, ARE TWO DIFFERENT BODIES, with different and separate responsibilities [...] The Investigation Sector of the Directorate against Terrorism at the Kosovo Police DID NOT HAVE ANY AUTHORIZATION to perform the expertise of electronic equipment."*

131. In response to the above-mentioned allegations, the Court of Appeals had stated: *"[...] Secondly, neither the notification report- analysis of the examination of electronic equipment with Ref.No. 06/1-03/385-2016, of 14.07.2016 is not inadmissible evidence for the fact that there is a substantial lack of mandatory data foreseen by Article 138 and 147 of the CPC. For the reason that this evidence was obtained in conformity with the legal provisions of article 136 and 137 of the CPC and there is no substantial lack of mandatory data as alleged, it is evident that the Prosecutor by decision PPS.nr.39/2014, of 17.06.2016 has requested from the Kosovo Forensic Agency- Information Technology Unit to perform the examination of electronic equipment that were seized from the accused, and this expertise was performed by the Investigation Sector of the Directorate against Terrorism. However, the examination of electronic equipment by this sector does not make this material evidence inadmissible as alleged by the defense counsel, because the Investigation Sector of the Directorate against Terrorism has examined the electronic equipment at the request of the Prosecutor, while in conformity with legal provisions respectively Article 147 para.2 of the CPC for computer equipment, electronic storage media or similar devices that have been lawfully obtained through a court order or by consent, the State Prosecutor may authorize the police officer or expert to examine, analyze and search for information or data contained within the computer equipment, electronic storage media or similar device. According to para.4 of the same Article, the authorized police officer or other expert shall issue an expert report with their findings in compliance with Article 138 of the Code but also with the conditions provided by this paragraph (under par. 4.1, 4.2, 4.3, 404, 4.5 and 4.6), while in fact in the present case these provisions have been complied with"* (see, the Judgment of the Court of Appeals, PAKR. No. 100/2017, of 23 May 2017, pg.5, line 29).

132. The Court notes that the regular courts have administered the challenged evidence by basing upon Article 138 [Report of the Expert] and Article 147 (2) and (4) [Computer Analysis] of the CPC, which stipulates that the state prosecutor may authorize the police officer or expert to examine, analyze and search for information or data contained within the computer equipment, electronic storage media or similar device.

133. The Court considers that the allegation for the examination of electronic equipment - especially given the detailed response of the Court of Appeals - is a matter of fact and law which is the duty and prerogative of the regular courts. The Court - based on the principle of subsidiarity - can not replace its decisions with those of regular courts.

134. In view of the above, the Court reiterates that it is not its duty to deal with errors of law allegedly committed by the regular courts (legality), unless and in so far as such errors may have infringed the rights and freedoms protected by the Constitution (constitutionality). The Court may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would mean disregarding of the limits imposed on its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see the case KI13/19, cited above).

135. Consequently, this allegation must be rejected as manifestly ill-founded.

Allegation for violation of the right to privacy

General principles from the jurisprudence of the ECtHR regarding the right to privacy in the implementation of covert surveillance measures

136. The Court notes that the Applicant's allegations concerning the implementation of covert measures fall within the scope of Article 36 [Right to Privacy] of the Constitution in conjunction with Article 8 [Right to respect for private and family life] of the ECHR.

137. The Court notes that in its jurisprudence the ECtHR has found that covert surveillance measures, including telephone conversations, are covered by the notions of "private life" and "correspondence" within the meaning of Article 8 of the ECHR. The ECtHR has stated that "surveillance" constitutes an interference with the exercise of the rights guaranteed by Article 8. According to paragraph 2 of Article 8 of the ECHR, such interference is justified if it is "in accordance with the law", "pursues one or more of legitimate aims" referred to in paragraph 2 "and is necessary in a democratic society" in order to achieve the aim or aims (see the ECtHR cases *Kvasnica v. Slovakia*, Judgment 9 June 2009, paragraph 77 and *Dragojević v. Croatia*, Judgment of 15 January 2015).

138. The expression "in accordance with the law", within the meaning of Article 8 (2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law (see, for example, the case of the ECtHR *Kruslin v. France*, Judgment of 24 April 1990, paragraph 27).

139. The legal requirement of "foreseeability" cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, where a power of the executive is exercised in secret the risks of arbitrariness are evident. Thus, the domestic law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures (see the ECtHR case *Bykov v. Russia* [DHM], Judgment of 10 March 2009, paragraph 76).

140. In this regard, the ECHR has also emphasized the need for procedural guarantees. In particular, since the implementation in practice of covert measures of surveillance of communications is not open to scrutiny by the individuals being monitored or the general public, it would be contrary to the rule of law for the discretion accorded to the executive authority or the judiciary to be expressed in the form of "unlimited power" (*"unfettered power"*) (see the ECtHR judgment in case *Klass and Others v. Germany*, of 6 September 1978, and see also the case *Blaj v. Romania*, Judgment of 8 April 2014, paragraph no. 118).

141. Consequently, the law must define the scope of discretion given to the competent authorities, with sufficient clarity to provide protection to the individual against arbitrary interference. In addition, taking into consideration the risk that the covert surveillance system for the protection of state security may undermine democracy, the ECtHR must ensure that safeguards against abuse are sufficient and effective. The assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law (see the case of the ECtHR, *Kennedy v. the United Kingdom*, Judgment of 18 May 2010, paragraph 153).

142. In its case-law, the ECtHR has pointed out that it must determine whether the procedures for ordering and implementing covert measures guarantee the "interference" only within what is "necessary in a democratic society". In addition, the values of a democratic society must be followed as faithfully as possible, in supervisory procedures if the bounds of necessity, within the meaning of Article 8 (2) of the ECHR, are not to be exceeded (see the ECtHR case *Dragojević v. Croatia*, Judgment of 15 January 2015, paragraphs 78-84 and the references cited therein).

Application of general principles in the circumstances of the concrete case

143. In the light of the case law of the ECHR, the Court must establish whether the measure of covert surveillance by public authorities against the rights of the Applicant, guaranteed by Article 36 of the Constitution and Article 8 of the ECHR, passes the triple test: (i) if the interference was in accordance with a "law" that was sufficiently accessible and foreseeable; (ii) if so, was it a restraint proportionate to the legitimate aim listed in paragraph 2 of Article 8 of the ECHR; and, (iii) whether the restraint is "necessary in a democratic society".

144. In this respect, the Court reiterates the Applicant's allegation that *" the Court has failed to apply the PROCEDURAL OBLIGATION FROM ARTICLE 88 of CPC, as it HAS NOT EXPLAINED THE REASONS HOW AND WHY the information obtained through a covert investigative measure, is likely to assist in the investigation of the criminal offence and WHY the investigation could not be conducted through other less intrusive investigative means [...] the unlawfness of the Ordinances for authorizing and implementing covert measures of investigation and surveillance, has resulted in violation of the right to privacy, under Article 36.3 of the Constitution of the Republic of Kosovo, and inter alia f Article 8 of the ECHR, due to the failure of the courts to justify the necessity and proportionality of the measures in question [...]".*

145. In this respect, the Court notes that this Applicant's allegation has been dealt with by all the courts of the regular courts.

146. Thus, the Basic Court, in relation to this case, had reasoned as follows*: "The trial panel found that the evidence obtained in the pre-trial procedure was obtained and collected in conformity with the provisions of the CPCK, all material evidence was issued pursuant to the Court ordinances on covert technical measures of surveillance and investigation and thus are not evidence obtained in violation of the provisions of criminal procedure provided in Article 257 para.2 of the CPCK, therefore are admissible evidence proposed in the initial indictment and then in the amended indictment pursuant to Article 252 of the CPCK, filed by the prosecutor* [...] "(see the Judgment of the Basic Court, PKR- 65/16, of 18 January 2017, page 17, line 1).

147. Whereas the Court of Appeals reasoned that "*all evidence with ordinal number 3-11 (Court ordinances regarding covert and technical measures of investigation and surveillance during the pre-trial investigation) [...] were obtained in accordance with the legal provisions of the Code Procedure Code and are in accordance with Article 88 of the CPC. According to the provision of article 97 para.1 of the CPC, the evidence obtained through the measure from this chapter is inadmissible if the order for the implementation of such a measure is unlawful, while, on the basis of the case file it is clear that none of the orders on the implementation of such measures are unlawful, and they are not even objected by the appeal in this respect. Further the court has provided clear reasons why it*

ordered such measures, therefore the allegations that the court did not draft them in accordance with the provision of Article 88 of the CPC are unfounded" (see the Judgment of the Court of Appeals PAKR. No. 100/2017, ii 23 May 2017, pg.6, line 3).

148. The Court also reiterates the reasoning of the Supreme Court that: "*The Supreme Court finds that these allegations were also presented in the appeal filed against the judgment of the first instance and the Court of Appeals, when rendering the judgment of the second instance, has assessed these allegations and rejected them as unfounded, while this court found that the reasons provided in the second instance judgment are legal and just and as such it approved them. At the same time it ascertained that the alleged shortcomings in the judgment of the second instance do not stand and that for most of them there have been provided detailed reasons in this judgment, as well."*

149. In view of the above, the Court notes that the regular courts have reasoned the measures of covert surveillance relying mainly on the provisions of Articles 88, 90, 252.5 and 257. 2 of the CPC. The Court also notes that Article 90 of the CPC provides that orders under Article 88 of the CPC can only be used to investigate, inter alia, at least one of the following suspected criminal offences: (i) concealment or failure to report terrorists and terrorist groups, as defined by Article 141 of the Criminal Code; and, (ii) preparation of terrorist offences or criminal offences against the constitutional order and security of the Republic of Kosovo, as defined by Article 143 of the Criminal Code.

150. Consequently, the Court considers that on the basis of the reasoning of the regular courts, but also of the substance of the Referral as a whole it results that: (i) the measures of covert surveillance were based on the law, which, has been and is accessible to the Applicant, in order for him to adjust his conduct according to the circumstances of the case; and, (ii) the measures in question are proportionate and pursue the legitimate aim of preventing and adjudicating terrorist related criminal offences as a serious threat to public safety; and it results that (iii), those measures are necessary in a democratic society.

151. In the light of the fight against terrorism, the Court finds it necessary to refer to certain findings of the ECtHR, in the case of *Fox, Campbell and Hartley v. The United Kingdom, that: "[...] the terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealing the suspects or produced in court to support a charge [...]in view of the difficulties inherent in the investigation and prosecution of terrorist-type offences in Northern Ireland, the "reasonableness" of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime [...]The Convention should not be*

applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism"(see the ECtHR case, *Fox, Campbell and Hartley v. the United Kingdom*, Judgment of 30 August 1990, paragraphs 32-34 and references cited therein).

152. The Court finds that the measures of covert surveillance did not infringe the essence of the rights guaranteed by Article 36.3 [Right to Privacy] of the Constitution in conjunction with Article 8 [Right to respect for private and family life] of the ECHR.

153. Consequently, this allegation must be rejected as manifestly ill-founded.

Allegation for violation of the principle of No-punishment without law - The Principle of Legality and Proportionality in Criminal Cases

General principles from the consolidated jurisprudence of the ECHR regarding the principle of no punishment without law

154. The Court notes that the Applicant's allegations concerning Article 139 of the CCK fall within the scope of Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution and Article 7 [No punishment without law] of the ECHR.

155. The Court refers to the general interpretations of the ECtHR, which point out that in any legal system, no matter how clear the wording of a legal provision may be, including the provisions of criminal law, there is an inevitable element for their judicial interpretation. The function entrusted to the courts serves precisely to remove those doubts that may remain regarding the interpretation of legal norms (see the ECtHR Decision *Kafkaris v. Cyprus*, 2008 Judgment, paragraph 141).

156. In the legal tradition of the States parties to the ECHR, there is a general view that jurisprudence, as a source of law, makes a necessary contribution to the progressive development of criminal law. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. (*S.W. v. The United Kingdom*, paragraph 36; *Streletz, Kessler and Krenz v. Germany*, para. 50; *Kononov v. Latvia*, paragraph 185).

157. The foreseeability of judicial interpretation concerns both the constituent elements of the criminal offence (*Pessino v. France*, paragraphs 35-36; *Dragotoniu and Militaru-Pidhorni v. Romania*, paragraphs 43-47; *Dallas v. The United Kingdom*, paragraphs 72-77), as well as the applicable measure of punishment (*Alimuçaj v. Albania*, paragraphs 154-162; *Del Rio Prada v. Spain*, paragraphs 111-117).

158. If the ECtHR finds that there has been a lack of foreseeability of a criminal offence, it is no longer required to examine whether the sanction applied was in itself provided by law within the meaning of Article 7 (*Plechkov v. Romania*, paragraph 75). The interpretation of purely procedural points has no bearing on the foreseeability of the criminal offence and therefore does not raise any questions in the light of Article 7 (*Khodorkovskiy and Lebedev v. Russia*, paragraphs 788-790, regarding an alleged procedural obstacle aggravating the charge).

159. As regards the consistency of the judicial interpretation given by the domestic jurisdictions on the substance of the criminal offence, the ECtHR must verify whether this interpretation was in accordance with the wording of the provision of the criminal law in question, read in its context, and whether that interpretation was unreasonable (see, inter alia, *Jorgic v. Germany*, paragraphs 104-108, concerning the crime of genocide).

Application of general principles in the circumstances of the concrete case

160. The Court highlights the Applicant's allegation: *"In paragraphs 102-119 of the Request for Protection of Legality, the Defense of Mr. Fatos RIZVANOLLI has submitted that there is a violation of the principle of no-punishment without law [..] precisely because, even under the assumption that if Mr. Fatos RIZVANOLLI indeed would have committed the acts with which he was charged, they would not form the figure of the criminal offence for which he was found guilty and convicted. The Supreme Court completely avoids the allegations raised by the Defense [...] Article 365.1, subpara. 1.1 of the CPC, explicitly provides that: In a judgment pronouncing the accused guilty the court shall state: 1.1. the act for which he or she has been found guilty, together with facts and circumstances indicating the criminal nature of the act committed, and facts and circumstances on which the application of pertinent provision of the criminal law depends. In points I and II of the enacting clause of the Judgment of the Basic Court, which is acceptec in its entirety by the Court of Appeals and the Supreme Court, it results that the Basic Court has failed to include in the enacting clause, the FACTS and CIRCUMSTANCES WHICH CONSTITUTE THE FEATURES OF THE CRIMINAL OFFENCE, THE FACTS and CIRCUMSTANCES on which the application of Article 139 of the CCK depends, as well as to show HOW THE CITED FACTS AND CIRCUMSTANCES CONSTITUTE THE CONSTITUTIVE ELEMENTS OF THE CRIMINAL OFFENCE Recruitment for terrorism , under Article 139 of the CCK, for which Mr. Fatos RIZVANOLLI has been convicted, and which has resulted in the violation of the criminal law to his detriment, as well as the principle of no punishment without law, itself, sanctioned by Article 7 of the ECHR."*

161. In relation to this allegation, the Court notes that the Basic Court [Judgment PKR-65/16, of 18 January 2017], had stated, inter alia, that: *"[...] The defendant, during the time period 2011 - 2014 has provided funds and financial resources for use by*

persons accused and convicted of terrorism, as part of the terrorist organizations ISIS and Al Nusra [...] by making available to them, on 17.10.2011, his car of make 'Toyota' model T22, Gray colour, with license plates 01-877-CF, for now the convict Shukri Aliu and the other suspect SH, and on 04.10.2013 he has made available for now the convict ZQ the car of make "Ford", green colour, with license plates 01-462-CQ, whereas on 07.102014, he has made available to the defendant E.B. the car of make "Volkswagen", blue colour, with license plates 01-407-EG [...] In the month of September 2013, acting at the request of the now convict IB, the accused Fatos Rizvanolli has made possible the departure of PB (AN - who was later killed in Syria) as well as the travel to Syria of ShK, on 05.10.2013, together with HD and KM, killed in the conflict in Syria, including IB himself, but the latter was setn back-deported by the Turkish State Airport authorities on 06.10.2013 [...] by doing so he has committed in continuation and co-perpetration the criminal offence of recruitment for terrorism under Article 139 in conjunction with Article 31 of the CCRK".

162. The Court notes that the Court of Appeals and the Supreme Court had rejected the Applicant's appeal, respectively the request for protection of legality, filed against the Judgment of the Basic Court [PKR-65/16, of 18 January 2017].

163. In view of the foregoing, the Court considers that the interpretation by the regular courts of the relevant provisions of the CCK: (i) does not result to have been read outside the context of the provisions in question, or that it has been unreasonable and arbitrary; and, (ii) the regular courts have clarified the criminal liability of the Applicant, based on the provision of Article 139 CCK. Therefore, the interpretation of the regular courts results to be coherent with the substance of the offence and reasonably foreseeable.

164. The Court again refers to the provision of Article 139 [Recruitment for Terrorism] of the Criminal Code which provides that: *"Whoever solicits another person to commit or participate in the commission of a criminal offence, to participate in the activities of a terrorist group or to provide funds or material resources shall be punished by imprisonment of five (5) to fifteen (15) years."*

165. The Court considers that the interpretation of the relevant provisions of the CPC, including Article 139, by the regular courts has not violated the essence of the right guaranteed by Article 33.1 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 [No punishment without law] of the ECHR.

166. Consequently, this allegation must be rejected as manifestly ill-founded.

167. In conclusion, as regards the Applicant's allegations for a reasoned decision, effective legal remedies and violation of the principle *in dubio pro reo*, the Court considers that the said allegations need not to be examined because they do not raise any new issues that have not been previously reviewed under Articles 31.4 [Right to Fair and Impartial Trial], 33 [The Principle of Legality and

Proportionality in Criminal Cases] and 36 [Right to Privacy] of the Constitution in conjunction with Articles 6 (1) (3) and (d) [Right to a fair trial], 7 [No punishment without law] and 8 [Right to respect for private and family life] of the ECHR.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47.2 of the Law and Rules 39(1) (b) and (2), 58 (4) and 59 (2) of the Rules of Procedure, on 2 September 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

The Judge who prepared the Resolution	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.