

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

Prishtina, on 05 October 2020 Ref.No.:RK 1625/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI243/19

Applicant

Muhamet Idrizi

Constitutional review of Judgment PML. No. 290/2019 of the Supreme Court of Kosovo, of 21 October 2019

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 Muhamet Idrizi, residing in the Municipality of Viti (hereinafter: the Applicant).

Challenged decision

2. The challenged decision is Judgment [PML. No. 290/2019] of 21 October 2019 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's fundamental human rights and freedoms guaranteed by Articles 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

- 5. On 30 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
- 6. On 9 January 2020, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
- 7. On 9 January 2020, lawyer Shemsedin Pira submitted a Referral to the Court on behalf of the Applicant.
- 8. On 30 January 2020, the Court notified the Applicant about the registration of the Referral and requested clarification as to whether he is represented by lawyer Shemsedin Pira or not.
- 9. On 5 February 2020, the Applicant notified the Court that he was not represented by any lawyer including lawyer Shemsedin Pira, proving this by attaching the revocation of the notarized power of attorney.
- 10. The Court notified and sent a copy of the Referral to the Supreme Court, it also notified the lawyer Shemsedin Pira about his revocation by the Applicant.
- 11. On 15 July 2020, the Applicant submitted urgency to the Court.
- 12. On 16 September 2020, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

- 13. On 29 December 2008, the District Prosecutor's Office in Gjilan (hereinafter: the District Prosecutor's Office) filed the Indictment [PP. No. 168/08] against the Applicant, on the grounded suspicion that he in cooperation with Sh. I. and assisted by E.I., committed the criminal offense established in Article 147 (Aggravated Murder) in conjunction with Articles 20 (Attempt) and 23 (Coperpetration) and Article 328 (Unauthorized ownership, control, possession or use of weapons) of the Provisional Criminal Code of Kosovo (hereinafter: PCCK), as on 2 September 2008, he attempted to deprive of life R.E. and Sh. E.
- 14. On 8 June 2009, the District Court in Gjilan (hereinafter: the District Court) by Judgment [P. No. 25/2009] acquitted the Applicant of the abovementioned charges, while the person, who allegedly assisted in the commission of the criminal offense, namely, E.I. was acquitted of the charge of committing the criminal offense set forth in Article 147 of the PCCK, while finding him guilty of committing the criminal offense established in Article 328 of the PCCK.
- 15. The District Prosecutor's Office filed an appeal with the Supreme Court against the abovementioned Judgment of the District Court on the grounds of essential violations of the provisions of criminal procedure and incomplete and erroneous determination of factual situation, with the proposal that the case be remanded for retrial. The Applicant and E. I. filed a response to the appeal of the District Prosecutor's Office, requesting that it be rejected as ungrounded.
- 16. On 7 March 2012, the Supreme Court, by Decision [AP. No. 393/2012] approved the appeal of the District Prosecutor's Office as grounded and annulled the Judgment [P. No. 25/2009] of the District Court in respect of the Applicant and remanded the case for retrial.
- 17. On 22 November 2017, the Basic Court, by Judgment [PKR. No. 107/2012], found the Applicant guilty of committing the criminal offense under Article 147 (Aggravated Murder) in conjunction with Articles 20 (Attempt) and 23 (Coperpetration) of the PCCK and sentenced him to 3 (three) years of imprisonment. Whereas, the charge of committing the criminal offense provided by Article 328 (Unauthorized ownership, control, possession or use of weapons) of the PCCK was rejected. By the same Judgment, the accused E. I. was acquitted of the charge.
- 18. The Applicant and the Basic Prosecutor's Office in Gjilan (hereinafter: the Basic Prosecutor's Office) filed an appeal against the abovementioned Judgment. The first, namely the Applicant, on the grounds of essential violations of the provisions of the criminal procedure, incomplete and erroneous determination of factual situation, violation of the criminal law and the decision on the criminal sanction; while the second, namely the Basic Prosecutor's Office, for the acquittal part of the Judgment for the accused E.I., and on the grounds of essential violations of the provisions of the criminal procedure and in conjunction with the criminal sanction for the criminal offense for which the Applicant was found guilty.

- 19. On 19 April 2018, the Court of Appeals by Judgment [PAKR. No. 108/2018], rejected the appeals of the Basic Prosecutor's Office and the Applicant and upheld the aforementioned Judgment of the Basic Court, namely Judgment [PKR. No. 107/2012] of 22 November 2017.
- 20. The Applicant and his defense counsel, separately, filed requests for protection of legality with the Supreme Court against the Judgment [PAKR. No. 108/2018] of the Court of Appeals in conjunction with Judgment [PKR. No. 107/2012] of the Basic Court, on the grounds of essential violations of the provisions of criminal procedure and violation of criminal law. In their requests they alleged, inter alia, that the Basic Court, by changing the description of the criminal offense and finding that the Applicant "committed the criminal offense with persons currently unknown", exceeded the charge contrary to the provisions of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCRK). State Prosecutor by submission [KMLP. No. 155/2018], submitted a response to the requests for protection of legality, proposing that they be rejected as ungrounded.
- 21. On 18 October 2018, the Supreme Court, acting upon the request for protection of legality filed by the Applicant's defense counsel, by Judgment [PML. No. 226/2018] rejected as ungrounded this request for protection of legality against Judgment [PAKR. No. 108/2018] of the Court of Appeals in conjunction with Judgment [PKR. No. 107/2012] of the Basic Court.
- 22. On 3 December 2018, the Supreme Court, acting upon the request for protection of legality filed by the convict, namely the Applicant, by Judgment [PML. No. 293/2018] also rejected as ungrounded this request for protection of legality against the Judgment [PAKR. No. 108/2018] of the Court of Appeals in conjunction with the Judgment [PKR. No. 107/2012] of the Basic Court.
- 23. On 30 November 2018, namely on 14 January 2019, the Applicant and his defense counsel submitted their Referrals to the Court, which were registered as KI187/18 and KI11/19.
- 24. On 29 July 2019, the Court decided to declare Referral KI187/18 inadmissible, while it declared admissible for review on merits Referral KI11/19 and found that in Judgment PML. No. 293/2018, of 3 December 2018 of the Supreme Court there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1, of Article 6 [Right to a fair trial] of the ECHR.
- 25. On 21 October 2019, the Supreme Court by Judgment [PML. No. 290/19] rejected as ungrounded the Applicant's request for protection of legality.

Applicant's allegations

26. The Applicant in his Referral alleges that the Supreme Court by Judgment [PML. No. 290/2019] of 21 October 2019, violated his fundamental rights and freedoms guaranteed by Articles 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

- 27. The Applicant specifically alleges that his rights guaranteed by Articles 30 and 31 of the Constitution in conjunction with Article 6 of the ECHR have been violated because his representative did not properly protect him during the trial and according to the Applicant, made the defense in contradiction with paragraph 7 of Article 11 of Law No. 03/L-117 on the Bar of 25 March 2009 (hereinafter: the Law on the Bar), because there was a conflict of interest, a fact of which the Applicant was not informed. According to the Applicant, the lawyer of the case Sh. P., was also the defense counsel of the person R. E. in another criminal case, but who was also the main witness in the criminal proceedings against the Applicant. In addition, according to the Applicant's allegations, the lawyer in question reflected obvious and persistent negligence during his defense.
- 28. The Applicant further states that (i) his lawyer was not sufficiently engaged and did not prepare a convincing legal argument, which allegedly violated his rights guaranteed by the Constitution and the ECHR, which relate to effective defense during the trial, and (ii) that the engagement of his lawyer was minimal, and in many court hearings he sent another lawyer to replace him and that he did not attend at all the hearings.
- 29. The Applicant also alleges that the Judgments of the regular courts contained essential violation of the criminal provisions under Article 384 paragraph 1 subparagraphs 1.10 and 1.12 in conjunction with Article 370 of the CPCRK.
- 30. Finally, the Applicant requests the Court to declare his Referral admissible; annul all decisions of the regular courts and remand his case for retrial to the first instance court.

Admissibility of the Referral

- 31. The Court first examines whether the admissibility requirements established in the Constitution, and further specified in the Law in the Rules of Procedure have been met.
- 32. In this regard, 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."
- 33. The Court also examines whether the Applicant has fulfilled the admissibility requirements, which are further prescribed in the Law. In this regard, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

[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 [...]".

- 34. With regard to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, who challenges an act of a public authority, namely Judgment [PML. No. 290/2019] of 21 October 2019 of the Supreme Court, after having exhausted all legal remedies provided by law. In this regard, the Applicant's Referral is in accordance with the criteria set out in paragraphs 1 and 7 of Article 113 of the Constitution and Articles 47 and 48 of the Law. The Applicant also submitted the Referral in accordance with the deadline set out in Article 49 of the Law.
- 35. In addition, the Court considers whether the Applicant has met the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure establishes the criteria based on which the Court may consider a referral, including the requirement that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:
 - "(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."
- 36. The Court recalls that the Applicant alleges that, despite the review of his case by the Supreme Court, the challenged decision violated his right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Applicant also alleges that his rights guaranteed by Article 30 [Rights of the Accused] of the Constitution have been violated, because he has not been well protected by his lawyer.
- 37. The Court first recalls that in its Judgment in cases KI187/18 and KI11/19, it found a violation of the right to a fair trial, as the Judgment of the Supreme Court

PML. No. 293/2018, of 3 December 2018, was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because (i) it was rendered in the composition of a Panel, in which, contrary to the relevant provisions of the criminal procedure and the case law of the ECtHR and of the Court, was attended by a judge who was also part of the decision-making in the earlier stages of the same criminal case, namely he participated as a member of the trial panel in the District Court when it was decided on the criminal charge of the Applicant and also as a member of the Panel when it was decided on his request for protection of legality in the Supreme Court; and in such circumstances, (ii) legitimate suspicions about the lack of impartiality of the court are objectively justifiable.

- 38. The Court notes that by Judgment in cases KI187/18 and KI11/19, it declared invalid only one of the Judgments of the Supreme Court, namely, Judgment [PML. No. 293/2018] of 3 December 2018, rendered as a result of the request for protection of legality of the defendant, namely the Applicant, against the Judgment [PAKR. No. 108/2018] of 19 April 2018 of the Court of Appeals. Whereas, it did not address the allegations regarding the Judgment [PML. No. 226/2018] of 18 October 2018 of the Supreme Court, because the request regarding the constitutional review of the latter, was declared inadmissible. This result of the review of the constitutionality of two Judgments of the Supreme Court dealing with requests for protection of legality against the same Judgment of the Court of Appeals, stems from the fact that the Supreme Court, in the circumstances of the present case, treated separately requests for protection of legality of filed by the defendant and his defense counsel, deciding by two Judgments.
- 39. In this regard, the Court considers that it was the duty of the Supreme Court to reconsider its decision in accordance with the findings of the decision of the Constitutional Court and to inform the Court about the implementation of its decision.
- 40. The Court notes that the Supreme Court, pursuant to the Judgment of the Court, reconsidered the request for protection of legality of the Applicant on the basis of the findings of the Judgment in case KI187/18 and KI11/19, regarding the allegations of the composition of the trial panel. The Supreme Court, after eliminating the violation found by the Judgment of the Court, reconsidered the allegations of the Applicant and decided to declare them ungrounded.
- 41. Consequently, the Court considers that the Supreme Court eliminated the violation according to the findings in Judgment KI187/18 and KI11/19 of the Court, and thus fulfilled its obligation regarding the implementation of the Judgment of the Constitutional Court.
- 42. The Court recalls that the Applicant also raises other allegations in relation to Judgment [PML. No. 290/2019] of 21 October 2019 of the Supreme Court. The Applicant refers to the violation of Article 30 [Rights of the Accused] of the Constitution, while with regard to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, he also alleges, as stated above, that (i) his defense counsel acted in violation of the Law on the Bar, thereby harming his interests;

- and (ii) the challenged Judgment was rendered in violation of certain provisions of criminal procedure.
- 43. With regard to the alleged violation of Article 30 of the Constitution, the Court notes that a mere mentioning of articles of the Constitution, is not sufficient to build a reasoned allegation of constitutional violations. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (see, in this regard, case of the Court, KII36/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33).
- 44. With respect to the allegations that (i) the challenged Judgment was rendered contrary to certain provisions of criminal procedure; (ii) his defense counsel acted in violation of the Law on the Bar, consequently harming his interests, the Court considers that the Applicant has built his case on the basis of legality, namely on erroneous determination of facts, as regards his representation by his defense counsel, as well as the erroneous interpretation of the law by the regular courts.
- 45. The Court recalls that these allegations relate to the way in which the regular courts have determined the facts of the case and made the relevant legal interpretations. As such, these allegations relate to the domain of legality and, in principle, do not fall within the jurisdiction of the Constitutional Court (see case of the Court KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 35).
- 46. In this regard, the Court reiterated its general position that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). If it were otherwise, the Court would be acting as a court of "fourth instance", which would result in exceeding the limits set by its jurisdiction. In accordance with its already consolidated case-law, the Court reiterates that it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law and that the Constitutional Court cannot make assessments as to why a regular court has decided in one way and not in another (see case of the Court KI70/11, Applicant Faik Hima, Magbule Hima and Besart Hima, Resolution on Inadmissibility of 16 December 2011).
- 47. The Constitutional Court can only examine whether in a court proceeding, the evidence was presented in a correct manner and whether the proceedings in general, viewed in their entirety, were conducted in such a way that the Applicant had a fair trial.
- 48. Based on the case file, the Court notes that the reasoning given in the Judgment of the Supreme Court is clear and after reviewing all the proceedings, the Court also found that the proceedings before the regular courts were not unfair or arbitrary.
- 49. The Court notes that the Supreme Court, having eliminated the violation found in Judgments KI187/18 and KI11/19 of the Constitutional Court, rejected the Applicant's request for protection of legality as ungrounded, filed against the

Judgment. of the Basic Court in Gjilan and the Judgment of the Court of Appeals. The Court notes that in Judgment [Pml. No. 290/2019] of 21 October 2019 of the Supreme Court, Judge R.R. was not part of the review panel, thusm he was not part of the decision-making. Part of the review panel in the aforementioned Judgment of the Supreme Court were the judges: E.P. presiding, A.M. and M.M. members. Thus, the Supreme Court eliminated the violation found by the Court through Judgments KI187/18 and KI11/19.

50. Therefore, the Supreme Court, after reviewing the Applicant's allegations in Judgment [Pml. No. 290/2019] of 21 October 2019, stated as follows:

"The Supreme Court of Kosovo, after eliminating the violation highlighted in the Judgment of the Constitutional Court of the Republic of Kosovo, again reconsidered the allegations presented in the request.

The Supreme Court of Kosovo in the panel session reviewed the case file within the meaning of Article 435 par. 1 in conjunction with Article 436 par.1 of the PCCK and after assessing the allegations in the request, found that: the request is ungrounded.

According to the assessment of the Supreme Court of Kosovo, the claim of the convict is ungrounded, because the judgments against which he filed a request do not contain violations that are alleged.

In the enacting clause of the judgment of the court of first instance is the description that the convict has acted with other persons currently unidentified, however, this does not make the enacting incomprehensible as it is evident that by this judgment only the convict Muhamet Idrizi was found guilty, and was convicted because he used an automatic rifle, which statement is in line with the ballistic expertise, which confirmed that 26 cartridges of 7.26x39 mm caliber were found at the scene and fired from the same weapon, and this was exactly the reason that the court of first instance acquitted the other defendant Enver Idrizi of the criminal offense of aggravated attempted murder. In this case, it turns out that it is not disputed that only the convict Muhamet Idrizi shot with a long gun, which is also confirmed by the injured witnesses Reshat and Shaip Emerllahu, as the court of first instance states in its judgment [on page 5-7] and this reasoning is fully approved by the Supreme Court of Kosovo. The judgment of the first instance court, namely the provisions, is clear and concrete and includes all the data regarding the time, place and manner of committing the criminal offense, while in its reasoning are given clear reasons for the decisive facts which have also been confirmed by the court of second instance.

The allegations stated in the request regarding the alibi of the convict Muhamet Idrizi, namely the circumstance that at the time when the criminal offense was committed he was in another place were not grounded. According to the assessment of the Supreme Court of Kosovo, the allegations regarding the violation of the criminal law, as in this case the fact that the criminal offense was committed for reasons of unscrupulous revenge, were also ungrounded allegations. Based on the manner and circumstances of committing this criminal offense, namely ambush the wel and waiting for the injured, is undoubtedly an aspect of cunning and which is also related to the

motive of revenge as a result of the murder that previously the family member of the injured namely, their uncle's son committed to the family of the now convict Muhamet Idrizi. The fact that it is about revenge motives is also confirmed through the continuation of the chain of violence between these families, namely the murder committed by the family member of the convict Muhamet Idrizi against the relatives of the injured clearly shows the motive for revenge in this case. Therefore, based on the conclusions of the of lower instances courts about the development of the event, the motive and legal qualification are the result of a fair assessment of the evidence administered and consequently the criminal law was correctly applied".

- 51. In this regard, the Court further considers that the Applicant did not substantiate that the proceedings before the Supreme Court were unfair or arbitrary, or that his fundamental rights and freedoms protected by the Constitution were violated, as a result of erroneous interpretation of the substantive law. The Court reiterates that the interpretation of law is a duty of the regular courts and is the issue of legality (see, *mutatis mutandis*, cases of the Court: KI63/16, Applicant Astrit Pira, Resolution on Inadmissibility of 8 August 2016, paragraph 44; and see also case KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants Arben Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku and Sami Lushtaku, Resolution on Inadmissibility of 15 November 2016, paragraph 62).
- 52. Regarding the allegation concerning his defense counsel, where, according to the Applicant, his defense counsel acted in violation of the Law on the Bar to the detriment of his interests, which in fact does not constitute a valid argument for review before the Constitutional Court, moreover when the Applicant himself had the opportunity to revoke his defense counsel at all stages of the proceedings, and it is proved that he did not do so.
- 53. The Court reiterates that bringing the lawyer or the representative authorized by the Applicant himself is responsibility of the Applicant. Any procedural action or inaction on the representative's part are in principle attributable to the applicant himself (see *Bekauri v. Georgia*, No. 14102/02 ECtHR, Judgment of 10 April 2012, paragraphs 22-25; and see *mutatis mutandis*, *Migliore and Others v. Italy*, No. 58511/13 ECtHR, Decision of 27 January 2014; see cases of the Court: case No. KI02/10, *Applicant Roland Bartezko*, Resolution on Inadmissibility, , paragraph 25-28, 21 March 2011; KI61/15, *Applicant Islam Krasniqi*, Resolution on Inadmissibility of 10 September 2015, paragraph 33).
- 54. Therefore, taking into account the allegations raised by the Applicant and the facts presented by him, the Court, also based on the standards established in its case law in similar cases and the case law of the ECtHR, finds that the Applicant has not proved and has not sufficiently substantiated his allegations of violation of his fundamental rights and freedoms guaranteed by the Constitution and the ECHR.
- 55. Consequently, the Referral on constitutional basis, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 39 (2) of the Rules of Procedure, is manifestly ill-founded and is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 16 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.

Judge Rapporteur

President of the Constitutional Court

Bajram Ljatifi

Kopje e vërtetuar Overena kopija Arta Rama-Hajrizi Certified Copy

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