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

Prishtina, on 26 October 2020
Ref.No.:RK 1632/20

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI71/20

Applicant

Etem Arifi

Constitutional review of Judgment
Pml. No. 380/2019, of the Supreme Court of Kosovo, of 30 January 2020

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 Etem Arifi, who is represented by Kujtim Kërveshi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment Pml. No. 380/19 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 30 January 2020. The challenged Judgment rejected as ungrounded the request for protection of legality of the Applicant filed against Judgment PKR. No. 740/2016 of the Basic Court in Prishtina of 20 April 2018 and Judgment PAKR. No. 328/19 of the Court of Appeals of Kosovo of 20 August 2019 [*Clarification: The Judgment of the Supreme Court which rejected the Request for Protection of Legality as ungrounded, the number of the Judgment of the Court of Appeals PAKR. No. 328/19 of 20 August 2019, turns out to be incorrectly marked, referring to the first Judgment of the Court of Appeals PAKR. No. 328/2018 of 28 March 2019. This is noted by the content of the Judgment of the Supreme Court Pml. No. 380/2019, of 30 January 2020 as well as from the Request for Protection of Legality submitted to the Supreme Court by the Applicant*].

Subject matter

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

4. At the same time, the Applicant requests the Court the imposition of an interim measure stating that: "*we are close to the date which is set for the Applicant to appear in the correctional facility for serving the sentence which is 04.05.2020, the imposition of an interim measure by the Constitutional Court is necessary and vital for the Applicant*".

Legal basis

5. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 27 [Interim Measures] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 32 [Filing of Referrals and Replies] and 56 [Request for Interim Measures] 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 27 April 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 19 May 2020, the President of the Court appointed Judge Safet Hoxha, as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi, (Presiding), Bajram Ljatifi and Radomir Laban (members).

8. On 29 May 2020, the Court notified the Applicant's representative about the registration of the Referral. On the same date, the Court notified the Supreme Court about the registration of the Referral.

9. On 3 June 2020, the Court also notified the Basic Court in Prishtina about the registration of the case and requested them to submit the complete case file to the Court within seven (7) days.

10. On 5 June 2020, the Basic Court in Prishtina submitted the complete case file to the Court.

11. On 1 July 2020, the Applicant submitted to the Court "*Request to deal with urgency with the request for interim measure*".

12. On 23 September 2020, the Review Panel considered the report of the Judge Rapporteur, and by a majority, recommended to the Court the inadmissibility of the Referral.

13. On the same date, the Court voted by a majority, the inadmissibility of the Referral.

Summary of facts

14. On 9 December 2016, the Special Prosecution of the Republic of Kosovo, filed an Indictment PPS. No. 158/2014 against the Applicant on suspicion of having committed in co-perpetration the criminal offense "*Subsidy fraud*" under Article 336, paragraph 3 in conjunction with Article 31 of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK) as well as the criminal offense of "*Trading in influence*", under Article 431, paragraph 1 of the CCRK. With the same Indictment for the criminal offense "*Subsidy fraud*" under Article 336, paragraph 3 in conjunction with Article 31 of the CCRK, the person B.G was also charged with co-perpetration.

15. On an unspecified date, the Applicant filed a request for dismissal of the Indictment and the objection of evidence with the Basic Court in Prishtina, Department for Serious Crimes (hereinafter: the Basic Court), alleging that there is no sufficient evidence to substantiate the reasonable suspicion that the Applicant has committed the criminal offense he is charged with.

16. On 28 June 2017, the Basic Court, by Decision PKR. No. 740/16, rejected the Applicant's request for dismissal of the Indictment and objection of evidence.

17. On 18 September 2017, the Applicant filed an appeal with the Court of Appeals against Decision PKR. No. 740/16 of the Basic Court, alleging essential violation of the provisions of criminal procedure and violation of criminal law. The Applicant, *inter alia*, stated in the complaint that "*The* [Basic] *Court has bypassed the important fact presented in the indictment in question. The allegations of the Special Prosecution described in the indictment include the period from December 2012 to July 2013 within which the legal system in Kosovo has undergone radical reform. [...] it is very important to accurately*

determine the time and place of the commission of the criminal offense because they determine the offense, the criminal sanction and above all the application of the law".

18. On 5 October 2017, the Court of Appeals by Decision PN. No. 779/2017 rejected as ungrounded the Applicant's appeal, considering that his allegations were not grounded. Regarding the above mentioned specific allegation of the Applicant, the Court of Appeals in Decision PN. No. 779/2017 reasoned as follows: "*the appealing allegations are ungrounded. The fact remains that the time of commission of the criminal offense and the place of commission are features of the criminal offense, but the allegations in this regard are unfounded because the enacting clause of the indictment states both the time and place of commission where the offenses have allegedly been committed. It is also evident that according to the indictment it is alleged that the defendant from December 2012 to July 2013 abused the subsidies received, but from this it cannot be concluded that the criminal law was applied incorrectly, because the latest actions were taken during 2013 (incriminating actions were taken from 20.12.2012 to 30.07.2013) and the criminal offense is classified according to the Criminal Code that entered into force in the same year* (2013), *while what law is more favorable in use remains the issue that the Court will assess [...]".*

19. On 20 April 2018, the Basic Court rendered Judgment PKR. 740/16, which found the Applicant guilty of committing, in co-perpetration, the criminal offense "*Subsidy fraud*" under Article 336.3 of the CCRK in conjunction with Article 31 of the CCRK. In that case, the Basic Court imposed on the Applicant a suspended sentence to imprisonment for a term of two (2) years, provided that within a period of three (3) years he does not commit any other criminal offense. The Basic Court also obliged the Applicant and the other convict to jointly compensate the damage caused: (i) 22,900 euro - to the Ministry of Labor and Social Welfare (hereinafter: the MLSW); and (ii) 2,749 euro - Office of the Prime Minister. Compensation was ordered to be made in installments within a time period of six (6) months.

20. With regard to the accusation of committing the criminal offense of "*trading in influence*", under Article 431.1 of the CCRK, the Basic Court acquitted the Applicant on the grounds that "*it has not been proven that the accused committed the criminal offense which he is charged with*".

21. The Basic Court in the above-mentioned sentencing Judgment [PKR. 740/16] among others stated *"[...] Based on the preliminary agreement and co-operation, from December 2012 to July 2013, they used in violation of the law the subsidies received from the Ministry of Labor and Social Welfare for three projects for education and integration of the Roma, Ashkali and Egyptian community in the total amount of 22,900.00 as well as the subsidy from the Office of the Prime Minister for integration amounting to 2,749.00 € [...] the defendant Etem Arifi* [the Applicant] *has influenced the officials of the Ministry of Labor and Social Welfare for granting subsidies, even though he knew that this NGO is a fictitious organization [...].] Thus, based on the evidence provided by the application of convert measures registration of*

entry and exit and the contents of the SMS for the telephone numbers of the accused [B.G] *and Etem Arifi it has been established that the accused Etem Arifi and* [BG] *have cooperated in receiving donations from MLSW and it has been established that the accused Etem Arifi has directly influenced with messages to MLSW officials to allocate these donations to the NGO [...].*

22. On 19 June 2018, the Special Prosecution of the Republic of Kosovo filed an appeal with the Court of Appeals against the abovementioned Judgment of the Basic Court, alleging that regarding the incriminating part of the above-mentioned Judgment regarding the criminal sanction, *"The first instance judgment is ungrounded in terms of criminal sanctions imposed"* while regarding the acquittal part of the above Judgment, the Special Prosecution of the Republic of Kosovo, alleged essential violation of the provisions of criminal procedure.

23. On 26 June 2018, against the abovementioned Judgment of the Basic Court [PKR. 740/16], the Applicant filed an appeal with the Court of Appeals, alleging essential violation of the provisions of criminal procedure, violation of criminal law, erroneous and incomplete determination of factual situation and the decision on the criminal sanction. The Applicant in his appeal among others argued that: *"Mr. Arifi was not the person responsible for establishing and operating the budget of the NGO " Zëri i Ashkalinjëve " (ZAI) and the Court selectively made the assessment by trusting the witnesses (of its own choosing) and apparently leaving the impression that despite the evidence, testimonies and the law has supported the allegation of the Prosecution that Mr. Arifi MUST be convicted in this trial even though the Prosecution has not provided evidence to substantiate the well-founded suspicion because the accused did not have the role of founder, manager, authorized person, moreover he was never authorized to bank account opened in the name of ZAI and consequently could not even withdraw money from the latter".*

24. On 28 March 2019, the Court of Appeals, by Judgment PAKR. No. 328/2018 decided to:

> "I. *the judgment of the Basic Court is modified [...] in the sentencing part regarding the decision on punishment and the obligation regarding the legal qualification of the criminal offense so that this Court [of Appeals] finds that in the actions of the accused Etem Arifi and* [BG] *described in the enacting clause I of the judgment are formed the elements of the criminal offense of subsidy fraud, from Article 336 par 3 in conjunction with paragraphs 2 and 1 of Article 31 of the CCRK and for this criminal offense sentences the accused with (1) year and (3) months imprisonment* [...] [The part on the property claim, the Court of Appeals states that it remains the same as in Judgment PKR. 740/16, of 20 April 2018, of the Basic Court].
> II. *Whereas, the above-mentioned judgment in the acquittal part regarding the accused Etem Arifi is annulled and the case is remanded to the same Court for retrial.*
> *III. The appeals of the defendants' defence counsels are rejected as ungrounded".*

25. The Court of Appeals in its Judgment reasoned that, the Basic Court when imposing the sentence has taken into account the mitigating circumstances, but those circumstances cannot be considered of the nature that justify the suspended sentence, given the gravity of the criminal offense, the damage caused, and the fact that the Applicant is a member of the Assembly of the Republic of Kosovo. Regarding the acquittal part of Judgment PKR. 740/16, the Court of Appeals stated that this part is remanded for retrial as the Basic Court did not reason the fact why it acquitted the Applicant of the charge of committing the criminal offense "*trading in influence* ", under Article 431.1 of the CCRK.

26. On 14 May 2019, the Basic Court sent to the Office of Criminal Sanctions a proposal for the execution of the imprison sentence for the Applicant.

27. On 22 May 2019, the Applicant filed a request for protection of legality with the Supreme Court, against Judgment PAKR. No. 328/2018, of the Court of Appeals. In his request, the Applicant alleged that the above-mentioned Judgment of the Court of Appeals was rendered in violation of the provisions of the criminal procedure, as the judge who participated in the composition of the trial panel of the court of second instance participated in the composition of the Panel of the Court of Appeals when deciding according to Decision PN. no. 779/2017 of 5 October 2017, on the appeal regarding the request for dismissal of the indictment and objection of evidence. Also, the Applicant alleged erroneous determination of facts, stating that Judgment PAKR. No. 328/2018 is contradictory and alleged violation of criminal law.

28. On 20 June 2019, the Supreme Court, by Judgment Pml. No. 168/2018 approved the request for protection of legality, annulling Judgment PAKR. No. 328/2018 of the Court of Appeals and remanding the case for retrial. The basic reason on which the Supreme Court decided to approve the request for protection of legality as grounded was precisely the participation of the judge who should have been excluded, according to the Supreme Court and according to the Applicant. In this context, the Supreme Court noted that "it *has not assessed other alleged violations as the composition of the court was not in accordance with the law, namely that the judge who should have been excluded participated in rendering the judgment, which constitutes an essential violation of the provisions of criminal procedure under article 384 par.1 .1.2 of the CPCK and as such conditions the annulment of the judgment of the second instance court".*

29. On 20 August 2019, the Court of Appeals, acting on retrial, rendered Judgment PAKR. No. 328/19. By it, the Court of Appeals decided the following:

> I. *With the approval of the appeal of the Special Prosecution of the Republic of Kosovo, Judgment PKR.no.740116 of the Basic Court DSC in Prishtina is modified, of 20.04.2018 in the sentencing part regarding the decision on the sentence [...], and for this criminal offense [...] sentences the accused Etem Arifi to 1 year and 3 months imprisonment [...].*
> II. *The accused Etem Arifi and [BG], are obliged to compensate the Ministry of Labor and Social Welfare in the name of the damage caused*

the amount of € 22,900, while the Office of the Prime Minister of the Republic of Kosovo-Office for Communities the amount of € 2,749, all within 3 months.
III. With the approval of the appeal [s] of the SPRK, and ex officio, the judgment in the acquittal part regarding the accused Etem Arifi is annulled and the case is remanded to the Basic Court DSC in Prishtina for retrial.
IV. The appeals of the defense counsels and the accused are rejected as ungrounded".

30. With regard to the Applicant's other allegations, the Court of Appeals stated that "*the appealed judgment does not contain essential violations of the provisions of the criminal procedure alleged in the appeal of the accused Etem Arifi [...] nor other violations which this court takes care of ex officio, which would condition the annulment of the appealed judgment. The Court of Appeals considers that the first instance court in the appealed judgment has given sufficient and clear reasons on which it is based when resolving this legal matter, in particular when proving the existence of a criminal offense and criminal liability of the accused for which they have been announced and this court accepts as fair the reasons presented regarding the evidence administered in the court hearing*".

31. On 1 November 2019, the Basic Court sent again to the Office of Criminal Sanctions the proposal for the execution of the imprisonment sentence for the Applicant.

32. On 18 November 2019, the Applicant submitted his second request for protection of legality to the Supreme Court. In this case, he filed a request against the Judgment of the Basic Court PKR. No. 740/16 of 20 April 2018 and Judgment PAKR 328/19 of the Court of Appeals of 20 August 2019, alleging violation of the provisions of criminal procedure and violation of criminal law. In his second request for protection of legality the Applicant specifically claimed the following:

(i) The judgments which he challenges are incomprehensible and contradictory and that they are not reasoned and that the reasons have not been presented in relation to the decisive facts;

(ii) His actions do not in any way constitute a criminal offense because the Applicant was not at all an integral part of the NGO "Zëri i Ashkalinjëve për Integrim" nor did he seek, sign, use the benefits, etc. From the funds requested and benefited by the NGO "Zëri i Ashkalinjëve për Integrim" with the destination defined by the request submitted to the MLSW, but the finding that it had a role based on material evidence is unrounded;

(iii) Decisions against which a request for protection of legality was filed have been rendered in violation of criminal law when it comes to the time of the commission of the criminal offense, as an essential element of the figure of the criminal offense. In this respect, it was specifically claimed that "*the issue of determining the time of commission of a criminal*

offense is of special practical importance because it depends on this fact what law will be applied, namely to apply the most favorable law". The Applicant alleged that the regular courts ignored the important fact presented in the indictment which "*includes the period December 2012 to July 2013 during which the legal system in Kosovo has undergone radical reform*". He further alleges that in the challenged judgments, there is no reference which would clearly define the time of the commission of the criminal offense and what law has been applied in the present case;

(iv) (iv) The Applicant in his request for protection of legality further stated "*The principle of legality known by the phrase "Nullum crimen sine lege, nulla poena sine lege" is a basic principle of the Constitution of Kosovo, the Criminal Code and encompasses the entire legal system of the country. Therefore, this principle should not be ignored by anyone* [...]";

33. On 27 December 2019, the State Prosecutor, by the submission KMLP. II. No. 263/2019, proposed to reject as ungrounded the request for protection of legality submitted by the Applicant.

34. On 30 January 2020, the Supreme Court by Judgment PML. No. 380/2019 rejected as ungrounded the request for protection of legality submitted by the Applicant.

35. First, the Supreme Court, in relation to the Applicant's allegation that his actions do not in any way constitute a criminal offense, held "*That the convict Etem Arifi was aware of all this, speaks the fact that he communicated by phone and in person throughout the period from December 2012 to July 2013, with the convict [BG], which is confirmed by transcripts of "sms" and from the statement of the witness [A.R] as well as by examining the list of banking transactions from the account of the NGO. The first instance and the second instance court, in this factual situation correctly determined, and rightly concluded that in the actions of the convict Etem Arifi are formed the elements of the criminal offense of subsidy fraud from Article 336 par.3 in conjunction with paragraphs 2 and 1 and Article 31 of the CCK, because to commit this criminal offense it is sufficient by falsely presenting facts about the NGO headquarters, staff and program, to be used for purposes for which they were not provided.*

36. Secondly, regarding the Applicant's allegation that they were committed in violation of criminal law when it comes to the time of the commission of the criminal offense, as an essential element of the figure of the criminal offense, the Supreme Court reasoned "*The Supreme Court, assessing the allegations from the request as well as based on the case file, finds that the enacting clauses of the judgments are clear, they do not contradict either themselves or their reasoning. In the reasoning of the judgment of the first instance and that of the second instance are presented all the necessary factual and legal reasons on the basis of which the meritorious decision has been taken and which is also approved by this court. Sufficient legal reasons are given in the*

reasoning regarding all the evidence administered in the court hearings, noting what facts and for what reasons it is proven or unproven and assessing the contradictory evidence in accordance with the provision of Article 370 par. 7 of the CPCK. The case file confirms that the convicts Etem Arifi and [BG] *were found guilty of the criminal offense of subsidy fraud in co-perpetration under Article 336 par.3 in conjunction with Article 2 and Article 31 of the CCK, and that the latter from December 2012 until July 2013, after previously being in friendly relations, at the same time the convict Etem Arifi was a Member of the Assembly of Kosovo and President of the Ashkali Party, have decided to establish the NGO " Zëri i Ashkalinjeve për Integrim [...] The court of first instance and that of the second instance, in this factual situation, rightly proved, rightly concluded that in the actions of the convict Etem Arifi are formed the elements of the criminal offense of subsidy fraud in under Article 336 par.3 in conjunction with par. 2 and 1 and Article 31 of the CCK, because in order to commit this criminal offense, it is sufficient that the subsidies obtained by falsely presenting facts related to the headquarters, employees and the program of the NGO, be used for purposes for which they are not provided. Thus, the allegation that the criminal law was violated to the detriment of the convict when he was found guilty of the criminal offense of fraud in subsidies under Article 336 paragraph 3 in conjunction with paragraphs 2 and 1 and Article 31 of the CCK is not grounded. Also, this court finds that the Criminal Code of Kosovo was correctly applied, which entered into force on 01.01.2013, because the criminal offense was committed from December 2012 to July 2013. In criminal offenses which are committed in the following, as the time of committing the criminal offense is considered the last incriminated action, in accordance with Article 9 of the CCK, this is taken as a basis for determining what law will be applied. In this case, since the last action was committed in July 2013, the Criminal Code of Kosovo was rightly applied, which entered into force on 01.01.2013"*

37. On an unspecified date, the Applicant filed with the Basic Court in Prishtina a request for postponement of the execution of the criminal sanction/prison sentence due to health problems.

38. On 4 March 2020, the Basic Court in Prishtina by Decision Ed. No. 2035/19, approved the Applicant's request and decided to postpone the commencement of the execution of the sentence against the Applicant, until 4 May 2020.

Applicant's allegations

39. The Applicant alleges that Judgment PML. No. 380/2019 of the Supreme Court of 30 January 2020, was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR.

40. The Applicant considers that the violation of his right to a fair and impartial trial occurred as a result of: (i) violation of the principle of legal certainty (ii) lack of reasoning of the court decision; (iii) the Applicant's absence from the hearing session in the Court of Appeals;

i) Regarding the violation of the principle of legal certainty

41. With regard to this allegation, the Applicant states that "*contrary to the principle Reformato in Peius, the Court of Appeals of Kosovo, by Judgment PAKR. No. 328/19 of 20.08.2019, reduces the deadline for compensation of damage caused from 6 months to 3 months. So in this case, legal remedy against the Judgment (with 6 months payment term) was filed only by Mr. Etem Arifi and after his Request for Protection of Legality was approved and the Court of Appeals modified the decision to his detriment*". The Applicant alleges that the Court of Appeals changed the sentence to his detriment, and according to the Applicant this course of action by the Court of Appeals violates the principle of legal certainty.

42. In support of his allegations regarding the violation of the principle of legal certainty, the Applicant refers to the case law of the ECtHR, namely the cases: *Beian v. Romania*, Judgment of 6 December 2007, *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016

ii) Regarding the lack of reasoning of the court decision

43. With regard to this allegation, first of all, the Applicant considers that in the challenged decision of the Supreme Court "*no clarification has been made between the findings on merit and the assessments regarding the evidence proposed by the State Prosecutor and the legal conclusions of the court on the other hand*".

44. More specifically, the Applicant alleges that the Supreme Court arbitrarily "*has ignored the allegations submitted by the Applicant's defense counsel in the Request for Protection of Legality pf 18.11.2019*". According to him, the Supreme Court "*does not justify at all the allegations of the defense regarding the meaning of the expression "Subsidy*".

45. He further states that the Supreme Court has not assessed the Applicant's allegations regarding the completion of the elements of the criminal offense which he was convicted with. This is because according to the Applicant, the CCRK provides that the criminal offense under Article 336 "Subsidy fraud" can be committed if the information he provides when applying for a subsidy is incorrect, conceals any information or misuses such a subsidy. According to the Applicant, these actions can be performed only by the person who carries out business activities. The Applicant emphasizes the fact that the Supreme Court does not distinguish between the expression subsidy and grant/transfer, an allegation which he claims to have raised in the previous regular courts.

46. The Applicant further alleges that the term "Subsidy" in the CCRK is not intended to include any type of funding made from public funds. The CCRK in Article 337, he stated, defines the criminal offense of Fraud related to the receipt of funds from the European Community, or in Article 335 defines the criminal offense of fraud. In this regard, the Applicant states that "*in this case, the criminal offense under Article 336 Subsidy fraud has a very specific*

purpose, namely to protect the category of Subsidies from possible misuse [...]".

47. The Applicant adds that even if the Supreme Court in its decision argued on the issue of subsidies, he could not be the perpetrator of the criminal offense of subsidy fraud, as the latter did not apply for obtaining, continuing or modifying conditions for receiving the subsidy, because this was done by the Director of the Non-Governmental Organization "Zëri i Ashkalinjëve për Integrim".

48. The Applicant further adds that he "*does not have and has not had any position within the NGO "Zëri i Ashkëlinjëve për Integrim" and the application was submitted by the director of this NGO [B.G]. Also the other elements of this criminal offense are completed by [B.G] as he is the person who submitted inaccurate or incomplete data and then did not disclose the data related to the transfer/grant expenditure [...]. Thus, in this case, the failure of the Supreme Court of Kosovo to reason the distinction of the elements of the criminal offense and the fact who may be the perpetrator of that criminal offense constitutes a violation of the right to a fair and impartial trial*".

49. In support of his allegations regarding the lack of reasoning of court decisions, the Applicant referred to the case law of the Constitutional Court, namely the cases: KI 146/17, 147/17, KI 148/17, KI 149/17 and KI 1590/17, Applicants *Isni Thaqi, Zeqir Demaku, Fadil Demaku, Nexhat Demaku and Jahir Demaku*, Judgment of 30 May, 2018; KI 135/14, Applicant *IKK Classic*, Judgment of 10 November 2015; KI172/12, Applicants *Veton Berisha and Ilfete Haziri*, Judgment of 5 December 2012. He further referred to the case law of the European Court of Human Rights (hereinafter: the ECtHR), namely the case *Tatishvili v. Russia*, Judgment of 22 February 2007; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Papon v. France*, Judgment of 7 June 2001.

ii) *Regarding the absence of the Applicant in the hearing session in the Court of Appeals*

50. With regard to this allegation, the Applicant emphasizes that the right to a fair trial in principle means the right of the parties to be present in person at the trial of their case.

51. He emphasizes that "*on the occasion of rendering Judgment PAKR. 328/2018 of 28.03. 2019, the Court of Appeals violated Article 390 of the CPCRK* [Criminal Procedure Code of the Republic of Kosovo] *as Etem Arifi was not invited to a session of the appellate panel at all. According to this decision, the suspended sentence was changed to an effective imprisonment sentence to Mr. Etem Arifi [...]*".

52. Based on his allegations regarding the non-presence of the Applicant in the review of his case in the Court of Appeals, the Applicant refers to the case of this Court: KI104/16, Applicant *Miodrag Pavic*, Judgment of 21 October 2016;

as well as the cases of the ECtHR: *Fredin v. Sweden*, Judgment of 23 February 1994; and *Ekbatani v. Sweden*, Judgment of 26 May 1988.

Allegations regarding interim measure

53. As noted above, in addition to the main request, the Applicant has also submitted a request for an interim measure to be imposed by the Court. Regarding the request for an interim measure, the Applicant states that taking into account *"that we are close to the date which is set for the Applicant to appear in the correctional facility for serving the sentence which is 04.05.2020, the imposition of an interim measure by the Constitutional Court is necessary and vital for the Applicant"*.

54. He further emphasized that the Court should also *"assess the status which the Applicant holds in the community as a deputy of the Republic of Kosovo for the fourth time in a row"*. In this regard, he emphasizes that *"the implementation of this Judgment* [challenged of the Supreme Court] *rendered in violation of constitutional rights and freedoms, would cause him to lose his mandate as a deputy and would deprive the Applicant of his liberty for months and possibly even years, and consequently it would cause irreparable damage to the Applicant as no court decision could return the mandate of the deputy. Furthermore, the violations of the rights and freedoms of the Applicant are evident and are presented in the reasoning of the referral"*.

55. Regarding the Applicant's request for imposition of an interim measure, he states that the Basic Court by Decision Ed. No. 2035/19 of 4 March 2020, taking into account the health condition of the Applicant, approved his request for postponement for another 2 months from the beginning of the execution of the sentence, specifically until 4 May 2020.

Applicant's final request to the Court

56. Finally, the Applicant requests the Court to decide the following:

> I. TO DECLARE THE REFERRAL ADMISSIBLE;
> II. TO FIND THAT there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;
> III. TO DECLARE that Judgment PML. No. 380/2019 of 30.01.2020 of the Supreme Court of Kosovo and Judgment PAKR. No. 328/19 of 20.08.2019 of the Court of Appeals of Kosovo are invalid because these Judgments are not in compliance with Article 31 of the Constitution and Article 6 of the ECHR.
> IV. TO REMAND the case to the Court of Appeals of Kosovo for reconsideration in compliance with the Judgment of the Constitutional Court
> V. TO ORDER the Court of Appeals of Kosovo to inform the Constitutional Court as soon as possible, but not longer than 6 months, about the

measures taken to implement the Judgment of this Court, in accordance with Rule 63 of the Rules of Procedure;
VI. TO REMAIN seized of the matter, pending compliance with that order;
VII. TO NOTIFY this decision to the parties;
VIII. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 24 (4) of the Law;
IX. TO DECLARE that this Judgment is effective immediately.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31 [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

European Convention on Human Rights

Article 6 (Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Provisional Code of the Republic of Kosovo R 2003/25

Article 262

SUBSIDY FRAUD

Whoever, in connection with the application for a grant, continuation, or modification of the terms of a subsidy, provides a competent authority with incorrect or incomplete information which is a condition for the granting, continuation or modification of a subsidy, or conceals such information in violation of an obligation to disclose such information to a competent authority, shall be punished by a fine or by imprisonment of up to five (5) years.

Criminal Code No. 04 / L-082 of the Republic of Kosovo (CCRK)

Article 3
Application of the most favorable law

1. The law in effect at the time a criminal offense was committed shall be applied to the perpetrator.
[...]

Article 9
Time of commission of criminal offenses

A criminal offense is committed at the time the perpetrator acted or ought to have acted, irrespective of when the consequence occurred

Article 336
Subsidy fraud

1. *Whoever, in connection with the application for a grant, continuation, or modification of the terms of a subsidy, provides a competent authority with incorrect or incomplete information which is a condition for the granting, continuation or modification of a subsidy, or conceals such information in violation of an obligation to disclose such information to a competent authority, shall be punished by a fine or by imprisonment of up to five (5) years.*
2. Whoever uses such subsidy in violation of the law or for purposes other than those for which it was originally granted by the subsidy provider shall be punished by a fine or by imprisonment of up to five (5) years.
3. If the offense provided for in paragraphs 1 or 2 of this Article results in material gain or material damage exceeding twenty-five thousand (25,000) EUR, the perpetrator shall be punished by imprisonment of one (1) to eight (8) years.
4. A subsidy for the purposes of this provision means a benefit from public funds under the law of the Republic of Kosovo which, at least in part is granted without market related consideration and is aimed at stimulating the economy.

Article 435
Unlawful collection and disbursement

1. An official person who collects from another something that such person is not bound to pay or collects more than such person is bound to pay or who, in a payment or delivery pays or delivers less than what is required shall be punished by a fine or by imprisonment of up to one (1) year.
2. If the value of the payments or delivery, provided for in paragraph 1 of this Article, exceeds fifteen thousand (15,000) EUR, the perpetrator shall be punishment buy imprisonment up to three (3) years.
3. An attempt to commit the offense provided for in paragraph 1 of this Article shall be punishable.

Article 436
Unlawful appropriation of property during a search or execution of a court decision

An official person who, during a search of premises or a person or during the execution of a court decision, takes movable property with the intent of obtaining an unlawful material benefit for himself, herself or another person shall be punished by imprisonment of six (6) months to five (5) years.

Admissibility of the Referral

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

58. 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".

59. The Court also examines whether the Applicant has fulfilled the admissibility requirements as required by Articles: 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and

freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

60. With regard to the fulfillment of the abovementioned criteria, the Court finds that the Applicant is an authorized party. who challenges an act of a public authority, namely Judgment Pml. No. 380/19 of the Supreme Court, of 30 January 2020, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms he claims to have been violated, in accordance with Article 48 of the Law and has submitted the Referral within the deadline set out in Article 49 of the Law.

61. However, in addition, the Court examines whether the Applicant met the other admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Specifically, Rule 39 (2) of the Rules of Procedure establishes 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."

62. The Court first recalls that the Applicant alleges that the challenged Judgment of the Supreme Court was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

63. In essence, the Applicant raises three key allegations related to the right to a fair and impartial trial. First, he alleges a violation of his rights guaranteed by Article 31 [Right to Fair and Impartial Trial], due to (i) violation of the principle of legal certainty, ii) lack of reasoning of the court decision, and (iii) his absence from the court hearing in the Court of Appeals.

64. Having said that, the Court will further elaborate on the abovementioned allegations in the light of the procedural guarantees guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, which have already been interpreted in detail through the case law of the ECtHR, in accordance

with which, the Court in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

Regarding the allegation of violation of the principle of legal certainty

65. In this regard, the Applicant alleges that "*contrary to the principle Reformato in Peius, the Court of Appeals of Kosovo, by Judgment PAKR. No. 328/19 of 20.08.2019, reduces the deadline for compensation of the damage caused, from 6 months to 3 months*". The Applicant alleges that the Court of Appeals changed the sentence to his detriment, and according to the Applicant, this course of action by the Court of Appeals violates the principle of legal certainty.

66. The Court, after analyzing all the document in the case file and the complete case file, notes that the Applicant is raising this allegation for the first time before the Constitutional Court.

67. The Court notes that the Applicant's request for protection of legality submitted to the Supreme Court alleges violations of the provisions of criminal procedure and violations of criminal law. However, none of the allegations in question raises either formally or in substance issues related to the allegation of a violation of the principle *Reformatio in Peius*.

68. With regard to this specific allegation of the Applicant, the Court notes that in the request for protection of legality, regarding this allegation it was stated that "*Further confirms the second part of the paragraph under I of the Judgment of the Basic Court in Prishtina PKR. No. 740/16 of 20.04.2018 (first instance) regarding the obligation for joint compensation within (3) months*".

69. In this regard, the Court reiterates that, in accordance with the principle of subsidiarity, the regular courts should be given the opportunity to decide on the case before them. This means that an alleged constitutional violation should, in principle, not be allowed to reach the Constitutional Court without first being reviewed by the regular courts.

70. The Court reiterates that the exhaustion of legal remedies includes two elements: (i) the exhaustion in the formal-procedural aspect, which implies the possibility of using a legal remedy against an act of a public authority, in a higher instance with full jurisdiction; and (ii) exhausting the remedy in a substantial aspect, which means reporting constitutional violations in "*substance*" before the regular courts, so that the latter have the opportunity to prevent and correct the violation of human rights protected by the Constitution and the ECHR. The Court considers as exhausted the legal remedies only when the Applicants, in accordance with applicable laws, have exhausted them in both aspects. (See the cases of the Constitutional Court, KI71/18, Applicants *Kamer Borovci, Mustafë Borovci and Avdulla Bajra*, Resolution on Inadmissibility of 21 November 2018, paragraph 57; KI119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility, of 3 May 2019, paragraph 73; and case KI154/17 and 05/18, cited above, paragraph 94).

71. Having regard to the circumstances, in which, according to the case file, it follows that these specific allegations of the Applicant have been filed for the first time before the Court, it concludes that the Applicant did not give the opportunity to the regular courts, specifically to the Supreme Court, to address these allegations and on that occasion, to prevent alleged violations raised by the Applicant directly before this Court without exhausting legal remedies in their substance. (See, *mutatis mutandis*, the case of the Court, KI118/15, Applicant *Dragisa Stojkovic*, Resolution on Inadmissibility of 12 April 2016, paragraphs 30-39).

72. Also, the Court, in relation to the Applicant's allegation raised in the request for protection of legality in the Supreme Court, against the decisions of the lower instance courts, alleging a violation of criminal law when it comes to the time of the commission of the criminal offense, as an essential element of the figure of the criminal offense and the erroneous application of the law, the Court recalls Article 9 of the CCRK, which establishes as follows:

Article 9
Time of commission of criminal offenses

A criminal offense is committed at the time the perpetrator acted or ought to have acted, irrespective of when the consequence occurred

73. In this regard, the Court considers that the Supreme Court has clearly specified in the reasoning of Judgment PML. No. 380/2019 of 30.01.2020, where among other things this Court finds and evidences that the Criminal Code of Kosovo that entered into force on 01.01.2013, has been correctly applied, because the criminal offense was committed from December 2012 to July 2013, and consequently in the ongoing criminal offenses, as the time of commission of the criminal offense is considered the last incriminating action, in accordance with Article 9 of the CCK, this action is taken as the time of commission of the criminal offense.

74. Therefore, in the light of the foregoing, with respect to this allegation, the Court considers that the Applicant has not substantiated his allegation.

75. The Court reiterates that it is the Applicant's obligation to substantiate his allegations and to submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see, case of the Constitutional Court No. KI19/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Syla*, Resolution on Inadmissibility of 5 December 2013)

Regarding the allegation of non-reasoning of the court decision

76. The Court first recalls the content of the relevant parts of Article of the Constitution and the ECHR which guarantee the right of every applicant to a reasoned court decision.
77. Article 31 of the Constitution provides:

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.[...]

78. Article 6 paragraph 1 of the ECHR establishes that:

> *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[...]"*

79. The Court recalls that the Applicant alleges that the Supreme Court did not address his allegations in the request for protection of legality regarding the completion of the elements of the criminal offense with which he was convicted. This is because, according to the Applicant, the CCRK provides that the criminal offense under Article 336 "*Subsidy fraud*" can be committed if the information he provides when applying for a subsidy is incorrect, conceals any information or misuses such a subsidy, and the latter can only be performed by the person conducting business activities. The Applicant alleges that the Supreme Court did not take into account the fact that the Applicant could not be the perpetrator of the criminal offense of subsidy fraud, as he did not apply for obtaining, continuing to modify the conditions for receiving the subsidy, but this was done by the Director of the Non-Governmental Organization "Zëri i Ashkalinjëve për Integrim". In this context, the Applicant underlines that the right to a fair and impartial trial includes the right to a reasoned decision.

80. In relation to this allegation, the Court refers to the case law of the ECtHR, which held that, although authorities enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (1) of the ECHR, their courts must "*indicate with sufficient clarity the grounds on which they based their decision*". (See ECtHR case *Hadjianastassiou v. Greece*, application no. 12945/87, Judgment of 16 December 1992, paragraph 33, see also case of the Court KI97/16, Applicant "*IKK Classic*", Judgment of 9 January 2018, paragraph 45, see case KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 17 May 2018, paragraph 54).

81. In accordance with the case law of the ECtHR, this Court, in a number of cases stated that, although the courts are not obliged to address all the allegations put forward by the Applicants, they should nevertheless address the allegations

central to the cases before them (see, *mutatis mutandis*, the abovementioned case of the Court KI97/16, Applicant *IKK Classic*, Judgment of 9 February 2016, paragraph 53). In this regard, the right to obtain a court decision in compliance with the law includes the obligation for the courts to provide reasons for their decisions, at both procedural and substantive level (see, *mutatis mutandis*, the abovementioned case of the Court KI97/16, Applicant *IKK Classic*, Judgment of 9 February 2016, paragraph 54).

82. In the Applicant's case, the Court first notes that the Supreme Court rejected his request for protection of legality as ungrounded. The reasons for rejecting the Applicant's request for protection of legality, the Supreme Court based on the relevant provisions of the CCRK which it considered relevant in relation to the circumstances of the present case and in relation to the substantive allegations raised by the Applicant.

83. First, with regard to the Applicant's specific allegations that the Supreme Court did not address his allegations in the request for protection of legality regarding the completion of the elements of the criminal offense with which he was convicted, the Court refers to the relevant part. of the Judgment of the Supreme Court which reasons:

> *"From the case file it is confirmed that the convicts Etem Arifi and* [B.G] *are found guilty of the criminal offense of subsidy fraud in co-perpetration under Article 336 par.3 in conjunction with Article 2 and Article 31 of the CCK, and that the latter from December 2012 to July 2013, having previously been in friendly relationship, at the same time the convict Etem Arifi was a Deputy of the Assembly of Kosovo and President of the Ashkali Party, have decided to establish the NGO " Zëri i Ashkalinjeve për Integrim". [...]*
> *At the moment that the Office of the Prime Minister requested a report on the expenditures of the received subsidies, the investigations for the misuse of these funds started. From the case file it is confirmed that the convict Etem Arifi and [...],talked about the opening of this NGO and that the NGO was fictitious, since it had never functioned in accordance with its statute and moreover had no headquarters, there were no staff working, although the witness [A.R] and the convict's daughter, [A.A], were paid as workers of this NGO.*
>
> *That the convict Etem Arifi was aware of all this, speaks the fact that the latter had communicated by phone and in person throughout the period from December 2012 to July 2013, with the convict [B.G], which is confirmed by transcripts of "sms" and from the statement of the witness [A.R] as well as by examining the list of banking transactions from the NGO account.*
>
> *The first instance court and that of the second instance, in this factual situation, correctly determined, correctly concluded that in the actions of the convict Etem Arifi are formed the elements of the criminal offense of subsidy fraud under Article 336 par.3 in conjunction with par.2 and 1 and Article 31 of the CCK, because in order to commit this criminal offense, it is*

sufficient that the subsidies obtained by falsely presenting facts related to the headquarters, employees and the program of the NGO, be used for purposes for which they were not provided".

84. In addition, the Court also refers to Judgment PAKR. No. 328/19 of the Court of Appeals, through which it was found that the challenged Judgment of the Basic Court does not contain essential violations of the provisions of the criminal procedure nor other violations, for which the Court of Appeals takes care of *ex officio*. Also in its reasoning the Court of Appeals found that the Basic Court has given sufficient and clear reasons on which it has based the resolution of the case and that after the administration of evidence in the court hearing, it has correctly determined the factual situation. In particular with regard to the issue of proving the existence of a criminal offense and criminal liability, the Court of Appeals in the reasoning of the Judgment, *inter alia*, stated that: *"after analyzing and assessing all the evidence and in relation to each other, fully supports the fair and logical conclusion of the court of first instance for the correct and complete determination of the factual situation and the finding of the accused criminally liable for their actions for committing the criminal offense for which they were found guilty and reasons given in this regard, but it is necessary to find that the criminal law was erroneously applied when the accused by the appealed judgment were found guilty of the criminal offense of subsidy fraud from Article 336 par 3 in conjunction with Article 31 of the CCRK. This is due to the fact that as it results from the case file and the enacting clause of the appealed judgment, the accused Etem Arifi and [BG], the subsidies given on behalf of the NGO "ZAI", were not used them for the purposes for which they were given therefore , in their actions are fulfilled the essential elements of the criminal offense under Article 336 paragraph 3 in conjunction with paragraph 2 and 1 in conjunction with Article 31 of the CCRK, and not only of the criminal offense under Article 336 paragraph 3, for which the legal qualification had to be changed in accordance with the criminal law. Regarding the decision on the sentence, the Prosecution alleges that the first instance court, in determining the type and length of the sentence, assessed the aggravating and mitigating circumstances and in this case for the accused assessed as mitigating circumstances the fact that the accused were not previously convicted, family circumstances, their correct stay in court. However, the court in question did not justify the imposition of the sentence below the limit provided by law, namely the imposition of a suspended sentence, since the criminal offense of Subsidy fraud is punishable by imprisonment of 1 to 8 years, which indicates the intensity of danger of the offense for which the accused have been found guilty, in this case the danger of the offense committed is manifested by the capacity of the perpetrators of the criminal offense in society, the motive and manner of committing the criminal offense.*

85. In the light of the foregoing, the Court concludes that Judgment Pml. No. 380/19, of the Supreme Court, of 30 January 2020 is clear and addresses the substantive allegations raised by the Applicant in his request for protection of legality. There is no substantive argument which the Supreme Court has set aside as unreasoned, as alleged by the Applicant.

86. Accordingly, the Supreme Court reached this conclusion after considering the reasoning given by the Basic Court, when it found the Applicant guilty of the committed criminal offense; his appeal to the Court of Appeals; the complaint of the Special Prosecution; the reasoning given by the Court of Appeal; as well as the Applicant's request for protection of legality, submitted to the Supreme Court.

87. Therefore, the Court considers that the conclusions of the Supreme Court were reached after a detailed examination of all the arguments submitted by the Applicant. Consequently, the Court notes that the reasoning given by the Supreme Court meets all the necessary standards of the ECtHR and the Court for a reasoned court decision.

88. In this regard, the Court recalls that in rejecting an appeal, or as in the present case, rejecting a request for protection of legality, the Supreme Court may, in principle, merely approve the reasons for rendering the decision of the lower instance courts, in this case the Court of Appeals and the Basic Court (see ECtHR cases, *Garcia Ruiz v. Spain*, cited above, paragraph 26; *Helle v. Finland*, application No. 20772/92, Judgment of 19 December 1997, paragraphs 59-60).

89. In this context, the Court also recalls that cases where a court of third instance court, as in the case of the Applicant, the Supreme Court, which confirms the decisions taken by the lower instance courts - its obligation to justify decision-making differs from cases where a court changes lower court decision-making. In the present case, the Supreme Court did not change the decision of the Court of Appeals or that of the Basic Court– by which the Applicant was found guilty but only proved their legality, as, according to the Supreme Court, there were no essential violations of criminal procedure and criminal law (see the case of Court KI194/18, Applicants *Kadri Muriqi and Zenun Muriqi*, Resolution on Inadmissibility of 5 February 2020, paragraph 106).

90. In this respect, the Court considers that, even though the Supreme Court may not have responded at every issue raised by the Applicant in his request for protection of legality, it has addressed the Applicant's substantive arguments as to the application of the substantive and procedural law (see, *mutatis mutandis*, the ECtHR cases: *Van de Hurk v. the Netherlands*, paragraph 61; *Buzescu v. Romania*, cited above, paragraph 63; and *Pronina v. Ukraine*, Application No. 63566/00, Judgment of 18 July 2006, paragraph 25, see the case of the Court KI194/18, Applicants *Kadri Muriqi and Zenun Muriqi*, Resolution on Inadmissibility of 5 February 2020, paragraph 107). In doing so, the Supreme Court has fulfilled its constitutional obligation to provide a reasoned court decision, in accordance with the requirements of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and the case law of the ECtHR and of this Court itself.

91. In the Applicant's case, the Court notes that in his allegations, submitted to the Court, mainly raise issues of legality.

92. In this regard, the Court reiterates that it is not its duty to deals 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). It may not itself assess the law which has led a regular court to adopt one decision rather than another. Otherwise, the Court would be acting as a court of "fourth instance", which would result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law (See ECtHR case *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, also case KI70/11, Applicant: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011).

93. With regard to the Applicant's allegations of violation of the right to fair and impartial trial, the Court notes that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, cannot in itself raise an arguable claim of violation of the right to fair and impartial trial (see, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; see also, case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 42).

94. Consequently, based on the abovementioned 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, holds that the Applicant has not proved and has not sufficiently substantiated his allegations that the proceedings before the regular courts were in any way unfair or arbitrary and that his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated by the challenged Judgment.

Regarding the allegation that the Applicant was not present at the hearing session in the Court of Appeals

95. With regard to this allegation, the Court recalls the Applicant's claim that "*on the occasion of rendering Judgment PAKR. 328/2018 of 28.03. 2019, the Court of Appeals violated Article 390 of the CPCRK as Etem Arifi was not invited to a session of the appellate panel at all. According to this decision, the suspended sentence was changed to an effective imprisonment sentence to Mr. Etem Arifi*".

96. From the case file the Court notes that against Judgment PAKR No. 328/2018, of the Court of Appeals, of 28 March 2019, the Applicant submitted a request for protection of legality to the Supreme Court.

97. The Supreme Court by Judgment Pml. No. 1628/2018, approved the request for protection of legality submitted by the Applicant and annulled the PAKR, No. 328/2018 of the Court of Appeals, due to the composition of the trial panel.

98. Consequently, Judgment PAKR No. 328/2018 of the Court of Appeals was rendered invalid.

99. The Court notes that the Court of Appeals, acting on the retrial by Judgment PAKR. No. 328/19, of 20 August 2019, the Applicant was also present at the review session. At this point, the Court refers to Judgment PAKR. No. 328/19, of 20 August 2019 of the Court of Appeals where among other things it is stated that *"The Court of Appeals held the panel session on 20.08.2019 in which the accused Etem Arifi and the defense counsel Merita Stublla-Emini were present".*

100. In light of all that has been clarified above, from what follows from the case file, the Court notes that the Applicant was summoned and was present at the hearing session held at the Court of Appeals.

101. Consequently, the Court finds that the Applicant's allegation regarding his absence from the Court of Appeals in the review of his case is ungrounded.

102. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and must be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

Request for interim measure

103. The Court recalls that the Applicant also requested the Court to impose an interim measure, stating *"we are close to the date which is set for the Applicant to appear in the correctional facility for serving the sentence which is 04.05.2020, the imposition of an interim measure by the Constitutional Court is necessary and vital for the Applicant.*
It is also necessary to assess the status which the Applicant holds in the community as a deputy of the Republic of Kosovo for the fourth time in a row, we consider that the implementation of this Judgment [challenged of the Supreme Court] *rendered in violation of constitutional rights and freedoms, would cause him to lose his mandate as a deputy and would deprive the Applicant of his liberty for months and possibly even years, and consequently it would cause irreparable damage to the Applicant as no court decision could return the mandate of the deputy".*

104. However, the Court has just concluded that the Applicant's Referral is to be declared inadmissible on constitutional basis.

105. Therefore, in accordance with Article 27.1 of the Law and Rule 57 (4) (a) of the Rules of Procedure, the request for an interim measure must be rejected, as it cannot be considered because the Referral was declared inadmissible.

Conclusion

106. The Court found that the Applicant has not substantiated his allegations that the relevant proceedings followed by the regular courts were in any way unfair or arbitrary. He also did not substantiate his allegations that Judgment PML.

No. 380/2019 of the Supreme Court violated the rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

107. In this regard, the Court found that the Applicant's Referral does not meet the admissibility criteria set out in the Rules of Procedure, as the Referral is manifestly ill-founded on constitutional basis. This is due to the fact that the presented facts do not in any way justify the allegation of violation of a constitutional right and that the Applicant has not sufficiently substantiated his allegation of the alleged constitutional violations.

108. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and as such is to be declared inadmissible, in accordance with Rule 39 (2) of the Rules of Procedure. In the same line of reasoning, the Court also rejected the request for an interim measure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, and in accordance with Rule 39 (2) and 57 (1) of the Rules of Procedure, on 23 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**

Safet Hoxha Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.