



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

Prishtina, on 26 November 2020
Ref.No.:AGJ 1642/20

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JUDGMENT

in

Case No. KI209/19

Applicant

Memli Krasniqi

Constitutional review of the Judgment Ka. No. 664/2019 of the Court of Appeals of Kosovo, of 5 August 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 Memli Krasniqi (hereinafter: the Applicant) represented by Artan Qerkini, a lawyer in the Law Firm "Sejdiu & Qerkini" L.L.C from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment Ka. no. 664/2019 of the Court of Appeals of Kosovo, of 5 August 2019, in conjunction with the Decision no. AKK-03-02-821/18 of the Anti-Corruption Agency, of 15 August 2018.
3. The Applicant requests the imposition of an interim measures against Judgment Ka. no. 664/2019 of the Court of Appeals of Kosovo, of 5 August 2019.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, which allegedly has violated the Applicant's fundamental rights and freedoms 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 on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law 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 Constitutional Court

6. On 22 November 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 27 November 2019, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges Selvete Gërxhaliu-Krasniqi (presiding), Bajram Ljatifi and Radomir Laban.
8. On 23 January 2020, the Applicant was notified about the registration of the Referral and a copy of the Referral was sent to the Court of Appeals of Kosovo.
9. On 17 June 2020, the Court requested from the Basic Court in Prishtina to submit the complete case file related to Referral no. KI209/19.
10. On 29 July 2020, the Basic Court in Prishtina submitted the complete case file related to the Referral no. KI209/19.
11. On 5 November 2020, the Review Panel considered the Report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral as well as the violation of the right to fair and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6.1. of the ECHR.

Summary of facts

12. On 15 August 2018, the Anti-Corruption Agency (hereinafter: ACA) by Decision AKA-03-02-821/18, ascertained that: (i) there is a conflict of interest in the dealt case bearing the number AKK.-03-02-821/18, for the Applicant, a member of the Assembly of the Republic of Kosovo and at the same time the Vice-President of the Kosovo Olympic Committee (hereinafter: KOC); (ii) the ACA notifies the President of the Assembly and requests the initiation of legal proceedings against him; (iii) the ACA will request the initiation of minor offence proceedings by the competent Court; (iv) all decisions issued by the ACA regarding the conflict of interest are made public on the official website of the ACA.
13. In the abovementioned Decision ACA had reasoned: (i) that the Applicant exercises the position of deputy in conformity with the Law No. 03/L-111 on Rights and Responsibilities of the Deputy, while the position of the first Vice-President of the Kosovo Olympic Committee is exercised by him based on the Olympic Committee, which operates according to the provisions of the Law 2003/24 on Sports, Law No. 04/L-075 amending and supplementing the Law No. 2003/24 on Sports; (ii) the ACA has sent a letter of warning to the Applicant (ACA-DPK-03-02/ 1642/18) whereby it was ascertained that the simultaneous exercise of the function of a Member of the Assembly of Kosovo and of the first Vice-President of the Olympic Committee is prohibited by Law No. 06/L-011 on Prevention of Conflict of Interest in Discharge of a Public Function; (iii) the Applicant was requested to resign from one function within the legal deadline, otherwise the ACA is obliged to act in accordance with the Law No. 06/L-011 on Prevention of Conflict of Interest; and, that (iv) despite the legal deadline provided by the ACA, the Applicant has failed to take action in order to avoid the situation of conflict of interest in discharge of the public function.
14. On 22 August 2018, the ACA filed a request for initiation of a minor offence proceedings in the Basic Court in Prishtina-General Department- Division for Minor Offence (hereinafter: the Basic Court), on the grounded suspicion that the Applicant contrary to Article 14 paragraph 1 of the Law No. 06 / L-011 on Prevention of Conflict of Interest, simultaneously exercises the functions of the Member of the Assembly of the Republic of Kosovo and of the first Vice-President of the Kosovo Olympic Committee.
15. On 5 June 2019, the Basic Court by Decision K.no.2608/19, due to the lack of evidence, decided to conclude the minor offence proceedings against the Applicant by suspension of proceedings. The Basic Court, inter alia, reasoned that: (i) According to Article 6 of the Law No. 06/L-011 on Prevention of Conflict of Interest, the conflict of interest may result from the circumstances in which an official has a private interest which influences, might influence or seems to influence the impartial and objective performance of official duties performing his official duty impartially and objectively; (ii) the Applicant is a member of the steering body of the KOC but there is no evidence that he personally holds an executive position; and that, (iii) there is no argument that the KOC receives funding directly from the Assembly, therefore in the absence of evidence the minor offence proceedings are suspended.

16. On an unspecified date, the ACA filed an appeal with the Court of Appeals against the aforementioned decision of the Basic Court stating: (i) that there is a suspicion that the Applicant, as a senior official, has come to a situation of conflict of interest because as a Member of the Assembly of Kosovo at the same time he exercises the duty of first Vice-President of the KOC; (ii) the ACA has sent a letter of warning to the Applicant on which occasion the latter was informed that he had come to a situation of conflict of interest, as per Article 14, paragraph 1 of the Law No.06/L-011 on Prevention of Conflict of Interest; and that, (iii) the Applicant was requested to resign from one position, but he failed to take the actions requested by the ACA.
17. On 5 August 2019, the Court of Appeals by Judgment Ka.no.664/2019 approved as founded the appeal of the ACA and amended the Decision of the Basic Court K.no.2609/2018 of 5 June 2019, so that the defendant (Applicant) due to the minor offence from Article 14, paragraph 1, sanctioned according to Article 23 paragraph 1, item 1.1 of the Law No. 06/L-011 on Prevention of Conflict of Interest, was imposed a fine of 1,500 (one thousand and five hundred) euros, which he has to pay within 15 days from the day of receipt of this Judgment, otherwise the imposed fine will be collected in accordance with Article 164.3 of the LMO.
18. The Court of Appeals, among other things, reasoned that: (i) the Basic Court did not properly assess the evidence presented and deposited by the parties to the proceedings; (ii) the reasoning of the Basic Court is contradictory and confusing because the conclusion of contracts or the acquiring of funds is not a matter of adjudication; (iii) the subject matter of trial is whether the defendant (the Applicant) has come to a situation of conflict of interest in the course of exercising his functions; (iv) it is undoubtedly ascertained that the Applicant is a Member of the Assembly of Kosovo, and at the same time is acting as the First Vice-President of the Non-Governmental Organization of KOC; (v) while, on the basis of Article 6 of the Law No. 06/L-011 on Prevention of Conflict of Interest having the main title [Executive Board] consisting of: point i) President, point ii) First Vice-President (position of the Applicant), it is undoubted that the defendant (Applicant) holds a leading position in the KOC, while being at the same time a Member of the Assembly of Kosovo, hence with his actions he has come into contradiction with Article 14.1 of the Law No. 06/L-011 on Prevention of Conflict of Interest.
19. The Court of Appeals added that *“As a result of the foregoing, the Trial Panel AMENDED the challenged decision, so that for the committed minor offence under Article 14 para.1, sanctioned according to article 23 para.1, point 1.1 of the Law on Prevention of Conflict of Interest in Exercising Public Function, in conformity with article 31 of the LMO, I hereby impose on him a fine in the amount of 1500 (one thousand five hundred) € , by taking into account all the facts and circumstances in which the minor offence act has been committed, while being convinced that even with the imposed fine would be achieved the purpose of the punishment, so that in the future the defendant does not commit the same or similar minor offences”*.
20. The Court of Appeals failed to notify the Applicant regarding the appeal of the ACA filed against the Decision K.no.2608/19 of the Basic Court in Prishtina, of

5 June 2019, and consequently, the Court of Appeals had examined only the appeal claims of ACA but not the arguments of the Applicant.

21. The Court of Appeals also determined that no appeal is permitted against its Judgment.

Applicant's allegations

22. The Applicant alleges that 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 have been violated.
23. The Applicant alleges that: *“The principle of equality of arms and the adversarial principle have been widely considered in the jurisprudence of the ECHR and the Constitutional Court not only in criminal cases but also in civil and minor offence cases. Thus, the jurisprudence in question has emphasized that the principle of the right to fair trial has as its own element the right of each party to be present at the court hearing. The constitutional jurisprudence and case law of the ECHR have also set standards for participation in the trial in order to provide opportunities for each party to effectively defend the allegedly violated right”*.
24. The Applicant alleges: *“In this case, the Court of Appeals has flagrantly violated the Applicant's right to be equal in relation to the opposing party and has also violated the Applicant's right to be heard in relation to the allegations of the opposing party. In the Applicant's case, the Court of Appeals did not inform him at all that the opposing party in the minor offence proceedings (the Anti-Corruption Agency) has filed an appeal against the Decision of the first instance court, rejecting their request, and moreover the Applicants was not given the opportunity at all to respond to the appeal claims of the opposing party's (ACA)”*.
25. The Applicant further adds: *“The Court of Appeals has heard only the allegations of one of the parties, while the Applicant has not been given the opportunity to defend himself before the court by presenting his evidence and arguments about the subject matter of the request as well as about the allegations of the other party at trial”*.
26. The Applicant alleges: (i) that he was not notified that against the decision of the Basic Court, which was favourable to him, the opposing party (ACA) had filed an appeal with the Court of Appeals; (ii) the Court of Appeals has heard only the allegations of one party (ACA), while the Applicant has not been given the opportunity to present his evidence and arguments with regard to the subject matter of the request and the allegations of the other party at trial (ACA).; and that, (iii) the right to a fair trial also includes the notion that both parties to a proceeding are entitled to have information about the facts and arguments of the opposing party.
27. For supporting his allegations, the Applicant refers to the Judgments of the Court in cases KI103/10 and KI108/10.

28. Finally, the Applicant requests from the Court to (i) declare his Referral admissible; (ii) find that the Court of Appeals has violated Article 31 of the Constitution and Article 6 of the ECHR; (iii) declare the Judgment of the Court of Appeals invalid; (iv) order the remanding of the case for reconsideration purposes; and, (v) determine any other legal measure deemed to be legally sound and reasonable.

Relevant Legal Provisions

Law on Minor Offences No. 05/L-087

CHAPTER XVII SUBMISSION OF WRITTEN NOTES

Article 79

Submission manner

2. Summons for investigation or questioning, i.e. for giving a written statement, as well as all decisions for which the appeal deadline commences upon submission, shall be delivered personally to the defendant. In the same way are delivered the decisions to the defendant for whom the appeal deadline commences upon submission.

Article 77

Types and communication of decisions

1. The court shall render its decisions in minor offence proceedings in the form of:

1.1. Judgment;

1.2. Ruling, and;

1.3. Orders.

Article 124

Issuing the judgment

1. Minor offence procedure ends with a judgment for conviction or acquittal, with the ruling which suspends the procedure or of the ruling in which the juvenile offender of minor offence is pronounced the educational measures.

Article 126

Ruling for the end of minor offence procedure

1. Minor offence procedure shall end with a ruling when found that:

[...]

1.8. there is no evidence that the defendant committed the minor offence;

Assessment of the admissibility of the Referral

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

30. 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.”

31. In addition, the Court also refers to the admissibility criteria, as provided by the Law. In this respect, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

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...”

32. As to the fulfillment of the admissibility criteria, as stated above, the Court assesses that the Applicant is an authorized party, challenging an act of a public authority, namely the Judgment Ka.no.664/2019 of the Court of Appeals, of 5 August 2019, after having exhausted all legal remedies prescribed by the law. The Applicant has also clarified all rights and freedoms for which he claims to have been violated, in accordance with Article 48 of the Law and has submitted the Referral in accordance with the deadline established in Article 49 of the Law.
33. However, in addition, the Court examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Paragraph (2) of Rule 39 of the Rules of Procedure establishes the criteria based on which the Court may consider a referral, including the requirement for the Referral not to be manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:
- “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.”*
34. Having examined the Applicant's complaints and remarks, the Court considers that the Referral raises complex issues of fact and law which are of such complexity that their determination should depend on the examination of the merits. Therefore, the Referral cannot be considered as manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure, and neither has any other ground been established for declaring it inadmissible (see, for example, the case of the ECHR, *A and B v. Norway*, Judgment of 25 November 2016, paragraph 55).
35. Consequently, the Court declares the Referral admissible.

Merits of the Referral

36. The Court recalls that the Applicant alleges the violation of his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 (Right to a fair trial) of the ECHR.
37. The Applicant, in essence, alleges that the principle of “equality of arms” has been violated to his detriment because: (i) he was not notified about the decision of the Basic Court, which was favourable for him, the opposing party (ACA) has filed an appeal with the Court of Appeals; (ii) The Court of Appeals has heard only the allegations of one party (ACA), while the Applicant has not been given the opportunity to present his evidence and arguments regarding the subject matter of the request and the allegations of the other party at the trial (ACA); and that, (iii) the right to a fair trial also includes the notion that both parties to the proceedings are entitled to have information about the facts and arguments of the opposing party.
38. The Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which stipulates:

“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.”

39. The Court also refers to Article 6.1. (Right to a fair trial) of the ECHR, which stipulates:

“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.”

40. The Court points out that the right to equality of arms is guaranteed by Article 31 of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR and its application has been interpreted by the European Court of Human Rights (hereinafter: the ECtHR). On the basis of Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court has a constitutional obligation to interpret fundamental rights and freedoms in accordance with the case law of the ECHR.

41. Consequently, as regards the interpretation of the allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the general consolidated principles from the case law of the ECtHR.

(i) General principles of “equality of arms” as developed by the case law of the ECtHR

42. The principle of equality of arms is inherent in the broader concept of a fair and impartial trial and is closely linked to the principle of adversarial principle (see, the ECtHR case *Regner v. Czech Republic*, Judgment of 19 September 2017, para. 146). The criterion of “equality of arms”, in the sense of a “fair balance” between the parties, applies in principle to civil as well as to criminal cases (see the ECtHR case *Feldbrugge v. The Netherlands*, Judgment of 7 July 1987, paragraph 44).

43. Equality of arms implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him in a substantial disadvantage vis-à-vis the other party (see, the ECtHR case, *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993, paragraph 33).

44. In the following lines, we will present several situations where the ECtHR found violations of the principle of equality of arms:

a) The appeal of the party was not sent to the other party, which, consequently, was not able to respond (see the ECtHR case, *Beer v. Austria*, Judgment of 6 February 2001, paragraph 19);

b) The time-limit was interrupted for only one of the parties, thus placing the other party in a considerably unfavourable situation (see the ECtHR case *Platakou v. Greece*, Judgment of 11 January 2001, paragraph 48);

c) Only one of the two key witnesses was permitted to be heard (see *Dombo Beheer B.V. v. The Netherlands*, cited above, paragraph 34-35);

ç) The opposing party had enjoyed considerable favour as regards the access to relevant information; it had taken a dominant position in the proceedings and had exercised considerable influence over the court's assessment (see the ECtHR case, *Yvon v. France*, Judgment of 24 April 2003, paragraph 37).

d) Failure to provide legal aid to one of the parties had deprived them of the opportunity to present their case effectively against a much richer opponent (see, the ECtHR case, *Steel and Morris v. United Kingdom*, Judgment of 15 February 2005, paragraph 72).

45. The ECtHR has determined that the criteria of “fairness” as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR covers the proceedings as a whole, and the question whether a person has had a “fair” trial is looked at through cumulative analysis of all stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage (see, for example, *Monnell and Morris v. the United Kingdom*, cited above, paragraphs 55-70).
46. It is inadmissible for one party to submit submissions to the court without the knowledge of the other party and on which the latter has not had the opportunity to comment. It is a matter for the parties to assess whether a submission deserves a reaction (see the ECtHR case, *APEH Üldözötteinek Szövetsége and others v. Hungary*, Judgment of 5 October 2005, para.42).
47. As regards the cases where prosecuting authorities deal with a private individual, prosecuting authorities may enjoy a privileged position justified by the protection of the rule of law. However, this should not result in a party to the civil proceedings being placed in an excessively disadvantaged position by the prosecuting authorities (see the ECtHR case, *Stankiewicz v. Poland*, Judgment of 6 April 2006, para.68).

(i) Application of general principles to the circumstances of the present case

48. The Court once again emphasizes the Applicant's main allegation: (i) that he was not notified that the opposing party (ACA) had filed an appeal with the Court of Appeals against the decision of the Basic Court which was favourable to him; (ii) The Court of Appeals has heard the allegations of only one party (ACA), whereas the Applicant has not been given the opportunity to present his evidence and arguments regarding the subject matter of the request and the allegations of the

other party in the trial (ACA); and that, (iii) the right to a fair trial also includes the notion that both parties to a proceeding are entitled to have information about the facts and arguments of the opposing party.

49. In the present case, the Court considers that it is not its duty to assess *in abstracto* the procedural and material legal provisions valid for resolving the Applicant's case. The main task of the Court in this case is to ascertain whether the principle of "equality of arms" has been respected and whether the proceedings as a whole have been fair and in accordance with the procedural guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
50. Moreover, in this case, as a general rule, the assessment of the facts of the case and the interpretation of the law are matters that pertain only to the regular courts, whose assessments and conclusions in this respect are binding on the Court. However, when a decision of a regular court is clearly arbitrary, the Court can and should question it (see the ECtHR case, *Sisojeva and Others v. Latvia*, Judgment of 15 January 2007, para.89).
51. The Court would like to clarify that it is not its duty to consider whether the regular courts have correctly interpreted the applicable law (legality), but it will consider whether the courts in question in their decisions have infringed individual rights and freedoms protected by the Constitution (constitutionality), (see, for example, the case of the Constitutional Court no. KI72/14, *Applicant Besa Qirezi*, Judgment of 4 February 2015, paragraph 65).
52. In the present case, the Court notes that the Court of Appeals (i) has read the Applicant's complaint filed with the Basic Court against the decision of the ACA; (ii) the statement given by the Applicant in the session of the main hearing in the Basic Court; (iii) the testimony of witness B.H., President of the KOC; and (iv) the testimony of witness D.A., ACA official. The Court of Appeals amended the Decision K.no.2609/2018 of the Basic Court, of 5 June 2019, by ascertaining that on the basis of the case file it is undoubted that the Applicant is a Member of the Assembly of Kosovo, and at the same time he exercises the duty of the first Vice-President of the Non-Governmental Organization KOC, thus acting contrary to Article 14.1 of the Law on Prevention of Conflict of Interest in Discharge of a Public Function (see paragraph 5 of the Judgment of the Court of Appeals Ka.no. 664/2019, of 5 August 2019).
53. The Court also notes that on the basis of the entire case file of Referral no. KI209/19 and of the content of the challenged Judgment of the Court of Appeals, there isn't any document indicating that the Applicant was notified about the court session held in the Court of Appeals, and initiated by the appeal of the ACA.
54. The Court notes that the Applicant was not aware of the appeal of the ACA filed with the Court of Appeals and that he was not given the opportunity to attend the hearing in the Court of Appeals in order to respond to the appeal of the ACA.
55. Given that the Court of Appeals amended the decision of the Basic Court which was favorable to the Applicant, the Court considers that the Court of Appeals had a legal and constitutional obligation to notify the Applicant about the

adjudication of his case, in order to give the latter the opportunity to respond to the appeal of the ACA.

56. Failure to summon the Applicant to be present at the hearing of the Court of Appeals and his lack of opportunity to respond to the ACA's appeal has resulted in Applicant being placed in an unequal position vis-à-vis the opposing party—the ACA, which consequently resulted in violation of the principle of equality of arms to the detriment of the Applicant.
57. The Court considers that it is inadmissible for one party to submit an appeal with the Court of Appeals without the knowledge of the other party and on which the latter has not had the opportunity to comment (see, *mutatis mutandis*, the ECtHR case, *APEH Üldözötteinek Szövetsége and others v. Hungary*, Judgment of 5 October 2005, para.42).
58. The Court also considers that the Applicant had to be summoned to the court hearing by the Court of Appeals not only to have knowledge of the date and the place of the hearing, but also to have enough time to prepare his case and to attend the court hearing (see the case of the Constitutional Court no. KI108/10, *Applicant Fadil Selmanaj*, Judgment of 6 October 2011, paragraph 66 and the references mentioned therein).
59. On the basis of the foregoing, the Court considers that in the concrete case there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Request for Interim Measures

60. The Court also notes that the Applicant requests the imposition of interim measures against the Judgment Ka.no. 664/2019 of the Court of Appeals, of 5 August 2019 by reasoning: “[...] *it is requested from this Honourable Court to issue an interim measure, to assess this Referral as admissible, to ascertain violations, to declare invalid the Judgment of the Court of Appeals of challenged by this Referral, and remand the case for reconsideration.*”
61. In this respect, the Court refers to Article 27 [Interim Measures] of the Law, which provides:
 - “1. *The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.*
 2. *The duration of the interim measures shall be reasonable and proportionate.*”
62. The Court considers that on the basis of the content of the Referral it results that the conditions for irreparable risk or damage are not met or that we are dealing with a public interest. In addition, the Court found a violation of a procedural nature and did not decide whether the Applicant had a conflict of interest or not.

63. The Court rejects the request for imposition of interim measures.

Conclusion

64. The Court concludes that in the present case it has found a violation of the principle of equality of arms as one of the components of the general right to a fair and impartial trial guaranteeing procedural justice embodied in Article 31 of the Constitution and Article 6 of the ECHR.
65. The Court notes that the finding of a violation of Article 31 of the Constitution and Article 6 of the ECHR is without prejudice to the material resolution of this case, namely if the Applicant has come to a situation of conflict of interest or not. That issue falls within the scope of and must be resolved by the regular courts.
66. However, the finding of a violation of Article 31 of the Constitution and Article 6 of the ECHR to the detriment of the Applicant obliges the Court of Appeals to summon the Applicant to the retrial and to grant him an effective opportunity to respond to the appeal of the ACA – and thus find a fair balance between the litigants in accordance with the principle of equality of arms (see the ECtHR case, *Streletz, Kessler and Krenz v. Germany*, Judgment of 22 March 2001, para.51).

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and Rules 59 (1) and 66 of the Rules of Procedure, in its session held on 5 November 2020, unanimously

DECIDES

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights;
- III. TO DECLARE the Judgment of the Court of Appeals, [Ka.no. 664/2019], of 5 August 2019, invalid;
- IV. TO REMAND the Judgment of the Court of Appeals, [Ka.no. 664/2019], for reconsideration in conformity with this Judgment;
- V. TO ORDER the Court of Appeals to inform the Court, pursuant to Rule 66 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court no later than on 3 May 2021;
- VI. TO REJECT the request for imposition of interim measures;
- VII. TO REMAIN seized of the matter pending compliance with this order;
- VIII. TO ORDER that this Judgment be notified to the Parties, and in accordance with Article 20.4 of the Law to be published in the Official Gazette;
- IX. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Remzije Istrefi-Peci

Arta Rama-Hajrizi

Kopje e vërtetuar
Overena kopija
Certified Copy

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