



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, on 31 December 2020  
Ref.No:AGJ1682/20

*This translation is unofficial and serves for informational purposes only.*

**JUDGMENT**

in

**Case No. KI193/19**

Applicant

**Salih Mekaj**

**Constitutional review of Judgment Pml.no.36/2019 of the Supreme  
Court, of 5 June 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 Salih Mekaj, residing in Prishtina (hereinafter: the Applicant).

## **Challenged decision**

2. The Applicant challenges the constitutionality of Judgment Pml.no.36/2019 of the Supreme Court, of 5 June 2019, which was served on him on 28 June 2019.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged Judgment [Pml.no.36/2019] of the Supreme Court, of 5 June 2019, which as alleged by the Applicant has violated his 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 6.1 [Right to a fair trial], of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).

## **Legal basis**

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

## **Proceedings before the Constitutional Court**

5. On 28 October 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 31 October 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (presiding), Gresa Caka-Nimani and Safet Hoxha (members).
7. On 14 November 2019, the Court notified the Applicant about the registration of the Referral KI193/19. On the same date, the Court requested from the Basic Court in Prishtina to submit the original case file of the Applicant's case, and a copy of the Referral was submitted to the Supreme Court.
8. On 18 November 2019, the Court received the original case file (PKR. No.338/2016) from the Basic Court in Prishtina .
9. On 22 November 2019, the Court requested additional information from the Supreme Court. More specifically, the Court requested from the Supreme Court to inform the Constitutional Court whether the Supreme Court had received the Applicant's response to the request for protection of the legality of the State Prosecutor? If so, was the request submitted in legal manner and within the procedural deadlines?

10. On 21 January 2020, the original case file was returned to the Basic Court in Prishtina (after its analysis).
11. On 29 September 2020, the Court repeated once again its request, sent to the Supreme Court, through the letter of 22 November 2020.
12. On 2 October 2020, the Supreme Court submitted to the Court as evidence the Applicant's response to the request for protection of the legality of the State Prosecutor. The Supreme Court confirmed that the Applicant's response was sent to the Supreme Court by mail (registered mail no. R 6806967), on 21 February 2019 and was received and recorded in the protocol by this court on 26 February 2019.
13. On 25 November 2020, the Court being in its full composition reviewed the case and decided to postpone the decision-making in this case for another hearing session.
14. On 17 December 2020, the Review Panel considered the report of the Judge Rapporteur and, by majority vote, recommended to the Court, being in full composition, to declare the Referral admissible and to find a violation of Article 31 [Right to Fair and Impartial Trial. ] of the Constitution.

### **Summary of facts**

15. On 30 May 2016, the Special Prosecution Office of the Republic of Kosovo (hereinafter: the Special Prosecution), filed the indictment PPS no. 38/2015 against the Applicant and persons V.G., M.S., and A.S. The Applicant in this case was accused of having committed the criminal offence of "Trading in influence", under Article 431, paragraph 1 of the CCRK; the accused V.G., for committing the criminal offence of "Incitement to commit a criminal offence" and "Trading in influence", under Article 431 paragraph 1 in conjunction with Article 32 of the CCRK, V.G., M.S. and A.S. for committing the criminal offence of "Attempted bribery", in co-perpetration, under Article 429, paragraph 3, in conjunction with paragraph 1, and as read by Articles 28 and 31 of the CCRK.
16. The Special Prosecution Office, during the main trial, had modified the indictment against the Applicant, by requalifying the criminal offence of "Trading in influence" to the criminal offence of "Abusing official position".
17. On 28 May 2018, the Basic Court in Prishtina, by Judgment PKR.no.338/16, decided to acquit the Applicant and the other accused, VG, MS , and AS of all the charges in the indictment, because it was not confirmed that they had committed the criminal offences which they were charged of. The Basic Court in Prishtina also ordered that the confiscated amount of 15,500.00 euros be returned to the defendant V.G.
18. On 13 August 2018, the Special Prosecution Office filed an appeal with the Court of Appeals against the Judgment of the Basic Court, PKR.no.338 / 16, of 28 May 2018, alleging that there have been essential violations of the



provisions of the criminal procedure, violations of the criminal law and erroneous and incomplete determination of the factual situation.

19. On 8 October 2018, the Appellate Prosecutor requested from the Court of Appeals to approve the appeal of the Special Prosecution, annul the judgment of the first instance and remand the case for retrial.
20. On 23 October 2018, the Court of Appeals, by Judgment PAKR.no.476/2018, rejected as unfounded the appeal filed by the Special Prosecution Office and confirmed the Judgment of the Basic Court in Prishtina, of 28 May 2018 in its entirety, by reasoning: *"The Court of Appeals considers that the challenged judgment does not contain essential violations of the provisions of the criminal procedure, as alleged in the Prosecution's appeal, nor essential violations of the provisions of the criminal procedure for which this court takes care ex officio."*
21. On 28 December 2018, the State Prosecutor filed a request for protection of legality with the Supreme Court, against the judgments of the court of first instance and the court of second instance, due to essential violation of the provisions of criminal procedure and violation of the criminal law, by proposing to ascertain the alleged violations or alternatively the case to be remanded for reconsideration.
22. On an unspecified date, acting ex officio, the Supreme Court sent a copy of the Referral to the Applicant and the persons V.G., M.S. and the A.S. in order to enable them to respond to the allegations of the State Prosecutor.
23. On 26 February 2019, the Applicant's response against the allegations of the State Prosecutor (which he had sent by mail on 21 February 2019) was submitted to the Supreme Court, with the proposal that the request for protection of legality of the State Prosecutor be rejected as unfounded, while the Judgment of the Court of Appeals, PAKR.no.476 2018 and that of the Basic Court in Prishtina, PKR.no.338/16, dated 28 May 2018, be confirmed.
24. On 5 June 2019, the Supreme Court, through Judgment Pml.36/2019, decided as follows: I. It partially approved the request for protection of legality, submitted by the State Prosecutor, by finding violations of the criminal law under Article 385, item 4, of the CPCRK, in the part that pertained to the Applicant, for the criminal offence of "Trading in influence", under Article 431, paragraph 1, of the CPCRK and the defendant V.G., for the criminal offence of "Incitement to trading in influence", under Article 431, paragraph 1, in conjunction with Article 32 of the CCRK; and II. Rejected as unfounded the remainder of the request for protection of legality relating to defendants V.G., M.S. and A.S., for the criminal offence of "Attempted bribery", under Article 429, paragraph 3, in conjunction with paragraph 1, as read by Articles 28 and 31 of the CCRK.
25. In the Judgment Pml.36/2019, the Supreme court, inter alia, stated:



*"(...)*

*"A request for protection of legality was submitted by the State Prosecutor of Kosovo against these judgments [of the courts of first and second instance], due to the essential violation of the provisions of the criminal procedure and the violation of the criminal law, with a proposal to have the violations ascertained or alternatively the case to be remanded for reconsideration.*

***Lawyer Besnik Berisha from Prishtina, the defense counsel of the defendant V.G. submitted a response to the request for protection of legality, wherein he explained that the request is not founded and proposed that as such it be rejected on the grounds that the request was submitted due to the erroneous and incomplete determination of the factual situation, which is the basis of the request that is not allowed by law.***

*The Supreme Court of Kosovo in the session of the trial panel reviewed the case file within the meaning of Article 435. para.1 in conjunction with Article 436. para. 1 of the CPCCK, and assessed the allegations contained in the request for protection of legality as well as the one in the submitted response and found that: - the request is partially founded.*

*(...)*

*The Supreme Court found that these allegations are not founded as to the essential violations of the provisions of criminal procedure, because the judgments contain legal reasons for their findings, and are founded in terms of violation of the criminal law. Despite the fact that, as stated in the response to the request for protection of legality, this legal remedy in accordance with the provision of Article 432. para.2. of the CPCCK is not allowed for erroneous or incomplete determination of the factual situation, this court considered the same because it related to the alleged violation of the criminal law. As it will be described below, it was found that in the correctly established facts, the criminal law was erroneously applied in favour of the defendants Salih Mekaj and V.G, because there were drawn wrong conclusions about the existence of criminal offences."*

### **Applicant's allegations**

26. The Applicant's fundamental allegation is that the challenged Judgment of the Supreme Court has violated the principle of equality of arms and, consequently, violated his right to fair and impartial trial, guaranteed by Article 31 of the Constitution; and Article 6 of the ECHR.

27. In this respect, the Applicant alleges that:

*"[...]when deciding on the Request for protection of legality, filed by the State Prosecutor, the Supreme Court was obliged to [...] in addition to the Request of the State Prosecutor review my Response as an opposing party in the proceedings, as well as I, as a defendant, was entitled to present my arguments against the Request for protection of legality and the court was obliged to examine them with the same attention as the arguments of the other party, which in this case is the Prosecution of State, but my Response*

*not only has not been reviewed at all but it is not even mentioned in the entire challenged Judgment that I have submitted a response to the Request of the State Prosecution and this not only violates the principle of equality of the parties to the proceedings, but also constitutes an arbitrary conduct on the part of the Court.”*

28. The Applicant further alleges that:

*“...the Judgment of the Supreme Court of Kosovo Pml.no.36/2019, of 05.06.2019, violates the principle of 'equality of arms' guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 31 para.1 of the Constitution of the Republic of Kosovo, which guarantees equal protection of rights of the parties to the proceedings before the court, because there has been reviewed and decided only in relation to the Request of the State Prosecutor, while my Response as a party to the proceedings filed against the request for protection of legality has not been reviewed at all, even though it has been submitted to the Court within the legal deadline.”*

29. Finally, the Applicant requests from the Court to find that the Referral for constitutional review is grounded and annul the Judgment Pml.no.36 / 2019 of the Supreme Court of Kosovo, of 5 June 2019.

#### **Relevant legal provisions**

**Criminal Procedure Code No.04/L-123, which came into effect on 1 January 2013**

#### **Article 395 Reformatio in Peius**

*Where only an appeal in favour of the accused has been filed, the judgment may not be modified to the detriment of the accused with respect to the legal classification of the offence and the criminal sanction imposed.*

#### **Article 435 Consideration of Request for Protection of Legality by Panel of Supreme Court**

*1. A request for protection of legality shall be considered by the Supreme Court of Kosovo in a session of the panel.*

*2. The Supreme Court of Kosovo shall dismiss a request for protection of legality by a ruling if the request is prohibited or belated under Article 434, paragraph 2, of the present Code, otherwise it shall send a copy of the request to the opposing party who may reply thereto within fifteen (15) days of receipt of the request.*

*[...]*



**Article 436**  
**Benefits of the defendant regarding the request for protection of legality**

- 1. When deciding on a request for protection of legality the Supreme Court of Kosovo shall confine itself to examining those violations of law which the requesting party alleges in his or her request.*
- 2. If the Supreme Court of Kosovo finds that reasons for deciding in favour of the defendant also exist in respect of another co-accused for whom a request for protection of legality has not been filed, it shall proceed ex officio as if such request has also been filed by that person.*
- 3. In deciding on a request for protection of legality filed in favour of the defendant, the Supreme Court of Kosovo shall be bound by the prohibition under Article 395 of the present Code.*

**Article 438**  
**Judgment on Request for Protection of Legality**

- 1. If the Supreme Court of Kosovo determines that a request for protection of legality is well-founded it shall render a judgment by which, depending on the nature of the violation, it shall:*
  - 1.1. modify the final;*
  - 1.2. annul in whole or in part the decision of both the Basic Court and the higher court of the decision of the higher court only, and return the case for a new decision or retrial to the Basic Court or the higher court; or*
  - 1.3. confined itself only to establishing the existence of a violation of law.*
- 2. If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it shall only determine that the law was violated but shall not interfere in the final decision.*  
*[...]*

**Admissibility of the Referral**

30. 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.
31. 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”.  
[...]*

32. In addition, the Court also refers to the admissibility criteria, as provided by 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...”*

33. As to the fulfillment of the admissibility criteria, as stated above, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely the Judgment Pml. no.36/2019 of the Supreme Court, of 5 June 2019, after having exhausted all legal remedies prescribed by law. The Applicant has also clarified all rights and freedoms 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.
34. The Court further examines whether the Referral meets the admissibility criteria set out in Rules 39 (1) (d) and 39 (2) of the Rules of Procedure, which provide:

Rule 39  
[Admissibility Criteria]

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

[...]

(d) *the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions*

(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”.*

35. In the light of the facts and arguments set forth in this Referral, the Court considers that the Referral raises serious constitutional issues, which require their addressing to depend on the examination of the merits of the Referral. Moreover, the Referral cannot be regarded as manifestly ill-founded within the meaning of Rule 39 of the Rules of Procedure and there is no other basis for declaring it inadmissible.
36. Consequently, the Court declares that the Referral is admissible for review on its merits.

### **Merits of the Referral**

37. The Court first notes that pursuant to Article 53 of the Constitution [Interpretation of Human Rights Provisions]: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”*
38. In this regard, the Court will address the Applicant's allegations concerning the alleged violations of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, based on its case-law and the case law of the European Court of Human Rights (hereinafter: the ECtHR).
39. In this connection, the Court recalls the contents of Article 31 of the Constitution and Article 6 of the ECHR, which stipulate:

Article 31 of the Constitution  
[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.”*

Article 6 of the Convention  
[Right to a fair trial]



1.“ *In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*”

40. On the basis of the Referral and the case file, the Court notes that the Applicant argues the violation of his rights to a fair and impartial trial, by the failure of the Supreme Court to take into consideration his response – submitted against the allegations and arguments raised by the State Prosecutor in the request for protection of legality. In this respect, the Applicant alleges that in this case “... *has been reviewed and decided only in relation to the Request of the State Prosecutor, while my Response as a party to the proceedings filed against the request for protection of legality has not been reviewed at all, even though it has been submitted to the Court within the legal deadline. This does not only constitute a violation of the principle of equality of the parties to the proceedings, but also an arbitrary conduct on the part of the Court.*”
41. In view of the foregoing, the Court considers that the essence of the Applicant's allegations relates to the principle of equality of arms and adversarial proceedings. The Court emphasizes that these two interconnected principles are key elements of the right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

***As regards the principle of equality of arms and the principle of adversarial proceedings pursuant to the ECtHR case law***

42. The Court first notes that, pursuant to the ECtHR case-law, Article 6 of the ECHR obliges the courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice of whether they are relevant to its decision (see, the ECtHR case, *Kraska v. Switzerland*, Judgment of 19 April 1993, Series A No. 254-B, pg. 49, paragraph 30).
43. Such an obligation for the courts is implemented, inter alia, through the application of the principle of equality of arms and the principle of adversarial proceedings during the main trial. In this context, the ECtHR has underlined that the principle of equality of arms is a key element of the wider concept of fair and impartial trial and is closely linked to the principle of adversarial proceedings (see, the ECtHR case *Regner v. Czech Republic*, Judgment of 19 September 2017, paragraph 146).
44. In the case law of the ECtHR, which has consistently been followed by the Constitutional Court, it has been continuously emphasized that the principle of equality of arms requires a "fair balance between the parties", where each party must be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage vis-à-vis the opponent (see the ECtHR cases *Yvon v. France*, Application No. 44962/98, Judgment of 24 July 2003, para.31 and *Dombo Beheer B.V. v. the Netherlands*, Application no. 14448/88, Judgment of 27 October 1993, paragraph 33; *Feldbrugge v. The Netherlands*, Judgment of 7 July 1987, paragraph 44; cases *Ofrer and Hopfinger v. Austria*, nos. 524/59 and 617/59, 19.12.60, Yearbook 6, pgs.680 and 696; see also other references in this Judgment, *Öcalan v. Turkey* [DHM], paragraph 140; see also the cases of the Constitutional Court, KI52/12,



Applicant *Adije Iliri*, Judgment of 5 July 2013; KI103/10, Applicant *Shaban Mustafa*, Judgment of 20 March 2012, paragraph 40).

45. Relying on the ECtHR case law, the principle of equality of arms is particularly important in criminal cases and this principle applies at all stages of the trial, including proceedings under an extraordinary remedy, such as the “request for protection of legality”. In this respect, the Court refers to the ECtHR decision *Grozdanoski v. the former Yugoslav Republic of Macedonia*, no. 21510/03, of 31 May 2007. In this case, a company that was the Applicant’s opponent in the proceedings, and also the Public Prosecutor, had filed an appeal, namely a “request for protection of legality” at the Supreme Court, against a decision of lower instance court. The other party (the Applicant) was not notified about that request. According to the ECtHR, the appeal and the request for protection of legality led to a decision of the Supreme Court which was completely unfavourable to the other party (the Applicant). Consequently, the ECtHR considered that the procedural failure to notify the other party (the Applicant) had prevented him from effectively participating in the proceedings before the Supreme Court. The ECtHR further stated that the “respect for the right to a fair trial, guaranteed by Article 6.1 of the Convention, requires the Applicant to have knowledge of and **the opportunity to comment on the company’s appeal and request [for protection of legality] of the public prosecutor**”.
46. The ECtHR has consistently stated that it is up to that court to decide whether the challenged proceedings as a whole have been conducted in accordance with the Convention-including Article 6 thereof. In this regard, according to the ECHR, Article 6.1. of the Convention the courts are obliged to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice of whether they are relevant to its decision (see, analogically, the ECtHR case, *Kraska v. Switzerland*, Judgment of 19 April 1993; *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988).
47. While the principle of adversarial proceedings implies that the parties to the proceedings should be aware of and have the opportunity to comment on and challenge the allegations and evidence presented during the main trial (see, inter alia, the ECtHR cases, *Brandstetter v. Austria*, no. 11170/84, Judgment of 29 August 1991; *Vermeulen v. Belgium*, no. 19075/91, Judgment of 20 February 1996).
48. Referring to the ECtHR case law, the Court emphasizes that the principle of equality of arms and the principle of adversarial proceedings are closely linked and in many cases the ECtHR has dealt with them altogether(see, inter alia, the ECtHR cases, *Rowe and Dawis v. the United Kingdom*, no. 18990/91; Judgment of 2000, *Jasper v. the United Kingdom*, no. 27052/95, Judgment of 2000; *Zahirović v. Croatia*, no. 58590/ , Judgment of 25 July 2013).
49. The ECtHR has further emphasized that, particularly in criminal cases, equality of arms and adversarial proceedings constitute an important and essential elements of a fair trial. Therefore their observance requires the rigorous fulfillment of a series of obligations, among which of special

importance is the notifying of the defendant or his defence counsel about the conduct of a procedure, the charge, appeal or extraordinary remedy exercised by the opposing party. In this regard, in the case *Zahirović v. Croatia* (no. 58590/11; Judgment 23 April 2012), the ECtHR determined as follows: “*The Court reiterates that the principle of equality of arms is one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.*”

50. The main purpose of respecting these principles is to have conducted a real and substantial confrontation between the accusing party and the defence, which directly influences to shed light on the truth and the administration of objective justice by the courts. Such constitutional and legal requirements are in function of the most effective protection of the defendant, since in front of him stands the state itself, represented by the prosecutor who represents and defends the charge filed against the defendant. The ECtHR has stated several times that the above requirements must be respected not only in the first instance, but also in other instances of the trial (see, inter alia, the ECtHR case, *Alimena v. Italy*, judgment of 19 February 1991).

#### ***Application of the above principles in the present case***

51. What is essential for the Court in the present case is whether the Applicant has had a real opportunity to present his views and arguments against the allegations of the State Prosecutor and whether those allegations have been reviewed and given a reasoned response by the Supreme Court.
52. The Court first recalls that the role of the Supreme Court, as the last instance in the regular judicial system, is in principle the control of the application of substantive and procedural law by the lower courts. In criminal cases, as in the present case, the realization of the effective defence of the accused person in the first place is in the interest of the defendant, but also in service of justice in general.
53. The Court recalls that, according to the law in force, the parties have the right to exercise extraordinary remedies against the judgments of the lower courts, whereby it has been decided on their guilt or innocence. In the present case, the Court recalls that the judgments (of the court of first instance and of the court of second instance) were favorable to the Applicant, as they found him not guilty of the criminal offences which he was charged of. However, the Court noted that the State Prosecutor, dissatisfied with the decision-making of the first instance court and the second instance court, had filed a request for protection of legality with the Supreme Court, against the Applicant and the other defendants, VG , M.S. and A.S., seeking modification of judgments or reconsideration of the case, due to the violations of criminal law.
54. On the basis of the case file, the Court notes that the Supreme Court, pursuant to the provisions of the CPCRK, had notified the Applicant and the other



defendants about the filing of the request for protection of legality by the State Prosecutor, by making available to them a copy of the said request.

55. It is noted from the case file that the Applicant has submitted a response to the Supreme Court (by Kosovo Post Office mail and within the legal deadline), against the allegations of the State Prosecutor, presented in the request for protection of legality. As the Applicant's only allegation related to the violation of the principle of equality of arms, in conjunction with the principle of adversarial proceedings, because in the challenged Judgment the Supreme Court does not address at all the fact that the Applicant has filed a response against the allegations of the State Prosecutor. The Court initially on 22 November 2019 and then on 29 September 2020, requested a written response from the Supreme Court indicating whether the Applicant's submission (response) had been received by this court. The Supreme Court, through its letter submitted to the Constitutional Court, on 2 October 2020, confirmed that the Applicant's response was received by mail on 26 February 2019.
56. In the light of these facts and circumstances, the Court notes that Article 433 of the CPCRK is in harmony with the requirements of Article 31 of the Constitution, as regards the observance of the standards of a fair and impartial trial, where one of the key elements of a fair trial is the application of the principle of equality of arms and the principle of adversarial proceedings. The observance of the requirements and standards stemming from these two principles is in the function of the most effective protection of the defendant, since in front of him stands the state itself, represented by the prosecutor who represents and defends the charge filed against the defendant (as stated in paragraph 48 cited above).
57. The purpose of Article 31 of the Constitution and Article 433, paragraph (2) of the CPCRK requires not only the fulfillment of the formal-procedural aspects, but also the fulfillment of the substantial aspects, of the standard of fair and impartial trial. This implies giving of the opportunity to the parties, in this case the defendant in the criminal proceedings, not only to submit to the court a written response to the allegations of the State Prosecutor, but also to have that submission reviewed and the possibility of a confrontation of arguments and counter-arguments, in accordance with the principle of equality of arms and the principle adversarial proceedings, in such a way that the parties to the proceedings are placed on an equal footing with each other (see the ECtHR case, *Dombo Beheer BV v. the Netherlands*, judgment of 27 October 1993, Series A, no. 274, which stipulates that "equality of arms" means that each party must be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage *vis-à-vis* the opponent").
58. From this point of view, it is clear that the Supreme Court was satisfied only with the fulfillment of the formal-procedural aspects, namely only with the sending of the notification to the Applicant for the exercise of the legal remedy against him, by not addressing at all, namely by not making as a part of the procedure the Applicant's response submitted to the "request for protection of legality" of the State Prosecutor. Moreover, the Supreme Court in its Judgment did not provide any reasoning as to why the Applicant's response was not



reviewed. In addition, the Court notes that the Supreme Court has acted differently against the other defendant in this case (V.G.), whose response was reviewed by the Supreme Court and referred to as a procedural fact in the challenged decision.

59. The Court considers that the obligation of the courts to notify the opposing party about the exercise of legal remedies against them is not an aim in itself. This obligation is a necessary procedural step to enable the parties to be treated equally, to have the opportunity to challenge the allegations and arguments of the opponent, and to present their case effectively. Therefore, the courts should not be satisfied only by the fact that the parties have received the notification about the exercise of a legal remedy against them, but the courts should assure the parties that their views and arguments have been duly reviewed and assessed, so that they are guaranteed the most effective protection against the allegations made against them. On the contrary, failure to review their objections and arguments automatically places them at a considerable disadvantage *vis-à-vis* the opponent (see, ECtHR, in the cases of *Ofrer and Hopfinger*, nos. 524/59 and 617/59, 19.12. 60, Yearbook 6, pg. 680, which states that each party must be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage *vis-à-vis* the opponent).
60. In this sense, the Court considers that the Supreme Court has failed to guarantee the application of the principle of equality of arms and the principle of adversarial proceedings, because the Applicant has been placed at a significant disadvantage *vis-à-vis* the State Prosecutor, after having been deprived of the opportunity to have a real and substantial confrontation with the arguments and allegations presented by the State Prosecutor, as an opposing party in the proceedings.
61. Consequently, the Court finds that the challenged Judgment of the Supreme Court was rendered contrary to the principle of equality of arms and the principle of adversarial proceedings.
62. The Court further clarifies that when it examines the proceedings as a whole - in conjunction with Article 31 of the Constitution - it first assesses: 1) whether the Applicant has had the opportunity to present arguments and evidence, which he considers relevant to his case during the various stages of the proceedings; 2) if he has been given the opportunity to effectively challenge the arguments and evidence presented by the opposing party, and if all the arguments which were relevant to the resolution of his case, viewed objectively, were duly heard and examined by the courts; 3) whether the factual and legal reasons against the challenged decisions were examined in detail; 4) if according to the circumstances of the case, the proceedings, viewed in their entirety, were fair (see, *mutatis mutandis*, the case of the Constitutional Court no. KI118/17, Applicant *Sani Kervan and others*, Resolution on Inadmissibility, of 16 February 2018, paragraph 35; see also *Garcia Ruiz v. Spain*, ECtHR, Application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

63. In light of this, the Court wishes to emphasize that the violation of the two aforementioned principles also causes the violation of other features of a fair and impartial trial, namely the principle of having the party heard and the right to a reasoned and reasonable judicial decision.

## **Conclusion**

64. In sum, the Court reiterates that the principle of equality of arms and the principle of adversarial proceedings - as key elements of the right to a fair and impartial trial - require the courts to strike a fair balance between the parties to the proceedings, as well as to enable them to have a substantial confrontation of allegations and arguments.
65. By having not reviewed the Applicant's response filed against the State Prosecutor's request for protection of legality, the Supreme Court has violated the principle of equality of arms and the principle of adversarial proceedings, and consequently the principle of having the party heard, and of a reasoned and reasonable judicial decision.
66. Therefore, the Constitutional Court considers that this omission of the Supreme Court constitutes an insurmountable procedural shortcoming, as the Applicant has been deprived of his right to a fair trial, which is guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.
67. Accordingly, the Court concludes that the Judgment of the Supreme Court, Pml.no. 36/2019, of 5 June 2019, has violated the Applicant's right to fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

## FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 17 December 2020, by majority vote:

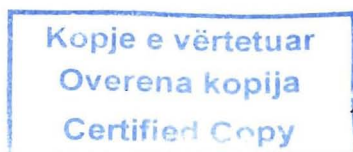
## DECIDES

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that there has been a violation of Article 31.1 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR;
- III. TO DECLARE invalid the Judgment of the Supreme Court Pml.no. 36/2019, of 5 June 2019, and REMAND the same for reconsideration, in conformity with the Court's Judgment;
- IV. TO ORDER the Supreme Court 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 21 June 2021.
- V. TO ORDER that its Judgment KI193/19 be notified to the Parties, and in accordance with Article 20.4 of the Law, be published in the Official Gazette;
- VI. This Judgment is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Bekim Sejdiu



Arta Rama-Hajrizi

*This translation is unofficial and serves for informational purposes only.*