



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

Pristina, on 28 December 2020
Ref.No.:RK 1673/20

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KO50/19

Applicant

The Supreme Court of the Republic of Kosovo

Request for constitutional review of Article 5 paragraph 2, and Article 7 paragraphs 3, 4 and 5 of Law No. 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offense and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of Law No. 06/L-087 on Extended Powers for Confiscation of Assets

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 is submitted by the Supreme Court of the Republic of Kosovo (hereinafter: the referring Court) signed by the President Enver Peci.

Challenged laws

2. The referring court raises doubts about the constitutionality of: (i) Article 5 paragraph 2, Article 7 paragraphs 3, 4 and 5 of Law No. 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offense (Official Gazette of the Republic of Kosovo / no. 5 / 8 March 2013, Prishtina, hereinafter: the challenged Law 1); and (ii) Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of Law No. 06/L-087 on Extended Powers for Confiscation of Assets (Official Gazette of the Republic of Kosovo / no. 23/26 December 2018, Prishtina, hereinafter: the challenged Law 2) [hereinafter when referred to jointly: the challenged Laws].

Subject matter

3. The subject matter of the Referral was the constitutional review of Article 5 paragraph 2, Article 7 paragraphs 3, 4 and 5 of the challenged Law 1 and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of the challenged Law 2, which are allegedly in violation of Article 30 [Rights of the Accused], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraph 8 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 51 [Accuracy of the Referral], 52 [Procedure before a court] and 53 [Decision] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rule 77 [Referral pursuant to Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2018 (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 26 March 2019, the referring Court submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 27 March 2019, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Gresa Caka-Nimani and Safet Hoxha.
7. On 2 April 2019, the Court notified the referring Court, the President of the Republic of Kosovo (hereinafter: the President), the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), the Prime Minister of Republic of Kosovo (hereinafter: the Prime Minister), the Ombudsperson and the Special Prosecution of the Republic of Kosovo (hereinafter: the SPRK), offering the opportunity to submit comments, if any, within 15 (fifteen) days from the date of receipt of the letter of the Court.

8. On the same date, the Court notified the lawyer Visar Haxhibeqiri about the registration of Referral KO50/19, as a lawyer of the interested parties in the court proceedings before the regular courts, namely persons L.H. V.H and V.H. [*Clarification of the Court*: all interested parties are the descendants of the deceased H.H. against which the SPRK proposed the continuation of the criminal procedure of confiscation of assets acquired by criminal offense (hereinafter the Court will be referred to jointly as the “interested party”)]. The Court also offered the interested parties the opportunity to submit comments within a period of 15 (fifteen) days from the date of receipt of the Court’s letter.
9. On 18 April 2019, the interested party submitted comments regarding the Referral of the referring Court to this Court.
10. On 10 May 2019, the Court notified the referring Court, the President, the President of the Assembly, the Prime Minister, the Ombudsperson and the SPRK about the comments of the interested party. The referring Court was notified that its comments regarding the comments of the interested party, if any, can be submitted by 22 May 2019.
11. On 15 May 2019, the referring Court requested that the original case be returned to it.
12. On 3 June 2019, the Constitutional Court returned the original of the case to the referring Court.
13. The referring Court did not comment on the comments made by the interested party.
14. On 27 December 2019, the interested party submitted a supplementation to the referral stating that after the expiration of 30 (thirty) days of validity of the Decision [GJPP 181/2009] of 4 May 2011, neither the prosecution nor the court issued any order or court decision for freezing, sequestration or any other measure that would impede the free administration of the property that was the subject of the dispute in this case.
15. On 24 February 2020, the Court notified the referring Court, the President, the President of the Assembly, the Prime Minister, the Ombudsperson and the SPRK about the supplementation of the Referral by the interested party.
16. On 4 March 2020, the interested party submitted the second supplementation of the Referral, where it placed emphasis on the letter of the SPRK addressed to the Basic Court - Department for Serious Crimes stating that the SPRK has waived the proposal to continue the criminal proceedings of confiscation of assets acquired by criminal offense against the deceased defendant H.H. *ex relation* [H.H. was the husband, namely the father of the interested parties mentioned above].
17. On 14 September 2020, the interested party submitted a request for deciding case KO50/19 or the latter be dismissed in accordance with Rule 35.4 of the Rules of Procedure.

18. On 14 September 2020, the Court addressed the SPRK for additional information regarding the case in question, specifically requesting confirmation *“has the proposal [PPS. No. 22/09] of 16 January 2018 for the extension of the criminal procedure of confiscation of assets acquired by the criminal offense against the deceased defendant H. H. ex relation been withdrawn? Such information was received by the Court from the interested parties in case KO50/19”*.
19. On 5 October 2020, in the absence of a response within the prescribed period, the Court reiterated the same request for additional information by the SPRK.
20. On 7 October 2020, the SPRK responded to the Court stating that they had responded earlier, but that their letter had not reached the official email of the Court. Further, in their response it was emphasized as follows: *“we inform you that this prosecution [SPRK] on 27.02.2020, addressed the Basic Court in Prishtina, with a notification that it has waived the Proposal PPS. No. 22/2019, of 16.01.2018, for the extension of the criminal procedure of confiscation of assets acquired by a criminal offense, against the deceased H.H., for the reasons which are mentioned in the letter which we are attaching to them”*.
21. On 13 October 2020, the Court initially notified the Supreme Court that based on the information received from the interested party, which was confirmed in communication with the SPRK, it results that the SPRK on 27 February 2020, notified the Department of Serious Crimes in the Basic Court in Prishtina *“give up the proposal PPS. No. 22/09 of 16.01.2018 for the extension of the criminal procedure of confiscation of assets acquired by criminal offense, against the deceased H.H”*. Having stated these facts, the Court requested further clarification from the Supreme Court:
 - “a) Based on the legislation in force, what is the practice of the Supreme Court in cases when the SPRK withdraws from the proposal to continue the criminal procedure of confiscation of assets acquired by criminal offenses?*
 - b) Does the procedure cease in case of withdrawal of the Prosecutor from the Proposal for continuation of the criminal procedure for confiscation of assets acquired by a criminal offense?*
 - c) Has anything changed in the status of case KO50/19 from the moment you submitted the referral to the Court, taking into account the procedural actions taken after you submitted the referral to the Constitutional Court?”*
22. On 14 October 2020, the Supreme Court by Decision [Pml. No. 3/2019] decided to reject the request for protection of legality filed by the lawyer of the interested party against Decision PKR. No. 1/17 of the Basic Court in Prishtina - Department for Serious Crimes, of 26 November 2018 and Decision [PN. No. 1240/18] of the Court of Appeals of Kosovo of 17 December 2018 as inadmissible.
23. On 27 October 2020, the Supreme Court responded to the Court with the following information: *“The Supreme Court of Kosovo, analyzing this*

*procedural situation by Decision Pml. No. 3/2019 of 14 October 2020, found that the request for protection of legality of the defense counsel Visar Haxhibeqiri, a representative of the interested parties of the legal heirs of the now deceased H.H., filed against the decision of the Basic Court in Prishtina-Department for Serious Crimes PKR. No. 1/17 of 26.11.2018, and Decision PN. no. 1240/18 of the Court of Appeals of Kosovo of 17.12.2018, **dismissed as lacking subject matter.***

According to what was described above, the Supreme Court of Kosovo with the waiver of the proposal of the competent prosecution from the case has no further competence to continue the criminal proceedings according to the request for protection of legality and therefore the decision of this court in this case does not depend on compliance with Law no. 06/L-087 on Extended Powers for Confiscation of Property Acquired by Criminal Offense.

Therefore, I propose that the Constitutional Court, according to Rule 35 of the Rules of Procedure, assess the need for further proceedings in this case”.

24. On 18 November 2020, the Review Panel after having considered the case, decided to postpone the decision to another session.
25. On 9 December 2020, after having considered the Report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

26. On 30 June 2009, the SPRK rendered a Decision to initiate investigations against 25 persons, for several criminal offenses of a financial nature. From the first stage of the investigation, it was noticed that in this criminal case, according to the SPRK, the deceased H.H. passed away on 21 March 2008.
27. On 15 March 2010, the Pre-Trial Judge of the District Court in Prishtina, upon the request of the SPRK Prosecutor, issued an order for covert measures – “Disclosure of financial data” against the late H.H., as a suspect for involvement in certain criminal offenses. According to the reports received from the banking authorities, H.H. even after his death, continued to have active accounts in commercial banks in Kosovo with a cash balance of 235,990.12 euro (two hundred and thirty five thousand nine hundred ninety euro and twelve cents).
28. On 28 April 2010, the Pre-Trial Judge of the District Court in Prishtina, by Decision [GJPP 181/2009] ordered the blocking/freezing of the bank accounts of H.H. in financial institutions in Kosovo for a period of thirty (30) days. This Decision stated that: *“Given the fact that H.H. was a suspect in this case together with the other suspects, therefore there is a reasonable suspicion that the money in the bank accounts derives from the commission of the criminal offense [...]”.*

29. On 28 May 2010, the Pre-Trial Judge of the District Court in Prishtina, by Decision [GJPP 181/2009] ordered the imposition of an interim measure for securing property, in accordance with paragraphs 1 and 2 of Article 247 and paragraph 1 of Article 489 [Procedure for Confiscation] of the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK) and paragraph 1 of Article 60 [Confiscation of objects] of the Provisional Criminal Code of Kosovo (hereinafter: PCCK).
30. On 4 May 2011, the Pre-Trial Judge of the District Court in Prishtina, by Decision [GJPP 181/2009] ordered the temporary confiscation of the immovable property of H.H.
31. On 28 June 2017, the Basic Court - Serious Crimes Department in Prishtina (hereinafter: the Basic Court) by Judgment [PKR. No. 642/15], *inter alia* and insofar as relevant to this case, found K.P. guilty for committing certain criminal offenses. In the framework of this judgment, the Special Prosecution on 31 March 2016, also proposed the confiscation of assets which are managed in the name of the deceased H.H. However, the Basic Court in deciding on the confiscation of these assets/property, considered that the property was not the subject of the indictment, the deceased H.H. is not part of this criminal process and that the prosecutor has not requested or developed procedural actions for the confiscation of these assets as required by the extended powers for confiscation defined by law.
32. On 2 October 2017, the SPRK submitted a proposal to allow the procedure of confiscation of assets acquired by criminal activity [PPS. No. 22/2009], against the deceased H.H., regarding the confiscation of immovable property on behalf of and the amount of money in his bank accounts.
33. On 16 January 2018, the SPRK, after receiving the Judgment [PSKR. No. 486/2017] of 20 November 2017 of the Court of Appeals, again submitted a proposal to allow the procedure of confiscation of assets acquired by criminal activity [PPS. No. 22/2009], against the deceased H.H., regarding the confiscation of immovable property in his name and the amount of money that was in his bank accounts. The proposal to allow the procedure of confiscation of assets acquired by criminal activity was submitted by the SPRK based on the challenged Law 1.
34. On 26 November 2018, the Basic Court by Decision [PKR. No. 1/17], approved the SPRK proposal to allow the continuation of the confiscation procedure against the deceased H.H. The criminal proceedings were also continued against the deceased H.H. *ex relatione* for assets that are subject to confiscation.
35. On 30 November 2018, the interested party filed an appeal against the aforementioned Decision of the Basic Court, alleging essential violation of the provisions of the criminal procedure and due to violation of the criminal law.
36. On 17 December 2018, the Court of Appeals by Decision [PN. No. 1240/2018], rejected as ungrounded the appeal of the interested party filed against the

decision of the first instance with the reasoning that “[*The first instance court, acted correctly when it approved the request of PPSRK, PPS. No. 22/2009, of 16.01.2018, to allow the continuation of the confiscation procedure against the now deceased H.H., ex relation, for assets that are subject to confiscation, [...]*”.

37. On 24 December 2018, the interested party filed a request for protection of legality on the grounds of violation of criminal law and violations of the provisions of criminal procedure when such violations have affected the legality of the court decision.
38. On 26 March 2019, the referring Court, namely the Supreme Court, suspended the case before it and, based on Article 113.8 of the Constitution, submitted to the Court the request for assessment of compliance with the Constitution of the provisions of Article 5 paragraph 2, Article 7 paragraphs 3, 4 and 5 of the challenged Law 1, and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of the challenged Law 2.
39. On 14 October 2020, the referring Court, notwithstanding the fact that the case was sent to the Constitutional Court for review pursuant to Article 113.8 of the Constitution, rendered Decision Pml. No. 3/2019 rejecting as non-subject matter the Referral of the interested party in protecting legality. Specifically, the Court found that: “*the request for protection of legality of the defense counsel Visar Haxhibeqiri, representative of the interested parties to the legal heirs of the now deceased H.H., filed against the decision of the Basic Court in Prishtina- Serious Crimes Department PKR. No. 1/17 of 26.11.2018, and decision PN. No. 1240/18 of the Court of Appeals of Kosovo of 17.12.2018, is dismissed as lacking subject matter.*”
40. On 27 October 2020, the same referring Court, shortly after rejecting as lacking the subject matter the request of the interested party for protection of legality, requested the Court that “*pursuant to Rule 35 of the Rules of Procedure, to assess the need for further proceedings in this case*”.

Applicant’s allegations

41. The referring court claims that Article 5 paragraph 2, Article 7 paragraphs 3, 4 and 5 of the challenged Law 1, and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of the challenged Law 2, are not in accordance with Article 30 [Rights of the Accused] of the Constitution.
42. The Applicant initially expresses doubts regarding the submission of the request for protection of legality submitted by the interested party, as “[*... pursuant to Article 432 paragraph 1 of the PCCK, this request may be filed only against a final court decision or against a court procedure which preceded the taking of such a decision, after the completion of the final criminal proceedings*]”.

43. Consequently, according to the Applicant, the first issue on which the decision depends is whether a request for protection of legality has been filed against the decision which was taken in the final criminal proceedings.
44. The referring Court notes that the Criminal Procedure Code of Kosovo (hereinafter: CPCK) refers to a living person, namely in Articles 19.3 to 19.6 are given the definitions of a suspect, defendant, accused and convicted person, but also in all other provisions, always is spoken about the living person. On this basis, the Applicant states that in accordance with the provision of Article 160 of the CPCK when during the course of criminal proceedings it is established that the defendant has passed away, the state prosecutor renders a decision to terminate the criminal proceedings. Therefore, the Applicant expresses dilemmas in understanding the provisions of Article 5.2 of the challenged Law 1 according to which *“assets subject to extended powers of confiscation which were acquired by a defendant who has died may be subject to confiscation under Article 7 of this Law”*.
45. Furthermore, the Applicant alleges that according to the provisions of Articles 7.3, 7.4 and 7.5 of the challenged Law 1, an indictment may be filed against the deceased, a defense counsel may be appointed and court hearing may be held, which is contrary to the provisions of the CPCK.
46. The second issue, which at the same time presents the second dilemma of the referring Court and on which its decision depends, is whether the request for protection of legality was submitted by the authorized person.
47. According to the referring Court, this Referral was not filed by the authorized persons specified in Article 433 paragraph 1 of the CPCK, which includes the Chief State Prosecutor, the defendant and his defense counsel. Also, the referring court puts special emphasis on this provision where it is determined that 'after the death of the defendant, a request on his behalf may be submitted by the persons provided by Article 424 paragraph 1 last sentence of this Code, which includes: state prosecutor, the spouse, the extramarital spouse, a blood relation person in a direct line to the first degree, an adoptive parent, an adopted child, a brother, a sister or a foster parent of the convicted person'.
48. Consequently, according to the referring Court, the request for protection of legality was submitted by the defense counsel assigned to the deceased person, against whom there is no criminal procedure and there was no criminal procedure even while he was alive.
49. Finally, as a main allegation presented by the referring Court is its suspicion in relation to the following issue: that since the deceased person under the challenged provisions obtains the status of the accused, the referring Court expresses doubt as to the compatibility of these provisions with Article 30 of the Constitution, because it is clear that a deceased person can neither have a lawyer nor enjoy these rights, while on the other hand, the accusation and the trial will have consequences for his heirs, even though they are persons against whom no indictment has been filed nor criminal proceedings conducted.

50. The referring court also reasoned that at the time of filing the request for protection of legality, the challenged Law 1 was in force, while from 10 January 2019 the challenged Law 2 was in force. However, according to the referring Court the provisions of interest for the case in question have not been amended, so Articles 5.2, 7.3, 7.4 and 7.5 of the challenged Law 1 are identical to the provisions of Articles 19.1.1, 19.2.1, 19.7 and 19.8 of the new Law (the challenged Law 2).
51. Finally, the referring Court notes that since its decision on merits is directly related to the legal norms of the challenged Laws, therefore cannot decide on the request for protection of legality until the Court has rendered the decision on merits regarding this request.

Comments of the interested party

52. The interested party initially expresses its surprise at the purpose of the Referral submitted to the Court, as according to it, this Referral does not address the issues raised through the legal remedies in this procedure.
53. With regard to the first allegation of the referring Court regarding the question whether the request for protection of legality was filed against the decision which was taken in criminal proceedings, as a final decision, the interested party states that the court decisions challenged by it represent meritorious decision-making (although erroneous) and not procedural decisions. According to them, this expected decision of the referring Court for the approval or not of the proposal of the State Prosecutor, has direct consequences whether there will be criminal proceedings with the object of confiscation of property or not.
54. Therefore, according to the interested party, the Decision of the Court of Appeals [PN. No. 1240/2018] of 17 December 2018, is final and that the latter according to Article 432, paragraph 1 of the PCPCK may be challenged with extraordinary legal remedy.
55. As to the allegation of the referring Court regarding that *‘[according to the provisions of Article 7.3, 7.4 and 7.5 of the challenged Law 1, an indictment may be filed against the deceased, a defense counsel may be appointed and a court hearing may be held, which is contrary to the provisions of the PCCK.]’* the interested party states that Article 5 paragraph 2 of the challenged Law 1 clearly states that property may be subject to confiscation under Article 7 and that this submission is not automatic and unconditional, but comes as a result of meeting certain legal conditions . The interested party claims that in order to file an indictment under this legal provision, the indictment is not filed against the defendant who died, but against the defendant who died *ex relatione* for the property subject to confiscation. So, the subject of the accusation in this case, is not the defendant who died, but his property.
56. The interested party further expresses its concern regarding the procedural violations committed by the two instances of the regular courts which have decided to *‘continue the proceedings’*, which according to the interested party

'has never started', since already deceased H.H. has never had the status of suspect, defendant, accused or convict in the criminal proceedings.

57. With regard to the second issue raised by the referring Court, as to whether the request for protection of legality was filed by an authorized person, as it is *"[...submitted by the defence counsel assigned to the deceased person...]"*, the interested party states that *"[Initially, the request was not filed by counsel assigned to the deceased person. The deceased person cannot have a guardian due to the extinction of his subjectivity and these rights do not belong to the deceased persons]"*.
58. Furthermore, the interested party states that the challenge to their legitimacy as applicants for the protection of legality has fatal consequences with a direct effect on the violation of constitutional rights, as follows: *"[Article 21 [General Principles] - where the fundamental principles of human rights in criminal proceedings have been violated, contrary to the PCKK; 2. Article 23 [Human Dignity] - tarnishing the image, loss of dignity, humiliation through the development of court proceedings contrary to applicable laws, arbitrary decisions in continuous violation of criminal and procedural law; 3. Article 24 [Equality Before the Law] - where discrimination is expressed by domestic institutions such as the State Prosecutor's Office and the Courts, attempting to obtain legal property under the tendency of establishing fictitious court proceedings, contrary to legal provisions in force; 4. Article 31 [Right to Fair and Impartial Trial] - where in the case in question is not provided even the minimum protection of rights in proceedings before the courts and the State Prosecutor's Office, in denial of familiarity with the case file in this criminal case despite the request submitted in writing to the court, under arbitrary and unilateral actions with unknown intentions to the detriment of the integrity of persons, dignity and attempt to seize private property; 5. Article 36 [Right to Privacy] - with the continuous publication of personal financial data and the dissemination of private information to the public, in relation to immovable property which has never been legally the subject of a criminal case; 6. Article 46 [Protection of Property] - deprivation of the right to property, arbitrary violation of the free disposition of private property]"*.
59. Based on the abovementioned elaborations, the interested party ultimately requests the Court to declare the Referral manifestly ill-founded because the provisions of the challenged Law 1 and the challenged Law 2 do not in any way infringe any constitutional right set forth in Article 30 of the Constitution.
60. Finally, the interested party requests the Court to assess the very existence of the criminal case in question, in the circumstances of non-fulfillment of the legal conditions for its existence, as a "continued" procedure without ever commencing, due to the lack of a decision to start the investigation, the lack of status of the party in the procedure of the deceased H.H. as a defendant, or any other status, lack of restraining orders issued by the court, non-inclusion in the initial indictment [PPS. No. 22/2009] of property, which are due to the violation of some applicable laws and with direct consequences for the interested parties in this procedure.

61. The interested party also submitted 2 supplementations to the comments given to the Court. On 27 December 2019, the lawyer of the interested party stated that after the expiration of the 30-day validity of the Decision [GJPP 181/2009] of 4 May 2011, neither the prosecution nor the court has issued any order or court decision for freezing, sequestration or any other measure that would impede their free administration of this property. The interested party provided the Court with communications from the Cadastre Directorate of the Municipality of Prishtina and the Special Prosecution, where the latter through its spokesperson stated that *“While the Special Prosecution has assessed that there is no legal basis to file an indictment against the deceased, H.H., ex relation, because he never had the quality of a defendant while he was alive. Therefore, in the absence of an indictment, the court will have to issue a decision on this issue”*.
62. The second completion of the comments of the interested party was submitted on 4 March 2020, where the emphasis was placed on the letter of the Prosecution [PPS. No. 22/09] of 27 February 2020, addressed to the Basic Court - Serious Crimes Department where it was emphasized that the Prosecution withdrew from the proposal for the continuation of the criminal procedure of confiscation of assets acquired by criminal offense against the deceased defendant H.H. *ex relation*. By this letter, the Special Prosecution stated that *“Assessing the fact, that from the case file it results that H.H, while he was alive did not have the capacity of the defendant, while based on Law No. 04/L-140 on Extended Powers for Confiscation of Property Acquired by Criminal Offense, the indictment can be filed against the deceased defendant ex relation, this prosecution has not filed an Indictment within 180, therefore we consider that there is no legal basis either for the continuation of the confiscation procedure further, for this reason we withdraw the proposal [PPS. No. 22/09] of 16.01.2018 for the continuation of the criminal procedure of confiscation of assets acquired by criminal offense, against the deceased H.H”*.

Admissibility of the Referral

63. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and as further specified by the Law and the Rules of Procedure.
64. In this respect, the Court refers to paragraphs 1 and 8, 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.*
- (...)
8. *The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that*

the referring court's decision on that case depends on the compatibility of the law at issue."

65. The Court further refers to Articles 51, 52 and 53 of the Law, which provide:

*Article 51
Accuracy of referral*

1. A referral pursuant to Article 113, Paragraph 8 of the Constitution shall be filed by a court only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

2. A referral shall specify which provisions of the law are considered incompatible with the Constitution.

*Article 52
Procedure before a court*

After the submission of a referral pursuant to Article 113, Paragraph 8 of the Constitution, the procedure before the referring court shall be suspended until a decision of the Constitutional Court is rendered.

*Article 53
Decision*

The Constitutional Court shall decide only about the compliance of the legal provision with the Constitution and shall not decide on other factual or legal matters related to the dispute before the referring court.

66. The Court also takes into account Rule 77 of its Rules of Procedure, which specifies:

Rule 77 [The Court also takes into account Rule 77 of its Rules of Procedure, which specifies]

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law.

(2) Any Court of the Republic of Kosovo may submit a referral under this Rule provided that:

(a) the contested law is to be directly applied by the court with regard to the pending case; and

(b) the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

(3) *The referral under this Rule must specify which provisions of the contested law are considered incompatible with the Constitution. The casefile under consideration by the court shall be attached to the referral.*

(4) *The referring court may file the referral ex officio or upon the request of one of the parties to the case and regardless of whether a party in the case has disputed the constitutionality of the respective legal provision.*

(5) *After the filing of the referral, the Court shall order the referring court to suspend the procedure related to the case in question until a decision of the Constitutional Court is rendered.*

67. In light of the abovementioned normative framework, it follows that any referral submitted under Article 113, paragraph 8 of the Constitution, in order to be admissible, must meet the following criteria:

- (1) The referral has been submitted by a “court”;
- (2) The challenged law must be directly applied by the referring Court in the case before it;
- (3) The referring Court should not be certain of the compatibility of the challenged law with the Constitution;
- (4) The referring Court must specify what provisions of the challenged law are considered incompatible with the Constitution;
- (5) The legality of the challenged law is a precondition for making a decision in the case under review.

68. The Court notes its case law which confirms the above-mentioned criteria regarding the admissibility of the Referrals submitted pursuant to Article 113.8 of the Constitution (see, *mutatis mutandis*, the case of the Constitutional Court, KO157/18, Applicant: the *Supreme Court of the Republic of Kosovo*, Judgment of 13 March 2019, paragraphs 41-46; KO126/16, Applicant: the *Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters*, of 27 March 2017, paragraph 62, as well as the case of the Constitutional Court KO142/16, Applicant: the *Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters*, of 9 May 2017, paragraph 58).

69. The abovementioned criteria must be met, all cumulatively, in order for a submitted referral under Article 113.8 to be considered on its merits. If any of these criteria are not met, then the referral must be declared inadmissible for review of merits due to non-compliance with the admissibility criteria established in the Constitution, Law and Rules of Procedure. Consequently, the Court will further assess the fulfillment of the abovementioned criteria.

(1) *If the referral is submitted by a “court”*

70. In this regard, the Court recalls that the Referral was submitted by the Supreme Court and signed by its President, within the framework of the powers relating to his function. The referral, at the time of submission, clearly

stated that it was submitted by the Supreme Court which has to decide on the request for protection of legality submitted by the interested party.

71. Therefore, the Court considers that the present Referral was submitted by the “Court” within the meaning of Article 113.8 of the Constitution and within the meaning of the abovementioned case law of this Court.

(2) Whether the challenged Laws are to be directly applied by the referring Court in the case before it

72. The Court recalls that this criterion requires that the challenged Law or Laws must be applied directly by the referring Court in the case before it; and that the referring court should have an active case pending. Thus, before the referring Court there must be an unresolved case which has been suspended until the decision of the Constitutional Court regarding the constitutionality of the Law which is suspected to be inconsistent with the Constitution is rendered.
73. In the circumstances of the present case, the Court notes that this criterion is not met, as will be clarified below.
74. The Court recalls that the Supreme Court, in its capacity as a referring Court, has submitted the present Referral to this Court, requesting the constitutional review of the two challenged Laws on suspicion that certain provisions may be inconsistent with the Constitution.
75. However, while the Constitutional Court was examining the case, it was informed by the interested party that the SPRK has withdrawn the indictment concerning the substance of the case before the referring Court. In that case, the Court was requested to reject the request and not to consider it further as there is no longer an active case before the Supreme Court.
76. As the Court did not have such official information from the Supreme Court as the referring Court, it initially addressed the SPRK to confirm whether the indictment in question has been withdrawn. The SPRK confirmed this in a letter. The Court then requested the referring Court to notify the Court about the status of the case before it (see the part of the proceedings before the Court which reflects the Court’s communication with the interested party, the SPRK and the Supreme Court).
77. In this regard, the Court recalls the clarification it has received from the referring Court regarding the changes in the status of the case before it. The Supreme Court notified the Court that it has already decided on the case and in this respect also stated that: *“The Supreme Court of Kosovo with the waiver of the proposal of the competent prosecution [SPRK] from the case has no further jurisdiction to continue the criminal proceedings according to the request for protection of legality and consequently the decision of this court in this case does not depend on compliance with Law no. 06/L-087 on Extended Powers for Confiscation of Property Acquired by Criminal Offense. Therefore,*

I propose that the Constitutional Court, according to Rule 35 of the Rules of Procedure, to assess the need for further proceedings in this case”.

78. It appears from the facts of the case that on 14 October 2020 the referring court resolved the case before it. This resolution or conclusion of the case was made by the Supreme Court by the issuance of Decision Pml. No. 3/2019, where it rejected the request of the interested party for protection of legality - on the grounds that after the withdrawal of the SPRK from the indictment there was no competence to continue criminal proceedings.
79. The Court recalls its position that the Court may decide on requests relating to Article 113.8 of the Constitution only if there is an active case pending before the referring Court and where *“the decision of the referring court in a particular case depends on the compatibility of challenged law”*. As explained above, there is no longer an active case before the referring Court because the request for protection of legality for the decision of which the court proceedings was suspended until a decision of the Constitutional Court - has already been resolved as a matter by the Supreme Court.
80. The Constitutional Court was informed about the existence of the Decision [Pml. No. 3/2019] of 14 October 2020 of the Supreme Court only after having requested the Supreme Court specifically about the status of the case, following the information on procedural conduct it had received from the interested party.
81. The Court emphasizes the fact that the Supreme Court as the referring Court was obliged to notify the Court in a timely manner about all procedural developments that have taken place in this case and to update the Referral submitted to the Court with this relevant information, without delay.
82. The Supreme Court could not decide on the case which it had already referred to the Constitutional Court before requesting the withdrawal of the case from the review proceedings before the Constitutional Court. This is due to the fact that Article 52 of the Law clearly states that: *“After the submission of a referral pursuant to Article 113, Paragraph 8 of the Constitution, the procedure before the referring court shall be suspended until a decision of the Constitutional Court is rendered”*. This means that Article 52 of the Law provides for an *ex lege* suspension of the procedure at the moment the referral is filed with the Constitutional Court based on Article 113.8 of the Constitution.
83. In the light of the foregoing, the Court finds that the admissibility criterion according to which the challenged Laws must be directly applied by the referring Court in the case before it, is not met in the circumstances of the present case as the referring Court does not have an active and unresolved case.
84. As this criterion is not met, the Court does not consider it necessary to further examine the other admissibility criteria.

85. In conclusion, in accordance with Article 113.8 of the Constitution, Articles 20, 51, 52 and 53 of the Law and Rule 77 of the Rules of Procedure, the Court declares Referral KO50/19 inadmissible for further consideration.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.8 of the Constitution, Articles 20, 51, 52 and 53 of the Law and in accordance with Rule 77 of the Rules of Procedure, on 9 December 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

Nexhmi Rexhepi

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.