



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

---

Prishtina, on 6 April 2021  
Ref.no.:RK1738/21

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

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI105/20**

Applicant

**Shani Rexhepi**

**Constitutional review of Judgment Pml. nr. 115/2020 of the Supreme  
Court of Kosovo, of 20 May 2020**

**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

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 Shani Rexhepi from the Municipality of Drenas, represented by Ramiz Krasniqi, a lawyer from Prishtina (hereinafter: the Applicant).

### **Challenged decision**

2. The Applicant challenges Judgment, Pml. nr. 115/2020 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 20 May 2020.

### **Subject matter**

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's rights guaranteed by Articles 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: ECHR).

### **Legal basis**

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

### **Proceedings before the Constitutional Court**

5. On 30 June 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 6 July 2020, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha (members).
7. On 10 July 2020, the Court notified the Applicant of the registration of the Referral.
8. On the same date, a copy of the Referral was sent to the Supreme Court.
9. On 25 March 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

### **Summary of facts**

10. On 9 September 2019, the Basic Court in Prishtina - Serious Crimes Department (hereinafter the Basic Court), by Judgment PKR.nr.675/2006, found the Applicant guilty of the criminal offense of sexual violence, referred to in Article 74 para. 1 of the Criminal Code of Kosovo (hereinafter: CCK) and

sentenced him to imprisonment for a duration of 4 (four) years, while the accused B.M. was acquitted of the criminal offense of aiding sexual violence, referred to in Article 74 para. 1 of the CCK in conjunction with Article 24 of the CCK.

11. On an unspecified date, the Applicant filed an appeal with the Court of Appeals, alleging the existence of a substantial violation of the provisions of criminal procedure, erroneous and incomplete determination of the factual situation and violation of criminal law, proposing that the appealed judgment be annulled and the case be remanded for retrial, or be modified and the Applicant acquitted. Both the Basic Prosecution and the representative of the injured party filed appeals, proposing to modify the appealed judgment and to impose harsher sentences on the accused. Whereas the defense counsel of accused B.M., through his response to the appeal of the Basic Prosecution, had proposed that the appeal of the Prosecution be rejected and the appealed judgment regarding the accused B.M. be upheld.
12. On 6 December 2019, the Court of Appeals, by Judgment PAKR.nr.532/19, rejected the appeals of the Applicant, the Basic Prosecution and the representative of the injured party as ungrounded, and upheld Judgment P.nr.675/06 of the Basic Court, of 9 September 2019.
13. On an unspecified date, the Applicant filed a request for protection of legality with the Supreme Court, alleging substantial violations of the provisions of criminal procedure and violation of criminal law, proposing that the challenged judgments be annulled and the case be remanded for retrial to the court of first instance.
14. On 20 May 2020, the Supreme Court, by Judgment PML.nr.115/2020, rejected the request for protection of legality, submitted by the Applicant against the judgments of the Basic Court and the Court of Appeals, as ungrounded.

### **Applicant's allegations**

15. The Applicant challenges Judgment PML.nr.115/2020 of the Supreme Court, of 20 May 2020, alleging that it was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR.
16. With regard to the alleged violations of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Applicant in essence states that the principle of equality of arms has been violated and that the decision of the Supreme Court has not been sufficiently reasoned. In this regard, the Applicant alleges that "*the Supreme Court in its decision did not take into account at all his request to review and verify correctly and accurately all the evidence contained in the case file*".
17. The Applicant alleges that the decisions of the Basic Court and the Court of Appeals were taken in absolute violation of the provisions of the criminal

procedure due to the fact that the enacting clause of the judgment of the first instance, which was also upheld by the Court of Appeals, is incomprehensible, contradictory and does not present the reasons regarding the decisive facts.

18. The Applicants further alleges that the judgments of the courts are based on inadmissible evidence. In this regard, the Applicant alleges that the regular courts have not fully established the factual situation, because they did not consider the forensics report, but rather considered as evidence the letter written by the person B.K.
19. Finally, the Applicant requests the Court to: (i) declare his Referral admissible; (ii) hold that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; and (iii) declare the Judgment of the Supreme Court invalid.

### **Admissibility of the Referral**

20. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.
21. In this respect, the Court initially refers to Articles 113.1 and 113.7 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

#### Article 113

*“(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.”*

*[...]*

22. The Court further refers to Article 47 [Individual Requests] and Article 48 [Accuracy of the Referral] and Article 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. [...]”.*

23. With regard to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party; challenges an act of a public authority, namely Judgment PML.nr.115/2020 of the Supreme Court, of 20 May 2020; has specified the rights and freedoms he alleges to have been violated; has exhausted all legal remedies provided by law, and has submitted the Referral within the legal deadline.
24. However, in addition to these requirements, the Court must also examine whether the Applicant has met the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Specifically, Rule 39 (2) stipulates that:

*“(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim.”*
25. The Court notes that, in essence, all allegations of the Applicant are related to violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR. In this regard, the Applicant complains that in his case the Courts have erroneously determined the facts, and erroneous interpretation of the law.
26. With regard to these allegations, the Court first notes that as a general rule , the allegations of erroneous determination of factual situation and erroneous interpretation of the law, allegedly made by the regular courts, are related to the field of legality and, as such, do not fall under the jurisdiction of the Constitutional Court. Therefore, in principle, their assessment is not a task of the Constitutional Court but of the regular courts (See, accordingly, the cases of Court No. KI06/17, Applicant *L.G. and five others*, Resolution on Inadmissibility, 25 October 2016, paragraph 36 Case KI122/16, Applicant *Riza Demboqaj*, Judgment of 30 May 2018, paragraph 56; and KI49/19 Applicant *Limak Kosovo International Airport S.H.A., “Adem Jashari”* , Resolution on Inadmissibility of 10 October 2019, paragraph 47).
27. The Court has consistently reiterated that it is not its duty to deal with errors of fact and law allegedly committed by the regular courts (*legality*), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (*constitutionality*). The Constitutional Court may not itself assess the reason which has led a regular court to adopt one decision

rather than another. If it were otherwise, the Constitutional Court would be acting as a court of “*fourth instance*”, which would result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to administer evidence, determine facts and interpret and apply the pertinent rules of procedural and substantive law (See, accordingly, cases of the Constitutional Court: KI70/11, Applicants *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility, of 16 December 2011, paragraph 29; KI06/17, cited above, paragraph 37; KI122/16, cited above, paragraph 57; and KI49/16, cited above, paragraph 48).

28. The Court has consistently held this view, and has clearly stated states that it is not the role of this Court to review the findings of the regular courts as to the factual situation and the application of substantive or procedural law (see decisions of the Constitutional Court: KI06/17, cited above, paragraph 38; KI122/16, cited above, paragraph 58; and KI49/19, cited above, paragraph 49).
29. The Court clarifies, however, that although the role of the Constitutional Court is limited in terms of assessing the interpretation of law by the regular courts, it must ensure and take action when it observes that a regular court has “*applied the law manifestly erroneously*”, in a particular case and which may have resulted in “*arbitrary conclusions*” or “*manifestly unreasoned*” (See, inter alia, the case of Court KI154/17 and 05/18, Applicants, *Basri Deva, Afërdita Deva and “Barbas” limited liability company*, Resolution on Inadmissibility, of 28 August 2019, paragraphs 60 to 65 and references used therein).
30. In the present case, the Court notes that the main allegation of the Applicant, raised through his Referral, is that the Judgment of the Supreme Court, of 20 May 2020, violated the principle of equality of arms and the principle of a reasoned court decision – both of these being essential elements of the right to a fair and impartial trial. The Applicant links these allegations with the arguments that, according to him, the enacting clause of the judgment in question was contradictory and the regular courts erroneously determined the factual situation.
31. In this regard, the Court notes that the Supreme Court addressed all the allegations of the Applicant related to: (i) the argument that the enacting clause of the judgment of the first instance, which was also upheld by the Court of Appeals, is incomprehensible and contradictory because it does not present the reasons regarding the decisive facts; (ii) the regular courts did not fully determined the factual situation, due to the fact that they considered the written letter from witness B.K. as evidence.
32. Regarding the Applicant’s first allegation, the Supreme Court, through its Judgment PML.nr.115/2020, of 20 May 2020, inter alia, stated:

*“The fact that the judgment of the first instance court, in the enacting clause wherein the convict SH.R. was found guilty, also describes the actions of the acquitted B.M. and that in the enacting clause of acquittal the same actions are described, is grounded, however, according to*

*assessment of this court, this fact has not affected the legality of the decision regarding the convict SH.R because, based on the case file, his actions stand. Also, this court finds that the reasoning of the challenged judgment is clear and contains all the decisive facts of this criminal-legal case and as it was compiled in accordance with provisions 370 para. 6 of the CPCK. Sufficient legal reasons have been provided on all points in the reasoning, both factual and legal, on the basis of which the decision based on merits has been taken, which have been approved as fair and lawful by this court. The court of first instance has provided the reasons regarding the contradictory evidence, presenting in full which facts and for what reason it finds them proven or unproven, by assessing the contradictory evidence and by assessing all the administered evidence during the main trial and in this regard it has presented its findings which are approved by this court as fair and lawful”.*

33. The Supreme Court also addressed the Applicant’s second allegation that the judgments are based on inadmissible evidence, due to considering as evidence the letter written by witness B.K. In this regard, the Supreme Court, inter alia, stated:

*“Regarding the allegation that the judgment is based on inadmissible evidence, this Court finds that the letter written by witness B.K. was presented as evidence by the state prosecutor in the session dated 24.07.2019 and as such it was administered by the trial panel in this session and the defense counsel of the convict made his remarks regarding this letter, while the allegation that this letter does not exist is ungrounded as well because this court has confirmed that the statement of witness B.K. is found, in the case file, and furthermore this court also finds that pursuant to Article 327 of the CPCK, in the main trial the evidence is not administered but presented based on the order and that now we are dealing with a change in legal terminology, so we no longer have the administration of evidence as alleged in the request, but rather the presentation of evidence.*

*The Supreme Court, by examining the above-mentioned minutes, confirmed that among the material evidence presented by the State Prosecutor is the handwritten letter, while the other parties to the proceedings have not submitted other material evidence, therefore the main trial continued on 04.09.2019 with the closing statement of the parties”.*

34. In light of the above, the Court considers that the regular courts had addressed and reasoned in their entirety the allegations of the Applicant and that the proceedings before the regular courts, in their entirety, do not result in any way to have been unfair or arbitrary.
35. In this regard, the Court considers it necessary to emphasize that the “fairness” which is required by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, is not “substantive” fairness, but “procedural” fairness. This translates in practical terms into application of the principle of adversarial proceedings, in which parties are heard and placed on an equal

footing before the courts (see, in this regard, cases of the Court KI42/16 Applicant *Valdet Sutaj*, Resolution on Inadmissibility of 7 November 2016, paragraph 41 and other references therein; and KI49/19, cited above, paragraph 55).

36. In this line of argument, the Court reiterates that Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, do not guarantee anyone a favorable outcome in a court trial. However, the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, namely with the decisions of the regular courts, as well as the mere mentioning of the articles of the Constitution, cannot itself make a substantiated allegation for a constitutional violation. When such violations of the Constitution are alleged, the Applicants must provide reasoned allegations and convincing arguments (See, *accordingly*, decisions of the Constitutional Court, KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 42).
37. In the light of these explanations and taking into account the allegation raised by the Applicant and the facts submitted by him, the Court considers that the Applicant has not sufficiently proved and substantiated his claim of violation of the fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
38. As a result, the Court finds that the Applicant has failed to substantiate the allegations that the relevant proceedings were in any way unfair or arbitrary and that the challenged decision violated his rights and freedoms guaranteed by the Constitution and the ECHR.
39. Therefore, pursuant to Rule 39 (2) of the Rules of Procedure, the Referral is manifestly ill-founded on constitutional basis, and is consequently inadmissible.

## FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Articles 113.1 and 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 25 March 2021, 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**

Bekim Sejdiu



Arta Rama-Hajrizi

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