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

Prishtina, 31 May 2021
Ref.no.:RK1797/21

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

case no. KI11/21

Applicant

Nuhaj Sami

Request for constitutional review of Judgment PML. No. 325/2020 of the Supreme Court of 16 December 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Nuhaj Sami from Ferizaj (hereinafter: the Applicant). The Applicant is represented by Artan Qerkini, a lawyer from Prishtina.

Challenged decision

2. The subject matter is the constitutional review of Judgment PML. No. 325/2020 of the Supreme Court of 16 December 2020, by which the request for protection of legality filed against Judgment PA1. No. 129/2020 of the Court of Appeals of 14 July 2020 and Judgment P. No. 298/2019 of the Basic Court in Ferizaj of 30 December 2020 was rejected.

Subject matter

3. The subject matter is the constitutional review of the Judgment of the Supreme Court, by which the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution of the Republic of Kosovo, as well as Articles 6 (Right to a fair trial) and 7 (No punishment without law) of the European Convention on Human Rights (hereinafter: the ECHR), have been violated.

4. The Applicant requests that a public hearing be held.

5. In addition, the Applicant requests the imposition of an interim measure, which would suspend the execution of final Judgment PML. No. 325/2020 of the Supreme Court of 16 December 2020.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals], 27 [Interim Measures] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] 39 and 56 [Request for Interim Measures] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 14 January 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 18 January 2021, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

9. On 3 February 2021, the Court notified the Applicant's legal representative about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

10. 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

11. Based on the case file, it results that the Applicant is the owner of the construction company PGP "Vizioni – S" LLC in Ferizaj, which deals with the performance of the construction works.

12. On 29 November 2014, around 15:00 hrs, an accident occurred in the construction site, in the building where the construction works are carried out by the Applicant's company, where the person M.A. fell from the 8th floor of the building, suffering injuries from which he died.

13. On 3 December 2015, the Basic Prosecution in Ferizaj filed Indictment PP. No. 2986/2014, with the Basic Court, against the Applicant and the person L.N., due to the criminal offense *"in co-perpetration destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 and Article 31 of the Criminal Code of Kosovo* (hereinafter: the CCRK), as well as against the legal entity PGP „Vizioni - S" LLC, with the responsible person Sami Nuhaj, due to the criminal offense of *destruction, damage or removal of protective equipment and endangerment of safety in the workplace under Article 367 par. 2 in conjunction with par. 7 and 3 and in conjunction Article 40 of the CCRK".*

14. On 18 May 2018, the Basic Court in Ferizaj rendered Judgment P. No. 1525/2015, by which found the Applicant guilty of committing the criminal offense *"destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK,* and sentenced him to imprisonment for a term of 1 (one) year and 3 (three) months, while rejecting the indictment of the Basic Prosecution against the person L.N.

15. By the same Judgment, the Basic Court ordered that the legal entity PGP "Vizioni - S" LLC, pay the fine in the amount of 5,000 (five thousand) euro.

16. In the reasoning of Judgment P. No. 1525/2015, the Basic Court declared:

> *„Since the accused did not plead guilty for the criminal offense under this charge, the Court presented the evidence and after assessing them one by one and interconnecting them with each other, within the meaning of Article 361 par. 1 and 2 of the CPCK, determined the factual situation, described in detail in the enacting clause of this judgment with this material evidence".*
>
> *From the evidence administered during the main trial in the place where the deceased was working, there were no adequate protective measures for the workplace such as skeletons, side shields, which if they existed would not lead to disaster, also from the autopsy report confirmed that the deceased M.A., died as a result of internal bleeding as a result of multiple bone fracture [...] as well as the report: official of the Labor Inspectorate in Ferizaj of 04.12.2014, confirms the fact that the defendant did not act in accordance with the provision of Article 5, 6 and 7 of the Law on Safety*

and Health at Work (04/L-161) and Article 42 of the Labor Law (03/L-313), for which the labor inspectorate on 17.12.2014, has imposed a fine in the amount of 10,000 euro.

"Also during the main trial it was confirmed that the company did not have a person responsible for safety at work, and no training was provided to workers for safety at work..."

The Court confirmed it from the opinion of the expert in the field of safety at work and protection at work who has confirmed on the one hand the omissions of the employer as: 1. The employer has not fulfilled the obligations to create safe conditions in the workplace, 2. Installation of styrofoam tiles on terraces [...] 3. Work has been impossible to start without securing the skeleton and and the balcony shield, 4. The employer is obliged to do training on safety and protection at work permanently, namely every year, 5. The deceased worker Mirsad Ajeti according to the data has never been trained in this field, 6. Has not provided the worker with (PPE), adequate personal protective equipment for work and work diary „7. The worker is not provided with a description of jobs and work duties as well as a work diary, and 8. The employer has not performed procedural obligations after the occurrence of the case, namely has not formed a professional commission which in its report would identify the causes of injury.

From the Official Report of Labor Inspectors No. Prot. 368/14 of 04.12.2014, in their opinion after the visit to the scene, analysis of material evidence and circumstances in which the accident was caused at work, checking the documentation and their analysis and administration of other relevant evidence, have found that: the employer did not act according to the provision of Article 5, 6 and 7 of Law no. 04/L - 161 on safety and health at work as well as Article 42 of the Law on Labor no. 03/L - 212,
When imposing sentence, the court took into account mitigating and aggravating circumstances, as mitigating circumstances for the accused Sami Nuhaj..."

17. Against the Judgment of the Basic Court, within the legal deadline, the Applicant's defense counsel filed an appeal on the grounds of essential violations of the provisions of criminal procedure, erroneous and incorrect determination of the factual situation and violation of criminal law, proposing that the Court of Appeals approves as grounded and modify the appealed judgment so as to acquit the accused of the charge or to annul it and remand the criminal case for retrial and reconsideration.

18. On 18 October 2018, the Court of Appeals rendered Judgment PA1. No. 710/18, by which it approved the appeal of the Applicant's defense counsel, annulled Judgment P. No. 1525/15 of the Basic Court, and remanded the case to the latter for retrial and reconsideration.

19. In reasoning, the Court of Appeals stated: *"The criminal panel of this court ex officio assesses that the appealed judgment contains essential violations of the provisions of criminal procedure under Article 384 par. 1 Article par 1.12, in conjunction with Article 370 par. 1 in conjunction with Article 366 of the CPC, because the written judgment is not in accordance with the pronounced judgment, as provided by provision of Article 370 par. 1 of the CPC that "the written judgment must be in accordance with the pronounced judgment".*

"In the present case, there is no minutes on the presentation of the final word of the parties as provided by the abovmentioned provisions, and there is also no minutes on the announcement of the judgment, as provided by the provision of Article 359 par. 1 and par. 2 of the CPCK. Given that in this case the source judgment is missing, namely the minutes on the pronouncement of the judgment, this court consequently considers that the written judgment presented to the parties is not identical to the original judgment, therefore from all this it considers that the judgment of the first instance court contains essential violations of the provisions of criminal procedure under Article 384 par. 1 item 1.12 in conjunction with Article 370 par. 1 of the CPCK, for which reason it had to be annulled".

20. On 30 December 2019, the Basic Court in Ferizaj in the repeated procedure rendered Judgment P. No. 298/19, by which it found the Applicant guilty of the criminal offense he is charged with, sentencing him to 10 months imprisonment. Whereas, regarding the legal entity PGP "Vizioni - S" LLC, ordered to pay the fine in the amount of 4,000 (four thousand) euro.

21. In reasoning of the Judgment, the Basic Court stated; *"... acting in this criminal case and in accordance with the instructions of the Court of Appeals, held the main hearings according on these dates 06.06.2019, 23.08.2019, 05.11.2019 and 02.12.2019, in which the representative of the prosecution-state prosecutor, read the accusing act, while the judge after being satisfied that the defendant understood the charge, in accordance with Article 325 par. 1 of the CPCK, offered the defendant the opportunity to plead guilty or plead not guilty.*

The defendant Sami Nuhaj in the main trial stated that he does not admit guilt for any point of the criminal offense which he is charged with.

It is not disputed that on the critical day as a result of not taking protective measures by the accused Sami Nuhaj, during the works in the building which is located on the street "Astrit Bytyqi" in Ferizaj, on 29.11.2014 around 15:00 hrs, from 8th floor where the deceased Mirsad Ajeti was working, fell to the ground in which case he lost his life, his factual condition was confirmed by the hearing of the abovemenioned witness who in the main trial of 05.11.2019 stated that the building where the latter have been working for a long time despite the fact that there should have been placed side-scaffolding shields on all sides of the building in this case on one side exactly in the place where the deceased was working, there were no scaffolding at all, therefore it came to the disaster, from the heard witnesses it was proved that the side-scaffolding shields had to be provided by the owner of the company, the defendant Sami

Nuhaj, who according to the witness Abedin Haxhijaj was informed about this fact but did not provide them.

The factual situation as in the enacting clause of the indictment was also confirmed by the expert for protection and safety at work Hysen Hysenaj, who stated on the basis of the law on safety at work, protection of the health of employees and the environment at work 04/L-161 , Article 5 point 1,3,4 and Article 6 point 1,2,3 the primary and main responsibility regarding the case falls on the enterprise NPN "Vizioni-S" l.l.c., while on the basis of the same law Article 21 point 1 and 2 to point 2.5 and points 3 and 4 the secondary responsibility falls on the employee. While from the completion of the clarified expertise regarding the defense claims, the expert has confirmed that the scaffolding should have been placed in the entire facility where there is a risk to the life and health of workers, while in terms of work that should have been performed on the critical day this could not have been known as there was no work plan for that day.

That the defendant did not act in accordance with the law on safety at work and health is confirmed by the official report of the inspectorate in Ferizaj dated 04.12.2014, which concluded that the accident at work resulting in the death of the employee happened because it was allowed by the employer to work on the installation of styrofoam tiles on the outdoor terrace without placing scaffolding and other protective measures and the worker was not equipped with a protective rope as a result of not taking these measures his fatal death occurred".

22. Against Judgment P. No. 298/19 of the Basic Court within the legal deadline, the appeal was filed by the Applicant's defense counsel on the grounds of violation of procedural provisions, erroneous and incomplete determination of the factual situation and violation of criminal law, with the proposal that the Court of Appeals modify the challenged judgment and find the accused not guilty and remand the case for retrial and reconsideration.

23. On 14 July 2020, the Court of Appeals rendered Judgment PA1. No. 129/2020, rejecting the appeal of the Applicant's defense counsel as ungrounded.

24. In reasoning the judgment, the Court of Appeals stated:

a) Regarding the allegations of the Applicant's defense counsel that the challenged Judgment contained essential violation of the provisions of the criminal procedure, adding that the Judgment does not contain reasons for the decisive facts...", the Court of Appeals found *"the abovementioned allegations are not grounded. The challenged Judgment does not contain essential violations of the provisions of the criminal procedure which are alleged in the appeal of the defense counsel of the accused, nor other violations which this court notes every time ex officio in accordance with the provision of Article 394 of the CPCK. The appealed judgment is concrete and clear, in the reasoning of the challenged judgment, the court of first instance has correctly described the factual situation which it has determined. The first instance*

court assessed the evidence in accordance with the provisions of Article 370 par. 6 and 7 of the CPCK, presenting in full what facts and for what reason it considers them to be proven or unproven".

b) With regard to the allegations of erroneous and incomplete determination of the factual situation, as well as the manner of assessment of evidence presented at the main trial, as well as the findings of the expert H. H., the Court of Appeals concluded, *"that the defense counsel's appealing allegations do not stand. According to the case file and the appealed judgment, the factual situation has been correctly and fully determined by the first instance court and that the criminal panel of this court considers that in this regard no fact has been left in doubt as unjustly alleged in the appeal filed against the first instance judgment. The first instance court, in accordance with the provision of Article 365 of the CPC, has found the accused Sami Nuhaj guilty, due to the criminal offense of destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK".*

c) *With regard to the appealing allegations of the Applicant's defense counsel of violation of the Criminal Code, namely that the court of first instance erred in applying the provisions of the Criminal Code, applying the analogy contrary to Article 2 paragraph 3 of the CCK, and that incorrectly applied the provisions of Article 367 of the CCK, the Court of Appeals concluded that, "The appealing allegations of the defense counsel of the accused that the court found the accused guilty by analogy and flagrantly violating the principle of legality does not stand. In accordance with Article 367 par. 2 of the CCK, it is established that "Whoever is responsible for workplace safety and health in any workplace and who fails to install safety equipment, fails to maintain such equipment in working condition, fails to ensure its use when necessary or fails to comply with provisions or technical rules on workplace safety measures and thereby endangers human life or causes considerable damage to property shall be punished by imprisonment of six (6) months to five (5) years. According to this provision, the perpetrator of this criminal offense is defined as anyone who is responsible for safety and health in the workplace, which responsible person is provided under Law no. 04/L-161 on Safety and Health at Work specifically Article 10, according to which article in its paragraph 1 is defined "Employer employing up to fifty (50) employees, if competent, can personally take over the responsibility for implementing measures determined in paragraph 1 of Article 9 of this Law, with the conditions to meet conditions and criteria as per paragraph 5 of Article 9 of this Law", therefore according to this provision the conclusion of the court of first instance is fair first when the accused Sami Nuhaj was found guilty and responsible for the criminal offense which he is charged with".*

25. Against Judgment PA1. No. 129/2020 of the Court of Appeals, a request for protection of legality was filed by the Applicant's defense counsel on the grounds of violation of criminal law with a proposal that the request be approved and the challenged judgments be annulled, as well as to remand the case for retrial to the of first instance court, as well as acquit the accused of the charge.

26. On 16 December 2020, the Supreme Court rendered Judgment PML. No. 325/2020, by which it rejected the request for protection of legality of the Applicant as ungrounded.

27. In the reasoning of the judgment PML. No. 325/2020, the Supreme Court stated:

i) Regarding the allegation of the Applicant's defense counsel that both judgments were rendered in violation of the criminal law, and that the violation consists in the fact that Sami Nuhaj was erroneously convicted as a person responsible for safety at work, the Supreme Court concluded *"As it results from the case file, the convict Sami Nuhaj is the owner and responsible person in the Enterprise "Vizioni-S", of the Law on Safety and Health at Work, Article 5 paragraph 1 of this law, establishes that the employer is responsible for creating the safe and health conditions at work in all aspects of work. In this case the employer is the convict Sami Nuhaj who according to the definitions from Article 3 of the Law on Safety and Health at Work is a natural or legal person who provides work for one or more employees, pays the employees for the work or services performed and is responsible for the working entity. Thus, according to these provisions, the convict as an employer was also a person responsible for safety and health in the enterprise of which he was the owner.*

The Supreme Court of Kosovo finds that from the above the convict is an employer and at the same time the responsible person, because the latter in accordance with Article 10 paragraph 1 of the above law, has employed up to 50 workers, which is not disputed, because even on the critical day at the construction site there were 30 workers and the latter could take responsibility for the implementation of the measures set out in paragraph 1 of Article 9, so he was responsible for the implementation of safety and health measures at the construction site...."

ii) Regarding the allegation of the Applicant's defense counsel that the Law on Safety and Health at Work sets administrative sanctions for companies employing up to 50 employees and there is no person responsible for safety at work, and that this shortcoming is sanctioned only by administrative measures and not criminal liability, the Supreme Court finds, *„that the imposition of fines as an administrative measure are a measure for the responsibility of the legal person, while the convict bears criminal liability for the consequences caused as a responsible person of the enterprise. Also, this court finds that the criminal law was correctly applied when he was found guilty due to the criminal offense of destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK, because from his actions and especially from the fact that the same despite being aware of the danger at work for his employees and as a responsible person, by negligence had not undertaken anything that according to the technical rules for safety at work to provide employees and even more so based on the fact that in the facility – construction site even though there were scaffolding placed but not in the*

entire facility, has allowed employees to work in the part which did not have technical conditions (scaffolding placed) for that kind of work. So, this court finds that the convict had not applied the technical rules of safety and health of employees at work as a responsible person and as a result of not following these rules came the loss of life of the now deceased which determines also the causal link between his actions-inactions and the consequence caused".

Applicant's allegations

28. The Applicant alleges that in the criminal proceedings the Supreme Court violated the principle of judicial procedure and applied the law arbitrarily, violating his individual rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution, as well as Articles 6 (Right to a fair trial) and 7 (No punishment without law) of the ECHR.

29. With regard to the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant mentions two allegations, namely the erroneous interpretation of the law, and the unreasoned Judgment of the Supreme Court.

30. More specifically, the Applicant adds that the Supreme Court of Kosovo has arbitrarily applied Article 5, paragraph 1 and Article 10 of the Law on Safety and Health at Work which provide *"Employer is responsible to provide safe and healthy working conditions at all aspects of work".*

31. In addition, with regard to the unreasoned Judgment, the Applicant alleges that Article 370, paragraph 1 of the Criminal Procedure Code clearly provides for the obligation for judicial authorities to reason decisions, but that the Supreme Court of Kosovo in applying arbitrarily the provisions of the Criminal Code has brought to the situation that Judgment PML. No. 325/2020 is not reasoned.

32. In support of the allegation of an unreasoned judgment, the Applicant also cites two paragraphs of the Judgments of the Court in cases KI93/16 and KI 87/18.

33. The Applicant adds that the Supreme Court in the Judgment does not provide valid reasons for "characterization of Mr. Sami Nuhaj as a person responsible for safety at work, but in his case the analogy was applied. Law on Safety and Health at Work No. 04/L - 166, Article 3, point 1. 10 provides that the person responsible for safety at work is defined as follows: *„ Individual in charge of safety and health at work – a professional employed with employer and appointed to carry out tasks closely linked to safety and health at work". So, for a person to have the status of a person responsible for safety at work must be a) professional; b) Employee: c) be assigned to perform tasks related to safety at work. By not a single piece of evidence administered in the main trial it was established that Mr. Sami Nuhaj as the owner of the Company to have the qualities required to gain the epithet of the person responsible for safety at work".*

34. As a second allegation, the Applicant alleges a violation of Article 33 of the Constitution and Article 7 of the ECHR, stating that no one can be found guilty or convicted of a criminal offense which, at the time of its commission was not defined by law as a criminal offense, therefore it is clear that the Constitution of the Republic of Kosovo affirms the principle *„Nullum crimen, nulla poena sine lege qerta"*, and this means that the elements of the crime and punishment in question must be clearly defined by law. Whereas according to Article 7 of the ECHR, *the elements of the crime and the corresponding punishment must be clearly defined in law. This requirement is met when the wording of the relevant provision, and if there is a need for interpretation by the court, the individual has the opportunity to know what actions or omissions will make him criminally liable".*

35. In the abovementioned context, the Applicant adds that in the absence of the establishing the person responsible for safety at work, the courts applied the analogy contrary to Article 2, paragraph 3 of the Criminal Code, according to which: *"The definition of a criminal offense shall be strictly construed and interpretation by analogy shall not be permitted"* (Law No. 04/L-082) and consequently charged the owner of the company "Vizioni – S" with criminal liability without any factual and legal basis.

36. The Applicant requests that a public hearing be held.

37. The Applicant also requests the Court to impose an interim measure in order to suspend the execution of the judgment of the Supreme Court, and in support of this claim he adds:

> *„This Referral fulfills all the conditions to be reviewed and approved by the Court as it is in writing, based on proven facts of the case, provides supporting legal arguments and indicates the irreparable consequences that the Applicant would suffer without imposing an interim measure".*
>
> *"In similar cases, where repairable damage would be caused without the interim measure, this honorable Court has issued decisions for the interim measure. See e.g. Tomë Krasniqi v. RTK and KEK, KI 11109 (16 October 2009); Fadil Hoxha and 59 others v. Municipal Assembly of Prizren, KI 56/09 (15 December 2009); Bajrush Xhemajli KI 78/12. Therefore, the Constitutional Court has also accepted that such cases deserve substantive review before a judgment is executed that would cause irreparable damage to the Applicants..."*

38. The Applicant addresses the Court with a request *"To find a violation of the Applicant's individual rights guaranteed by Articles 31 and 33 of the Constitution of the Republic of Kosovo, Article 10 of the Universal Declaration, and Articles 6 and 7 of the European Convention, as a result of violations by the Supreme Court of a number of rights guaranteed to the Applicant with these instruments and the Criminal Procedure Code of Kosovo".*

Relevant constitutional and legal provisions
Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

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

[...]

Article 33
[The Principle of Legality and Proportionality in Criminal Cases]

1. "No one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law..

2. No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed. 3. The degree of punishment cannot be disproportional to the criminal offense. 4. Punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent applicable law are more favorable to the perpetrator."

European Convention on Human Rights

Article 6
(Right to a fair trial)

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

Article 7
(No punishment without law)

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations".

Relevant legal provisions

LAW NO. 04/L-161 ON SAFETY AND HEALTH AT WORK

Article 3
Definitions

1. Terms used in the Law shall have the following meaning:

1.1. Employer – a natural or legal person that provides jobs for one or more employees, pays the salary to employee/s for the work or services rendered and is responsible for the working entity;

1.2. Employee - a natural person who carries out work or services with payment for employer and has employment relations with the employer;

1.3. Safety and health at work - an integral part of the work process organization, by taking prevention measures that aim at improving work conditions, employees' health protection, improvement of working environment, protection of physical and psychic health of employees and others who participate in the work process;

1.4. Hazard - possibility that employees suffer injuries, illnesses or health difficulties, immediate or consequent, as a result of exposure to work environment containing hazardous physical, chemical and biological elements, exposure to working tools or machinery without protection equipment and unsafe to use, wrong way of using working tools and machinery and wrong way of work organization;

1.5. Potential and serious hazard – an identifiable activity, which shows hazard, and which in a short-term period may cause material and human damages;

1.6. Occupational illness – any illness caused by the exposure to damaging and hazardous chemical, physical and biological elements at working environment during carrying out the work activity;

1.7. Preventive measures – all actions taken and planned at all work processes within the company to avoid or minimize hazards caused by exercising the work activity;

1.8. Working places – include all places and spaces under direct and indirect supervision of employers, where employees should carry out work activities and stay during the work process;

1.9. Risk assessment document – a document which describes characteristics of the work, identification of the risk source, determining who may be at risk, what is at risk and how, assessment of risk to health and safety at work and determining required and necessary actions to improve such measures according to periodical assessments;

1.10. Individual in charge of safety and health at work – a professional employed with employer and appointed to carry out tasks closely linked to safety and health at work;

1.11. Specialized people or services – natural or legal persons, outside the company, which are qualified and licensed to carry out activities related to safety and health at work in accordance with the present Law;

1.12. Work or work-related accident – any unexpected occurrence during the work process, which causes immediate damage to employees' body, damage causing temporary disability, permanent disability and any other health damage related directly to the exercising of work activity;

1.13. Labour Inspectorate – an executive body of the MLSW that supervises the implementation of labour legislation, including this Law.

1.14. Ministry – the Ministry of Labour and Social Welfare.

Chapter II
Employer's duties

Article 5
General principles for employers

1. *Employer is responsible to provide safe and healthy working conditions at all aspects of work.*

Article 10
Employees in charge for safety and health at work

1. *Employer employing up to fifty (50) employees, if competent, can personally take over the responsibility for implementing measures*

determined in paragraph 1 of Article 9 of this Law, with the conditions to meet conditions and criteria as per paragraph 5 of Article 9 of this Law.

2. Employer employing over fifty (50) employees and less than two hundred and fifty (250) employees, is obliged to appoint an expert, for carrying out tasks related to safety and health at work.

3. Employer employing over two hundred and fifty (250) employees should engage one (1) or more experts to carry out activities related to safety and health at work.

CODE NO. 04/L-082 Criminal Code

Article 367
Destroying, damaging or removing safety equipment and endangering work place safety [...]

2. Whoever is responsible for workplace safety and health in any workplace and who fails to install safety equipment, fails to maintain such equipment in working condition, fails to ensure its use when necessary or fails to comply with provisions or technical rules on workplace safety measures and thereby endangers human life or causes considerable damage to property shall be punished by imprisonment of six (6) months to five (5) years.

3. When the offense provided for in paragraph 1 or 2 of this Article is committed by negligence, the perpetrator shall be punished by imprisonment of up to three (3) years.
[...]

7. When the offense provided for in paragraph 3 of this Article results in the death of one or more persons, the perpetrator shall be punished with imprisonment from one (1) to eight (8) years".

Admissibility of the Referral

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

40. 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."

41. In addition, the Court examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, 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...".

42. As regards the fulfillment of the abovementioned requirements, the Court finds that the Applicant is an authorized party, challenging the act of the public authority, namely Judgment PML. No. 325/2020 of the Supreme Court of 16 December 2020, after the exhaustion of all available legal remedies provided by Law. The Applicant also clarified the rights and freedoms he claims to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

43. In addition, the Court examines whether the Applicant has met the admissibility criteria established in Rule 39 (Admissibility Criteria) of the Rules of Procedure. Paragraph (2) of Rule 39 (2) of the Rules of Procedure establishes the criteria based on which the Court may consider a Referral including the criterion that the referral is not manifestly ill-founded. Rule 39 (2) of the Rules of Procedure establishes that:

"The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

44. The abovementioned rule, based on the case law of the ECtHR and of the Court, enables the latter to declare inadmissible referrals for reasons related to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based on and after assessing its merits, i.e. if it deems that the content of the referral is manifestly ill-founded on constitutional basis, as defined in paragraph 2 of Rule 39 of the Rules of Procedure.

45. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as "*manifestly ill-founded*" in its entirety or only with respect to any specific claim that a referral may constitute. In this regard, it is more accurate to refer to the same as "*manifestly ill-founded claims*". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of "*fourth instance*"; (ii) claims that are categorized as "*clear or apparent absence of a violation*"; (iii) "*unsubstantiated or unsupported*" claims; and finally, (iv) "*confused or far-fetched*" claims. (See: more precisely, the concept of inadmissibility on the basis of a referral assessed as "*manifestly ill-founded*", and the specifics of the four above-mentioned categories of claims qualified as "*manifestly ill-founded*", The Practical Guide to the ECtHR on Admissibility Criteria of 31 August 2019; part III. Inadmissibility Based on Merit; A. Manifestly ill-founded applications, paragraphs 255 to 284).

46. In this context and below of the assessment of the admissibility of the referral, namely in the circumstances of this case, the assessment of whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the merits of the case that this referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

47. Returning to the present case, the Court recalls that the substance of the case relates to the fact that, in accordance with the decisions of the regular courts, the Applicant as a responsible person, namely the owner of the construction company "Vizioni – S" LLC, has committed a criminal offence *destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK*, because he did not take all necessary safety measures as defined by the law on safety and health of workers, which resulted in the death of one of the workers in the workplace.

48. In this regard, the Applicant challenges the findings of the Supreme Court, alleging a violation of his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution and Articles 6 (Right to a fair trial) and 7 (No punishment without law) of the ECHR.

Allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

49. With regard to the violation of Article 31 of the Constitution and Article 6 of the ECHR, the Court notes that the Applicant considers that the Supreme Court **i)** has arbitrarily applied Article 5, paragraph 1 and Article 10 of the Law on Safety and Health at Work, and **ii)** that the judgment of the Supreme Court was not reasoned in accordance with the requirement of Article 370, paragraph 1 of the Criminal Procedure Code in relation to his characterization as a person responsible for safety at work, as provided in Article 3 of the Law on Safety and Health at Work.

i) Allegations of arbitrary application of Article 5, paragraph 1 and Article 10 of the Law on Safety and Health at Work

50. Regarding the allegations of the Applicant as to the erroneous determination of the factual situation and the erroneous application and interpretation of the substantive law, in the present case *Article 5, paragraph 1 and Article 10 of the Law on Safety and Health at Work*, the Court wishes to emphasize its principled position that it is not the task of the Constitutional Court to deal with errors of fact of law (legality) allegedly committed by the Supreme Court or any other court of lower instances, unless and in so far as such errors may have infringed rights and freedoms protected by the Constitution (constitutionality). The Court further reiterates that it is not its task under the Constitution to act as a court of "fourth instance", in respect of the decisions taken by the regular courts. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See: *mutatis mutandis*, case of the Constitutional Court: KI68/16, Applicant: *Fadil Rashiti*, Resolution on Inadmissibility of 2 June 2017, paragraph 51 and 52, case KI70/11, Applicants: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, paragraph 29).

51. In view of this, the Court notes that the fact that the Supreme Court applied Article 5, paragraph 1 and Article 10 of the Law on Safety and Health at Work when determining its legal status as a responsible person, is problematic for the Applicant, who should provide health and safety conditions for workers, which led to the conclusion that he should be punished for the crime he is charged with.

52. The Court first recalls that the Constitutional Court has no jurisdiction to decide whether or not the Applicant was guilty of committing a criminal offense. Nor does it have jurisdiction to assess whether the factual situation has been correctly determined or to assess whether the regular courts have had sufficient evidence to establish the Applicant's guilt. (See: the case of the Constitutional Court: KI68/16, Applicant: *Fadil Rashiti*, Resolution on Inadmissibility, of 2 June 2017, paragraph 50).

53. The Constitutional Court can only consider whether the proceedings in the regular courts, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair and non-arbitrary trial (see: *mutatis mutandis*, cases of the Constitutional Court: KI68/16, Applicant: *Fadil Rashiti*, Resolution on Inadmissibility of 2 June 2017, paragraph 54, and KI70/11,

Applicants: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, paragraph 30).

54. Returning to the present case and the Applicant's appealing allegation, the Court finds that the Applicant was convicted by a final judgment as a responsible person who did not take all security measures at the construction site as provided for in Article 5 and Article 10 of the Law on Safety and Health at Work, where his company performed construction work, in which one of the workers lost his life. The Court recalls that the aforementioned articles of the law emphasize:

Article 5

"1. Employer is responsible to provide safe and healthy working conditions at all aspects of work".

Article 10 paragraph 1

"1. Employer employing up to fifty (50) employees, if competent, can personally take over the responsibility for implementing measures determined in paragraph 1 of Article 9 of this Law, with the conditions to meet conditions and criteria as per paragraph 5 of Article 9 of this Law".

55. Referring to the legal provision with the Applicant's allegations, the Court finds that the Applicant did not acquire the status of a responsible person before the Supreme Court as he stated in the Referral, but that such a conclusion was reached by the Basic Court in the determination procedure of his criminal liability, in which case the evidence was presented, the witnesses were heard, the court experts were engaged, and as a result of these actions, the Basic Court concluded *"that the law on safety at work stipulates that if a company has 50 or more employees, it must have a person responsible for safety at work, otherwise, when these are not assigned to an individual they are transferred to a responsible person . Sami Nuhaj was the director of the company, [...], the director of the company is not a direct person but it does not mean that he has no responsibility in safety and in the construction site".*

56. In fact, the Court may conclude that on the basis of the above, the Basic Court characterized the Applicant as a responsible person who was obliged to create safety conditions on the construction site, which in itself means not only the provision of technical measures and equipment, but providing adequate training, in order to train workers for safety at work, which he did not do in accordance with the findings of the court, as well as on the basis of his own statement at trial *"that persons designated for safety at work have not had adequate qualifications other than work experience".*

57. In view of this, the Basic Court decided that the Applicant, as a directly responsible person, in accordance with Article 5 and Article 10 of the Law on Safety and Health at Work, has committed the criminal offense in accordance with Article 367 of the CCK, for which he was sentenced to imprisonment.

58. The Court further notes that the Applicant filed the same allegations before the Court of Appeals challenging his status as a responsible person, stating the fact *"the legislator in article 367 has defined as the subject of committing this criminal offense the person responsible for safety at work, and not the owner, or the director of the company".*

59. The Court notes that the Court of Appeals paid special attention to the Applicant's allegation regarding his status as a responsible person, concluding that the responsibility for safety and health at work lies with the employer - the owner, who should have created safety conditions, or to authorize an employee to carry out occupational safety and health activities, which he did not do in the present case, in fact, no evidence has established that the accused authorized someone to carry out activities of safety and health at work, as defined by Law no. 04/L-161 on safety and health at work, and that therefore, *the appealing allegations in this regard, in the opinion of this panel, are ungrounded.*

60. With regard to the proceedings before the Supreme Court, the Court also finds that the Applicant has initiated two main appealing allegations, the first of which concerned the fact *"that the courts erred in applying Article 10 par. 1 of the Law on Safety at Work, because in the enterprise there were persons responsible for safety at work. Therefore, there were responsible persons in the enterprise, but even if there were no such persons, the very non-appointment of persons responsible for safety at work is not an element of the criminal offense for which the convict was found guilty"*. The other appealing allegations concerning the fact that the Law on Protection and Safety at Work provided for administrative rather than criminal sanctions, in case a company employing up to 50 workers did not have persons responsible for safety at work.

61. The Court cannot fail to notice that the Supreme Court dealt with both of the Applicant's appealing allegations in which it concluded ***i)*** that the convict was an employer and at the same time a responsible person, because the latter in accordance with Article 10, paragraph 1 of the abovementioned law, he employed up to 50 workers, which is not disputed, because on the critical day there were 30 workers on the construction site and he could take responsibility for the implementation of the measures set out in paragraph 1 of Article 9, therefore, he was responsible for enforcing safety and health measures at the construction site. As to the second appealing allegations regarding the fact that the law provides for administrative sanctions and not criminal liability, the position of the Supreme Court was *„that the imposition of fines as administrative measures are measures for the responsibility of the legal person, while in the present case, the Applicant bears criminal liability for the consequences caused as a responsible person of the enterprise".*

62. In view of all the above, the Court rejects Applicant's allegations as allegations of fourth instance regarding the arbitrary application of Article 5 paragraph 1 and Article 10 paragraph 1 of the Law on Safety and Health at Work in relation to his status as a responsible person.

ii) Allegations that the judgment of the Supreme Court was not reasoned in accordance with the requirement of Article 370, paragraph 1 of the Criminal Procedure Code

63. The Court notes that the Applicant considers that the Judgment of the Supreme Court was not reasoned in accordance with Article 370, paragraph 1 of the Criminal Procedure Code, regarding his characterization as a person responsible for safety at work, as required by Article 3 of the Law on Safety and Health at Work.

64. The Court recalls that Article 370 paragraph 1 of the Criminal Procedure Code, which was invoked by the Applicant, regulates the form and content of a Judgment, which, according to the Applicant's allegations, did not occur when it comes to the Judgment of the Supreme Court, especially when it comes to the reasoning regarding his characterization as a person responsible for safety as defined in Article 3 of the Law on Safety and Health at Work.

65. The Court recalls that Article 370 paragraph 1 of the CPC in the relevant part states:

> Article 370 Content and Form of Written Judgment
>
> *"1. The judgment drawn up in writing shall be fully consistent with the judgment as it was announced. It shall have an introduction, the enacting clause and a statement of grounds".*

66. The Court adds that it already has a consolidated case law with regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. This case law was built based on the ECtHR case law, including, but not limited to cases: *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007.

67. In addition, the fundamental principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to cases KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012; KI22/16, *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018; KI143/16, *Muharrem Blaku and Others*, Resolution on Inadmissibility of 13 June 2018; and KI24/17 Applicant *Bedri Salihu*, Judgment of 17 May 2019.

68. In principle, the case law of the ECtHR and that of the Court emphasize that the right to a fair trial includes the right to a reasoned decision and that the courts must "*show with sufficient clarity the grounds on which they based*

their decision". However, this obligation of the courts cannot be understood as a requirement for a detailed answer to any argument. The extent to which the obligation to give reasons may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. The essential arguments of the Applicants are to be addressed and the reasons given must be based on the applicable law.

69. Returning to the Applicant's specific appealing allegations, the Court notes that the Supreme Court in its Judgment found that „ *the convict Sami Nuhaj is the owner and responsible person in the Enterprise "Vizioni-S", of the Law on Safety and Health at Work, Article 5 paragraph 1 of this law, establishes that the employer is responsible for creating the safe and health conditions at work in all aspects of work. In this case the employer is the convict Sami Nuhaj who according to the definitions from Article 3 of the Law on Safety and Health at Work is a natural or legal person who provides work for one or more employees, pays the employees for the work or services performed and is responsible for the working entity. Thus, according to these provisions, the convict as an employer was also a person responsible for safety and health in the enterprise of which he was the owner* ".

70. The Court, bringing the Applicant's allegations in connection with its case law and the case law of the ECtHR, as well as with the requirements of Article 370, paragraph 1 of the CPC, is of the opinion that the Applicant's allegations in relation to the unreasoned judgment of the Supreme Court regarding his characterization as a person responsible for security are ungrounded. The Court reached such a conclusion, precisely with a detailed analysis of the Judgment of the Supreme Court in relation to the decisive facts on which the Supreme Court based its conclusion regarding the fulfillment of the conditions defining his status as a responsible person.

71. Based on the above, it follows that the Applicant's allegations of an unreasoned Judgment of the Supreme Court are manifestly ill-founded due to the fact that the regular courts have respected the principles and guarantees of Article 31 of the Constitution and Article 6 of the ECHR, regarding the issue of the reasoned court decision.

Allegations of violation of Article 33 of the Constitution, as well as Article 7 of the ECHR

72. With regard to the Applicant's allegations regarding the violation of Article 33 of the Constitution in conjunction with Article 7 of the ECHR, the Applicant first states that the Supreme Court in this case applied the analogy contrary to Article 33 of the Constitution and Article 2, paragraph 3 of the Criminal Code, because the provision of Article 367, paragraph 2, which deals with the person responsible for safety at work, interpreted by analogy for the responsible person of the company. Therefore, the Applicant alleges that no one can be found guilty or convicted of a criminal offense which, at the time of its commission, was not defined by law as a criminal offense *„Nullum crimen, nulla poena sine lege qerta"* as it was case with him.

73. According to the Applicant's allegations, the Court finds that in the light of the circumstances of the present case and the allegations, the constitutional review of the Applicant's allegations of a manifestly arbitrary interpretation and application of the law due to the application of the analogy by regular courts, which falls within the framework of the rights guaranteed by Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 (No punishment without law) of the ECHR and its implementation, widely interpreted in the case law of the ECtHR

74. The Court recalls that Article 33 of the Constitution guarantees a number of specific principles, the purpose of which is to ensure legal certainty in a sensitive area of criminal law.

75. In this regard, the Court notes that Article 33, paragraph 1 of the Constitution proclaims the principle of legality of offenses and punishments, namely sanctions that prohibit, in addition, the retroactive effect of criminal law and other criminal regulations. According to the principle of legality, *nullum crimen nulla poena sine lege* referred to by the Applicant, implies that there is no criminal offense or punishment without law. This means that no one can be found guilty of an offense which, before being committed, by law or other law-based regulation, was not provided for as punishable, nor can a sentence, which was not provided for that offense be imposed. The retroactive effect of criminal law is excluded, because the punishment is determined according to the regulation that was valid at the time the crime was committed, except in those cases when the subsequent regulation is more favorable for the perpetrator (Article 33 paragraph 4 of the Constitution).

76. The Court therefore finds that the Applicant's allegations must be examined on the basis of the above facts and evidence attached to the Referral, in order to respond to the Applicant's allegations concerning *"prohibition of analogy in criminal law"* (see, in a similar way, case KI145/18, Applicant *Shehide Muhadri, Murat Muhadri dhe Sylë Ibrahimi,* cited above, paragraph 36).

77. It is therefore necessary to assess the constitutionality of the Applicant's allegations of arbitrary interpretation and application of the law as a result of the use of analogy, with reference to the principles of *"principle of legality"* and *"prohibition of analogy in criminal justice"* embodied in Article 33 of the Constitution, Article 7 of the ECHR and the relevant case law of the ECtHR.

General principles in relation to Article 7 established by the case law of the ECtHR

78. The Court notes that the guarantee enshrined in Article 33 of the Constitution and Article 7 of the ECHR, which is an essential element of the rule of law, occupies a prominent place in the protection system of Convention, as it is underlined by the fact that no derogation from it is permissible under Article 15 of the ECHR in time of war or other public emergency. It should be construed and applied, as follows from its objective and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and

punishment (see Judgment *Korbely v. Hungary* [GC], Application no. 9174/02, dated 19 September 2008, paragraph 69).

79. Accordingly, Article 33 of the Constitution and Article 7 of the ECHR "*are not confined to prohibiting the retroactive application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable*" (*see Judgment Korbely v. Hungary, cited above, paragraph 70*).

80. In addition, when speaking of "law" Article 7 of the ECHR and Article 33 of the Constitution allude to the very same concept as that to which the ECHR refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see case *EK v. Turkey*, application no. 28496/95, judgment of 7 February 2002, paragraph 51). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries (see Judgment *Del Rio Prada v. Spain*, application no. 42750/09, of 21 October 2013, paragraph 91).

81. In addition, the Court adds that, in principle, it is not the task of the Constitutional Court to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention and the Constitution (see Judgment *Waite and Kennedy v. Germany*, application no. 26083/94, 18 February 1999, paragraph 54, see also Judgment *Korbely v. Hungary*, cited above, paragraph 72).

Application of the abovementioned principles to the Applicant's case

82. In the light of the aforementioned principles concerning the scope of its supervision, we recall that the Constitutional Court is not called upon to decide on the individual criminal liability of the Applicant, which is primarily a matter for the assessment of the regular courts. Also, the Court is not called upon to decide whether there is the figure of another criminal offense in the Applicant's actions, this is also o at the discretion of the regular courts (see Judgment *Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532/97 and 44801/98, of 22 March 2001, paragraph 51).

83. The function of the Court, from the point of view of Article 33 of the Constitution and Article 7 paragraph 1 of the ECHR, is to consider whether the criminal offense for which the Applicant was convicted constituted a criminal offense defined with sufficient accessibility and foreseeability and whether regular courts contrary to the principle of legality, applying the analogy broadly interpreted the criminal law to the detriment of the accused (see Judgment *Kokkinakis v. Greece*, Application no. 14307/88, of 25 May 1993, paragraph 52).

a) Accessibility

84. As regards the application of the principles established by the ECtHR, the Court considers that it must first be established whether the criminal law and the Law on Safety at Work were accessible to the Applicant at a time when their very accessibility was essential to the outcome of the procedure.

85. In this regard, based on the facts of the case and the case file, the Court notes that the Applicant was a director of a construction company performing construction work in the territory of Kosovo, and that due to the death of one of its employees, the Basic Prosecution in Ferizaj on 3 December 2015 filed an indictment against the Applicant for the criminal offense *destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK.*

86. The Court finds that the Applicant was found guilty by the regular courts of committing this criminal offense on the basis of "*Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK*, for which he was sentenced to imprisonment.

87. The Court finds that the courts rendered their judgments pursuant to CCK 04/L-082, which was published in the Official Gazette no. 19/2012, on 13 July 2012, and the Law on Safety and Health at Work of 31 May 2013, based on this, it can be concluded that the CCK which provided for a criminal offense and the Law on Safety and Health at Work, which provided for the obligation to comply with the requirements regarding safety at work were in force at the time the criminal offense was committed, and that they were at all times sufficiently accessible to the Applicant.

b) Foreseeability

88. The Court must further determine whether the CCK and the Law on Safety at Work were foreseeable and whether the regular courts, applying the analogy, interpreted them broadly and unpredictably to the detriment of the Applicant.

89. In this regard, the Court notes that the Applicant established his construction company and that consequently, as the owner, he had his rights and obligations, namely that in accordance with the applicable law on safety at work, he had to take all security measures in order to protect employees and other persons who may be harmed directly or indirectly by their non-undertaking. Furthermore, Article 10 (Employees in charge of safety and health

at work) of the Law on Safety at Work, provided the obligation of the Applicant to hire persons who would regularly provide all the necessary training and education for all employees in order to increase safety measures at work.

90. The Court is of the opinion that the Applicant was obliged and could have foreseen that such omission, namely the non-fulfillment of the conditions provided by the relevant provisions of the Law on Safety at Work, could lead to his criminal liability. for non-fulfillment of the latter, and thus of the criminal offense provided by the CCK in force.

91. In addition, the Court finds that the Court of Appeals also dealt with the issue of application of the analogy in the criminal proceedings, which, according to the Applicant, was to his detriment, and in this case concluded that *"The appealing allegations of the defense counsel of the accused that the court found the accused guilty by analogy and flagrantly violating the principle of legality does not stand. In accordance with Article 367 par. 2 of the CCK, it is established that "Whoever is responsible for workplace safety and health in any workplace and who fails to install safety equipment, fails to maintain such equipment in working condition, fails to ensure its use when necessary or fails to comply with provisions or technical rules on workplace safety measures and thereby endangers human life or causes considerable damage to property shall be punished by imprisonment of six (6) months to five (5) years". According to this provision, the perpetrator of this criminal offense is defined as anyone who is responsible for safety and health in the workplace, which responsible person is provided under Law no. 04/L-161 on Safety and Health at Work".*

92. Consequently, the Court considers that the regular courts throughout the entire proceedings had adhered to the principles of the CCK, and had acted exclusively in the spirit of the legal provision, and that the analogy invoked by the Applicant had not been applied.

93. Therefore, the Court concludes that there has been no violation of Article 33 of the Constitution in conjunction with Article 7 of the ECHR with regard to the Applicant's allegations of application of the analogy in criminal proceedings.

94. Having regard to the fact that it responded to all the allegations of the Applicant, the Court finds that nothing in the case filed by the Applicant indicates a violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, nor any violation of the principles of legality and proportionality in criminal proceedings, guaranteed by Article 33 of the Constitution in conjunction with Article 7 of the ECHR.

95. The Court reiterates that it is the Applicant's obligation to substantiate his constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see case of the Constitutional Court No. K119/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

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

Request for holding a hearing

97. The Court notes, among other allegations in the Referral, that the Applicant requested the Court to hold a public hearing in his case, without giving any specific reasoning, nor any reason why a public hearing would be necessary.

98. In this regard, the Court refers to Article 20 of the Law:

> *"1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
>
> *2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files ".*

99. The Court notes that there is no reason invoked by the Applicant in support of this request.

100. The Court considers that the documents in the Referral are sufficient to decide this case in accordance with the wording of Article 20, paragraph 2 of the Law (see, *mutatis mutandis*, case of the Constitutional Court No. KI34/17, Applicant: *Valdete Daka*, Judgment of 12 June 2017, paragraphs 108-110).

101. Therefore, the Applicant's request to hold an oral hearing was rejected as ungrounded.

Request for interim measure

102. The Court recalls that the Applicant also requests the Court to impose an interim measure, which would suspend the execution of the final judgment of the Supreme Court..

103. However, the Court has just concluded that the Applicants' Referrals must be declared inadmissible on constitutional basis.

104. Therefore, in accordance with Article 27.1 of the Law and Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for interim measure is to be rejected, as the latter cannot be the subject of review, because the Referral is declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Articles 20 and 27.1 of the Law, and Rules 39 (2) and 57 (1) of the Rules of Procedure, in the session held on 25 March 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for holding a hearing;

III. TO REJECT the request for interim measure;

IV. TO NOTIFY this Decision to the parties;

V. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

VI. This Decision is effective immediately.

Judge Rapporteur | **President of the Constitutional Court**

Safet Hoxha | Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.