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

Prishtina, on 13 June 2022
Ref. no.: AGJ 2007/22

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JUDGMENT

in

Case No. KI196/21

Applicant

Gëzim Shtufi

Constitutional review of
Judgment PML. No. 310/2021 of the Supreme Court of the Republic of Kosovo, of 14 September 2021

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Gëzim Shtufi (hereinafter: the Applicant), residing in the municipality of Shpenadia, municipality of Prizren, who is represented by the Law Firm Sejdiu & Qerkini.

Challenged decision

2. The Applicant challenges constitutionality of Judgment [PML. No. 310/2021] of the Supreme Court of the Republic of Kosovo of 14 September 2021 (hereinafter: the Supreme Court).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which has allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6.1 (Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

4. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure to suspend the execution of the sentence of effective imprisonment, imposed by Judgment PAKR. no. 179/221 of the Court of Appeals and upheld by the challenged Judgment [PML. no. 310/2021] of the Supreme Court, of 14 September 2021, pending a decision on this Referral.

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties], paragraph 2 of Article 116 [Legal Effect of Decisions] 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] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 2 November 2021, the Referral was submitted to the Court.

7. On 5 November 2021, the Court notified the Applicant's representative and the Supreme Court about the registration of Referral KI196/21.

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

9. On 11 January and 25 April 2022, the Applicant's authorized representative requested that the request for an interim measure be considered urgently.

10. On 26 May 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare the Referral admissible. On the same date, the Court unanimously found that Judgment [PML. no. 310/2021] of 14 September 2021i of the Supreme Court, is not in compliance with

Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6.1 (Right to a fair trial) of the ECHR.

Summary of facts of the case

11. On 20 February 2015, the Basic Prosecution in Prizren filed indictment PP. no. 3063/2013 against the Applicant and two other persons S.D. and Z. Th., all from the Municipality of Prizren, for the criminal offense of "*threat*" under Article 185, paragraph 1 of the Criminal Code of the Republic of Kosovo (hereinafter: CCRK).

12. On 19 June 2015, the Basic Court in Prizren, by Judgment [P. no. 333/15], rejected the indictment filed against the Applicant and the accused, because the prosecutor of the case before the end of the trial of the case had withdrawn from the indictment, because in the main hearing the injured party L. Sh. withdrew further criminal prosecution, against the accused, stating that with the latter "*I have reached the language of reconciliation and understanding*".

13. On 9 December 2016, the Basic Prosecution in Prizren, Department for Serious Crimes (hereinafter: the Basic Prosecution), filed the indictment [PP. no. 274.2015] against K. D., on the grounds of suspicion of committing the criminal offense of "*usury*" under Article 343, paragraph 3, in conjunction with paragraph 1 of the CCRK, K.B., on the grounds of suspicion of committing the criminal offense of "*usury in aid*" under Article 343, paragraph 3, in conjunction with paragraph 33 of the CCRK, and the Applicant this time on the grounds of suspicion of committing the criminal offense of "*extortion*" under Article 340, paragraph 2, in conjunction with paragraph 1 of the CCRK and the criminal offense of "*unauthorized ownership, control or possession of weapons*" under Article 374, paragraph 1 of the CCRK. All the accused are from the Municipality of Prizren.

14. On 21 September 2017, the Basic Court in Prizren (hereinafter: the Basic Court), by Judgment P. no. 224/16, i) acquitted the Applicant from the indictment for the criminal offense of "*extortion*" under Article 340 , paragraph 2, in conjunction with paragraph 1 of the CCRK, while ii) found him guilty of the criminal offense of "*unauthorized ownership, control or possession of weapons*" under Article 374, paragraph 1 of the CCRK, sentenced to a fine in the amount of 2500 euro. With regard to the criminal offense of "*extortion*", the court in question found that the Applicant by Judgment [P. no. 333/15] of 19 June 2015 for this criminal offense had previously been acquitted of all counts of the indictment, and that based on Article 34 of the Constitution "*no one may be tried more than once for the same offense*".

15. The Applicant and the Basic Prosecution filed an appeal against the above Judgment, the Applicant on the grounds of essential violations of the provisions of criminal procedure, incomplete and erroneous determination of factual situation, violation of criminal law and decision on criminal sanction. Whereas, the Basic Prosecution for the acquittal part of the Judgment, due to the essential violations of the provisions of the criminal procedure and in relation to the criminal sanction.

16. On 26 December 2017, the Court of Appeals, by Decision PAKR. no. 541/2017, i) rejected the Applicant's appeal regarding finding him guilty of the criminal

offense of "*unauthorized ownership, control or possession of weapons*", upholding in this part the Judgment [P. no. 224/16] of the Basic Court, while regarding the acquittal of the indictment for the criminal offense of "*extortion*", annulled the Judgment [P. no. 224/16] of the Basic Court, remanding the latter to the retrial in the presence of the latter, on the grounds that: *"the finding of the Court* (the Basic Court) *is erroneous when it concluded that the accused Gëzim Shtufi was tried once for the same criminal matter, if we refer to the Judgment of the Basic Court in Prizren, P. nr. 333/15, of 19.02.2015 and we make the analysis and comparison in this criminal case, the time of committing the criminal offense is not the same, the amount of debt or loan taken is not the same, and the disproportionate benefit is not mentioned, so we are not dealing with an adjudicated case although the injured party and the accused are the same"*. The presiding judge of the review panel in this decision-making was judge M.M).

Remanding the case for retrial (first time)

17. On 18 April 2018, the Basic Court, by Judgment P. no. 2/2018, again rejected the indictment filed against the Applicant for the criminal offense of "*extortion*", arguing that this case was adjudicated once and that the same became *res judicata* by Judgment [P. no. 333/15] of 19 June 2015 and that the same person can not be tried again for the same criminal offense.

18. The Basic Prosecution filed an appeal against the above Judgment *"... on the grounds of essential violation of the provisions of the criminal procedure, violation of the criminal law and erroneous and incomplete determination of the factual situation, with the proposal that the Court of Appeals quashes the judgment of the court of first instance and remand the latter for retrial or modify it, in such a way that the accused K.D., K.B., Gëzim Shtufi and A.D. are found guilty by imposing the sentences provided by law"*.

19. On 9 October 2018, the Court of Appeals, by Decision PAKR. no. 443/2018, annulled the Judgment [P. no. 2/2018] of the Basic Court, of 18 April 2018, remanding the case for retrial to the Basic Court, regarding the rejection of the indictment against the Applicant, in relation to the criminal offense of "*extortion*". By this decision, the Basic Court was ordered to try the case by another panel. In its reasoning, the Court of Appeals, *inter alia*, stated that "*Since the trial panel that adjudicated in the first instance did not comply with the remarks and instructions of the Court of Appeals which are required by law, this panel decided that in the retrial this criminal case should be given to another trial panel"*. The presiding judge of the review panel in this decision-making was again judge M.M).

Remanding the case for retrial (second time)

20. On 21 March 2019, the Basic Court, by Judgment PKR. no. 86/2018, again rejected the indictment filed against the Applicant for the criminal offense of "*extortion*", arguing that we are dealing with adjudicated case *res judicata*, because for this criminal offense there is a final judgment, therefore this circumstance constitutes an obstacle to retrial of this criminal matter, based on the principle *ne bis in idem*.

21. The Basic Prosecution filed again an appeal against the above-mentioned Judgment with the Court of Appeals, on the grounds of essential violations of the provisions of criminal procedure, violation of criminal law and erroneous and incomplete determination of the factual situation, with the proposal that the appealed Judgment be annulled and the case be remanded to the first instance court for retrial.

22. On 8 January 2020, the Court of Appeals, by Judgment PAKR. no. 327/2019, annulled the Judgment [PKR. no. 86/2018] of the Basic Court, of 21 March 2019, remanding the case for retrial to the Basic Court, ordering the latter, that this criminal case be tried again by another trial panel. In its reasoning, the Court of Appeals stated that:*"... as to the question of whether it is an adjudicated matter or not, the assessment of the court of first instance that it is the same case, which has been decided by a final decision of the Basic Court is ungrounded- ..., because, according to the case file, the previous case ended in June 2015, while the injured party after the end of this case went to the police and reported the case that the accused is still threatening and requesting money from the injured party, where regarding the facts and circumstances in question he gave a detailed statement and always found that there is talk about the case after June 2015".*

Remanding the case for retrial (third time)

23. On 12 January 2021, the Basic Court, by Judgment PKR. no. 3/2020, found the Applicant and the other three accused guilty of committing the criminal offense under Article 267.2, in conjunction with paragraph 1 of the CCRK, imposing on him the suspended imprisonment sentence of 1 (one) year. In its reasoning, the Basic Court emphasized that in the present case we are not dealing with adjudicated cases, since according to the indictment the subject of review was not identical with the subject of review in Judgment P. no. 333/15, of 19 June 2015, which the Applicant refers to.

24. Against the abovementioned Judgment, the Basic Prosecution filed an appeal with the Court of Appeals, regarding the decision on the criminal sanction, pursuant to Article 387, paragraphs 1 and 2 of the CCRK, proposing that: *"The Court of Appeals should modify the appealed judgment regarding the decision on the sentence so that the accused K.D., due to the criminal offense Contract of disproportionate benefit under Article 270 of CCRK, to impose an imprisonment sentence or a higher fine, the accused K.B, due to the criminal offense of Contracting disproportionate benefit in assistance under Article 270, in conjunction with Article 25 of the CCRK, to impose a sentence of imprisonment or a higher fine, the accused Gëzim Shtufi* (Applicant), *due to the criminal offense Extortion under Article 267, par.2 in conjunction with par. 1 of the CCRK, to impose an effective imprisonment sentence, the accused A.D, due to the criminal offense Extortion under Article 340, paragraph 2 in conjunction with paragraph 1 of the CCRK, to impose an imprisonment sentence or punishment with higher fine".*

25. On 7 May 2021, the Appellate Prosecution, by submission [PPA/Lno. 185/21], proposed that the appeal of the Basic Prosecution be approved as grounded, to

modify the appealed judgment and the accused K. D., K. B. and A.D., br imposed imprisonment sentence or higher fines, while the accused Gëzim Shtufi be sentenced to effective imprisonment.

26. The Applicant, through his defense, filed a response to appeal with the Court of Appeals against the proposal of the Basic Prosecution to impose more severe sentence, requesting that such a proposal be rejected as ungrounded.

27. On 14 June 2021, the Court of Appeals, deciding on the appeal of the Basic Prosecution and responding to the appeal of the Applicant, by Judgment PAKR. no. 179/2021, modified Judgment [PKR. no. 3/2020] of the Basic Court, of 12 January 2021, only with regard to the decision on the sentence, increasing the suspended sentence of imprisonment from 1 (one) year, to the sentence of effective imprisonment for a period of 3 (three) years. In its reasoning, the Court of Appeals reasoned that the first instance court has given reasons that we are not dealing with an adjudicated case, even though they are the same parties in the procedure, the main action of the accused is different, because in the case which was completed by rejecting judgment, the accused (Applicant) was charged with the criminal offense of "*threat*", while in this case he is accused of the criminal offense of "*extortion"*.

28. On 12 July 2021, the Applicant filed a request for protection of legality with the Supreme Court, against Judgment [PAKR. no. 179/2021] of 14 June 2021 of the Court of Appeals, in conjunction with Judgment [PKR. no. 3/2020], of 12 January 2021 of the Basic Court, alleging that the latter were rendered in violation of Article 432, paragraph 1, subparagraph 1.2, in conjunction with Article 384, paragraph 1, point 1.7 and point 1.8, in conjunction with Article 370, paragraph 1, points 6.7 and 8, as well as Article 361 of the CPCRK, reasoning that these violations have also led to the violation of Article 403 of the CPCRK. The Applicant by this legal remedy also requested the postponement of the execution of the effective imprisonment sentence until the Supreme Court renders a decision on merits of the case.

29. On 14 September 2021, the Supreme Court, acting upon the request for protection of legality filed by the Applicant, by Judgment PML. no. 310/2021, rejected as ungrounded the request for protection of legality, filed against Judgment [PAKR. no. 179/2021] of the Court of Appeals in conjunction with Judgment [PKR. no. 3/2020] of the Basic Court in Prizren, of 12 January 2021, thus upholding the judgments of the lower instances as fair and based on law, both in terms of the application of criminal law and the application of essential provisions of procedural law. In this decision-making part of the Review Panel was Judge M.M.

Applicant's allegations

30. The Applicant alleges that the Supreme Court by Judgment [PML. no. 310/2021] of 14 September 2021, has violated 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, as a result of the violation of **(i)** the impartiality of the court and **(ii)** the right to a reasoned court decision.

i. *Allegations regarding the "impartiality of the court"*

31. With respect to this allegation, the Applicant reasons that in the trial of his criminal case, Judge M.M. participated three times, and at two different instances of the court, first as presiding judge in the Court of Appeals in Judgment [PAKR. no. 541/2017], of 26 December 2017; secondly also as presiding judge of the panel in Judgment [PAKR. no. 443/2018] of 9 October 2018; and thirdly as a member of the panel in the Supreme Court in the challenged Judgment [PML. no. 310/2021], of 14 September 2021, actions which according to the Applicant make the challenged Judgment not in compliance with the requirements of the "the right to a fair and impartial trial".

32. In support of this allegation, the Applicant referred to the case law of the ECtHR and the Court, in particular joint cases KI187/18 and KI11/19, Judgment of 29 July 2019, as well as the relevant provisions of the CPCRK- governing the issue of recusal of judges in the regular proceedings.

33. The Applicant further reasons that *"one of the fundamental guarantees provided by Article 31 of the Constitution [Right to Fair and Impartial Trial], in conjunction with Article 6 of the ECHR, is a trial by an impartial court. This procedural guarantee is clearly sanctioned in Article 39 of the CPC. The jurisprudence of the ECtHR, which has been strictly applied by the Constitutional Court of the Republic of Kosovo, clearly states that the participation of the same judge in decision-making of the court in two different instances, when deciding on the merits of the case, constitutes a violation of the principle of impartiality of the court ("functional impartiality"). This violation becomes even more serious in criminal cases, when the Applicants are found guilty and sentenced to imprisonment. Such a situation arises in this case therefore - moreover when in this case the same judge has participated in 3 court decision-making of the criminal case of the Applicant and that twice in the Court of Appeals, as the presiding judge and once in the Supreme Court. Therefore, Judgment PML. 310/2021 of the Supreme Court, of 14.09.2021, represents a flagrant violation of Article 31 of the Constitution and Article 39 of the CPC".*

ii. *Allegations regarding the violation of the right to a "reasoned court decision"*

34. With respect to this allegation, the Applicant states: *"...one of the main contested issues throughout the criminal proceedings in this case was whether we had an adjudicated case, namely whether the case should be resolved according to the principle res judicata and ne bis in idem. The Basic Court in Prizren, three times rejected the request against Gëzim Shtufi, the Applicant in this case, with the strong argument that we are dealing with an adjudicated case. The Basic Court in Prizren has supported with clear and consistent elaborations its finding that there has already been a court decision of 2015 that has become final, regarding the actions for which the Basic Prosecution in Prizren accused the Applicant. But, despite the consistent arguments of the Basic Court, the Court of Appeals three times, in an persistent manner, quashed the judgments of the Basic Court and remanded the case for retrial, precisely because of the erroneous interpretation of the application of res judicata and ne bis in idem principles*

committed by the Court of Appeals. Following this unusual persistence of the Court of Appeals, the Basic Court changed its interpretation that it had pursued in three consecutive judgments, finding the Applicant guilty. Furthermore, following the appeal filed by the Applicant and the Prosecutor of the Basic Prosecution, the Court of Appeals modified the Judgment of the Basic Court only in terms of the length of the sentence, increasing the sentence against the Applicant (from suspended imprisonment sentence to three years of effective imprisonment)".

35. The Applicant further states: "*... that he addressed the Supreme Court with a request for revision and that with two basic allegations, one of which was that the Court of Appeals and the Basic Court by the decisions which found the Applicant guilty and convicted him, violated the principle of the adjudicated case (res judicata) and the principle ne bis in idem (which prohibits the conduct of court processes twice for the same case). The Supreme Court, by Judgment PML. 310/2021, which is challenged by this Referral, has not addressed this allegation of the Applicant by any single word. This was not only one of the two main allegations of the request for protection of legality, but, as is very clear, this has been one of the main issues throughout the criminal proceedings against the Applicant. The Supreme Court, being clear that this was the main issue of the criminal proceedings against the Applicant, has committed a serious violation of its obligation to hear carefully to the parties, to weigh their claims and arguments and to justify its decisions. Furthermore, in its Judgment, the Supreme Court itself first notes that the Applicant has raised the issue of the principle res judicata and cites, in summary form, the Applicant's arguments in this regard. Mentioning the fact that the Applicant in the request for protection of legality has raised allegations that the principle res judicata has been violated and, on the other hand, the complete disregard of this allegation in the reasoning of the Judgment renders the challenged Judgment of the Supreme Court contrary to the right to a reasoned court decision and the principle of the heard party, which are essential procedural guarantees of Article 31 of the Constitution. Add to this the fact that one of the judges of the panel of the Supreme Court had participated in the rendering of judgments against the Applicant in the same case and the Court of Appeals, which raises the suspicion that the Supreme Court had no arguments to justify the erroneous interpretations of the Court of Appeals regarding the application of the principle res judicata in the present case.*

36. In sum, the Applicant adds that *"The standard of the reasoned court decision, in relation to the principle of the heard party, as a fundamental guarantee of the right to a fair and impartial trial, is violated when the courts do not address the main allegations of the parties to the proceedings. Judgment PML. 310/2021 of the Supreme Court of 14.09.2021 failed to meet the standard of a reasoned court decision. This is because that Judgment has disregarded in entirety the Applicant's main allegation, filed in the request for protection of legality, that in his case the principle res judicata had been violated."*

37. Finally, the Applicant requests the Court to: declare the Referral admissible; to impose the interim measure and suspend the execution of Judgment PML. no. 310/2021 of the Supreme Court of 14 September 2021, as well as Judgment PAKR. no. 179/21 of the Court of Appeals, in conjunction with Judgment PKR. no.

3/2020 of the Basic Court in Prizren; to find that Judgment PML. no. 310/2021 of the Supreme Court of Kosovo of 14 September 2021 has violated the Applicant's rights guaranteed by Articles 31 of the Constitution; and to annul Judgment PML. no. 310/2021 of the Supreme Court and remand the case for retrial.

Request for interim measure

38. The Applicant requested the Court to impose an interim measure, noting that violations of Article 31 of the Constitution [Right to Fair and Impartial Trial], in conjunction with Article 6 of the ECHR, are evident in this case and strongly substantiated in this constitutional referral. Thus, the request is *prima facie* justified and, if the current practice of the Constitutional Court is followed, the constitutional violation in this case is evident. Second, if the Applicant were sent to serve a sentence, he could suffer irreparable harm. This is because he suffers from a serious heart disease and by the Medical Commission at the University Clinical Center of Kosovo he was suggested to be treated abroad (because his disease cannot be cured in Kosovo). As stated in the case file, the issue of the Applicant's health condition was also raised during the hearings before the regular courts. Also, the serious illness suffered by the Applicant is certified by the certificate of the UCCK Medical Commission, which is attached to this referral. Therefore, the imposition of an interim measure would avoid the possible fatal and irreparable consequences on the health of the Applicant, who will suffer if the execution of the challenged judgments begins and he is sent to serve his sentence. In this regard, it should be taken into account that the Applicant is a spouse, breadwinner and parent of several children. Furthermore, it should be noted that the declaration as unconstitutional of the challenged Judgment of the Supreme Court (PML. no. 310/2021), may result in the remand of the case for retrial. All the cited arguments strongly justify the approval of the request for an interim measure and the suspension of the execution of the mentioned judgments.

Relevant constitutional and legal provisions

The 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.
3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.

5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

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.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law..

Criminal Procedure Code of the Republic of Kosovo

Article 39
Bases for Disqualification of Judges

[…]
3. "A judge shall be excluded as the single trial judge, presiding trial judge, a member of the trial panel, a member of the appellate panel or Supreme Court panel if he or she has participated in previous proceedings in the same criminal case, except for a judge serving on a special investigative opportunity panel. However, a judge shall not be excluded where he or she has only been involved in previous proceedings in the same criminal case as a member of a review panel".
[…]

Admissibility of the Referral

39. 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.

40. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties], and paragraph 2 of Article 116 [Legal Effects of Decisions] of the Constitution, which establish:

Article 113
[Jurisdiction and Authorized Parties]

"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".

[...]

Article 116
[Legal Effect of Decisions]

[...]
2. While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages.
[...]"

41. The Court further examines whether the Applicant has met the admissibility requirements as established in the Law, namely Articles 47, 48 and 49 of the Law, which stipulate:

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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced...".

42. Regarding the fulfillment of the abovementioned criteria, the Court considers that the Applicant: i. is an authorized party within the meaning of Article 113.7 of the Constitution; ii. challenges the constitutionality of an act of public authority, namely Judgment PML. no. 310/2021 of the Supreme Court, of 14 September 2021; iii. has exhausted all available legal remedies, within the meaning of Article 113.7 of the Constitution and Article 47.2 of the Law; iv. has clearly specified the rights guaranteed by the Constitution, which he claims to have been violated, as

provided by Article 48 of the Law; and v. has submitted the referral within the legal deadline of 4 (four) months, as established in Article 49 of the Law.

43. In addition, the Court examines whether the Applicant has met the admissibility criteria set out in Rule 39 [Admissibility Criteria], in accordance with provisions (1) (d) and (2) of Rule 39 of the Rules of Procedure, that establish:

> *(1) "The Court may consider a referral as admissible if:*
>
> *(...)*
>
> *(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.*
>
> *(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".*

44. The Court considers that the Referral raises serious constitutional allegations and that it is not manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure.

45. Therefore, the Court finds that the Applicant's Referral meets the requirements for assessment on merits.

Merits of the Referral

46. In dealing with the merits of this Referral, the Court recalls that by Judgment [P. no. 333/15] of 19 June 2015 of the Basic Court, the Applicant was acquitted of the charge of committing the criminal offense of "threat" under Article 185, paragraph 1 of the CCRK. The Basic Prosecution, against the Applicant for the second time filed the indictment PP. no. 3063/2013 for committing the criminal offense of "extortion" under Article 340.2, in conjunction with paragraph 1 of the CCRK and for the criminal offense of "unauthorized ownership, control or possession of weapons" under Article 374, paragraph 1 of CCRK. The Basic Court, by Judgment P. no. 224/16, acquitted the Applicant of the charge of the criminal offense of "extortion" and found him guilty of the criminal offense of unauthorized ownership, control or unauthorized possession of weapons" and fined him in the amount of 2500 euro. The Court of Appeals, acting upon the appeal of the Basic Prosecution, by Decision PAKR. no. 541/2017, remands the case for retrial to the Basic Court, which by Judgment P. no. 2/2018, rejects again the indictment against the Applicant for the criminal offense of "extortion", referring to the principle *res judicata*. The Court of Appeals, acting upon the appeal of the Basic Prosecution, by Decision PAKR. no. 443/2018, for the second time remands the case for retrial to the Basic Court, which by Judgment P. no. 86/2018, rejects again the indictment against the Applicant, referring to the principle *res judicata* and *ne bis in idem*.

47. The Judgment of the Basic Court was again challenged by the Basic Prosecution in the Court of Appeals, which by Decision PAKR. no. 327/2019, remands for the third time the case for retrial to the Basic Court, and the latter by Judgment PKR.

no. 3/2020, found the Applicant guilty and sentenced him to suspended sentence for a period of 1 (one) year. Against the Judgment of the Basic Court, an appeal was filed by the Basic Prosecution, but only regarding the length of the sentence imposed, in which case the Court of Appeals, by Judgment PAKR. no. 179/2021, modified the Judgment of the Basic Court, increasing the sentence from 1 (one) year, of the suspended sentence, to 3 (three) years of effective imprisonment. The Applicant against this Judgment filed a request for protection of legality with the Supreme Court, which by challenged Judgment PML. no. 310/2021, rejected the request for protection of legality and upheld the judgments of the lower instances, leaving in force the sentence imposed on the Applicant with effective imprisonment for a period of 3 (three) years.

48. Regarding the Judgment [PML. no. 310/2021] of 14 September 2021, of the Supreme Court, the Court recalls that the Applicant alleges that the Supreme Court has violated 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, for violating (i) the impartiality of the court and (ii) the right to a reasoned court decision.

i. The Court's assessment regarding the impartiality of the trial

a) General Principles

49. In dealing with the Applicant's first allegation relating to the right to a "fair" and "impartial trial", the Court will apply the case law of the ECtHR, on the basis of which it, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Therefore, with regard to the interpretation of the allegations of violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR, the Court will refer to the case law of the ECtHR as well as its consolidated case law.

50. In this regard, the Court recalls that the impartiality of a tribunal under Article 31 of the Constitution in conjunction with Article 6 of ECHR, based on the consolidated case law of the ECtHR, must be determined according to (i) a subjective test, that is on the basis of the personal conviction and behaviour of a particular judge implying that a judge may have had personal prejudice or bias in a particular case; and (ii) an objective test, that is ascertaining whether the court, *inter alia,* its composition offered guarantees sufficient to exclude any legitimate doubt in this respect (See, *inter alia*, ECtHR cases, *Miracle Europe KFT v. Hungary*, Judgment of 12 April 2015, paragraphs 54 and 55, *Gautrin and Others v. France*, Judgment of 20 May 1998, paragraph 58, *San Leonard Band Club v. Malta* Judgment of 29 July 2004, paragraph 58, *Thomann v. Switzerland*, Judgment of 10 June 1996, paragraph 30, *Wettstein v. Switzerland*, Judgment of 21 December 2000, paragraph 42, *Korzeniak v Poland*, Judgment of 10 January 2017, paragraph 46; and case of the Court KI06/12, Applicant *Bajrush Gashi*, Judgment of 9 May 2012, paragraph 45, as well as the joint cases of the Court KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 29 July 2019, paragraph 50).

51. More specifically, as regards the subjective test, based on the ECtHR case law, personal impartiality of a judge must be presumed until there is proof to the contrary. (See, *inter alia*, ECtHR cases, *Mežnarić v. Croatia*, Judgment of 30 November 2005, paragraph 30; *Padovani v. Italy*, Judgment of 26 February 1993, paragraph 26; *Morel v. France*, paragraph 41; *San Leonard Band Club v. Malta*, cited above, paragraph 59; *Hauschildt v. Denmark*, Judgment of 24 May 1989, paragraph 47; *Driza v. Albania*, Judgment of 13 November 2007, paragraph 75; and *Korzeniak v. Poland*, cited above, paragraph 47). As regards the type of proof required to prove such a thing, the ECtHR, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons. However, to decide whether in a particular case there is sufficient basis to determine that a particular judge is not impartial, the Applicant's point of view is important, but not decisive. (See, *inter alia*, ECtHR case, *De Cubber v. Belgium*, Judgment of 26 October 1984, paragraph 25). However, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the ECtHR. (See, ECtHR cases, *Kyprianou v. Cyprus*, cited above, paragraph 119; *Micallef v. Malta*, Judgment of 15 October 2009, paragraphs 93-94; and *Tozicka v. Poland*, Judgment of 24 July 2012, paragraph 33, as well as the joint cases of the Court KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 29 July 2019, paragraph 51).

52. Furthermore, according to the case law of the ECtHR, while in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the criteria and requirements of objective impartiality provides a further important guarantee for an impartial trial. (See case of ECtHR *Micallef v. Malta*, cited above, paragraphs 95 and 101). It must be noted, that in the vast majority of cases raising impartiality issues the ECtHR has focused and found violations in the aspect of the objective test. (See also case of ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*, Judgment of 6 November 2018, paragraph 146; and *Korzeniak v. Poland*, cited above, paragraph 48, as well as the joint cases of the Court KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 29 July 2019, paragraph 52).

53. As to the objective test, the Court notes that based on the ECtHR case law, when it is applied on a trial panel, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to impartiality of the court. In this respect even appearances may be of a certain importance or, because *"justice must not only be done, it must also be seen to be done*". (In this context, see, *inter alia*, ECtHR cases, *De Cubber v. Belgium*, cited above, paragraph 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. (See, *inter alia*, ECtHR cases, *Castillo Algar v. Spain*, Judgment of 28 October 1998, paragraph 45; *San Leonard Band Club v. Malta*, cited above, paragraph 60; and *Golubović v. Croatia*, cited above, paragraph 49). Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. (See, ECtHR case, *Micallef v. Malta,* cited above, paragraph 98, as well as the joint cases of the Court KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 29 July 2019, paragraph 53).

54. The case law of the ECtHR further provides that situations in which issues of lack of impartiality may be raised may be of (i) functional nature; and (ii) personal

nature. The first one relates to the exercise of various functions within a judicial proceeding by the same person or hierarchical or other nature between the judge and other actors in the particular judicial process. With regard to the latter, the level and nature of this connection should be examined. These situations of a functional nature may include examples of cases in which were carried out (i) advisory and judicial functions (in this context, see, *inter alia*, cases of ECtHR *Procola v. Luxembourg*, Judgment of 8 September 1995, paragraph 45, *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraph 200; *Sacilor Lormines v. France*, Judgment of 9 November 2006, paragraph 74); (ii) judicial and extra-judicial (in this context, see, *inter alia*, ECtHR case, *McGonnell v. the United Kingdom*, Judgment of 8 February 2000, paragraphs 52-57); and (iii) various court cases. In this context, the ECtHR emphasizes that the assessment of whether the participation of the same judge at different stages of the trial may have resulted in a violation of the requirements related to the impartiality of the court, should be assessed case by case and depending on the circumstances of each case. The second, namely, issues of personal nature, are mainly related to the conduct of a judge regarding a case or the existence of links with one of the parties or his/her representative in one case. (See further in this context, the ECtHR Guideline of 30 April 2019, on Article 6 of the ECHR, Right to a Fair Trial (criminal aspect), Part IV. General Guarantees: Procedural Criteria, C. Independence and Impartiality, 2. Impartial Court, a. Criteria for the assessment of impartiality (see, in this context the joint cases of Court KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 29 July 2019, paragraph 54).

b) Application of general principles in the circumstances of the concrete case

55. In applying those principles in the context of the circumstances of the present case, the Court recalls that the Applicant alleges that precisely the exercise of different functions of a judge within the same court process, namely the fact that Judge M.M. had participated 3 (three) times in the trial of this criminal case, and twice as the presiding judge of the Panel in the Court of Appeals in issuing decisions [PAKR. no. 541/2017], of 26 December 2017 and [PAKR. no. 443/2018] of 9 October 2018, and most recently as a member of the Panel in the Supreme Court in rendering the challenged Judgment [PML. no. 310/2021] of 14 September 2021, actions which according to the Applicant, have resulted in violation of his right to "*fair and impartial trial*".

56. In this context and based on the case law of the ECtHR, the Court will first examine the Applicant's allegations concerning the impartiality of the court under the criteria of the subjective test.

57. The Court reiterates that with regard to the subjective test, the judge's personal impartiality must be presumed until proven otherwise. The Applicant has not submitted any evidence which could call into question the impartiality of Judge M.M. Consequently, the Court finds that in rendering Judgment [PML. no. 310/2021] of 14 September 2021, no facts can support the finding that the court was not impartial in terms of the subjective test.

58. Therefore in the following, in accordance with the principles of case law of the ECtHR, and as an additional guarantee for the circumstances of the present case, the Court will examine the Applicant's allegations under the criteria of the

objective test and initially (i) whether the circumstances of the present case may raise legitimate doubts on the part of the Applicant regarding the impartiality of the court and whether this is the case; and (ii) whether these suspicions are objectively justifiable. The determination of these issues is done in each case separately. (See, in this regard, ECtHR cases, *Mežnarić v. Croatia*, cited above, paragraph 31; *Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, paragraph 58; *Wettstein v. Switzerland*, cited above, paragraph 44; and *San Leonard Band Club v. Malta*, cited above, paragraph 60; *Korzeniak v. Poland*, cited above, paragraph 49 and *Tozicka v. Poland*, cited above, paragraph 33, as well as the joint cases of the Court KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 29 July 2019, paragraph 58).

59. In this respect, and as stated above, the exercise of various functions within the same judicial process by the same judge, and which relates to the circumstances of the present case, presents categories of issues of a functional nature which are relevant in the assessment of the impartiality of a court. In such cases, the ECtHR has in principle held that there are legitimate doubts as to the impartiality of the court (see, *inter alia*, the case of the ECtHR, *Korzeniak v. Poland*, cited above, paragraphs 51 and 52). The Court will hold the same position as well. Consequently, based on the case law of the ECtHR, the Court will in the following assess whether such doubts, in the circumstances of the present case, can be objectively justified.

60. In terms of assessing legitimate doubts in the context of circumstances where a judge has exercised more than one function within the same judicial case, two categories of cases are relevant. First, special attention should be paid to the characteristics of the law and the rules applicable to a particular case (See*, inter alia*, ECtHR cases, *Warsicka v. Poland*, Judgment of 16 January 2007, paragraph 40; *Toziczka v. Poland*, Judgment of 24 July 2012, paragraph 36; and *Korzeniak v. Slovakia*, cited above, paragraph 50). In this context, the ECtHR has emphasized that organizational issues are also important (See, *inter alia*, the case of the ECtHR, *Piersack v. Belgium*, Judgment of 1 October 1982, paragraph 30). For example, the existence of procedures that ensure impartiality, namely the rules and procedures that also govern the withdrawal/exclusion of a judge, are relevant factors (see ECtHR cases, *Pfeifer and Plankl v. Austria*, Judgment of 25 February 1992, paragraph 6; *Oberschlick v. Austria* (no. 1), Judgment of 23 May 1991, paragraph 50; and *Pescador Valero v. Spain*, Judgment of 24 September 2003. paragraphs 24-29). Secondly, it is necessary to assess whether the interrelationship between the issues relating to the content dealt with by the same judge at different stages of the proceedings is so close/evident that it casts doubt on the impartiality of the judge who participated in the decision-making during these stages. This determination is also made on a case-by-case basis and taking into account their specific characteristics and circumstances (See, *inter alia*, the ECtHR cases, *Warsicka v. Poland*, cited above, paragraph 40; *Toziczka v. Poland*, cited above, paragraph 36; and *Korzeniak v. Slovakia*, cited above, paragraph 50, as well as the joint cases of the Court KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 29 July 2019, paragraph 60).

61. In this respect, the Court, in the light of the ECtHR case law elaborated above, must first address the legal and regulatory issues. The Court recalls that the

procedures governing the withdrawal/exclusion of a judge from decision-making are of a particular importance.

62. In this context, the Court notes that in the Applicant's case in the proceedings which concern the requests for protection of legality, the Supreme Court has applied the provisions of the CPCRK. The latter, in Articles 39 and 40 (Procedure for Disqualification) thereof, specifically regulates the circumstances in which judges are excluded from the decision-making process. The Court emphasizes that paragraph 2 of Article 39 of the CPCRK, which violation is alleged by the Applicant, establishes that:

> *"A judge shall be excluded as the single trial judge, presiding trial judge, a member of the trial panel, a member of the appellate panel or Supreme Court panel if he or she has participated in previous proceedings in the same criminal case, except for a judge serving on a special investigative opportunity panel. However, a judge shall not be excluded where he or she has only been involved in previous proceedings in the same criminal case as a member of a review panel".*

63. The Court, based on the case file, notes that in the circumstances of the present case, Judge M.M. participated 3 (three) times in the decision-making of this criminal case and that 2 (two) times at different court instances. She was initially, in a capacity of a presiding judge of the panel of the Court of Appeals, part of the decision-making in the Decision [PKRK. no. 541/2017] of 26 December 2017 and Decision [PKRK. no. 443/2018] of 9 October 2018, in the capacity of member of the Review Panel participated in rendering the challenged Judgment [PML. no. 310/21] of the Supreme Court, of 14 September 2021.

64. In this context, the Court notes that the content of paragraph 2 of Article 39 of the CPCRK, namely "*participation in previous proceedings in the same criminal case*", is applicable in the circumstances of the present case, and based on this phrase, Judge M.M. had to be excluded from decision-making in the relevant panel of the Supreme Court. Furthermore, Judge M.M., in the previous decision-making procedure, was the presiding judge of the Review Panel in the Court of Appeals, where she participated in rendering the decisions of 26 December 2017 and 9 October 2018, by which the case was remanded for retrial with regard to the acquittal part of the accused, namely the Applicant.

65. The Court also notes that in such circumstances, the disqualification of a judge is not necessarily dependent on the parties' request in the proceedings. On the basis of the provisions of the CPCRK, the judge himself should seek his/her disqualification from decision-making. This is stipulated in Articles 39 to 42 of the CPCRK, and is also supported by the ECtHR case law, which, by emphasizing the importance of the perception and confidence that courts have to reflect in public in a democratic society, have repeatedly stated that any judge who believes that his or her participation in a court case may raise doubts about the impartiality of the court, should be excluded from decision-making.

66. Moreover, the Court also recalls that the procedure relating to the protection of legality does not provide for a public procedure in which the Applicant may participate. This procedure is based on written submissions only. Therefore, due

to the written nature of the proceedings, neither the Applicant nor his defence counsel could have known until the Supreme Court had rendered the decision that the same judge who was presiding judge of panel in the Court of Appeals has also taken part in the panel of the Supreme Court, which decided on his request for protection of legality. Therefore, the responsibility for not excluding the respective judge cannot be attributed to the Applicant and it cannot be concluded that he has waived the right to have his case decided by an impartial court (See, in this context, the case of the ECtHR, *Oberschlick v. Austria*, cited above, paragraph 51, and cases of the Court KI06/12, Applicant: *Bajrush Gashi*, cited above, paragraph 36, as well as the joint cases KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 29 July 2019, paragraph 67).

67. The Court recalls that the issue of whether the number of judges to decide on the requests for the protection of legality is sufficient or not is a matter entirely under the jurisdiction, and for discussion, if necessary, between the judiciary and other responsible bodies. The primary responsibility for the proper administration of justice rests with the relevant institutions, and organizational issues cannot be used as a justification for disregarding the Constitution (In this context, see the Court's case, KI06/12, Applicant: *Bajrush Gashi*, cited above, paragraph 51; and case K04/11, Applicant: *Supreme Court of Kosovo*, Constitutional review of Articles 35, 36, 37 and 38 of the Law on Expropriation of Immovable Property, No. 03/L-139, Judgment of 1 March 2012, as well as the joint cases KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 29 July 2019, paragraph 68).

68. According to the case law of the ECtHR, problems with impartiality may arise, *inter alia*, if, at other stages of the proceedings, the judge has already expressed an opinion on the guilt of the accused (see, in this case, the ECtHR, *Gómez de Liaño y Botella v. Spain*, paragraphs 67-72). In the circumstances of the present case, it is clear that Judge M.M., presiding over the panel at the Court of Appeals, expressed herself against the views of the Basic Court, which had acquitted the Applicant of the indictment. With the fact that the Court of Appeals had remanded the case for retrial to the Basic Court, which at a later stage found the Applicant guilty, based on its recommendations, and same judge then participated, as a member of the panel in the Supreme Court, where the latter by the challenged Judgment [PML. no. 310/2021] of 14 September 2021, upheld Judgment [PAKR. no. 179/2021] of the Court of Appeals of 14 June 2021, in conjunction with Judgment [PKR. no. 3/2020] of the Basic Court, of 12 January 2021, makes the allegation of the Applicant of lack of impartiality of the trial of this criminal case justifiable.

69. Consequently and in such circumstances, the Court must find that legitimate doubts as to the impartiality of the court arising as a result of the exercise of the various functions of a judge within a same judicial process are objectively justified. The Court must also ascertain that in rendering the Judgment [PML. No. 310/2021] of 14 September 2021, the Supreme Court was not impartial in the sense of the objective test and that consequently, the Applicant's right to a "*fair and impartial trial*" was violated by an impartial court, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

70. The Court notes that this conclusion relates exclusively to the challenged Judgment of the Supreme Court, namely Judgment [PML. no. 310/2021] of 14

September 2021, from the point of view of the impartiality of the court within the meaning of the objective test, and in no way prejudices the outcome of the merits of the case.

ii. Regarding other allegations

71. The Court recalls that the Applicant also raises other allegations regarding the challenged Judgment [PML. no. 310/2021] of 14 September 2021, of the Supreme Court, namely the violation of the right to a reasoned court decision. However, the Court recalls that it has already found a violation of the principle of "impartiality of the court" which is guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, and therefore does not consider it necessary to address this allegation separately, since the challenged Judgment [PML. no. 310/2021] of 14 September 2021 of the Supreme Court, is declared invalid and remanded for retrial to the Supreme Court, which in the retrial procedure will again address all the allegations of the Applicant, raised in the request for protection of legality, now by a new review panel of the Supreme Court.

Assessment of the request for interim measure

72. In this regard, the Court recalls that pursuant to Article 27 (Interim Measures) of the Law, the Court may impose an interim measure on a matter which is the subject of the proceedings (i) if the measure is necessary to avoid risks or irreparable damages; or (ii) whether the taking of such interim measures is in the public interest. These criteria are further specified in paragraph (4) of Rule 57 of the Rules of Procedure.

73. The Court notes that the Applicant has requested the imposition of an interim measure to suspend the execution of the sentence of effective imprisonment for a period of 3 (three) years against him, until the Court renders a decision on the Referral. The Court, taking into account the fact that the interim measure is issued and has effect until rendering a final decision by the Court, considers that the request for imposition of an interim measure in the Applicant's case is no longer the subject of the case, as the Court has already decided on the admissibility and merits of the Applicant's Referral. Therefore, the request for interim measure, for the above, is to be rejected.

Conclusions

74. In sum, the Court recalls that by this Judgment, it has declared invalid only the Judgment of the Supreme Court, namely, Judgment [PML. no. 310/2021] of 14 September 2021, rendered as a result of the submission of the request for protection of legality by the Applicant, against the Judgment [PAKR. no. 179/2021], of 14 June 2021 of the Court of Appeals, in conjunction with Judgment [PKR. no. 3/2020], of 12 January 2021 of the Basic Court in Prizren.

75. In the circumstances of the present case, the Court has found that Judgment [PML. no. 310/2021] of the Supreme Court, of 14 September 2021 was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because (i) it was rendered by the composition of a Panel, which contrary to the relevant provisions to the criminal proceedings, and the case law of the

ECtHR and the Court, was attended by a judge who was also part of the decision-making in the earlier stages of the same criminal case, namely twice in the capacity of presiding judge in the Court of Appeals, when it was decided on the Applicant's criminal charge, and most recently as a member of the Panel, when it was decided on his request for protection of legality in the Supreme Court; and in such circumstances, (ii) legitimate suspicions about the lack of impartiality of the court are objectively justifiable.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 and 116.2 of the Constitution, Articles 20, 27 and 47 of the Law and Rule 59 (a) of the Rules of Procedure, in the session held on 26 May 2022, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that Judgment [PML. No. 310/2021] of 14 September 2021 of the Supreme Court is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1, of Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE Judgment [PML. No. 310/2021] of 14 September 2021 of the Supreme Court invalid;

IV. TO REMAND Judgment [PML. No. 310/2021] of 14 September 2021 of the Supreme Court for retrial in accordance with the Judgment of this Court;

V. TO REJECT the request for interim measure;

VI. TO ORDER the Supreme Court, that in accordance with Rule 66 (4) of the Rules of Procedure, to notify the Court by 25 November 2022, regarding the measures taken to implement the Judgment of this Court;

VII. TO REMAIN seized of the matter, pending compliance with this order;

VIII. TO ORDER this Judgment to be notified to the parties, and in accordance with Article 20.4 of the Law, to publish the latter in the Official Gazette;

IX. TO DECLARE that this Judgment is effective on the day of its publication.

Judge Rapporteur **President of the Constitutional Court**

Safet Hoxha Gresa Caka-Nimani

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