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GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 7 August 2023
Ref. no.: MM 2242/23

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DISSENTING OPINION

of Judge

RADOMIR LABAN

in

case no. KI161/21

Applicant

Suzana Zogëjani Sekiraqa

Constitutional review of Judgment
Pml. no. 310/220 of the Supreme Court of Kosovo of 28 April 2021

Expressing from the beginning my respect and agreement with the opinion of the majority of judges in this case, who by a majority of votes held that judgment [Pml. no. 310/220] of 28 April 2021 of the Supreme Court of Kosovo; that judgment [PAKR. no. 328/19] of 20 August 2019 of the Court of Appeals of Kosovo and judgment [PKR. no. 37/2019] of 17 December 2019 of the Basic Court in Prishtina are not in compliance with Article 31 of the Constitution and Article 6 of the European Convention on Human Rights.

However, I, as a single judge, have a dissenting opinion regarding the conclusion of majority and I do not agree with the opinion of majority.

As a judge, I agree with the factual situation as stated and presented in the judgment and I accept the same factual situation as correct. I, as a judge also agree with the way in which the Applicant's allegations were stated and presented in the judgment and I accept the same as correct.

However, I do not agree with the legal analysis and position of the majority regarding the Applicant's allegations of violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial], in conjunction with Article 6 of the European Convention on Human Rights. Also, I do not agree with the opinion of the majority to DECLARE INVALID judgment [Pml. no. 310/220] of 28 April 2021 of the Supreme Court of Kosovo; judgment [PAKR. no. 328/19] of 20 August 2019 of the Court of Appeals of Kosovo and judgment [PKR. no. 37/2019] of 17 December 2019 of the Basic Court in Prishtina;

Due to the above, and in accordance with Rule 56 of the Rules of Procedure of the Constitutional Court, in order to follow the reasoning of my dissenting opinion as easily and clearly as possible, I will **(I)** recall the main allegations of the Applicant **(II)** perform constitutional review regarding the Applicant's allegations of the principle of equality of arms and the principle of adversarial proceedings and the admissibility of evidence in the proceedings; **(III)** perform constitutional review regarding the Applicant's allegations of violation of the right to cross-examine witnesses; **(IV)** perform constitutional review regarding the Applicant's allegations of violation of rights when taking of the testimony of [X.X.], who was a minor at the time, the latter was examined only in the presence of a social worker and not a psychologist. **(V)** express an opinion on the obligation to impose an interim measure *ex officio*; **(VI)** present a conclusion regarding the alleged violations of the Applicant's rights

(I) Recall the Applicant's main allegations

1. First, I recall the essence of the case, which is related to the indictment of the Basic Prosecutor's Office in Prishtina - Department for Serious Crimes, against the Applicant on suspicion of having committed the criminal offence of *„Aggravated Murder*" under Article 179, paragraph 1, items 1.3. and 1.4, of the CCRK. The Basic Court, by its judgment [PKR. 37/2019], found the Applicant guilty of having committed the criminal offense accused of and sentenced her to 25 (twenty-five) years imprisonment. The Applicant then filed an appeal to the Court of Appeals against the judgment of the Basic Court which found her guilty, claiming that there has been a violation of criminal provisions and erroneous determination of factual situation. The Basic Prosecutor's Office also filed an appeal to the Court of Appeals against the Basic Court's judgment, requesting that the Applicant be imposed more severe punishment. The Court of Appeals partially approved the Applicant's appeal, but also *ex officio*, modified the judgment of the Basic Court only in relation to the legal qualification of the criminal offense, so that the Court of Appeals for the criminal offense for which the Applicant was found guilty, legally described it as a criminal offense of „aggravated murder" under Article 179, paragraph 1, paragraph 3 of the CCRK. The court rejected the appeal of the Basic Prosecutor's Office as well as the other appeals of the Applicant as unfounded. The Applicant then submitted a request for protection of legality to the Supreme Court, against lower-instance judgments. The Supreme Court by judgment [PML. no. 310/2020] rejected as unfounded the request for protection of legality submitted by the Applicant.

2. All these findings of regular courts, including the judgment of the Supreme Court, are challenged by the Applicant before the Court, which can be summarized as follows:

    i) The Applicant claims that the regular courts ignored the material evidence presented by the Applicant's defense and that no court instance accepted to administer evidence that, in her opinion, would support the defense *„regarding the permanent violence that the victim has exercised against the Applicant, for which he was sentenced to prison by the judicial authorities of France*", as well as the refusal of a request for a psychiatric expert opinion, which, according to her, would prove her mental state at the time of the commission of the criminal offence;

ii) the judgments of all court instances are based on inadmissible evidence and adds that, according to her allegations, the regular courts neglected legal obligations by specifying that the evidence was obtained through informal channels by the governments of foreign countries, as it happened in the case of securing evidence and other material evidence, crime scene investigation reports as well as forensic examination reports submitted by France, which is inadmissible evidence, unless the evidence is accompanied by a statement from the French government or law enforcement authorities that the evidence was obtained and secured in accordance with the law of that country.

iii) The Applicant further claims that when obtaining testimony from [X.X.], who was a minor, he was examined only in the presence of a social worker and not a psychologist; as well as

iv) At the very end, the Applicant states that paragraph 4 of Article 31 of the Constitution was violated as a result of her inability to cross-examine witnesses and experts whose testimony influenced the Applicant to be found guilty.

3. In essence, the Applicant states that the challenged decision violated two principles guaranteed by the right to a fair and impartial trial guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, namely: (i) on the principle of equality of arms and the principle of adversarial procedure and admissibility of evidence in the procedure; (ii) the right to cross-examine witnesses as well as iii) when taking the testimony of [X.X.], who was a minor at the time, he was examined only in the presence of a social worker and not a psychologist.

4. In this regard, I will consider the above-mentioned claims by referring to the case law of the European Court of Human Rights (hereinafter: ECHR), based on which the Court, 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.

(II) Constitutional review regarding the Applicant's allegations of the principle of equality of arms and the principle of adversarial proceedings and the admissibility of evidence in the proceedings

5. In this regard, I would like to recall once again of the allegations of the Applicant regarding the administration of evidence by the regular courts, which she also presented in her request for protection of legality, which was submitted to the Supreme Court.

6. First of all, the Applicant claims before the Court that "*she was not allowed to present evidence submitted by her defence, related to multiple bodily injuries [...] presented by the defence through numerous pictures, which were submitted to the court, were not considered at all by the court and were fully ignored as if they did not exist at all* ". In this regard, the Applicant adds that no court instance accepted to review the evidence, which, in her opinion, would be in favor of the defense.

7. The Applicant in relation to this claim also adds that: "*the courts have disregarded the legal obligation from Article 290, paragraph 6 of the Criminal Procedure Code (CPC), which stipulates that evidence obtained through informal channels by foreign governments, as it was the case of obtaining testimonies and other material evidence, crime scene inspection reports, and forensic examination reports sent by France, are inadmissible if they are not accompanied by a Declaration from the French*

government or law enforcement authorities stating that such evidence was obtained and collected in accordance with the laws of that State".

8. In further consideration and elaboration of the Applicant's allegations, I will further elaborate on the general principles established by the Court's case law, as well as the case law of the ECtHR on the principle of equality of arms and the principle of adversariality, including the general principles related to the admissibility of evidence in the proceedings.

General principles based on the case law of the Court, as well as the case law of the ECtHR in relation to the principle of equality of arms and the principle of adversariality, and in relation to the admissibility of evidence in the proceedings

9. Referring to the case law of the ECtHR, primarily emphasizes that the principle of „*equality of arms*" is an element of a broader concept of a fair trial (see Court's case KI230/19, Applicant: *Albert Rakipi*, Judgment of 9 December 2020, paragraph 97).

10. The ECtHR and the Court, in their case law, have emphasized that the principle of "*equality of arms*" requires a "*fair balance between the parties*", where each party must be given a reasonable opportunity to present his/her case, under conditions which would not place him at a significant disadvantage *vis-à-vis* the opposing party (see Court's case KI230/19, cited above, paragraph 98; see also the cases of ECtHR *Yvon v. France,* Judgment of 24 July 2003, paragraph 31; and *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993, paragraph 33, see also cases of the Court, KI52/12, Applicant *Adije Iliri*, Judgment of 5 July 2013, KI103/10, Applicant *Shaban Mustafa*, Judgment of 20 March 2012, paragraph 40).

11. I further recall that the case law of the ECtHR has determined that the requirement of equality of arms, in terms of a fair balance between the parties, applies in principle to both civil and criminal cases (see Court's case KI230/19, cited above, paragraph 99; see also case of the ECtHR, *Dombo Beher B.V. v. the Netherlands*, Judgment of 27 October 1993, paragraph 33).

12. Furthermore, i note that a fair trial includes the right to a trial in accordance with the "*principle of adversarial proceedings*", a principle which is linked to the principle of "*equality of arms".* (see case of the Court KI230/19, cited above, paragraph 99).

13. Furthermore, in the context of criminal proceedings, the ECtHR has underlined that *"It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence"* (see the case of ECtHR *Lea v. Estonia,* application no. 59577/08, Judgment of 6 March 2012, paragraph 77*)*. Consequently, with regard to the principle of adversarial proceedings, the ECtHR emphasized that, in a criminal proceeding, both the prosecution and the defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see case *Brandstetter v. Austria*, cited above, paragraph 67).

14. On the other hand, with regard to issues related to the presentation of evidence and their admissibility, the Court also refers to the case law of the ECtHR which, in principle, states that "*Although Article 6 guarantees the right to a fair trial it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law*" (see ECtHR cases *Schenk v. Switzerland*, paragraphs 45-46 and *Heglas v. Czech Republic,* paragraph 84). However,

the ECtHR has underlined that the aspect to be considered in these cases is whether the proceedings, including the manner in which the evidence was taken, were fair in its entirety (see case of the Court KI230/19, cited above, paragraph 102; see also ECtHR cases *Khan v. the United Kingdom*, Judgment o 12 May 2000, paragraph 34; *P.G, and J.H. v. The United Kingdom*, Judgment of 25 September 2001, paragraph 76; and *Allan v. the United Kingdom*, Judgment of 5 November 2002, paragraph 42).

Application of these principles in the case of the Applicant

15. I note that the Applicant made the above-mentioned allegations before regular courts, including in her request for protection of legality, where she stated, among other things, that two lower instance courts *ignoring the right of the defense party to propose evidence related to proving exculpatory facts for the accused, such as the proposal for her psychiatric examination to prove her mental state at the time of the commission of the criminal offense, the observation of the existence of accumulated affect as a result of her continuous mistreatment [...]*

16. First of all, in connection with the Applicant's allegation that no court instance accepted to consider the evidence, which, according to her claims, would be in her favor, on the basis of the above and referring to proceedings before the regular courts, especially regarding the administration of evidence by these courts, the Court first refers to the judgment of the Basic Court, which based its decision on the conviction of the Applicant on a significant amount of personal and material evidence proposed by the parties to the proceedings, such as the reading of the statements of several witnesses, which were received from the French state, the hearing of witnesses H.S, E.H, A.S and X.X. at the main trial, the reading of numerous minutes that were taken before the French authorities (taking into account that the criminal offense was committed in the state of France where the Applicant lived together with the deceased A.S) the forensic autopsy report compiled by the Institute of Forensic Medicine, the death certificate for the deceased (the Applicant's ex-husband) issued on 29 September 2018, which are exhaustively listed in the judgment of the Basic Court.

17. Furthermore, I also refer to the judgment of the Court of Appeals, which established that the challenged judgment of the Basic Court assessed the evidence in accordance with the provisions of Article 362, paragraph 2 of the CPCK, while, for contradictory evidence, it acted in accordance with the provisions of the Article 370, paragraph 7 of the CPCK, stating in full what facts and for what reasons it considers proven or unproven, and therefore the Appellate Court found that the Basic Court gave sufficient explanations which the Court of Appeals considers to be fair. The Court of Appeals, in connection with the Judgment of the Basic Court, emphasized that "*the approach to decisive facts was fair and legal, so that no question remained unclear or unproven, and in addition to being properly proven, they were also fully and accurately reasoned.*

18. In addition, I also refer to the specific part of the Judgment of the Court of Appeals, which is related to the Applicant's allegation that the evidence proposed by the Applicant's defense was not reviewed, and in connection with this allegation, the Court of Appeals adds that the first instance court in this case took into account the material evidence that was proposed by the defendant's defense and in order to secure the latter from the French state, "*however, from the case file and from other material evidence, it is proven that, the court of first instance has taken into account the evidence in question, especially the data related to the past of the accused and the now deceased, in terms of married life, then from the statements of the witnesses - neighbors of the accused, it has also confirmed the behavior of the accused towards the now deceased, the behaviors, therefore, were not of such a level that it would be possible to conclude*

that only now the deceased had violent behavior, because even for the accused the witnesses in question have confirmed the aggressive behavior of the accused in relation to the now deceased, therefore, the first instance court has rightly refused to provide other material evidence from the state of France, in relation to the facts and circumstances in question."

19. Following the consideration of this allegation, I recall the reasoning from the Judgment of the Supreme Court [PML. no. 310/2020] of 28 April 2021, which rejected as ungrounded the request for protection of legality, and which reasons the following: "*in relation to the violation of the criminal law as it appears from the content of the request, the defense claims that in the present case the criminal law was violated, because according to the defense of the convict and the material evidence, the convict acted in necessary defence as a result of the sexual abuse of the deceased with the minor and the ill-treatment or violence used by the deceased towards the convict on the critical night, the circumstances of which speak of murder committed in defense required by Article 179, par. 1 point 3 in conjunction with Article 12 par. 1 and 4 respectively of CCRK. However, this court assesses these claims as unfounded. First, in this criminal legal matter, the fact that the marital relations between the convict and the deceased were not good and that the deceased used violence against the convict, but regarding the critical moment, there is no eyewitness to the event, is not disputed [...] regarding the defense's proposal for psychiatric expertise to prove the mental state of the convict at the time of the commission of the criminal offense, this court assesses that the first instance court has rightly rejected such a proposal and in this regard has given clear reasons which this court also approves as correct. The convict first lived with the deceased family, then they went to France and lived there for a while alone and according to her request, the deceased also went to France to live with her [...] Then, from the case file there is no evidence that argues the fact that the convict on the critical night had suffered injuries from the deceased, therefore the claims in this regard are unfounded and to this court, it is not clear on what the defense bases this claim. In fact, it turns out that the court rejected to administer the medical reports before the critical event, but in the case files there is no evidence that substantiates the fact that the convict had suffered injuries from the deceased on the critical night.*

20. Further, in the light of the above, I note that the Applicant was found guilty after analyzing a large body of evidence presented by her defense as well as other parties, and from all this it follows that the Applicant had opportunities to present evidence that could influence her acquittal.

21. Furthermore, in connection with the allegation of the Applicant that the judgments of lower instances are based on evidence that, in her opinion, do not meet the standards set by law to be considered as evidence, I recall the reasoning of the Judgment of the Court of Appeals [PAKR. no. 133/2020] which, when considering this claim, added that all the evidence obtained from the French state was processed in accordance with the legal provisions of the latter "*which means that based on the provisions* of the *Law on International Legal Cooperation of Kosovo, all evidence provided by another State must be processed in accordance with the provisions of the Law of such State, and this happened precisely in the present case* ".

22. Furthermore, I quote the Judgment of the Supreme Court, where in relation to this claim added that: "*the allegations that this evidence was not obtained legally are unfounded, because the case file show that the evidence obtained by the French authorities was obtained in accordance with the provisions of the criminal procedure code of France and as such were handed over to the local authorities. In fact, the defender only cites the legal provisions of the Criminal Procedure Code (Article 219*

par. 6 of the CPCK) but does not specify the fact of what their illegality consists of, and in addition, they are not the only or decisive evidence for finding the guilt, as it was said above, because the convict has accepted the fact that she committed the murder, but under the pretext that she was attacked [...]

23. In light of the general principles of the ECtHR stated above and the reasoning of the regular courts, I primarily consider that in the case of the Applicant, the regular courts rendered their decisions in accordance with the standards required for a fair and impartial trial and their decision-making was not based not only on one piece of evidence, but on several pieces of evidence, which the Basic Court cited in its Judgment and which were later upheld both by the Court of Appeals and the Supreme Court.

24. I also note that the criminal proceedings against the Applicant were fair in its entirety, as the courts respected the right to defence. In this regard, the Court notes that in the proceedings before the regular courts, the Applicant was given the opportunity, through her legal representative, to propose evidence as well as to oppose it, which was presented during the criminal proceedings.

25. Therefore, based on the above reasoning, I note that the Applicant failed to prove that in her case the regular courts did not administer evidence in accordance with the requirements of Article 31 of the Constitution and Article 6 of the ECHR as well as the principles established through the case law of the ECtHR, which are also contained in the relevant provisions of the criminal procedure. Therefore, I consider that these allegations of the Applicant are ungrounded.

(III) Constitutional review regarding the Applicant's allegation of violation of the right to cross-examine witnesses

26. The Applicant states that she did not have the opportunity to cross-examine the witness who, according to her, influenced the Applicant to be found guilty with his testimony.

27. I recall that the general criteria regarding the right of the accused to question the witnesses against him is elaborated in detail by the case law of the Court in case KI14/18, Applicant *Hysen Kamberi*, Judgment of 15 January 2020, paragraphs 47 to 76, and which judgment is based on two ECtHR cases, namely *Al-Khawaja and Tahery v. United Kingdom*, judgment of 15 December 2011 and *Schatschaschwili v. Germany*, Judgment of 15 December 2015.

28. In this regard, I note that based on the case law of the ECtHR, given that the admissibility of evidence, is in principle a matter of regulation by law and the national courts, based on paragraphs 1 item d of paragraph 3 of Article 6 of the ECHR, it only examines whether the proceedings, in their entirety, have been conducted in a fair manner. (see the Cour's case KI14/18, cited above, paragraph 46; see also ECtHR cases, *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Schatschaschwili v. Germany*, cited above, paragraph 101; and *Seton v. the United Kingdom*, Judgment of 12 September 2016, paragraph 57). These provisions, however, incorporate the presumption against the use of extrajudicial evidence against the accused in criminal proceedings. The same applies when such evidence may be in favor of the defense (see Court's case KI14/18, cited above, paragraph 46).

29. In addition, based on item d of paragraph 3 of Article 6 of the ECHR and the relevant case law of the ECtHR, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument (see Court's case KI14/18, cited above, paragraph 47, see the ECtHR case *Al-*

Khawaja and Tahery v. the United Kingdom, cited above, paragraph 118; *Schatschaschwili v. Germany*, cited above, paragraph 101; and *Seton v. the United Kingdom*, cited above, paragraph 57). Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see Court's case KI14/18, cited above, paragraph 47; see ECtHR cases *AlKhawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Hummer v. Germany*, Judgment of 19 July 2012, paragraph 38; *Luca v. Italy*, Judgment of 27 February 2001, paragraph 39; *Solakov v. the former Yugoslav Republic of Macedonia*, Judgment of 31 October 2001, paragraph 57; and *Schatschaschwili v. Germany*, cited above, paragraph 105). However, the ECtHR, also stated that the use of the statements obtained during police inquiry and judicial investigation at a hearing is not in itself in contradiction with paragraph 1 and item d of paragraph 3 of Article 6 of the ECHR, provided that the rights of the defense are respected. As a general rule, the accused and his or her defense should have adequate opportunity to challenge and question the relevant witness, either when the latter made a statement or at a later stage of the court proceedings. (see Court's case KI14/18, cited above, paragraph 47, and see ECtHR cases *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Trampevski v. the former Yugoslav Republic of Macedonia*, Judgment of 10 July 2012, paragraph 44; and *Schatschaschwili v. Germany*, cited above, paragraph 105).

30. The ECtHR also reiterated that considering the e place that the right to fair functioning of the judicial system has in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice, then that measure should be applied. (See the ECtHR case, *Van Mechelen and Others v. the Netherlands*, Judgment of 23 April 1997, paragraph 58). Possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial. (see Court's case KI14/18, cited above, paragraph 48, see, *inter alia*, the ECtHR case, *Tarău* v. *Romania*, Judgment of 24 February 2009, paragraph 74).

31. Therefore, the ECtHR emphasized that if any such exemption occurs, then: (i) the competent court should first examine the preliminary question, namely whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance; (ii) when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort; (iii) admitting as evidence statements of absent witnesses results in a potential disadvantage for the criminal defendant, who, in principle, should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at a later stage in the proceedings; (iv) according to the "*sole or decisive rule*", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted; (v) however, as item d of paragraph 3 of Article 6 of the ECHR should be interpreted in a holistic examination of the fairness of the proceedings, "*sole or decisive rule*" should not be applied in an inflexible manner; and (vi) in particular, where a hearsay statement is "*sole or decisive rule*", against a defendant, its admission as evidence will not automatically result in a breach of paragraph 1 of Article 6 ECHR. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, the competent court must base its decision on counterbalancing factors, including the measures that permit

a fair and proper assessment of the reliability of the relevant evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case (see Court's case KI14/18, cited above, paragraph 51).

32. Whereas, with regard to the test developed in the case of *Al-Khawaja and Tahery*, to assess the compatibility with the guarantees embodied in item d of paragraph 3 of Article 6 of the ECHR, based on the case law of the ECtHR, it is necessary to consider three basic issues, in each case where the statements of absent witnesses in the trial were admitted as evidence in court. The court must consider whether (i) there were reasonable grounds for the non-attendance of the witness at the court hearing and, consequently, the admission of the extrajudicial testimonies of the absent witness as evidence in court; (ii) if the testimony of the absent witness is the "*sole or decisive*" basis for the conviction of the accused; and (iii) if there is sufficient counterbalancing factor, including strong procedural safeguards, to compensate for the disadvantage of the defense as a result of the admission of extrajudicial evidence and to ensure that the trial, in its entirety, was fair. (see Court's case KI14/18, cited above, paragraph 52; and see also the cases of the ECHR *Schatschaschwili v. Germany*, cited above, paragraph 107; and *Seton v. the United Kingdom*, cited 16 above, paragraph 58). The Court will further elaborate the three cases identified in more detail.

Application of these principles in the present case

33. Considering the above-mentioned principles concerning the right of the accused to cross-examine the witnesses against him, I will further assess the application of the aforementioned principles in the present case, in order to determine whether impossibility to examine the witnesses in the case at the main hearing, whose statements are read during the main trial, resulted in a violation of the right to a fair trial.

34. First, I note that the Applicant also filed these allegations before the courts of lower instance.

35. First, I refer to the judgment of the Basic Court, where, as stated above, the Applicant's guilt was established after a large amount of evidence, including, among other things, the statements of witnesses H.S., A.S. as well as E.H. given during the main hearing as well as the statements of the witness CH.J. and A.D. which were also read during the main hearing.

36. In this respect, I recall the judgment of the Basic Court [PKR. no. 37/19], which, among other things, lists the evidence that was presented in connection with this case and which are the hearing during the main hearing of the witnesses H.S, A.S and E.H, as well as the reading of the statements/witnesses Ch.J, A.D and H.S given to the French authorities and which were considered in terms of material evidence, then a large number of Minutes, a forensic autopsy report, a death certificate issued on 29 September 2018.

37. Further, and in connection with this claim, recalls the judgment of the Court of Appeals, which upheld the judgment of the Basic Court on this point, stressing that: *"it has analyzed all the evidence processed during the court hearing, including the forensic expertise, then, the statements of the witnesses given in the court hearing, which even so do not change in terms of proving the basic facts, especially with regard to proving the facts and circumstances of how the now deceased A.S. was deprived of his life. the facts and circumstances, which the accused herself does not dispute, but who claims that at the critical moment she was attacked by the now deceased, for which reason, and in this connection, the first instance court"*.

38. I also refer to the Judgment of the Supreme Court where, in its reasoning, based on Article 262 of the CPCK, it is emphasized that: "*In this criminal legal case, taking into account the fact that the murder was committed in France, and after committing the murder the convict came to Kosovo where she was arrested, it is evident that a lot of evidence was provided by the authorities of the competent bodies of France, among them the testimonies of the witnesses J.C., A. D. and H. S. mentioned in the requests and these testimonies the convict was not able to oppose in the court hearing through questioning, but from this fact it cannot be claimed that they are inadmissible as alleged in the request, because the provision of Article 262 stipulates that this evidence do not determine guilt and that in the present case they have not determined because it is about the testimonies of the witnesses who have shown their relationships with the deceased and the convict. Then they are not crucial evidence to prove the most important fact if on the critical night there was a conversation and a physical conflict between the convict and the deceased as claimed by the defense, because there are no eyewitnesses to the event (in this case there is no eyewitness to the event to show how the critical event unfolded) and the court has not even assessed it as such evidence*."

39. Bearing in mind the above-mentioned reasoning of the Supreme Court, regarding the Applicant's allegation that he was unable to challenge the testimony of witnesses given before the French authorities, which in her opinion influenced the determination of guilt, I note that the testimonies given and which were read at the court hearing and which could not be contested by the Applicant, were primarily not decisive for finding the Applicant guilty, because the judgment of the Basic Court was primarily based on the acceptance of guilt by the Applicant, and after that and on a significant amount of material evidence as well as on other evidence that was given at the main hearing, which the Applicant had the opportunity to challenge.

40. In the light of everything stated above, after analyzing the case file, as well as the reasonings of the decisions of lower-instances of regular courts, I consider that the testimonies of witnesses Ch.J, A.D and H.S, which were only read during the court hearing and which could not be challenged the Applicant, are not crucial evidence to establish the fact that is the most important regarding her guilt, because in the present case we are talking about the testimonies of witnesses who spoke about the relationship between the Applicant and the deceased, explaining that these witnesses were not eyewitnesses to the event .

41. Therefore, taking into account all the above, the Court considers that the fact that the testimonies of witnesses Ch.J, A.D and H.S were only read at the court hearing did not affect the fact that the court proceedings against the Applicant were considered to be unfair as a whole as it is prescribed in the right to a fair trial, which is guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

42. Therefore, this Applicant's allegation is also ungrounded.

(IV) Constitutional review regarding Applicant's allegations of violation of rights during the taking of the testimony of [X.X.], who was a minor at the time, the latter was examined only in the presence of a social worker and not a psychologist

43. In this regard, I once again recall the Applicant's allegation, who emphasized in her request that during the interrogation, in the capacity of eyewitness X.X., who was a minor, the latter gave his testimony only in front of a social worker and not in front of a psychologist.

44. The Court notes that the Applicant has also stated this allegation before all other court instances.

45. In this regard, I recall the Judgment of the Supreme Court, which in its reasoning regarding this claim states that: "Article 130, paragraph 5 of the Criminal Procedure Code was not violated since this provision *emphasizes that when examining a person who has not reached the age of eighteen (18), especially when they are the victim of a criminal offence, caution is exercised that the issue does not negatively affect his mental state. When necessary, he is examined with the assistance of a child psychologist, or a child educator, or another expert who is a professional. From this provision, it turns out that examining through a psychologist is not a mandatory requirement of the court but rather at the court's discretion, in case it deems it to judge that a person under the age of 18 should be interviewed by a psychologist or other expert. In this specific case, the court has assessed that it is not necessary, but E,S.. was examined in the presence of the representative of the social worker and acted with special care because, as can be seen from the case file, the defense attorney asked all questions through the convict".*

46. I further recall that both the Judgment of the Basic Court and the judgment of the Court of Appeals, when considering this claim, are in the same line with the reasoning of the Supreme Court, and in addition, in the reasoning of the Basic Court regarding this issue, it is emphasized that the Basic Court partially gave trust to the testimony of witness X.X. because from his testimony it could be seen *" that it is clear that these statements were made under the influence of the now accused Suzana".*

47. In order to consider this claim, I will primarily refer to paragraph 5 of Article 130 of the CPCK, which stipulates that:

"A person who has not reached the age of eighteen (18) years, especially if that person has suffered damage from the criminal offence, shall be examined considerately to avoid producing a harmful effect on his or her state of mind. If necessary, a child psychologist or child counselor or some other expert should be called to assist in the examination of such person"

48. Bearing in mind the above, I consider that the very content of paragraph 5 of Article 130 of the CPCK allows regular courts discretion in the sense that whenever the courts deem it necessary, the minor is examined either with the help of a psychologist or a pedagogue or a professional expert. Based on paragraph 5 of Article 130, it is prescribed that during the examination of minors, the conditions prescribed as *"psychologist or counselor or some other expert should be called to assist"* must be met.

49. In the present case, the Court notes that the questioning of X.X. as a witness was done in the presence of a social worker, therefore, the third condition of paragraph 5 of Article 130 of the CPCK has been met.

50. In light of what was said above, and in connection with this allegation, the Court concludes that the Judgment of the Supreme Court [Pml. no. 310/220], is clear and that it deals with all essential allegations that were presented by the Applicant in the request for protection of legality as well as before all lower instance courts. There is no substantive argument that the Supreme Court or lower instance courts have set aside as not reasoned, as claimed by the Applicant. Therefore, I consider that this conduct of the regular courts did not affect the fact that the court proceedings against the Applicant were considered not to be fair in their entirety, as prescribed in the right to a fair trial, which is guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

51. Therefore, this Applicant's allegations is also ungrounded.

(V) Opinion on the obligation to impose interim measure *ex officio*

52. I consider that when the Court decided to DECLARE INVALID judgment [Pml. no. 310/220] of 28 April 2021 of the Supreme Court of Kosovo; judgment [PAKR. no. 328/19] of 20 August 2019 of the Court of Appeals of Kosovo and judgment [PKR. no. 37/2019] of 17 December 2019 of the Basic Court in Prishtina, should have imposed an interim measure *ex officio*.

53. I recall that Article 27 of the Law on the Constitutional Court provides that "*The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.*"

54. Considering that the Court decided to annul all the judgments based on which the Applicant was serving an imprisonment sentence, I consider that the court was obliged *ex officio* to impose an interim measure that would leave the Applicant in detention until the first decision of the regular courts.

55. I consider that when the Court decided to DECLARE INVALID judgment [Pml. no. 310/220] of 28 April 2021 of the Supreme Court of Kosovo; judgment [PAKR. no. 328/19] of 20 August 2019 of the Court of Appeals of Kosovo and judgment [PKR. no. 37/2019] of 17 December 2019 of the Basic Court in Prishtina, there is no longer any legal basis for the Applicant to remain in prison or in detention because the Applicant was serving a prison sentence based on the annulled judgments.

56. Considering that the Applicant's guilt, who herself admitted to the commission of the criminal offense charged with, is not disputed, not imposing an interim measure that would keep the Applicant in detention until the first decision of the regular court, in my opinion, was an obligation of this Court in order to avoid the possibility of the Applicant's release and prevention of the repetition of the procedure ordered by the Constitutional Court by this Judgment.

(VI) Conclusion regarding alleged violations of the Applicant's rights

1. Based on the above, and taking into account the considerations of the Applicant's allegation in her referral:

I. I AGREE with the Court's conclusion to DECLARE the referral admissible;

II. I CONSIDER THAT the Court should have HELD that judgment [Pml. no. 310/220] of 28 April 2021 of the Supreme Court of Kosovo; judgment [PAKR. no. 328/19] of 20 August 2019 of the Court of Appeals of Kosovo and judgment [PKR. no. 37/2019] of 17 December 2019 of the Basic Court in Prishtina did not violate the Applicant's rights guaranteed by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights;

III. I CONSIDER THAT judgment [Pml. no. 310/220] of 28 April 2021 of the Supreme Court of Kosovo; judgment [PAKR. no. 328/19] of 20 August 2019 of the Court of Appeals of Kosovo and judgment [PKR. no. 37/2019] of 17 December 2019 of the Basic Court in Prishtina should have REMAINED IN LEGAL FORCE by the Court;

IV. I AGREE with the Court's conclusion to REJECT the Applicant's request for imposition of an interim measure;

V. I CONSIDER THAT the Court should have, *ex officio*, in accordance with Article 27 of the Law on the Constitutional Court, imposed an interim measure by which it would order the detention of the Applicant until the first decision of the Basic Court on the measure to ensure the presence of the defendant in the proceedings.

Dissenting Opinion is submitted by Judge;

Radomir Laban, Judge

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On 02 August 2023 in Prishtina

This translation is unofficial and serves for informational purposes only.