



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

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Prishtina, on 14 June 2016  
Ref. no.: RK954/16

## RESOLUTION ON INADMISSIBILITY

in

**Case No. KI38/16**

Applicant

**Nezir Kryeziu**

**Constitutional review of Judgment Pml. no. 148/2015, of the Supreme Court of Kosovo, of 9 November 2015**

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

composed of

Arta Rama-Hajrizi, President  
Ivan Čukalović, Deputy-President  
Robert Carolan, Judge  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge,  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge, and  
Gresa Caka-Nimani, Judge

### **Applicant**

1. The Referral was submitted by Mr. Nezir Kryeziu from Suhareka (hereinafter: the Applicant), who is represented by Mr Ethem Rogova, lawyer from Prizren.

### **Challenged decision**

2. The Applicant challenges Judgment Pml. no. 148/2015, of the Supreme Court of Kosovo, of 9 November 2015.

### **Subject matter**

3. The subject matter is the constitutional review of the abovementioned challenged Judgment, which allegedly violated Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).
4. The Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measure *“and to suspend the detention on remand against the convict – Nezir Kryeziu until the final decision of this Court“*.

### **Legal basis**

5. The Referral is based on Article 113.7 of the Constitution, Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 29 and 54 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 22 February 2016, the Applicant submitted the Referral to the Court.
7. On 14 March 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.
8. On 25 March 2016, the Court informed the Applicant and the Supreme Court of Kosovo about the registration of the Referral.
9. On 18 May 2016, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court to declare the Referral inadmissible.

### **Summary of facts**

10. On 26 October 2011, the Prosecutor in Prizren filed an indictment (PP. no. 28/2011) against the Applicant for the following three criminal offences: the criminal offence of murder; the criminal offence of attempted murder which results in light bodily harm, in conjunction, and the criminal offense of unauthorized ownership, control, possession or use of weapons.
11. On 4 November 2013, the Basic Court in Prizren. by Judgment P. no. 251/11 found the Applicant guilty and imposed an aggregate punishment of the

imprisonment of 11 (eleven) years for the criminal offences criminal offence of murder in exceeding the limits of necessary defense, and criminal offense of attempted murder that resulted in light bodily harm.

12. By the same Judgment, the Basic Court in Prizren rejected the indictment for the criminal offence of unauthorized ownership, control, possession or use of weapons, because this criminal offense is covered by the law on amnesty.
13. The Applicant filed appeal with the Court of Appeal against the Judgment (P. no. 251/11) of the Basic Court.
14. On 23 April 2014, the Court of Appeal (Decision PAKR. No. 163/2014) annulled Judgment (P. no. 251/11 of 4 November 2013) of the Basic Court in Prizren, and remanded the case to the first instance court for retrial, reasoning that:

*“The enacting clause of the judgment is incomprehensible and ambiguous, does not coincide with the reasoning and the decisive facts, presented by the first instance”.*

15. On 24 October 2014, in the repeated procedure the Basic Court (Judgment P. no.130/2014) found the Applicant guilty and imposed an aggregate punishment of the imprisonment of 9 (nine) years and 10 (ten) months for the criminal offence of murder in exceeding the limits of necessary defense, and for the criminal offence of attempted murder which resulted in light bodily harm.
16. The Basic Prosecutor in Prizren filed an appeal with the Court of Appeal due to essential violations of the Criminal Procedure Code (hereinafter: CPC) and erroneous determination of the factual situation.
17. The Applicant’s defense counsels filed appeals with the Court of Appeal against the Judgment (P. no. 130/2014) of the Basic Court on the grounds of essential violations of CPC and erroneous determination of the factual situation.
18. On 22 December 2014, the Appellate Prosecutor (submission PPA/I no. 604/14) proposed that the appeal of the Basic Prosecutor be approved and the appeals of the Applicant’s defense counsels be rejected as ungrounded.
19. On 17 March 2015, the Court of Appeal (Judgment P. no. 130/2014) rejected as ungrounded the appeal of the Basic Prosecutor and rejected as ungrounded the appeals of the Applicant’s defence counsels, upheld the Judgment (P. no. 130/2014) of the Basic Court, regarding the length of the imprisonment sentence and legal qualification of the criminal offence of murder in exceeding the limits of necessary defence.
20. At the same time, the Court of Appeal – SCD modified *ex-officio* the Judgment (P. no. 130/2014) of the Basic Court, only in the part pertinent to the legal qualification of the criminal offence under item II, thus the criminal offence of attempted murder resulting in light bodily harm, is re-qualified as criminal offence of attempted murder.

21. The Applicant's defense counsels submitted to the Supreme Court of Kosovo a request for protection of legality against the Judgment (P. no. 130/2014) of the Basic Court and the Judgment (PAKR. no. 619/2014) of the Court of Appeal due to essential violations of the CPCK.
22. On 16 July 2015, the State Prosecutor by submission (KMLP. II. no. 112/2015) proposed that the request for protection of legality be rejected as ungrounded.
23. On 19 November 2015, the Supreme Court (Judgment Pml. no. 148/2015) rejected as ungrounded the request for protection of legality of the Applicant, and gave detailed explanation of each Applicant's allegations.

### **Applicant's allegations**

24. The Applicant alleges that the challenged Judgment violated his right guaranteed by Articles 31 of the Constitution and Article 6 of ECHR.
25. The Applicant alleges that by indictment (PP. no. 28/2011) he was accused of criminal offence of murder, and that by Judgment (P. no. 251/2011) of the Basic Court in Prizren he was found guilty for the commission of the criminal offence of murder in exceeding the limits of necessary defense.
26. The Applicant alleges that because the prosecution did not re-qualified the indictment, he could not declare on the guilty because if it was read to him "*...the modified indictment regarding the criminal offence of*" murder in exceeding the limits of necessary defense, *the accused Nezir would admit the commission of criminal offence and by this, the imposed sentence based on the guilty plea would be lower.*"
27. The Applicant mentions that the alleged violations constitute "*...absolute violations of Article 386, paragraph 1 of the PCPCK, a provision determining that the judgment may relate only to the accused and only to an act which is the subject of a charge contained in the indictment as initially filed or as modified or extended in the main trial.*"
28. The Applicant further emphasizes that he emphasized the issue of re-qualification of the indictment also in the appeal procedure before the regular courts.
29. The Applicant addresses the Court with the following request:
 

*"To hold that there has been a violation of Article 31, paragraph 1 of the Constitution of the Republic of Kosovo as read in conjunction with Article 6 of the European Convention on Human Rights."*
30. The Applicant requests the Court to impose interim measure "*and to suspend the detention on remand against the convict – Nezir Kryeziu until the final decision of this Court*".

## Admissibility of the Referral

31. The Court needs to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.
32. The Court refers to Article 113.7 of the Constitution, which provides:

*“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”.*
33. The Court also refers to Article 48 of the Law, which states:

*“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”.*
34. Furthermore, the Court takes into consideration Rule 36 (1) d) and (2) d) of the Rules of Procedure, which provides:

*“(1) The Court may consider a referral if:*

*[...]*

*(d) the referral is prima facie justified or not manifestly ill-founded.*

*2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*

*[...]*

*(d) the Applicant does not sufficiently substantiate his claim;”*
35. The Applicant essentially alleges that the regular courts have accepted to consider the unchanged indictment, and by this they committed absolute violation of Article 386 paragraph 1 of the PCPCK, and that due to such erroneous interpretation of the law there has been a violation of Article 31 of the Constitution and of Article 6 of the ECHR.
36. In this regard, the Court refers to Article 31 of the Constitution, which provides:

*“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.”*
37. In addition , the Court takes into account Article 6 (1) of ECHR, which states:

*“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. “*

38. As well as Article 386 of PCPCK on which the Applicant refers and which provides:

*“(1) The judgment may relate only to the accused and only to an act which is the subject of a charge contained in the indictment as initially filed or as modified or extended in the main trial.*

*(2) The court shall not be bound by the motions of the prosecutor regarding the legal classification of the act.*

*(3) The court shall not be bound by any agreement between the public prosecutor and the defence regarding modification of the charges or the guilty plea.”*

39. The Court notes that the Applicant presented these allegations also in the proceedings upon the appeal before the Court of Appeal and in the request for protection of legality before the Supreme Court, which gave detailed response to these Applicant's allegations.

40. The Court of Appeal (Judgment PAKR. no. 619/2014) reviewed these Applicant's allegations and concluded that:

*“Having analyzed the case file this court considers that in the present case we have violation of the criminal code in favour of the defendant, due to which we set from the principle reformatio in peius, therefore, and for this reason the latter cannot be modified, but it can only be concluded“*

41. The Supreme Court (Judgment Pml. no. 148/2015) reviewed these Applicant's allegations:

*“... The allegation of the defense counsel – E. R. that the first instance court should have initiated the court review session, not with the initial indictment of the state prosecutor as regards the legal qualification stands, due to the reason that the criminal offence of murder was re-qualified to a murder by exceeding the limits of necessary defense and this re-qualification was not challenged by the state prosecutor, whereas the case was remanded for retrial by an appeal of the defense counsels of the accused person, however this violation did not influence the legality of the decision and the principle “reformatio in peius” was not violated“.*

42. The Supreme Court reasoned in detail why it considers that the violation did not have influence on the legality of the decision:

*“... First of all, the accused person was favored by the Prosecutor, because even though in such circumstances the question was about the criminal offence of Attempted Aggravated Murder provided by Article 147, item 11, as read in conjunction with Article 20 of CCK, his actions have been*

*qualified as an ordinary murder and attempted murder, provided by Article 146 of CCK.”*

43. Furthermore, the Supreme Court states the following:

*“...the conclusion of the first instance court for exceeding the limits of necessary defense by the accused is very disputable”, since one cannot be the actor of an attack and at the same time exceed the limits of necessary defense. The limits of necessary defense may be exceeded by the person attacked (person defending himself or herself from an attack), not by the attacker as the first instance court has concluded, however this defect created by the first instance court cannot be cited in any manner, as it would violate the principle ‘reformatio in peius’.*

44. Finally, the Supreme Court reasoned that the flaws referred by the Applicant made the first instance court to re-qualify the serious criminal offence in the lesser criminal offence, concluding as it follows:

*“...that the (Basic Court in Prizren) by an unclear conclusion in the enacting clause, which is in contradiction with the institute of the necessary defense when in it, the accused person is considered also as the attacker and that he has exceeded the limits of necessary defense; however this erroneous and illogical conclusion may be, it has favored him (the Applicant), due to the reason that in accordance with this conclusion, the first instance court has re-qualified the Murder as a Murder in exceeding the necessary defense”.*

45. The Court notes that the regular courts took into account the objections submitted by the Applicant; this is supported by the fact that based on his appeal Judgment (P. no. 251/11) of the Basic Court in Prizren - SCD was annulled and in the repeated proceedings he was imposed a lower sentence.
46. The Applicant referred also on: *“...absolute violation of Article 386, paragraph 1 of the PCPCK, whose provision provides that the judgment may relate only to the accused and only to an act which is the subject of a charge contained in the indictment as initially filed or as modified or extended in the main trial.”*
47. The Court notes that this Article in paragraph 2 provides that *“the Court shall not be bound by the motions of the prosecutor regarding the legal qualification of the act.”*
48. From the above, it follows that the Applicant was given an opportunity that in various stages of the proceedings before the regular courts presents arguments and evidence that he considers relevant to his case. At the same time, he had the opportunity to effectively challenge the arguments and evidence presented by the responding party and to challenge the interpretation of the law before the Municipal Court, the Court of Appeal and the Supreme Court in regular court proceedings.
49. The Court reiterates that under the Constitution, it is not its duty to act as a court of fourth instance, in respect of the decisions taken by regular courts. It is

the role of the regular court to interpret and apply the pertinent rules of both procedural and substantive law (See, case *Perlala v. Greece*, no. 17721/04 paragraph 25. ECHR, Judgment of 22 February 2007).

50. Although the Applicant claims that his rights have been violated by erroneous determination of facts and erroneous application of the procedural and substantive law by regular courts, the Applicant did not substantiate his allegation that the abovementioned decisions violated his constitutional rights under Article 31 of the Constitution and Article 6 of the ECHR.
51. The Court reiterates that it is not its task to deal with errors of fact or applicable law, allegedly committed by regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). The Applicant must submit a reasonable claim and compelling argument when he argues that the public authority violated his/her rights and freedoms protected by the Constitution.
52. In fact, the Court emphasizes that its role is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way evidence was taken, or whether in any way the proceedings were unfair or arbitrary (see *mutatis mutandis Shub vs. Lithuania*, paragraph 16, ECtHR Decision on admissibility of the Referral of 30 June 2009; *Edwards v. United Kingdom*, paragraph 34, ECtHR Judgment of 16 December 1992; *Barbera Messegue Jabardo v. Spain*, paragraph 68, ECtHR Judgment of 6 December 1998).
53. The Court considers that all the arguments of the Applicant that were relevant to the criminal case, were duly heard and duly examined by the courts, that the material and legal reasons for the decision he challenges were presented in detail and, subsequently, the proceedings before the regular courts, viewed in their entirety, were fair.
54. In summary, the Court finds that the admissibility requirements have not been met. The Applicant failed to present and substantiate the allegations that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECtHR.
55. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with the Rules 36 (2) d) of the Rules of Procedure.

### **Request for Interim Measure**

56. As mentioned above, the Applicant also requests the Court to impose interim measure “...and to suspend the detention on remand against the convict – *Nezir Kryeziu until the final decision of this Court*“.
57. In order that the Court grants the Interim Measure, in accordance with Rule 55 (4 and 5) of the Rule of Procedure, it is necessary that:



*“Rule 55 (4) (a) the party requesting interim measures has shown [...] prima facie case on the admissibility of the referral;*

*[...]*

*Rule 55 (5) If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application. “*

58. As stated above, the Applicant’s Referral is inadmissible, because the presented facts do not in any way justify the allegation of a violation of the constitutional rights. The Applicant has not shown a *prima facie* case on the admissibility of the referral. Therefore, the request for interim measure is to be rejected.

### **FOR THESE REASONS**

The Constitutional Court, pursuant to Article 113 paragraph 7 of the Constitution, Articles 20 and 48 of the Law, and Rules 36 (2) (d) and 55 (5) of the Rules of Procedure, on 18 May 2016, unanimously

### **DECIDES**


- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the Request for Interim Measure;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- V. TO DECLARE this Decision effective immediately;

**Judge Rapporteur**



Bekim Sejdiu

**President of the Constitutional Court**



Arta Rama-Hajrizi