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

Prishtina, on 16 November 2017
Ref. No.: RK 1150/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI63/17

Applicant

Lutfi Dervishi

Constitutional review of Judgment Pml. Kzz. 19/2017, of the Supreme Court of Kosovo, of 11 April 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
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 Lutfi Dervishi from Prishtina (hereinafter: the Applicant), who is represented by Valon Hasani, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo [Pml. Kzz. 19/2017] of 11 April 2017, which rejected as ungrounded the Applicant's appeal against the Decision of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) [PNI 44/17] of 19 January 2017 and Decision of the Basic Court in Prishtina (hereinafter: the Basic Court) [PKR. No. 11. 2017] of 11 January 2017 on the imposition of detention on remand against the Applicant.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which has allegedly violated the Applicant's rights guaranteed by Articles 29 [Right to Liberty and Security] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 1 June 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 2 June 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Ivan Čukalović (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

7. On 6 June 2017, the Court notified the Applicant about the registration of the Referral and requested him to submit to the Court: 1) the power of attorney for his representative before the Court, and 2) the entire copy of the Decision of the Court of Appeals [PN1 44/17] of 19 January 2017 and of the Judgment of the Supreme Court [Pml. 19/2017] of 11 April 2017. On the same date, the Court sent a copy of the Referral to the Supreme Court.

8. On 14 June 2017, the Applicant submitted to the Court the additional documents requested by the Court.

9. On 13 July 2017, the Applicant requested the Court that his Referral be reviewed urgently.

10. On 30 August 2017, the Applicant corrected the Referral with regard to some technical flaws pertaining to the dates prescribed in some parts of the Referral.

11. On 18 October 2017, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of Referral.

Summary of facts

12. On 15 October 2010, against the Applicant and some other persons, the Indictment [PPS No. 41/09] was filed, which was then modified on 22 March and 17 April 2013, for the criminal offenses provided for in the Provisional Criminal Code of Kosovo (hereinafter: PCCK) as it follows: trafficking in persons in co-perpetration under Articles 23 and 139; organized crime under Article 274; unlawful exercise of medical activity under Article 221; grievous bodily harm in co-perpetration under Articles 23 and 154; fraud under Article 261; and falsifying documents under Article 332.

13. On 29 April 2013, the Basic Court by Judgment [P. 309/10, P340/10] found the Applicant guilty of committing the criminal offenses: trafficking in persons in co-perpetration and organized crime, imposing a sentence of imprisonment of 8 (eight) years and a fine of 10,000 (ten thousand) euro.

14. On 25 November 2013, the Basic Court issued Order [P. No. 309/10, 340/10] for the closure and confiscation of the "Medikus" clinic, the owner of which was the Applicant.

15. The Applicant and the Prosecutor of the Special Prosecution of the Republic of Kosovo (hereinafter: the Prosecutor) filed an appeal against the Judgment [P. 309/10 and P. 340/10] of the Basic Court and the Order [P. No. 309/10, 340/10] for the confiscation of the "Medikus" clinic.

16. On 6 November 2015, the Court of Appeals by Judgment [PAKR 52/14] partially approved the Applicant's appeal, with regard to the determination of the factual situation pertaining to the number of kidney transplants in which the Applicant participated, reducing this number from 24 to 7, while confirming the decision on the sentence, as determined by the Basic Court. The appeal of the Prosecutor was rejected, in so far as it pertained to the Applicant.

17. On 15 March 2016, the Applicant filed an appeal against the Judgment of the Court of Appeals [PAKR 52/14] to the Supreme Court on the basis of Article 430 of the Provisional Criminal Procedure Code of Kosovo (hereinafter: the PCPCK) which allows an appeal against a judgment of the first instance, if the court of second instance differently determines the factual situation.

18. On 17 March 2016, the President of the Basic Court issued the Order [ED. No. 252/2016] for the commencement of service of the sentence against the Applicant.

19. On 5 April 2016, the Applicant also filed a request for protection of legality against the Judgment [PAKR 52/14] of the Court of Appeals, on the grounds of essential violation of the provisions of the criminal procedure and also filed a request for suspension of execution of the Judgment of the Court of Appeals,

until the respective appeals have been decided. Against the Judgment of the Court of Appeals, an appeal was also filed by the Prosecutor.

20. On 26 April 2016, the Supreme Court by Decision [PML-ZZZ-92/2016] rejected as ungrounded the Applicant's request for suspension of the execution of the Judgment of the Court of Appeals until the request for protection of legality has been decided.

21. However, the Applicant did not appear to serve the sentence as required by the Order [ED. No. 252/2016] of the President of the Basic Court.

22. On 15 December 2016, the Supreme Court by the Judgment [Pml. Kzz. 92/2016] found that the request for protection of legality submitted by the Applicant was partly grounded. The Supreme Court ordered the immediate stay of implementation of the Judgment [PAKR 52/14] of the Court of Appeals and that of the Basic Court [P. 309/10 and P340/10] and remanded the Applicant's case for retrial to the Basic Court. The Supreme Court reasoned that the procedure which preceded the Judgment of the Basic Court [PAKR 52/14] contained essential violations of the criminal procedure because, among others, the Presiding Judge who should have been excluded from participation in the trial, has participated on it.

23. On 6 January 2017, the Prosecutor submitted to the Basic Court a request for an arrest warrant against the Applicant.

24. On 10 January 2017, the Basic Court issued an arrest warrant for the Applicant. On the same date, the Applicant was arrested.

25. On 11 January 2017, the Prosecutor requested the Basic Court to impose a measure of detention on remand on the Applicant.

26. On 11 January 2017, the Basic Court by Decision [PKR. no. 11/2017] approved the Prosecutor's request for detention on remand against the Applicant and imposed a detention on remand for a term of 1 (one) month.

27. On 13 January 2017, the Applicant filed an appeal against the Decision [PKR. No. 11/2017] of the Basic Court to the Court of Appeals, on the grounds of essential violations of the provisions of the criminal procedure. Whereas, on 16 January 2017, the Prosecutor submitted a response to the Applicant's appeal.

28. On 19 January 2017, the Court of Appeals by the Decision [PN1 44/17] rejected as ungrounded the Applicant's appeal and upheld the Decision of the Basic Court.

29. On 30 January 2017, the Applicant filed a request for protection of legality with the Supreme Court against the arrest and detention on remand, on the grounds of "*essential violations of the provisions of criminal procedure and violation of human rights.*"

30. On 11 April 2017, the Supreme Court by Judgment [Pml. Kzz 19/2017] rejected as ungrounded the Applicant's appeal and upheld the Decision of the Basic Court and the Court of Appeals.

31. On 9 February 2017, the Basic Court extended the detention on remand for the Applicant for another two months, whereas on 10 April 2017, the Basic Court continued the detention for another two months.

32. On 14 February 2017, the Prosecutor filed a request for protection of legality against the Judgment [Pml. Kzz. 92/2016] of the Supreme Court, alleging that the Supreme Court had decided unlawfully on the protection of legality, without having first decided on the appeal filed by the Applicant based on Article 430 of the PCCK against Judgment [PAKR 52/14] of the Court of Appeals.

Applicant's allegations

33. The Applicant alleges that the Judgment [Pml. Kzz. 19/2017] of the Supreme Court violates his rights guaranteed by Articles 29 [Right to Liberty and Security] and 31 [Right to Fair and Impartial Trial] of the Constitution.

34. As it pertains to the allegations for violation of Article 29, the Applicant alleges that his arrest by the police was conducted on 10 January 2017 at 10:00 hrs, based on an arrest warrant issued on the basis of the decisions "*which have been annulled by [...] the Supreme Court*" through the Judgment [Pml. KZZ. 92/2016] of the Supreme Court, based on which the Applicant's case was remanded for retrial. The Applicant alleges that only after the Applicant was arrested, the Basic Court issued a new arrest warrant, which did not specify the time of issuance.

35. The Applicant also maintains that his arrest has no legal basis on the Criminal Procedure Code and violates his right to freedom and security since "*the only legitimate and legal reason for issuing an arrest warrant, [...] would be if the defendant failed to respect his legal obligation to appear in the sessions to be scheduled by the Basic Court*". The Applicant also alleges that the regular courts failed to "*use the adequate measure to ensure the presence of the [Applicant] in the procedure - by sending summon - but it automatically deprived him*".

36. With regard to the right to liberty and security, the Applicant further specifies that "*in order to respect the requirements of legality of the deprivation of liberty, the detention shall be in accordance with the procedure foreseen by the law*" of the domestic legislation. In this regard, the Applicant refers to the case of the European Court of Human Rights (hereinafter: ECtHR), Judgment of 21 October 2013 *Del Rio Prada v. Spain,* No. 15/1997/799/1002.

37. As it pertains to the allegations for violation of Article 31, the Applicant alleges a violation of the right to fair and impartial trial, maintaining that "*the regular courts at all three instances did not give any reasoning regarding the lawfulness of the arrest of the defendant or the reasoning given is*

inadequate". In this regard, the Applicant refers to the Judgment of ECtHR of 2 October 2014, of *Hansen v. Norway,* No. 15319/09.

38. Finally, the Applicant requests the Court to approve the Referral as admissible; to hold violations of paragraphs 1 and 4 of Article 29 and paragraph 2 of Article 31 of the Constitution; and, to declare invalid the decisions of the regular courts, namely the Judgment of the Supreme Court [PML. Kzz. 19/2017], Decision of the Court of Appeals [PN1 44/17] and Decision of the Basic Court [PKR. No. 11/2017], regarding his detention on remand.

Admissibility of the Referral

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

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

41. The Court also examines whether the Applicant has met the admissibility requirements as provided by Law. In this respect, the Court first refers to Article 48 [Accuracy of Referral] and 49 [Deadlines] of the Law, which provide:

Article 48
Accuracy of Referral

> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".*

Article 49
Deadlines

> *"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...".*

42. As to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely the Judgment of the Supreme Court [PML. Kzz. 19/2017] of 11 April 2017, after having exhausted all legal remedies. The Applicant has also clarified the rights and freedoms that he claims to have been violated in accordance with the

requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

43. In addition, the Court assesses whether the Applicant has fulfilled the admissibility criteria provided by Rule 36 [Admissibility Criteria] of the Rules of Procedure. Rule 36 (1) of the Rules of Procedure establishes the criteria based on which the Court may review the Referral, including the requirement that the Referral is not manifestly ill-founded. Specifically, Rule 36 stipulates that:

"(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:

b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights;

[...]

d) the Applicant does not sufficiently substantiate his claim".

44. The Court recalls that the Applicant alleges violations of the paragraphs 1 and 4 of Article 29 [Right to Liberty and Security] of the Constitution, as he considers that: *i)* the arrest and his detention were carried out without a legal basis because the arrest warrant was issued after his arrest; and *ii)* the legal criteria deriving from the applicable legislation to decide on a detention have not been met. The Applicant also alleges violation of Article 31 [Right to Fair and Impartial Trial] maintaining that: *iii)* his trial was not impartial in violation of the rights and freedoms guaranteed by paragraph 2 of Article 31 of the Constitution; and *iv)* the decisions of the regular courts regarding his detention are not sufficiently reasoned.

As it pertains to the allegations for violation of Article 29 of the Constitution in conjunction with Article 5 of the Convention

45. The Court initially recalls Article 29 of the Constitution and Article 5 of the Convention, which provide that:

Article 29 [Right to Liberty and Security] of the Constitution:

"1. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:

[...]

(2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law".

[...]

2. Everyone who is deprived of liberty shall be promptly informed, in a language he/she understands, of the reasons of deprivation. The written notice on the reasons of deprivation shall be provided as soon as possible. Everyone who is deprived of liberty without a court order shall be brought within forty-eight (48) hours before a judge who decides on her/his detention or release not later than forty-eight (48) hours from the moment the detained person is brought before the court. Everyone who is arrested shall be entitled to trial within a reasonable time and to release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial.

[...]

4. Everyone who is deprived of liberty by arrest or detention enjoys the right to use legal remedies to challenge the lawfulness of the arrest or detention. The case shall be speedily decided by a court and release shall be ordered if the arrest or detention is determined to be unlawful."

Article 5 (Right to liberty and security) of the Convention:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[...]

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

[...]

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial..

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

[...]

46. The content of Article 5 of the Convention and its application have been subject of detailed interpretation by the ECtHR through its case law, in accordance with which the Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] must interpret the fundamental rights and freedoms guaranteed by the Constitution. Accordingly, in interpreting the allegations for violation of Article 29 of the Constitution in conjunction with Article 5 of the Convention, the Court uses as a reference the well-established case law of the ECtHR.

47. The Court recalls that the ECtHR has dealt with and clarified the importance of the right to liberty and security in a democratic society, its relations with the principle of legal certainty and the rule of law, specifying that the general purpose of the right to liberty and security is to ensure that no one can be deprived of liberty in an arbitrary manner. (See, *mutatis mutandis*, ECtHR Judgment of 13 December 2013, *El-Masri v. Former Yugoslav Republic of Macedonia*, No. 39630/09, paragraph 230).

48. In this respect, and based on the case law of the ECtHR, the Court notes that on the basis of Article 29 of the Constitution and Article 5 of the Convention, everyone is guaranteed the right to liberty and security, except in cases when the deprivation of liberty is done based on the grounds set forth in these Articles, following the procedure prescribed by law and by a decision of the competent court. Again, the aim of these Articles is to ensure that no one is arbitrarily deprived of liberty in an arbitrary fashion. (See, *mutatis mutandis,* ECtHR Judgment of 8 June 1976 *Engel and Others v. The Netherlands*, No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, paragraph 58).

49. The Court further notes that Article 29 of the Constitution and Article 5 of the Convention, apart from the guarantees, also establish the respective exceptions, specified in Article 29 of the Constitution, paragraph 1, sub-paragraphs 1 to 5 and Article 5 of the Convention, paragraph 1, subparagraphs a to f, on the basis of which the deprivation of liberty is permitted, provided that the procedure prescribed by law is followed and the rights guaranteed by Article 29 of the Constitution, paragraphs 2 to 6 and Article 5 of Convention, paragraphs 2 to 5, are respected.

50. In this respect, the ECtHR has maintained that the list of exceptions to the right to liberty and security is a closed one and that only a strict interpretation of these exceptions is considered consistent with the aim of Article 5. (See, *mutatis mutandis*, ECHR Judgment of 22 March 1995, *Qiunn v. France*, No. 18580/91, paragraph 42).

51. Consequently, and in accordance with the ECtHR case law, the deprivation of liberty can only be done by respecting the substantive and procedural

safeguards established in Article 29.1 (1-5) of the Constitution in conjunction with Article 5 (1) (a-f) of the Convention and, by respecting the rights guaranteed by Article 29 (2-6) of the Constitution and Article 5 (2-5) of the Convention. The latter represent "*a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be reviewed by an independent judicial scrutiny and by securing the accountability of the authorities for that act*". (See, Judgment of the ECtHR of 25 May 1998, *Kurt v. Turkey*, No. 15/1997/799/1002, paragraph 123).

52. Further, the Court explains that, according to the ECtHR case law, two main principles must be taken into account when interpreting the right to liberty and security, the "principle of legality" and the "protection from arbitrariness".

53. In this regard, the Court reiterates the case law of the ECtHR which maintains that the "principle of legality" within the meaning of Article 5, requires following the procedure established by law. The expressions "lawful" and "in accordance with a procedure prescribed by national law" in Article 5 (1) of the Convention and Article 29 (1) of the Constitution, refer to the domestic applicable legislation and entail the obligation to respect the substantive and procedural guarantees prescribed in this legislation. Despite the fact that it is the role of the regular courts to interpret and apply the relevant law, on the basis of Article 5 (1) of the Convention and Article 29 (1) of the Constitution, failure to comply with the domestic legislation as it pertains to the limitations of the right to security and liberty, leads to violation of the Convention and thus, the Court can and must review whether this legislation has been complied with. (See, *mutatis mutandis*, ECHR Judgment *Del Rio Prada v Spanjës*, paragraph 125; and, ECtHR Judgment of 22 March 1995 *Ladent v. Poland*, No. 11036/03, paragraph 47).

54. In addition, the period of detention is, in principle, "lawful", if it is based on a court order, while the possible mistakes pertaining to the arrest warrant do not necessarily mean that the period of detention is unlawful from the perspective of the meaning of Article 5 (1) of the Convention. (See, *mutatis mutandis*, ECtHR Judgment *Ladent v. Poland*, paragraph 47).

55. The "principle of legality" within the meaning of Article 5 of the Convention, also includes the absence of or the protection from arbitrariness. In this respect, the compliance with the domestic law, is not however sufficient. Article 5 (1) of the Convention in conjunction with Article 29 (1) of the Constitution further require, that any deprivation of liberty must be compliant with the purpose of protection from arbitrariness. (See, *mutatis mutandis*, ECtHR Judgment *Ladent v. Poland*, No. 11036/03, paragraph 48).

56. In addition, the ECtHR has a well-established case law, also pertaining to the exceptions based on which the deprivation of liberty can happen, in respect of the rights and the relevant principles. For the purposes of the present case, the Court notes that on the basis of Article 29.1 (2) of the Constitution and Article 5.1 (c) of the Convention, the deprivation of liberty is permitted in case of a reasonable suspicion of committing the criminal offense and when the deprivation of liberty is reasonably necessary to prevent the commission of

another offense or fleeing after having done so. Such a deprivation of liberty, according to the respective articles, must be conducted in compliance with the procedure prescribed by law and shall guarantee the additional rights established by the Constitution and the Convention.

57. In this respect, Article 29.1.2 of the Constitution in conjunction with Article 5.1.c of the Convention establish the grounds based on which arrest or deprivation of liberty is permitted throughout the process of administration of criminal justice. The ECtHR, through its case law, has established three basic issues that must be examined in order to assess whether the respective arrest or deprivation of liberty is lawful and non-arbitrary: 1) "the offence", a term which, for the purposes of Article 5 of the Convention has been interpreted through the ECtHR Judgment of 29 November 1988 *Brogan v. United Kingdom* (no. 11209/84, 11234/84; 11266/84; 11386/85), and which in principle refers to an offense defined as criminal in the domestic law (see ECtHR Judgment of 22 February 1989, *Ciulla v. Italy*, No. 11152/84, para. 38); 2) "Purpose of detention", which in principle should serve the function of the implementation of criminal proceedings (see ECtHR Judgment of 7 March 2013, *Ostendorf v. Germany*, no. 15598/08, paragraph 68) and moreover that must be proportional in the sense that it should be necessary to ensure the appearance of the affected person in front of the relevant competent authorities (see: Judgment of the ECtHR of 18 June 2008, *Ladent v. Poland*, no. 11036/03, paragraphs 55); and 3) "Reasonable suspicion", consequently, a reasonable suspicion based on reasonable facts that based on the case law of the ECHR "*constitutesan essential part of the safeguard against arbitrary arrest or deprivation of liberty*". (see, *mutatis mutandis*, ECtHR Judgment of 30 August 1990, *Fox, Campbell and Hartley v. United Kingdom*, no 12244/86; 12245/86, 12383/86, paragraph 32);

58. More specifically, for the arrest to be lawful, a "reasonable suspicion" must exist that the suspect has committed the criminal offense and "*all circumstances would satisfy an objective observer that the person concerned may have committed the offence*". (See, *mutatis mutandis*, ECtHR Judgment of 30 August 1990, *Fox, Campbell and Hartley v. United Kingdom*, no. 12244/86; 12245/86, 12383/86).

59. Applying the main principles of the ECtHR case law, to the extent relevant to the case in question and as elaborated above, the Court will further examine whether the Constitution, Convention and the already referred to criteria, have been respected in the Applicant's case.

60. In this respect, the Court recalls that, in order to comply with the Constitution and the Convention, the arrest or detention must be based on one of the grounds for the deprivation of liberty laid down in Article 29 of the Constitution in conjunction with Article 5 of the Convention; that the arrest or deprivation of liberty must have been conducted following the procedure prescribed by law, while meeting the requirements of the "principle of legality" and "protection from arbitrariness"; and finally, based on the case law of the ECtHR, the offense must be qualified as criminal, the purpose of arrest or deprivation of liberty must exist, and a "reasonable suspicion" must exist.

61. The Court reiterates that the arrest in the present case is based on Article 29.1.2 of the Constitution in conjunction with Article 5.1.c of the Convention. While, as it pertains to the allegations that the arrest in question is not in accordance with the procedure prescribed by law and has been conducted arbitrarily, referring to criteria established in the Constitution, Convention and the case law of the ECtHR, the Court notes:

62. First, as it pertains to the allegation that the arrest and detention of the Applicant was conducted without a legal basis, the Court notes that in fact the Applicant's arrest was not done based on Order [ED. No. 252/2016] of 17 March 2016, which was subsequently annulled by the Judgment [Pml. KZZ. 92/2016] of the Supreme Court, but rather based on the arrest warrant of 10 January 2017, issued by the Basic Court, upon the request of the Prosecutor on 6 January 2017.

63. While, as it pertains to the allegation that the arrest warrant of 10 January 2017 was issued only after the Applicant's arrest on the same date, the Court considers that the Applicant did not submit sufficient evidence supporting the substantiation of such a claim.

64. In this regard, and furthermore, the Court reiterates that it is not its role to deal with errors of facts or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would be to disregard the limits imposed on its jurisdiction. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See: case *García Ruiz v. Spain*, ECHR no. 30544/96, of 21 January 1999, par. 28 and see, also case: KI70/11, Applicants *Faik Hima, Magbule Hima and Besart Hima,* Resolution on Inadmissibility, of 16 December 2011).

65. Secondly, as it pertains to the Applicant's allegation that his arrest was not conducted following the procedure prescribed in the CPCK, the Court notes that the Applicant was brought before the relevant court the next day of the arrest, where it was decided on his detention on remand by the Decision [PKR. No. 11/2017] of the Basic Court. The Decision of the Basic Court was confirmed by both, the Court of Appeals and the Supreme Court.

66. Moreover, the Court recalls that the Supreme Court [Judgment Pml. Kzz 19/2017] reasoned its decision on the rejection of the Applicant's appeal claiming unlawful detention, specifying that *"deprivation of freedom [of the Applicant] is in fact lawful as he was arrested on 10 January 2017 and he was immediately brought before the court based on the arrest warrant that was issued on the same day".*

67. From these respective decisions of the regular courts, it is clear that there was a legal basis for maintaining the Applicant in detention on remand and the Court

does not find that there has been a violation of the procedure under the legislation in force or that the proceedings were in any way arbitrary.

68. The Court also recalls that the CPCK, namely Article 187 thereof, establishes the procedure for deciding on detention on remand, including necessary evidence supporting the grounded suspicion, that the arrested person has committed the criminal offense, and the conditions that support reasonable grounds to believe that, as far as it is applicable in the specific case, that: 1) there is a danger of flight; and 2) the lesser measures to ensure the presence of the defendant are insufficient.

69. The Court emphasizes that the decisions of the regular courts contain the necessary reasoning for all the above-mentioned criteria, relevant to the present case. The Court recalls that the regular courts reasoned, among others, that 1) there is a reasonable suspicion; and 2) there is a danger of flight.

70. The Court recalls the Indictment, which was filed based on a reasonable suspicion of committing the criminal offenses with which the Applicant is charged and that this Applicant was already convicted by the Basic Court and the Court of Appeals, Judgments which were subsequently annulled by the Supreme Court for reasons of procedural violations, remanding the case for retrial to the Basic Court. In this regard, the reasonable suspicion of committing the criminal offense by the Applicant continues to exist.

71. On the other hand, as it pertains to the danger of Applicant's flight, the Court recalls the reasoning of the Supreme Court [Judgment Pml. Kzz 19/2017] that:

> *"The non-appearance of the [Applicant] before the correctional institution based on the order issued on 25 March 2016, even after his request for suspension of the execution of the imposed sentence was rejected, clearly indicates the risk of flight. [...] The fact that [the Applicant] did not comply with these orders and avoided, clearly shows the attitude and respect of his obligations arising from the court decisions. Consequently, [the Supreme Court] rejects the allegations that the risk of flight does not exist. [...] The decisions of [the Basic Court and the Court of Appeals] include comprehensive explanations of all material facts that form the basis for decisions, including the reasons for a grounded suspicion that [the Applicant] has committed the criminal offenses which he is charged with, confirmation of risk of flight and the possibility of applying one of the softer measures provided for in the CPC".*

72. Finally, the Court also recalls the criteria established by the case law of the ECtHR as it pertains to deprivation of liberty made on the basis of Article 29.1.2 of the Constitution in conjunction with Article 5.1.c of the Convention, the qualification of the offense as a criminal offense, the purpose of detention, and the reasonable suspicion. The Court reiterates that the offenses with which the Applicant is accused of are qualified as criminal in the CPCK; that the deprivation of liberty in the present case was done for the purpose of administering the criminal justice; and as it has been elaborated above, there is a reasonable suspicion in this case that the Applicant has committed the criminal offenses which he is charged with.

73. As far as the abovementioned case of ECtHR *Del Rio Prada v. Spain*, which the Applicant refers to specifically, arguing that the detention should have complied with the prescribed procedure in law, the Court reiterates that throughout the assessment of the allegations of the Applicant, it has explained the applicability of the "principle of lawfulness" within the the meaning of Article 5 of the Convention into the specific case, and in addition, it considers that the Applicant has not sufficiently substantiated that the regular courts have violated the criteria established through the aforementioned case.

74. Therefore, the Court considers that the decisions of the regular courts were reasoned and fair when deciding on the detention on remand for the Applicant and therefore, it cannot be said that they have not been reasoned in accordance with Article 29 of the Constitution in conjunction with Article 5 of the Convention or, that viewed in their entirety, were in any way arbitrary. (see *mutatis mutandis*, Judgment of the ECtHR of 14 June 2016 *Merabishvili v. Georgia*, No. 72508/13, paragraph 87).

As it pertains to the allegation for violation of Article 31 of the Constitution

75. As it pertains to the Applicant's allegation that regular courts have violated the rights guaranteed by Article 31 of the Constitution, because his trial was not impartial and that the decisions of the courts were not sufficiently reasoned, the Court first notes that as it pertains to the reasoning of the decisions, it has already dealt with these allegations when assessing the alleged violations pertaining to Article 29 of the Constitution in conjunction with Article 5 of the Convention, holding that they meet the criteria foreseen for the right to liberty and security.

76. The Court recalls that the Applicant did not sufficiently substantiate the other allegations pertaining to violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution.

77. In addition, the Court notes that the ECtHR case law explained that Article 5, paragraph 4 of the Convention contains specific procedural guarantees for matters of deprivation of liberty, which are distinct from the procedural guarantees of Article 6. Therefore, Article 5 paragraph 4 is the *lex specialis* in relation to Article 6 of the Convention. Therefore, the Court will not separately assess the alleged violations with respect of Article 31 of the Constitution. (See, *mutatis mutandis*, ECtHR Judgment of 15 November 2005 *Reinprecht v. Austria*, No. 67175/01, paragraph 55).

78. The Court emphasizes at the end, that the facts presented by the Applicant do not justify the allegation for a constitutional violation of his right to liberty and security, and that the Applicant, did not present evidence substantiating that the proceedings before the regular courts were in violation of his right to fair and impartial trial. Therefore, the Court considers that the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure, on 18 October 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional**
Gresa Caka-Nimani	Arta Rama-Hajrizi