



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

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Pristina, 4 August 2017  
Ref. No.:AGJ1114/17

## JUDGMENT

in

**Case no. KI104/16**

Applicant

**Miodrag Pavić**

**Constitutional review of Judgment PML-KZZ. No. 110/2016, of the  
Supreme Court of Kosovo, of 16 May 2016**

### 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 Miodrag Pavić from village Koretishtë, Municipality of Novobërdë (hereinafter: the Applicant), who is represented by lawyer Azem Vllasi.

## **Challenged decision**

2. The Applicant challenges Judgment [PML-KZZ. No. 110/2016] of the Supreme Court of 16 May 2016, in conjunction with the Judgment of the Supreme Court [PA-II. no. 6/2015] of 1 December 2015 and the Judgment of the Court of Appeals [PAKR. no. 222/2015] of 15 July 2015. The challenged Judgment [PML-KZZ. No. 110/2016] of the Supreme Court was served on the Applicant on 20 June 2016.

## **Subject matter**

3. The subject matter is the constitutional review of the above-mentioned Judgment [PML-KZZ. No. 110/2016] of the Supreme Court, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR), and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
4. The Applicant also requests the Constitutional Court (hereinafter: the Court) to impose interim measures to suspend the beginning of execution of the sentence of imprisonment until the Court renders a decision.

## **Legal Basis**

5. The Referral is based on Article 113 [Jurisdiction and Authorized Parties] paragraphs 1 and 7 of the Constitution, Article 27 [Interim Measures], Article 47 [Individual Requests] and Article 48 [Accuracy of the Referral] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 29, 54 and 55 of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

## **Proceedings before the Court**

6. On 9 August 2016, the Applicant submitted the Referral to the Court.
7. On 19 September 2016, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Bekim Sejdiu and Selvete Gërzhaliu-Krasniqi.
8. On 30 September 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 21 October 2016, the Review Panel considered the initial report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.
10. Based on Article 22.9 of the Law and Rule 35.7 of the Rules, the Judge Rapporteur submitted a revised report to the Review Panel.

11. On 29 May 2017, the Review Panel considered the revised report of the Judge Rapporteur and unanimously recommended to the Court to declare the referral admissible and to find a violation.
12. On the same date, the Court unanimously voted to declare the referral admissible and to find a violation.

### **Summary of facts**

13. On 9 November 2012, the Basic Prosecution - Serious Crimes Department (hereinafter: the Prosecution), based on the grounded suspicion that the Applicant had committed the criminal offense of accepting bribes, filed an indictment with the Basic Court in Prizren - Serious Crimes Department (hereinafter: the Basic Court).
14. On 29 January 2015, the Basic Court rendered Judgment [K. no. 82-2013], which acquitted the Applicant of the indictment. The Judgment reads: "*As it was not determined that the accused [the Applicant] committed the criminal offence which he is accused of, namely the criminal offence of Accepting Bribes under Article 343 para.2 of CCK, he is acquitted of the indictment proposal.*"
15. The Prosecution filed an appeal with the Court of Appeals on the grounds of substantial violations of the provisions of the criminal procedure, violation of the criminal law and erroneous and incomplete determination of the factual situation, with the proposal that the Court of Appeals annul the Judgment of the Basic Court and remand the case for retrial. The Applicant, within the deadline, submitted a response to the Prosecution's appeal.
16. On 15 July 2015, the Court of Appeals held a session to consider the Prosecution's appeal. From the Applicant's allegations and the case file, it results that, based on Article 390 of Criminal Procedure Code of Kosovo (hereinafter: CPCK), the Applicant was not informed of the Court of Appeal's session, as he was not serving a sentence of imprisonment.
17. During the session of 15 July 2015, the Court of Appeals rendered Judgment [PAKR. no. 222/2015], which approved the appeal of the Prosecution, and modified the Judgment [K. no. 82-2013] of the Basic Court. The Court of Appeals found the Applicant guilty and sentenced him to imprisonment for one year. The reasoning of the judgment, *inter alia*, reads:

*"Taking into account the factual situation, the Court of Appeals as a second instance court notes that the first instance court in the present case correctly determined the factual situation, but it did not correctly apply the criminal law. The first instance court in the present case, violated the law in favor of the defendant in the presence of all facts, erroneously assessed that the accused should be acquitted of the charge."*
18. The Applicant filed an appeal with the Supreme Court against the Judgment of the Court of Appeals [PAKR. no. 222/2015] claiming, *inter alia*, that the Court of Appeals held a session in which he was found guilty, without having informed

the Applicant of the session, and thus rendered the decision in violation of the CPCK.

19. On 1 December 2015, the Supreme Court rendered Judgment [PA-II. no. 6/2015], which rejected the Applicant's appeal as ungrounded. As to the Applicant's allegations for not having been informed about the session in which he was found guilty and sentenced to a year of imprisonment, the Supreme Court reasoned:

*"The Supreme Court concluded that such an obligation of the second instance court does not exist. Based on the afore-mentioned legal provisions (Article 390.1 of the CPCK), when the sentence of imprisonment is imposed on the accused, the notification regarding the session of the Appellate Panel shall be sent to the Prosecution Office having jurisdiction, the Injured person, the Accused and his Defense Counsels. Therefore, it has not been stipulated that the second-instance court – in cases when the parties request, although no punishment by imprisonment had been imposed on the accused – is obliged to notify of the sessions scheduled to be held."*

20. Within the legal deadline, the Applicant filed a request for protection of legality against the Judgment of the Court of Appeals [PAKR. no. 222/2015] and the Judgment of the Supreme Court [PA-II. no. 6/2015]. In his request for protection of legality, the Applicant claimed, *inter alia*, that:

*"the provision of Article 390 of the CPCK was violated, considering that the convict and his Defense Counsel were not informed about the hearing of the trial panel of the second-instance court, so that they could be given the opportunity to provide their reasons regarding the Prosecutor's allegations contained in the response to the appeal."*

21. On 16 May 2016, the Supreme Court rendered Judgment [PML-KZZ no. 110/2016] through which it rejected the Applicant's request for protection of legality as ungrounded. In respect to the Applicant's repeated allegations for not having been informed about the session in which he was found guilty and sentenced to a year of imprisonment, the Supreme Court reasoned in its Judgment, *inter alia*, that:

*"The Supreme Court concluded that such obligation of the second-instance court does not exist. Based on the aforementioned provisions (Article 390.1 of the CPCK), when the decision on sentence to imprisonment has not been imposed on the Accused, the notification regarding the session of the Appellate Panel shall be sent to the Prosecution Office having jurisdiction, the Injured person, and the Accused and his Defense Counsels. Therefore, it has not been stipulated that the second-instance court – in cases when the parties request, although no punishment by imprisonment had not imposed on the Accused – is obliged to notify of the sessions scheduled to be held."*

## **Applicant's allegations**

22. The Applicant challenges the Judgment of the Supreme Court [PML. KZZ. No. 110/2016], claiming that it violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 (Right to a fair trial) of the ECHR, and Article 54 [Judicial Protection of Rights] of the Constitution.
23. The Applicant further alleges that the defense, when giving a response to the appeal of the Prosecution against the Judgment of the Basic Court, requested to be informed in time about the session of the Court of Appeals. The Applicant claims that, due to the fact that Court of Appeals modified the Judgment of the Basic Court entirely, and declared the Applicant guilty, sentencing him to one year of imprisonment, it was obliged to inform the Applicant about the session. Therefore, according to the Applicant, the Court of Appeals violated Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
24. Accordingly, the Applicant considers that the Judgment of the Court of Appeals [PAKR. no. 222/15] is in contradiction with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because in deciding on the appeal of the Prosecution, it acted in breach of Article 390.1 of the CPCK, because the Applicant, as the accused party, was not notified about the session of the Court of Appeals and, thus, he was denied the right to present his arguments.
25. The Applicant in addition alleges that Judgment [PAKR No. 222/15] of the Court of Appeals is contrary to: a) Article 403 of the CPCK; b) Article 382 of the CPCK, as it modified the Judgment of the first instance, finding the accused, namely the Applicant guilty, despite the fact that the Prosecution proposed in his appeal the annulment of the Judgment of first instance and remanding the case for retrial; and c) Article 384 of the CPCK, as it contains contradictions over decisive facts.

## **Admissibility of the Referral**

26. In order to determine whether the referral is admissible, the Court first examines whether the Applicant fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and Rules of Procedure.
27. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

*“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.”*
28. The Court further refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide:

*Article 48  
Accuracy of the Referral*

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

*Article 49  
Deadlines*

*“The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. [...]”*

29. Regarding the above, the Court finds that the Applicant submitted the Referral as an individual and in the capacity of an authorized party, challenging an act of a public authority, namely the Supreme Court Judgment [PML-KZZ. No. 110/2016], after having exhausted all legal remedies. The Applicant has also clarified the rights and freedoms that he alleges have been violated, as per the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines prescribed in Article 49 of the Law.
30. The Court finally considers that this Referral is not manifestly ill-founded within the meaning of the Rule 36 (1) (d) of the Rules of Procedure. It further considers that it is not inadmissible on any other grounds. It must therefore be declared admissible. (see European Court of Human Rights (hereinafter: ECtHR) Judgment of 9 July 2012, *Alimuçaj v. Albania*, No. 20134/05, paragraph 144).
31. Since the Applicant has fulfilled the procedural requirements as established by the Constitution, the Law and the Rules of Procedure, the Court considers that the Referral is admissible for review on the merits.

**Merits**

32. The Court recalls that the Applicant claims a breach of his rights as guaranteed by Article 31 (Right to Fair and Impartial Trial) of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.
33. The Applicant's main allegation is that the Court of Appeals, without summoning the Applicant to the session, and in the absence of any legal representative of the Applicant, held a session on 15 July 2015 and found the Applicant guilty of the criminal offence with which he was charged.
34. The Applicant complains that, although he was acquitted of all charges in the first instance, the Court of Appeals found him guilty without allowing him to participate at its session, either personally or through his legal representative. He alleges that he was denied the opportunity to present his defense, to contest the evidence, and to question witnesses against him, or to present witnesses on his behalf.

35. The Applicant has raised the same allegations twice before the Supreme Court, alleging that these procedural violations were committed by the Court of Appeals. The Applicant presented these arguments first before the Supreme Court, in the appeal following the Judgment the Court of Appeals, which the Supreme Court by Judgment [PA-II. no. 6/2015] rejected, and later through the request for protection of legality, which the Supreme Court by Judgment [PML-KZZ no. 110/2016] also rejected as ungrounded.
36. In order to assess the merits of the Applicant's allegations, the Court first recalls the relevant provisions from the Constitution and the ECHR:

*Article 31 [Right to Fair and Impartial Trial] of the Constitution:*

*"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.*

*[...]*

*4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.*

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

*Article 6 [Right to a fair trial] of the ECHR:*

*"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. [...]*

*[...]*

*3. Everyone charged with a criminal offence has the following minimum rights:*

*[...]*

*(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

*(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

[...]"

37. The Court also reiterates that, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*"
38. In this respect, the Court notes that the case law of the ECtHR consistently maintains that the fairness of a proceeding is assessed on the basis of the proceedings as a whole. (see: ECtHR Judgment of 6 December 1988, *Barberà, Messegué and Jabardo v. Spain*, No. 10590/83, para. 68). Therefore, in determining the merits of the Applicant's allegations, the Court shall adhere to this principle.
39. The Court also notes that the allegations of the Applicant raise general questions related to right to a fair trial under Article 6.1 of the ECHR, as well as specific guarantees provided by Article 6, paragraph 3, under (c) and (d), of the ECHR, concerning the right of the accused to present a defense, as well as his right to examine witnesses who are presented by the prosecution. According to the consistent case law of the ECtHR, all evidence must in principle be presented in the presence of the accused, who must be given the opportunity to challenge the allegations of the prosecution and the evidence on which the criminal charge is based.
40. The Court, therefore, reiterates that the requirements of a fair hearing in principle imply the right of the parties to be present in person at the trial and that this right is closely linked to the right to an oral hearing and the right to follow the proceedings in person. (see ECtHR Judgment of 23 February 1994, *Fredin v. Sweden*, Application no. 18928/91, paragraphs. 10 and 11; and ECtHR Judgment of 26 May 1988, *Ekbatani v. Sweden*, Application no. 10563/83, paragraph 25).
41. In the following paragraphs, the Court will refer to the key principles established by the ECtHR case law pertaining to the right to an oral hearing, and how the latter apply to the Applicant's allegations and the merits of the case.

#### ***As to the right to an oral hearing***

42. The Court recalls that, although not expressly mentioned in the text of Article 6 of the ECHR, an oral hearing constitutes a fundamental principle enshrined in Article 6 (1). (see the ECtHR Judgment of 23 November 2006, *Jussila v Finland*, no. 75053/01).
43. However, the ECtHR also maintains that, "*in cases in which there has been an oral hearing at the first instance, or in which, one has been waived at that level, there is no absolute right to an oral hearing in any appeal proceedings that are provided*". (see ECtHR Judgment of 12 November 2002, *Döry v. Sweden*, no. 28394/95, paragraph 37).

44. Where the proceedings involve an appeal only on points of law, an oral hearing is generally not required. (see ECtHR Judgment of 8 December 1983, *Axen v Germany*, Application no. 8273/78, paragraph 28).
45. If an Appeal Court is called upon to decide questions of fact, an oral hearing may or may not be required, depending upon whether one is necessary to ensure a fair trial.
46. In this respect, the Court notes that whether an oral hearing is required at the appellate level, according to the ECtHR case law, “*depends on the special features of the proceedings involved, account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein*”. (see ECtHR Judgment of 26 May 1988, *Ekbatani v. Sweden*, Application No. 10563/83, para. 27, and ECtHR Judgment of 2 March 1987, *Monnell and Morris v. the United Kingdom*, Application Nos. 9562/81 & 9818/82, para. 56).
47. Furthermore, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did commit the act allegedly constituting a criminal offence. (see ECtHR Judgment of 9 June 2009, *Sobolewski (no. 2) v. Poland*, Application No. 19847/07 , para. 35, and ECtHR Judgment of 6 July 2004, *Dondarini v. San Marino*, Application No. 50545/99, para. 27).
48. The Court also notes that, according to the ECtHR, an oral hearing was required on appeal, where there was a dispute as to the facts in a criminal case that involved the accused’s credibility: the accused’s guilt or innocence “*could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant*”. (see above-mentioned ECtHR Judgment *Ekbatani v. Sweden*, paragraph 32).
49. The Court therefore summarizes that a right to an oral hearing at the appellate proceedings is not absolute as per the ECtHR case law. One is generally not required when the appellate proceedings only involve a review on points of law. Whether one is required when the proceedings involve a review of both points of law and fact, depends on whether an oral hearing is necessary to ensure a fair trial. However, according to the ECtHR case law, when the appellate proceedings involve an assessment of guilt or innocence, an oral hearing is required to ensure a fair trial. The Court recalls that in the present case, the Court of Appeals made an assessment of the Applicant’s guilt or innocence, and declared the Applicant guilty, modifying the Judgment of the Basic Court which had declared the Applicant innocent.

***Application of the relevant ECtHR case law to the present case***

50. The Court initially notes that, in the proceedings at the Basic Court, the Applicant was heard orally regarding the criminal offense which he was charged with. Subsequently, the Basic Court conducted the evidence procedure in which it heard the witnesses and the other evidence was presented. The Applicant also

benefitted from legal assistance and was able to present his defense such that, with his evidence and arguments, he was able to oppose and challenge the evidence and the criminal charges. As such, the Court considers that the Applicant had benefitted from the right to an oral hearing in the proceedings before the first instance court. The Court recalls that the Applicant was acquitted of all charges by the first instance court.

51. Then, in the proceedings before the Court of Appeals, the Court notes that the Applicant was found guilty and sentenced to one year imprisonment, without having been provided the opportunity to participate in the session.
52. Therefore, the Court must now consider whether the Applicant should have also benefitted from the full guarantees of an oral hearing in the appeal proceedings at the Court of Appeals as well.
53. The Court first notes that in both the appeal and the protection of legality proceedings before the Supreme Court, the Applicant mentioned the fact that the Court of Appeals had denied him a fair trial by excluding him from the proceedings, in which he was convicted of a criminal offence.
54. The Supreme Court twice rejected the Applicant's claims, based on the content of Article 390.1 of CPCK, which provides that:

*“Article 390 Session before Appeal Panel*

*1. When an imprisonment sentence was imposed on the accused, the notification of the session of the appeal panel shall be sent to the state prosecutor, to injured party, and to the accused and his/her defense counsel.”*

55. In this regard, the Court notes that, in its interpretation of this provision, the Supreme Court reasoned that, *“since the accused is found not guilty, the Court of Appeals as a second instance court was under no obligation to notify him about the session.”*
56. The Court recalls, however, that the Court of Appeals, in the session held on 15 July 2015, decided not to annul the Judgment of the Basic Court and to return the case of the Basic Court for retrial, but rather decided to modify the Judgment of the Basic Court. In doing so, the Court of Appeals, had the option to hold a hearing, based on Articles 391 and 392.1 of the CPCK, in which scenario, according to Article 392.2 of the CPCK, it must have invited to the hearing all relevant parties, as well as the accused and his representative. While the interpretation of the CPCK is a prerogative of the regular courts, and is a matter of legality, the allegations of the Applicant in the present case as to his right to an oral hearing, as an integral part of the rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, amount to matters of constitutionality.
57. In order to determine whether the constitutional requirements of fairness related to the right to an oral hearing were met in the present case, as required by the ECtHR case law, it is necessary for the Court to consider, *inter alia*, the

nature of the procedure before the Court of Appeals and its significance in the context of the criminal proceedings as a whole; the scope of the powers of the Court of Appeals; and the manner in which the Applicant's interests were actually presented and protected before the Court of Appeals. (see, *mutatis mutandis*, ECtHR Judgment of 2 March 1987, *Monnell and Morris v. United Kingdom*, Application nos. 9562/81, 9818/82, p. 56).

58. Accordingly, regard must be had to the following questions: (1) was the appellate court called upon to examine the case as to the facts and the law; (2) was the appellate court called upon to make a direct assessment of the evidence given in person by the accused; and (3) was the appellate court called upon to make a full assessment of the issue of guilt or innocence.
59. The Court reiterates that, based on the ECtHR case-law quoted above, where an appeal proceeding on the determination of a criminal charge is called upon to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he committed the act allegedly constituting a criminal offence. (see ECtHR Judgment of 9 June 2009, *Sobolewski (no. 2) v. Poland*, Application No. 19847/07, para. 35, and ECtHR Judgment of 6 July 2004, *Dondarini v. San Marino*, Application No. 50545/99, para. 27).
60. The Court notes that, in the present case, because the Applicant had been acquitted of all charges in first instance, the Court of Appeals was called upon to examine all aspects of the facts and the law and make a full assessment of the issue of guilt or innocence.
61. The Court of Appeals, as well as the reasoning of the two subsequent Supreme Court Judgments, [PML-KZZ. No. 110/2016] of 16 May 2016 and [PA-II. no. 6/2015] of 1 December 2015, respectively, maintained that the factual situation was determined correctly by the Basic Court, and thus the Court of Appeals did not review the Basic Court Judgment on points of fact, but rather only law. However, the Court considers that in the present case in order to make its assessment on the application of the law to the established facts of the case, the Court of Appeals was called upon to make its own determination of the case and make a full assessment of the question of the Applicant's guilt or innocence.
62. Furthermore, the Court considers that, in the circumstances of the present case, the distinction between "reconsidering the facts" and "reviewing the application of the law to established facts" is an artificial distinction. In both situations, the Court of Appeals is required to assess the validity of the evidence.
63. The Court also recalls that, in accordance with the case law of the ECtHR, the guarantees contained in Article 6, paragraphs 1 and 3 (c), continue to apply to all stages of a criminal proceeding. The right to defense under Article 6, paragraph 3, item (c), includes the right of the accused to defend himself, the right to legal assistance including free legal aid, as well as the right of the accused to be present at all actions in the procedure.

64. Therefore, the Court considers that, in order to reach a finding of guilt, the Court of Appeals would have needed to make a direct assessment of the evidence given in person by the Applicant for the purpose of proving that he did commit the act allegedly constituting a criminal offence.
65. The Court notes that, in these circumstances, it was not possible for the Court of Appeals to make such a full assessment without making an assessment of the evidence given in person by the Applicant.
66. Further, in the present case, the Court recalls that the Court of Appeals found the Applicant guilty of the criminal charges of which he had initially been acquitted without summoning the Applicant to the session and notifying either the Applicant or his legal representative that a session or hearing was going to be held. Accordingly, the Applicant did not even know that a session at the Court of Appeals regarding the prosecution's appeal was being held, in which he was found guilty and sentenced to imprisonment for one year.
67. As a consequence of not being notified, the Court considers that, in the proceedings before the Court of Appeals, the Applicant was deprived of all rights and guarantees. He could not defend himself in person, did not have the opportunity to present his defense and to oppose the arguments of the other party, had no legal assistance, nor was he able to participate in the proceedings at the stage where the Court of Appeals found him guilty. Furthermore, this situation cannot be attributed to the Applicant, but falls within the responsibility of the competent court which did not notify him about the court session.
68. Accordingly and based on the above, having regard to the entirety of the proceedings before the regular courts, the role of the Court of Appeals, and the nature of the issue addressed and decided by it, the Court concludes that in the present case there has been a violation of the right to a fair trial as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial), paragraphs 1 and 3, under (c) and (d), of the ECHR, because the Applicant was prevented from participation in the session of the court deciding on the criminal charge against him.
69. The Court emphasizes that this conclusion of a violation of the right to a fair trial in no way prejudices the outcome of any repetition of criminal proceedings in respect of the Applicant's guilt or innocence.
70. Having found a violation of Article 31 of the Constitution, in conjunction with Article 6, paragraphs 1 and 3, under (c) and (d), of the ECHR, the Court does not consider it necessary to address the Applicant's allegation of a violation of Article 54 [Judicial Protection of Rights] of the Constitution.
71. As to the other allegations of the Applicant, the Court considers that they raise questions of legality and that Supreme Court has provided detailed reasoning on these questions in both of its Judgments, [PA-II. no. 6/2015] and [PML-KZZ no. 110/2016], respectively.

### **Request for interim measure**

72. Given that the Court has found that the Judgment of the Supreme Court [PML-KZZ. No. 110/2016] of 16 May 2016, in conjunction with the Judgment of the Supreme Court [PA-II. no. 6/2015] of 1 December 2015 and the Judgment of the Court of Appeals [PAKR. no. 222/2015] of 15 July 2015, are in violation of the Applicant's rights as protected by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, it does not consider it necessary to consider the Applicant's request for the granting of interim measures.

### **Conclusion**

73. In conclusion, the Court finds that, by not inviting the Applicant to be present at the session of the Court of Appeals at which his guilt was determined, the Applicant was denied the opportunity to defend himself from the accusations against him. As a consequence, the Court finds that there has been a violation the Applicant's right to a fair trial for the criminal offences of which he is charged, as guaranteed by Article 31 of the Constitution, in conjunction with Article 6, paragraphs 1 and 3, under (c) and (d), of the ECHR.
74. Having found a violation of Article 31 of the Constitution, in conjunction with Article 6, paragraph 1 and 3, under (c) and (d), of the ECHR, the Court does not consider it necessary to address the Applicant's other allegations.
75. Furthermore, having found a violation of Article 31 of the Constitution, in conjunction with Article 6, paragraph 1 and 3, under (c) and (d), of the ECHR, the Court does not consider it necessary to consider the Applicant's request for the granting of interim measures.
76. In sum, in accordance with Rule 74(1) of the Rules of Procedure, the Judgment of the Supreme Court [PML-KZZ. No. 110/2016] of 16 May 2016, in conjunction with the Judgment of the Supreme Court [PA-II. no. 6/2015] of 1 December 2015 and Judgment of the Court of Appeals [PAKR. no. 222/2015] of 15 July 2015, is declared invalid and, in accordance with the subsidiarity principle, the case is remanded to the Supreme Court of Kosovo for fresh consideration.

## FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law, and Rule 56.1 of the Rules of Procedure, in the session held on 29 May 2017, unanimously

## DECIDES

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that the Judgment of the Supreme Court [PML-KZZ. No. 110/2016] of 16 May 2016, in conjunction with the Judgment of the Supreme Court [PA-II. no. 6/2015] of 1 December 2015 and the Judgment of the Court of Appeals [PAKR. no. 222/2015] of 15 July 2015, is in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;
- III. TO HOLD that it is not necessary to examine whether there has been a violation of Article 54 [Judicial Protection of Rights] of the Constitution;
- IV. TO DECLARE INVALID the Judgment of the Supreme Court [PML-KZZ. No. 110/2016] of 16 May 2016, in conjunction with the Judgment of the Supreme Court [PA-II. no. 6/2015] of 1 December 2015 and the Judgment of the Court of Appeals [PAKR. no. 222/2015] of 15 July 2015, because this Judgment is not in compliance with Article 31 of the Constitution, in conjunction with Article 6 of the ECHR;
- V. TO REMAND the case to the Supreme Court for reconsideration in conformity with the Judgment of this Court;
- VI. TO ORDER the Supreme Court to inform the Court, in accordance with Rule 63 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;
- VII. TO REMAIN seized of the matter pending compliance with that order;
- VIII. TO NOTIFY this Decision to the Parties;
- IX. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;
- X. TO DECLARE this Decision effective immediately.

**Judge Rapporteur**

*Gresa Caka-Nimani*  
Gresa Caka-Nimani



**President of the Constitutional Court**

*Arta Rama-Hajrizi*  
Arta Rama-Hajrizi