



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

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Prishtina, on 10 November 2016  
Ref. No.:1001/16

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI74/16**

Applicant

**X**

**Constitutional review of Judgment Pml. no. 3/2016 of the Supreme  
Court, of 25 January 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 is submitted by the juvenile X (hereinafter: the Applicant), who is represented by Mahmut Halimi, lawyer from Prishtina.

## **Challenged decision**

2. The Applicant challenges Judgment Pml. no. 3/2016, of the Supreme Court, of 25 January 2016, in conjunction with Decision PAM. no. 39/2015, of the Court of Appeal, of 6 October 2015, and Decision PM. no. 4/15, of the Basic Court in Mitrovica, of 23 July 2015.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged decisions, which allegedly violated the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 5.1 (d) [Right to liberty and security] and Article 2 of Protocol no. 7 [Right of appeal in criminal matters] of the European Convention on Human Rights (hereinafter: the Convention).
4. The Applicant also requested that his identity be not disclosed due to his minor age.

## **Legal basis**

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Constitutional Court**

6. On 12 May 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 14 June 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova, Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
8. On 23 June 2016, the Court informed the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 16 September 2016, after having considered the report of the Judge Rapporteur, the Review Panel recommended to the Court the inadmissibility of the Referral.

## **Summary of facts**

10. Based on the documents contained in the Referral, it results that the Applicant in co-perpetration with several other persons entered illegally the house of a third person to take money and other material goods, on which occasion the third person died of serious bodily injuries.

11. On 2 April 2015, the Basic Prosecutor's Office in Mitrovica - Juvenile Department filed a proposal to punish the Applicant for committing the criminal offence of aggravated murder under Article 179, paragraph 1, subparagraph 1.4 and 1.6 in conjunction with Article 31 and unauthorized ownership, control or possession of weapons under Article 374.1 of the Criminal Code of the Republic of Kosovo (hereinafter: CCK).
12. The Basic Court in Mitrovica – Juvenile Department re-qualified the criminal offence from the criminal offense of aggravated murder to the criminal offense of robbery, provided by Article 329, paragraph 5 in conjunction with paragraph 1 of Article 31 of the CCK.
13. From 10 April 2015 until 23 July 2015, the Basic Court in Mitrovica – Juvenile Department held some hearing sessions in the presence of the State Prosecutor, of the Applicant and his defence counsel and imposed (Decision, PM. no. 4/15) an educational measure.
14. The Basic Court in Mitrovica concluded that the Applicant was guilty, because he committed the criminal offense of robbery under Article 329, paragraph 5, in conjunction with paragraph 1 of Article 31 of CCK and for the criminal offense of unauthorized ownership, control or possession of weapons under Article 374, paragraph 1 of the CCK.
15. On 17 August 2015, the Applicant filed an appeal with the Court of Appeal against the abovementioned decision of the Basic Court. The Applicant complained of essential violation of the procedural provisions, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on imposition of the educational measure. The Applicant also expressly requested to be summoned at the hearing of the Court of Appeal, in order that he presents his allegations orally.
16. On 6 October 2015, the Court of Appeal (Decision, PAM. no. 39/2015) rejected the appeal of the Applicant as ungrounded and upheld the Decision of the Basic Court.
17. The relevant part of the Decision of the Court of Appeal, provides:

*“When imposing the educational measure – Sending to the Educational – Correctional Institution, the Court was based on all the circumstances that it found that the legal requirements foreseen by the provision of Article 28 of JJC were fulfilled, since the juveniles have committed the criminal offence punishable by imprisonment to more than 3 (three) years, the need of specialized education and such a measure is in the best interest of the juveniles, taking into account the gravity and nature of the criminal offence. When imposing the educational measure, the Court has considered as mitigating circumstances the best interest for the juveniles, their age, an age during which the psychological and social developments are great, the biography and poor economic and living conditions of the juveniles, their correct behaviors during the court review sessions, that it*



*was the first time that they have fallen in contradiction with the law for the criminal offences punishable by over 5 years, the latter fully entered the guilty plea... whereas as aggravating circumstances for the juveniles, in conformity with Article 74, paragraph 1 and 2, item 2.2, 2.3, and 2.7 of CCK, it has found the high degree of intent, presence of severe violence, the cause of death, the age of the deceased person, the manner of his living in solitude, the use of his sleepiness late at night.*

*Such an assessment of the relevant circumstances for the imposition of the educational measure – Sending to the Educational – Correctional institution is accepted by this Court as well, and it concludes that the educational measure which the first instance court has imposed is fair and lawful, and it assesses that this measure shall contribute in the positive rehabilitation and re-integration of the juveniles at the society, in order to ensure professional education and training, by developing their personal liabilities, with the purpose of preventing recidivist behaviors, and this measure would contribute in the best interest of the juveniles, and by this, the purpose of the educational measures foreseen by Article 19 of JJC shall be achieved.”*

18. On 30 November 2015, the Applicant filed a request for protection of legality with the Supreme Court against the aforementioned decision of the Court of Appeal. The Applicant complained of essential violations of the provisions of criminal procedure and violation of the criminal law. The Applicant also complained of a violation of Article 390, paragraph 1 of CCRK, because the panel session for juveniles in the Court of Appeal was held without his presence, even though it is a legal obligation, and moreover, he requested the Court of Appeal to be notified of the panel session.
19. On 25 January 2016, the Supreme Court (Judgment, Pml. no. 3/2016) rejected as ungrounded the request for protection of legality, filed by the Applicant and upheld the Decision of the Court of Appeal.
20. Regarding the legal obligation to inform the Applicant, the relevant part of the judgment of the Supreme Court, states:

*“In compliance with the provision of Article 390, paragraph 1 of CPCR, when the punishment by imprisonment was imposed on the accused, the notification as regards the appellate panel session is delivered to the competent state prosecutor, the injured person, the accused person and his defense counsel. This provision is also applied in the criminal procedure against the juvenile perpetrator which is based on the provision of Article 5 of the Juvenile Justice Code (JJC), according to which, the provisions of the Criminal Code of Kosovo, the Criminal Procedure Code of Kosovo, the Law on Execution of Criminal Sanctions and every other relevant law, shall be applied for juveniles, except in cases where it is otherwise regulated by this Code. In the Juvenile Justice Code, this issue is not otherwise regulated, namely there is no provision which differs from the provisions for adults in relation to the information of the parties as regards the panel session of the second instance court. On the basis of*

*these provisions, the conclusion results that the punishment by imprisonment was not imposed on the juvenile, and that the obligation of the Court of Appeal to inform the juvenile and his Defense Counsel as regards the appellate session did not exist.”*

## **Relevant legal provisions**

### **CRIMINAL PROCEDURE CODE No. 04/L-123**

#### **Article 390 paragraph 1 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.”*

### **JUVENILE JUSTICE CODE No. 03/L-193**

#### **Article 5**

*“The provisions of the Criminal Code of Kosovo, the Kosovo Code of Criminal Procedure, the Law on Execution of Penal Sanctions and any other relevant legislation shall apply to minors, unless otherwise regulated by the present Code.”*

## **Applicant’s allegations**

21. The Applicant alleges violation of his rights to fair and impartial trial and to legal remedies, due to: *“erroneous interpretation of the provision of Article 390/1 of CPCK, in conjunction with Article 5 of the Juvenile Justice Code, as the equal status of a prisoner is not given to the juvenile, who is in the educational – institutional measure, namely a measure was imposed on him to be sent to the correctional institution for a duration of 5 years”.*
22. The Applicant also claims a violation of his rights to liberty and security and to appeal in criminal matters.
23. The Applicant addresses and requests the Court to: (i) approve and declare the submitted Referral admissible, (ii) hold violation of individual rights guaranteed by the provisions cited in the Referral, based on the Constitution and Convention, (iii) declare invalid the Decision of the Court of Appeal and the Judgment of the Supreme Court challenged in this Referral and (iv) order the Court of Appeal to schedule the panel session to which would be summoned the Applicant and his defense counsel, and after holding the session to render a lawful decision.



## Admissibility of Referral

24. The Court first examines whether the Applicant fulfills the admissibility requirements laid down in the Constitution, and as further specified in the Law and Rules of Procedure.

25. In this respect, the Court refers to Article 113.7 of the Constitution, which establishes:

*“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.”*

26. The Court also refers to Article 48 of the Law, which provides:

*“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.”*

27. The Court further takes into account Rule 36 (2) (d) of the Rules of Procedure, which specifies:

*“Rule 36  
Admissibility Criteria*

*(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”.*

28. The Court also refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which stipulates that:

*“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”*

29. The Court notes that in essence the Applicant complains that, due to Court of Appeal’s erroneous interpretation of Article 390 (1) of the CPCK in conjunction with Article 5 of the Juvenile Justice Code, his right to be summoned and present at the panel session, as guaranteed by Articles 31 and 32 of the Constitution, was violated.

30. In this respect, the Court finds that the entitlement to a “*public hearing*” as guaranteed by Article 31.2 of the Constitution and Article 6.1 of the Convention necessarily implies a right to an “*oral hearing*”. (See, for example: case *Dory v. Sweeden*, application no. 28394/95, ECtHR, Judgment of 12 November 2002, paragraph 37).

31. The principle of an oral and public hearing is particularly important in the criminal context, where the accused person of criminal offence in general, should be provided an opportunity to be present in the session of the first instance court, which fully meets the requirements of Article 31 of the Constitution and Article 6 of the Convention, and where an applicant has an entitlement to have his case “heard”, with the opportunity, *inter alia*, to give evidence in his own defence, hear the evidence against him, and examine and cross-examine the witnesses. (See case *Jussila v. Finland*, application no. 73053/01, [GC], Judgment of 23 November 2006, paragraph 40).
32. However, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing. The manner of application of Article 31 of the Constitution and Article 6 of the Convention to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the legal order and of the role of the appellate court. (See *Hermi v. Italy*, application no. 18114/02, [GC], Judgment of 18 October 2006, para. 60).
33. Even where the court of appeal has jurisdiction to review the case both as to facts and as to law, Article 31 of the Constitution and Article 6 of the Convention always require a right to a public hearing irrespective of the nature of the issue to be decided. The publicity requirement is certainly one of the means whereby confidence in the courts is maintained. However, there are other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the courts’ case-load, which must be taken into account in determining the need for a public hearing at stages in the proceedings subsequent to the trial at first instance. (See case, *Fejde v. Sweeden*, application no. 12631/87, [GC], Judgment of 29 October 1991, paragraph 31).
34. In the present case, the Court notes that the first instance court met the requirement for holding a public and oral hearing, because the trial hearings were held in the personal presence of the Applicant and his counsel and the accusing party, in accordance with the adversarial principle enshrined in Article 31 of the Constitution and Article 6.1 of the Convention. Moreover, the first instance court reasoned its decision in detail, based, among others, on a number of evidence such as witness testimonies, police report, the report of the forensic doctors, the analysis of DNA and pictures from the scene of event.
35. Based on the circumstances and factual situation of this case, the Court considers that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle; at the various stages of those proceedings he was enabled to submit the arguments he considered relevant to his case, that he was given the opportunity to challenge effectively the arguments and evidence presented by the responding party; and that all the arguments, viewed objectively, that were relevant for the resolution of his case, were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decision were presented in detail; and that, in accordance with the circumstances of the case, viewed in their entirety, the proceedings were fair.



(See, for example, case *Garcia Ruiz v. Spain* [GC], application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

36. As regards the allegations of violation of other provisions of the Constitution and Convention, the Court considers that the Applicant only quotes and generally describes the content of those provisions, without substantiating how those constitutional norms were violated in his case, as it is required by Article 48 of the Law.
37. The Court reiterates that it is not the task of the Constitutional Court to deal with errors of facts or law allegedly committed by the 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).
38. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See *mutatis mutandis García Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).
39. The Constitutional Court recalls that it is not a fact-finding Court and that the correct and complete determination of the factual situation is within the full jurisdiction of regular courts, while the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court". (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
40. The Court reiterates that the task of the Court is to assess whether the proceedings before the regular courts were fair in their entirety, including the way the evidence was taken. (See case *Edwards v. United Kingdom*, no. 13071/87, Report of the European Commission of Human Rights, of 10 July 1991).
41. The fact that the Applicant disagrees with the outcome of the case cannot serve him as a right to raise an arguable claim on the violation of the provisions of the Constitution. (See Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 May 2012, paragraph 28).
42. In these circumstances, the Court considers that the Applicant has not substantiated the allegation of a violation of fundamental human rights and freedoms guaranteed by the Constitution, because the facts presented by him do not indicate in any way that the regular courts denied him the rights guaranteed by the Constitution.
43. Therefore, the Referral is manifestly ill-founded on constitutional grounds and is to be declared inadmissible as established by Article 113.7 of the Constitution, provided for in Article 48 of the Law, and as further specified in Rule 36 (2) (d) of the Rules of Procedure.



### **Applicant's request to not disclose identity**

44. In this respect, the Court refers to Articles 8 and 40 of the Convention on the Rights of the Child, which provides:

#### **Article 8**

*1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*

#### **Article 40**

*1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*

*2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:*

*(...)*

*(vii) To have his or her privacy fully respected at all stages of the proceedings.*

45. The Court notes that the Applicant is of minor age and thus considers that he enjoys the constitutional protection guaranteed by the Convention on the Rights of the Child, which, pursuant to Article 22 (7) of the Constitution, is “*directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions*”.
46. Therefore, the Court grants the Applicant's request to not disclose his identity and to have his privacy fully respected at all stages of the court proceedings, as it is established by Article 22 (7) of the Constitution, in conjunction with Articles 8 and 40 of the of the Convention on the Rights of the Child.

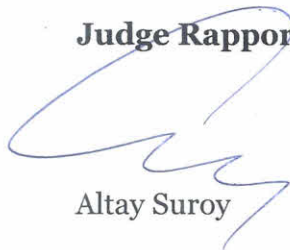
## FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (2) (d) of the Rules of Procedure, on 16 September 2016, unanimously

## DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO APPROVE the Request to not disclose his identity;
- 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**



Altay Suroy



**President of the Constitutional Court**



Arta Rama-Hajrizi