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

BULLETIN OF CASE LAW

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OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Table of Contents:

Foreword

I have the special honor and pleasure that, in the capacity of the President of the Court, write this foreword for the 7th Bulletin of the Case Law of the Constitutional Court. The Bulletin has become a useful reference and frequently cited from those who work in the field of constitutional law and fundamental human rights and freedoms. Once again, we have been highly dedicated to show some of the main results of our work in the second half of 2017.

The present Bulletin edition contains a number of more special and more important cases, including a Referral by the Special Chamber of the Supreme Court, in the so-called 'incidental control' for the constitutional review of Articles 10 and 40.1.5 of the Annex of Law No. 04/L-034 on the Privatization Agency of Kosovo.

During the second half of this year, the Court has also rendered other important decisions related to individual referrals in which the issues of the right to fair and impartial trial, the right to a hearing in criminal cases, the right to a court decision within a reasonable time, labor disputes, the protection of property, the concept of exhaustion of legal remedies and the regular election process of the presidents of the regular courts, have been addressed.

It is worth reiterating how much important it is that the future applicants and their legal representatives, who intend to file referrals with the Constitutional Court, to consult this Bulletin, as well as previous Bulletins carefully, and consider whether their case can have any possibility of success by referring to the similar decisions of the Court. It should be clearly understood that in principle, the right to appeal cannot be denied to any applicant, but it would be useful that one should become preliminarily familiar with the jurisprudence of the Court and objectively assess the success of their referral.

The purpose of publishing the decisions of the Court in the Bulletin is to show to the public that the judges of the Constitutional Court take their decisions independently and in a completely transparent way, by applying the highest standards of human rights and constitutional justice.

Finally, I want to thank and express my special gratitude to the entire staff of the Court, whose work and support made it possible for the present Bulletin of Case Law of the Constitutional Court to be published.

Arta Rama-Hajrizi

President of the Constitutional Court

KI 130/16 Applicant Hamdi Ibrahimi, constitutional review of Decision KGJK/No.74/2016 of the Kosovo Judicial Council, of 6 July 2016

KI130/16 Resolution on Inadmissibility approved on 27 March 2017, published on 07 July 2017

Key words: Individual referral, Freedom of expression, *referral manifestly ill-founded*

The subject matter is the constitutional review of the abovementioned decision of KJC, whereby the Applicant's rights and freedoms guaranteed by Article 40 [Freedom of Expression] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) as well as Article 10 [Freedom of expression] of the European Convention on Human Rights (hereinafter: ECHR) have allegedly been violated.

The Court find that the legal provisions, as well as the principle of subsidiarity, require that before addressing the Constitutional Court, the Applicants must exhaust all procedural possibilities in the regular proceedings in order to prevent violations of human rights and freedoms guaranteed by the Constitution or to remedy any violation of the rights guaranteed by the Constitution.

The Court concluded that in this case there is no final decision of the competent authority that at this stage could be the subject of review by the Constitutional Court.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI130/16

Applicant

Hamdi Ibrahimi

Constitutional review of Decision KGJK/No.74/2016 of the Kosovo Judicial Council, of 6 July 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 Hamdi Ibrahimi from Podujeva (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision KGJK/No.74/2016 of Kosovo Judicial Council (hereinafter: KGJK), of 6 July 2016, which was served on him on 12 July 2016.

Subject matter

3. The subject matter is the constitutional review of the abovementioned decision of KJC, whereby the Applicant's rights and freedoms guaranteed by Article 40 [Freedom of Expression] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) as well as Article 10 [Freedom of expression] of the European Convention on Human Rights (hereinafter: ECHR) have allegedly been violated.

4. The Applicant also requests the Constitutional Court (hereinafter: the Court): ..."*to impose interim measure so that the Decision of KJC of 6.07.2016 is annulled until the final decision is rendered by the Constitutional Court of the Republic of Kosovo.*"

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 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 11 November 2016, the Applicant submitted the Referral to the Court.

7. On 12 December 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Bekim Sejdiu (judge) and Selvete Gërxhaliu-Krasniqi (judge).

8. On 20 December 2016, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Kosovo Judicial Council.

9. On 1 January 2017, the Applicant submitted to the Court the supplement to the Referral of 11 November 2016.

10. On 27 March 2017, the Review Panel considered the report of Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. On 29 June 2015, the Applicant, in a capacity of the President of the Basic Court in Prishtina, in an interview with a radio television station in which he presented his stance and commented on the work of the State Prosecution of Kosovo.

12. On 4 December 2015, the Office of the State Prosecutor submitted to the Disciplinary Committee of the Kosovo Judicial Council (hereinafter: DCKJC) a complaint, in which it accused the Applicant of misconduct under Article 34, paragraph 1. item 1.4 of the Law on Kosovo Judicial Council, pertaining the violation of the Code of Ethics and Professional Conduct for Judges.

13. On 31 March 2016, the DCKJC rendered Decision KD.No. 04/2016, which found the Applicant guilty of misconduct, and therefore imposed on him the disciplinary measure of reprimand. The Decision of DCKJC reads:

> *„The Committee concluded that by his statement President Ibrahimi, on 29 June 2015, in the TV station Koha Vision, in the show Puls, has exceeded his competences as a president of the court, provided by Article 24, items 1, 2, 3, 4, 5, 6, 7 of the Law on Kosovo Judicial Council.“*

14. On 27 April 2016, the Applicant filed an appeal with KJC against the Decision of DCKJC of 31 March 2016.

15. On 6 July 2016, the KJC rendered Decision which rejected the Applicant's appeal with the reasoning:

> *„Kosovo Judicial Council, pursuant to Article 41 of the Law on Kosovo Judicial Council No. 03/L-223, reviewed the case file, challenged decision, the appealing allegations and following this, found that the appeal of the President/Judge Hamdi Ibrahimi is ungrounded.“*

Applicant's allegations

16. The Applicant considers that "*these decisions violate the right to freedom of expression guaranteed by the Constitution of the Republic of Kosovo to address the critics towards the work of an institution or the holders of responsibilities in that institution, and in particular when a person having the legal competencies to act, does not act.*"

17. The Applicant further adds that *„the statement of the President of the Court, as a free expression of an opinion, was absolutely in the function of the increase of an authority of the justice system in Kosovo, and in no way, aiming at denigrating any institution or an individual.“*

18. The Applicant further alleges that "*that the decision rendered by KJC was taken in the administrative proceedings, that against this decision he had an opportunity in accordance with the law to exhaust the legal remedy-that by a claim to initiate the procedure of the administrative conflict before the Department for Administrative Matters that acts within the subject matter and territorial jurisdiction of the Basic Court in Prishtina...but due to the fact that he directly runs the Department for Administrative Matters, where he appoints and dismisses the judges from this department, he did not want to exhaust this legal remedy.“*

19. The Applicant requests the Court to:

> *„a) To declare the Referral admissible.*
>
> *b) To impose interim measure, so that the Decision of 6.07.2016, be annulled until the final decision is rendered by the Constitutional Court of the Republic of Kosovo.*
>
> c) *To hold that the Decision of KJC of 6.07.2016 has violated the freedom of expression guaranteed by the Constitution of the Republic of Kosovo– Article 40. To order the KJC to declare Decision of 12.07.2016 invalid and as such does not produce any legal effect.*
>
> *d) To order the KJC to notify the Constitutional Court about the implementation of the decision of the Constitutional Court."*

Admissibility of Referral

20. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and in the Rules of Procedure.

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

> *"[...] 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."*

22. The Court also refers to Article 47.2 of the Law, which provides:

> *"[...] The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

23. The Court further refers to Rule 36 (1) (b) of the Rules of Procedure which foresees:

> *"(1) The Court may consider a referral if:*
>
> *[...]*
>
> *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted."*

24. The Court notes that the Applicant in the Referral challenges the decisions of the KJC which are rendered in the administrative proceedings conducted before the competent committees of the KJC.

25. The Court further notes that the Applicant having been served with the decisions of the KJC, directly addressed the Constitutional Court, requesting the constitutional review of the KJC decisions related to the alleged violations of the constitutionally guaranteed rights and freedoms, despite the fact that he had available other legal remedies which are prescribed by the law and by exhausting them he could have protected his rights and freedoms.

26. The Court notes that the Applicant considers that the mere fact that he has a specific position that in itself "bears" certain rights, obligations and responsibilities, should of itself acquit him of the exhaustion of all remedies that are prescribed by law and which are available to him.

27. The Court emphasizes that this cannot be the reason for which the Applicant should be exempt of non-exhaustion of legal remedies, given the fact that law regulated the way to solve such requests.

28. The Court recalls that Article 113 of the Constitution regulates the jurisdiction and the authorized parties, whereby in this Article is specified in detail what cases, and under what circumstances and the criteria, the authorized parties can address the Constitutional Court.

29. The Court further notes that the Applicant is an individual who is among the authorized parties pursuant to Article 113.7 of the Constitution and as such will be a subject of consideration.

30. Furthermore, the Court recalls that other legal provisions, as well as the principle of subsidiarity, require that before addressing the Constitutional Court, the Applicants must exhaust all procedural possibilities in the regular proceedings in order to prevent violations of human rights and freedoms guaranteed by the Constitution or to remedy any violation of the rights guaranteed by the Constitution.

31. The Court would like to recall that in case KI145/15 has dealt with a similar request, and that on 16 May 2016, rendered a resolution on inadmissibility, because the Applicant had not exhausted all the legal remedies provided by law (see: Resolution on inadmissibility: *Florent Muqaj, against decision No. 321/2015 of the Prosecutorial Council of Kosovo,* KI145/15 of 5 November 2015).

32. The rationale for the exhaustion rule of legal remedies is to afford the competent authorities, including the regular courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that Kosovo legal order provides an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character to the Constitution (See Resolution on Inadmissibility: *AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo*, KI41/09, of 21 January 2010, and see *mutatis mutandis*, ECHR, *Selmouni vs. France*, no. 25803/94, Decision of 28 July 1999).

33. In sum, the Court considers that in this case there is no final decision of the competent authority that at this stage could be the subject of review by the Constitutional Court.

Request for interim measure

34. The Applicant requests the Court to impose an interim measure that would render the decisions of KJC ineffective, until it renders a decision regarding this referral.

35. In order that the Court imposes interim measure, in accordance with Rule 55 (4) of the Rules of Procedure, it is necessary that:

> *"(a) the party requesting interim measures has shown [...], if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
>
> *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*
> *[...]*
>
> *If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application."*

36. Based on the above, the Applicant has not shown a *prima facie* case on the admissibility of the Referral. Therefore, the request for interim measure is to be rejected, as ungrounded.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 47 of the Law, and Rules 36 (1) (b) and 55 (4) of the Rules of Procedure, on its session held on 27 March 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI 54/16, Applicant Ramadan Demirović, constitutional review of Judgment GSK-KPA-A-002/14 of the Supreme Court of Kosovo Property Agency Appeals Panel of 14 October 2015

KI54/16 Resolution on Inadmissibility approved 31 May 2017, published on 07 July 2017

Key words: *Individual Referral, property rights, right to home, referral manifestly ill-founded*

The subject matter was the constitutional review of the Judgment of the Appeals Panel whereby the Applicant's rights and freedoms guaranteed by Article 24 (Equality Before the Law), Article 31 (Right to Fair and Impartial Trial), Article 46 (Protection of Property) of the Constitution of the Republic of Kosovo as well as Article 6 (Right to a fair trial), Article 8 (Right to respect for private and family life), Article 1 of Protocol No. 1 (Protection of Property) and Article 14 (Prohibition of discrimination) of the European Convention on Human Rights.

The Court noted that the Appeals Panel examined all allegations which the Applicant raised during the regular proceedings, whereby it provided clear conclusions as to why those allegations were ungrounded.

The Court find that the Referral is manifestly ill-founded, and it was declared inadmissible in accordance with Rule 36 (1) (d) and (2) (b) of the Rules.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI54/16

Applicant

Ramadan Demirović

Constitutional review of Judgment GSK-KPA-A-002/14 of the Supreme Court of Kosovo Property Agency Appeals Panel of 14 October 2015

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 Ramadan Demirović from Dragash, residing in Belgrade, Republic of Serbia (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment GSK-KPA-A-002/14 of the Supreme Court of Kosovo Property Agency Appeals Panel (hereinafter: the Appeals Panel), of 14 October 2015, which was served on him on 14 December 2015.

Subject matter

3. The subject matter is the constitutional review of the abovementioned Judgment of the Appeals Panel whereby the Applicant's rights and freedoms guaranteed by Article 24 (Equality Before the Law), Article 31 (Right to Fair and Impartial Trial), Article 46 (Protection of Property) of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial), Article 8 (Right to respect for private and family life), Article 1 of Protocol No. 1 (Protection of Property) and Article 14 (Prohibition of discrimination) of the European Convention on Human Rights (hereinafter: ECHR) have allegedly been violated.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 18 March 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 13 April 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.

7. On 22 April 2016, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Appeals Panel.

8. On 9 June 2016, the Court sent to the Applicant a letter requesting to submit additional documents, as well as the receipt indicating when the challenged judgment was served on him.

9. On 17 June 2016, the Applicant submitted additional documents and the receipt on the service of Judgment.

10. On 31 May 2017, the Review Panel considered the report of Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. Until 1999, the Applicant lived in an apartment located in Prishtina, with address, Dardania SU 9/1 L2, VII floor, apartment number 30.

12. In 1999, the Applicant left Prishtina and persons B.D and L.D moved into the aforementioned apartment.

13. On an unspecified date, the Applicant filed a claim to repossession of his property with the Housing and Property Directorate (hereinafter: HPD). This claim was registered under number DS302305.

14. On a different unspecified date, the persons B.D. and L.D., also filed a claim with the HPD, which was registered under number DS000369, requesting the restitution of the property rights over the property. This claim was based on the contract on associated resources No. 01-982, dated 12 May 1986.

15. On 18 June 2004, the Housing and Property Claims Commission (hereinafter: HPCC) rendered Decision [HPCC/D/137/2004/A&C], which approved claim no. DS000369 of the Applicants B.D and L D. and recognized their rights as “A” category clients, because they had acquired rights to the property before 1989, and therefore, they acquired the right to restitution of the immovable property in question.

16. The HPCC registered the Applicant’s claim DS302305 as a “C” category claim and by the same decision rejected the claim as ungrounded.

17. The Applicant filed an appeal with the second instance panel of HPCC against Decision [HPCC/D/ 137/2004/A&C], requesting a review of the first instance decision.

18. On 11 December 2006, the second instance panel of HPCC rendered a group decision [HPCC/REC/86/2006], whereby the Applicant's request for review of the first instance decision of the HPCC was rejected as ungrounded.

19. On 16 October 2006, UNMIK Regulation No. 2006/50, entered into force. This regulation established the Kosovo Property Agency (KPA) as the legal successor to HPD.

20. On 17 October 2007, using the legal possibility given to him by the new UNMIK Regulation [2006/50], the Applicant submitted a property claim to the KPA for recognition of ownership rights over the property in question.

21. On 18 April 2013, by Decision [KPCC/D/R/199/2013], the Kosovo Property Claims Commission (hereinafter: KPCC) rejected the property claim of the Applicant as being subject to a *res judicata* decision. The KPCC reasoned that,

> *"In accordance with Article 11.4 of UNMIK Regulation 2006/50, as well as by adopted Law No. 03/L 079, the Commission will reject the claim in entirety, if the claim was previously considered and decided in a final administrative or a judicial decision, therefore this claim is rejected."*

22. On 23 January 2014, the Applicant filed an appeal with the Appeals Panel of the KPA (hereinafter: Appeals Panel) against Decision [KPCC/D/R/199/2013] of the KPCC, stating that: "*it is not about res judicata, because these are two different claims, one on which it has already been decided in 2006 and which concerned the claim for repossession of property, and the other claim, which he filed in 2007 regarding the confirmation of the property rights."*

23. On 14 October 2015, the Appeals Panel rendered Judgment [GSK-KPA-A-002/ 14], which rejected the Applicant's appeal, reasoning that,

> *"The Applicant claims that the subject matter is now of a different nature from the subject matter that was decided in the previous proceeding. He alleges that the KPCC should have decided on his property claim regarding his right of use, while now it is about his property rights. The Court finds that this allegation is erroneous. The HPCC decided on two claims: the property claim of the respondent of "A" category regarding the restitution of his property rights over the property in the claim and the property claim of "C" category appellant regarding the re-possession of the property right (ownership), the legal possession or rights of use, or tenancy rights over the property in the claim.*
>
> *Accordingly, the issue between the claimant and the appellant as to who is the property owner – who has the ownership - over the property in the claim has already been resolved by the HPCC. Therefore, the decision of KPCC is res judicata on the issue of the property rights over the property in the claim between the appellant and the claimant. Accordingly, already rejected, a property right cannot be a subject of review in the current proceeding."*

Applicant's allegations

24. The Applicant alleges that, *"By the actions of the Appeals Panel of the Supreme Court and by previous decisions of HPCC and KPCC my rights guaranteed by the Constitution of Kosovo and the European Convention on Human Rights and Freedoms have been violated. The concerned apartment was my home in which I used to live with the members of my family and now my right to home was taken and the apartment was given to another person."*

25. The Applicant further alleges in the Referral: "*Since I am a member of a national minority in Kosovo, this clearly leads to the conclusion that the representatives of*

majority population do not face similar problems that I face, and it is obvious that there is no equality before the law and that on this basis I am discriminated against."

26. The Applicant requests that the Court, based on the held violations of the rights guaranteed by the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, orders the authorities in Kosovo to promptly rectify the alleged violations of the Constitution.

Admissibility of Referral

27. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and Rules of Procedure.

28. In this respect, the Court initially refers to Article 113. 7 of the Constitution, which establishes:

> *"[...]*
> *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."*

29. The Court 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."*

30. Regarding the foregoing, the Court finds that the Applicant submitted the Referral as an individual and in a capacity of an authorized party; that he pointed out at possible constitutional violations; the Referral was submitted in accordance with the deadlines established in Article 49 of the Law and after exhausting all legal remedies.

31. However, the Court must also take in to consideration Rules 36 (1) (d) and 36 (2) (b) and (3) (g) of the Rules of Procedure, which foresee:

> *"(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) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights"*
>
> *(3) A Referral may also be deemed inadmissible in any of the following cases:*
>
> *[...]*
>
> *g) the Referral is incompatible ratione temporis with the Constitution."*

32. In this case, the Court by examining the case file and the Applicant's allegations found that the Applicant had two proceedings before the regular courts and that both proceedings were decided by final decisions.

33. The Court observes that, basically, the Applicant raises constitutional allegations with regards to both sets of proceedings. He alleges that *"the actions of the Appeals Panel of the Supreme Court and previous decisions of HPCC and KPCC"* encroached on his rights guaranteed by the Constitution and the ECHR.

34. The Court notes that the Applicant initiated the first proceeding by claim DS302305 submitted to HPD, in which he requested to be allowed repossession of the property in question.

35. The Court also notes that the first proceeding was concluded on 11 December 2006, by final decision [HPCC/REC/86/2006] of the second instance panel of the HPCC whereby the subject matter of this claim was resolved.

36. Therefore, the Court concludes that the proceedings and the decisions related to the first proceeding were rendered under different circumstances and at a time when the Court had no temporal jurisdiction and as such are *ratione temporis* incompatible with the Constitution which entered into force on 15 June 2008 (see, for example case: no. KI47/14, Applicant: *Mustaf Zejnullahu,* Resolution on Inadmissibility of 11 August 2014, paragraph 25).

37. Therefore, pursuant to Rule 36 (3) (g) of the Rules of Procedure, the claim regarding the first group of the proceedings is to be rejected as incompatible *ratione temporis* in accordance with the Constitution.

38. As regards the second proceeding, the Court notes that it relates to the claim which the Applicant submitted on 17 October 2007 to the KPA, in which he requested the recognition of ownership rights over the property. The KPCC decided in first instance on this claim on 18 April 2013, and the Appeals Panel decided in final instance of this claim on 14 October 2015.

39. In this regard, the Court notes that the Applicant considers that, when deciding on his second claim, the regular courts violated his rights and freedoms guaranteed by Article 24 (Equality Before the Law), Article 31 (Right to Fair and Impartial Trial) Article 46 (Protection of Property) of the Constitution and Article 6 (Right to a fair trial), Article 8 (Right to respect for private and family life) of Article 1 of Protocol No. 1 (Protection of property) and Article 14 (Prohibition of Discrimination) of the ECHR.

i) Alleged violation of Article 31 (Right to Fair and Impartial Trial) of the Constitution and Article 6 (Right to a fair trial) of the ECHR

40. As to the Applicant's allegation regarding a violation of Article 31 in conjunction with Article 6 of the ECHR, the Court first of all recalls that the fairness of a proceeding is assessed looking at the proceeding as a whole (see case: ECHR, *Barbera, Messeque and Jabardo v. Spain*, Judgment of 6 December 1988, Application no. 10590/83, paragraph 68). Therefore, in the determination of the merits of the Applicant's allegations, the Court will comply with this principle.

41. In this regard, the Court noted that the Applicant considers that his right guaranteed by Article 31 of the Constitution has been violated because in the contested proceedings before the KPCC, and later in the appeal proceedings before the Appeals Panel, he failed

to win his claim to his property rights, because the courts appreciated more and gave more importance to the allegations of the respondent.

42. The Court reiterates that the complete determination of the factual situation is within the jurisdiction of regular courts, and that 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 ECtHR case *Akdivar v. Turkey*, No. 21893/93, 16 September 1996, para. 65; see also, *mutatis mutandis* Constitutional Court case KI86/11, Applicant *Milaim Berisha*, 5 April 2012).

43. The Court further notes that the purpose of Article 31 of the Constitution and Article 6 of the ECHR, *inter alia*, is to assign duties to the courts to perform the prescribed verification of submissions, arguments and evidence submitted by the parties to the proceedings, without prejudice of their assessment and relevance in respect of the court decision (see case: ECHR *Kraskav. Switzerland*, Judgment of 19 April 1993, Application No. 13942/88).

44. Article 6.1 ECHR also requires that a fair balance is established between the parties to the proceedings, namely that there exists an equality between the parties to the proceedings (see Case ECtHR *De Haes v. Gijselsv, Belgium,* Judgment of 24 February 1997, Application No. 19983/92).

45. Accordingly, the Court notes that the regular courts took into account all allegations of both parties to the proceedings, the Applicant as a claimant and the respondent, when determining the ownership right over the immovable property in question, and placed them in an equal position, enabling them to present their arguments and evidence.

46. The Court further notes that the Appeals Panel specifically addressed the Applicant's allegation that the subject matter in this second claim is of a different nature from the one decided in the first proceedings, and therefore, the case is not *res judicata*.

47. In this regard, the Court notes that the Appeals Panel took into account the grounds of the Applicant's appeal, which addressed the question of the *res judicata* decision, and the Appeals Panel concluded that the respondent party had been found to be a claimant of the "A" category, because he had ownership rights over the property in question. As regards the Applicant's claim, the Appeals Panel determined that he was a claimant of the "C" category, because he in fact never had a right over the property in question.

48. Therefore, the Court notes that the Appeals Panel examined all allegations which the Applicant raised during the regular proceedings, whereby it provided clear conclusions as to why those allegations were ungrounded.

49. Accordingly, the Court considers that the Applicant's allegations regarding the violation of Article 31 of the Constitution and Article 6 of ECHR are ungrounded.

ii) Alleged violation of Article 8 (Right to respect for private and family life) of the ECHR

50. As to the Applicant's allegations regarding a violation of Article 8 of the ECHR related to the *"right to home",* the Court notes that according to the case law of the ECtHR, the term "home" has an autonomous meaning and assumes, in principle, that the person has developed a domicile relationship to the place of living. Only in such a determined situation, a particular apartment can be considered a home and a particular person may enjoy the protection of the rights of access and housing (see case: ECtHR decision *Wiggins v. United Kingdom*, application no. 7456/76, no. 40, 1978).

51. The Court notes that Article 8 ECHR protects an individual's right to respect for his home and provides for non-interference of public authorities with the exercise of this right, except in cases defined in paragraph 2 of this Article.

52. However, the Court notes that in this case the Applicant does not allege any interference with his home by public authorities, but considers that only he has the right to access the property of which he considers himself the owner. According to the decisions of the regular courts, the Applicant never had a right of ownership over the apartment. Thus, the subject of his appeal is the right to acquire ownership of the concerned apartment and not interference with the Applicant's already acquired right.

53. In this regard, the Court considers that the Applicant's allegations of a violation of Article 8 of the ECHR are ungrounded.

iii) Alleged violation of Article 46 (Protection of Property) and Article 1 of Protocol No. 1 (Protection of property) of the ECHR

54. The Applicant considers that the courts have also violated the rights guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR.

55. In this respect, the Court notes that the right which the Applicant claims to have acquired, could be considered as the right to property if there is a legal basis, namely, if he acquired the apartment in question in accordance with the legal rules through legal inheritance or legal action.

56. However, the Court notes that the courts in their decisions found that the Applicant could not be the holder of the ownership rights over the property in question, because the ownership rights were held by another person prior to the Applicant occupying the apartment. As such, the Applicant could not acquire this ownership under the laws prevalent during the period of his occupancy.

57. Accordingly, the Court notes that the Applicant had not acquired property within the meaning of Article 1 of Protocol 1 of the ECHR, since the right to property does not exist until the moment when the person's right over a property in question is determined. In other words, the right to property does not include the right to acquire the property (see case: ECHR *Marckx v. Belgium* Judgment of 13 June 1979 Application No. 6833/74).

iv) Alleged violation of Article 24 (Equality Before the Law) of the Constitution and Article 14 (Prohibition of discrimination) of the ECHR

58. The Applicant considers that, as a member of a minority community in Kosovo, he was discriminated against during the entire proceedings, which is contrary to Article 24 of the Constitution and Article 14 of the ECHR.

59. In this regard, the Court recalls that a treatment is discriminatory if an individual is treated differently to others in similar positions or situations, and if that difference in treatment has no objective and reasonable justification. In order that it is justified, the treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized (see case: ECHR Judgment, *Marckx v. Belgium,* of 13 June 1979 Application No. 6833/74).

60. Therefore, it is necessary in each specific case to determine whether the Applicant was treated differently from others in the same or similar situations. Any different treatment

shall be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim and if there is no reasonable relationship between the means employed towards that aim.

61. In the present case, the Court notes that, aside from his blanket allegation of a violation of the abovementioned right, the Applicant did not provide any argument which would indicate that in the proceedings of the case he was in any way discriminated against.

62. Therefore, the Court considers that the Applicant's allegation of a violation of the prohibition of discrimination under Article 24 of the Constitution and Article 14 of the ECHR regarding the right to a fair trial are ungrounded.

63. Based on the foregoing, Court considers the Applicant's Referral is an expression of dissatisfaction by the fact that his claim requesting the exercise of his property rights was rejected as ungrounded in all instances, which, in the present case, is not, either directly or indirectly, a result of a lack of a fair trial.

64. Therefore, the Court finds that the Applicant does not provide facts and evidence that could justify other allegations of violation of the rights referred to, because of which there are no elements that indicate *prima facie* that the assessment of the merits would be required.

65. In this respect, the Court notes that the Referral is manifestly ill-founded if it lacks any *prima facie* evidence which would clearly point out to a possible violation of human rights and freedoms (see case: ECHR, *Vanek vs. Slovak Republic,* Decision of 31 May 2005, application no. 53363/99), if the facts in respect of which the Referral is submitted clearly do not constitute a violation of the rights alleged by the Applicant, namely if the Applicant has no "reasoned Referral" (see case: *ECtHR, Mezőtúr-Tiszazugi and Vízgazdálkodási Társulat v. Hungary*, Judgment of 26 July 2005, the application number 5503/02).

66. In sum, the Court considers that in the conducted proceedings there are no facts or circumstances that would in any way indicate that in the proceedings before the regular courts, the Applicant's human rights or freedoms guaranteed by the Constitution or the ECHR have been violated.

67. The Court considers that the Applicant has not substantiated his allegations, nor has he submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (See, case No. KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Syla*, Constitutional Court of the Republic of Kosovo, Constitutional Review of Decision CA. no. 2129/2013, of the Court of Appeal of Kosovo, of 5 December 2013, and Decision CA. no. 1947/2013, of the Court of Appeal of Kosovo, of 5 December 2013).

68. Therefore, the referral as regards the complaints relating to the first set of proceedings, are incompatible *ratione temporis* with the jurisdiction of the Court, in accordance with Rule 36 (3) (g) of the Rules.

69. Regarding the complaints relating to the second set of proceedings, the Referral is manifestly ill-founded, and is to be declared inadmissible in accordance with Rule 36 (1) (d) and (2) (b) of the Rules.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 47 of the Law and Rule 36 (1) (d), 2 (b) and (3) (g) of the Rules of Procedure, in its session held on 31 May 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI50/15, Applicant: Florim Leci, who requests the constitutional review of Judgment Rev. no. 230/2014 of the Supreme Court of Kosovo, of 4 December 2014.

KI50/15, Resolution on inadmissibility of 28 March 2017, published on 7 July 2017

Key words: Individual referral, constitutional review of the Judgment of the Supreme Court of Kosovo, criminal proceedings, manifestly ill-founded

The Applicant submitted his Referral based on Article 113.7 of the Constitution, Articles 22 and 47 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

This case is about the murder of a person and injury of a few others during a theft in a private house. The act of theft had been carried out by several persons, and the Applicant and two other persons were taken into pre-trial detention accused of having committed the criminal offense.

Criminal proceedings against the Applicant for the criminal offense of "Grave cases of theft in the nature of robbery or robbery" had been conducted before the ordinary courts.

The said criminal proceedings against the Applicant were concluded by a Judgment of the Supreme Court which rejected the Applicant's request for protection of legality as ungrounded and upheld the judgment of the first- and second-instance courts whereby the Applicant had been found guilty.

The Basic Court found the Applicant guilty, reasoning that he had not supported by any piece of evidence his defense which was based on the allegation that he was unable to commit the criminal offense due to suffering from type 1 diabetes.

The Court noted that the Applicant's Referral is about the manner in which various trial courts dealt with the evidence during the proceedings conducted against him. The Applicant's main allegation concerns the continuous rejection of regular courts to order an ADN testing and a direct medical examination in order to establish the factual situation in this matter.

Therefore, Court considered that the Applicant had not substantiated his claims regarding the violation of the right to a fair trial due to the failure of the regular courts to call for a DNA test on the blood stains in the victim's and the Applicant's clothing.

In conclusion, the Court considered that the Applicant's Referral had not met the admissibility requirements established by the Constitution, foreseen by the Law and further specified by the Rules of Procedure; it, therefore, decided that the Referral was manifestly ill-founded, hence inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 50/15

Applicant

Florim Leci

Constitutional review of Judgment Pml. no. 230/2014 of the Supreme Court of 4 December 2014

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 Mr. Florim Leci (hereinafter: the Applicant), residing in village Gmica, Municipality of Kamenica. The Applicant is represented by Mr. Shabi Sh. Isufi, a practicing lawyer from Gjilan.

Challenged decision

2. The Applicant challenges Judgment Pml. no. 230/2014 of the Supreme Court of 4 December 2014, which was served on the Applicant on 18 December 2014.

Subject matter

3. The subject matter is the constitutional review of Judgment Pml. no. 230/2014 of the Supreme Court, by which, allegedly, Article 31 [Right to Fair and Impartial Trial] and Article 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the "ECHR") have been violated.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the "Law") and Rule 56 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 17 April 2015, the Applicant submitted the Referral by post to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 20 April 2015, the Referral was registered by the Court.

7. On 2 June 2015, the President of the Court, by Decision No. GJR. KI 50/15, appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President of the Court, by Decision No. KSH. KI 50/15, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Almiro Rodrigues and Bekim Sejdiu.

8. On 5 June 2015, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 2 November 2016, the President appointed Judge Altay Suroy to replace Robert Carolan on the Review Panel.

10. On 28 March 2017, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the referral.

Summary of facts

11. On 12 March 2012, one person was murdered and several others were injured during a robbery at a private residence. The robbery was committed by more than one person.

12. On the same day, the Forensics Unit of the police inspected the crime scene and produced a report.

13. On the same day, the Applicant and two other persons were taken into pre-trial detention accused of having committed the criminal act.

14. On 3 April 2012, the District Prosecutor questioned the Applicant about the robbery. The Applicant requested DNA testing be performed on the blood stains and the clothes of the victims and the suspects so that the factual situation could be determined (Minutes PPH. No. 65/2012).

15. On 11 June 2012, at the hearing session on the extension of his detention, the Applicant repeated his request for DNA testing (Minutes PPr. No. 27/12).

16. On 8 October 2012, the District Public Prosecutor's Office filed an Indictment (PP. no. 65/2012) with the District Court in Gjilan against the Applicant for having committed the criminal offence under Article 256, paragraph 2 [Grave Cases of Theft in the Nature of Robbery or Robbery], as read in conjunction of Article 23 of the Provisional Criminal Code of Kosovo (hereinafter: the "PCCK").

17. On 22 November 2012, the hearing session confirming the Indictment was held. The Applicant requested DNA testing at this hearing session confirming the Indictment. Specifically, the Applicant proposed comparing the blood samples of the victim, the injured party and that of the suspects. This testing would be vital, according to the Applicant, in order to determine the correct factual circumstances, given that there are substantial contradictions between the statements of the co-accused.

18. On the same day, the District Court in Gjilan (Judgment P. (k.a.) No. 171/12) confirmed the indictment of 8 October 2012 (PP. no. 65/2012). In its decision, the District Court

in Gjilan did not address the Applicant's request for DNA testing that was raised during the hearing session.

19. On 25 January 2013, the Applicant addressed the Basic Court - Department for Serious Crimes requesting a direct examination of the Applicant by a committee of medical experts to determine whether a person suffering from Type I Diabetes, at the level of severity of the Applicant, would be physically capable to undertake the actions necessary for committing the criminal offence.

20. On 9 February 2013, the Applicant addressed the Basic Prosecutions Office - Department for Serious Crimes with a submission requesting an examination of the Applicant by a committee of medical experts in order to determine the factual circumstances of the criminal offence.

21. On 19 June 2013, the University Clinical Center of Kosovo (hereinafter: the UCCK), as requested by the Basic Court in Gjilan, submitted to the Basic Court in Gjilan a medical report with respect to the Applicant. The Court had required the Commission of Doctors to give their expert opinion as to whether the accused person (the Applicant) was able to undertake the actions which he is charged with in the Indictment, taking into account also the medical diagnosis under which he is treated.

22. The medical report ascertained, *inter alia,* the following:

> *1. "[The Applicant], born on 27.03.1993, in October 2010 was diagnosed with type I diabetes, a lifelong disease, which requires the application of insulin permanently for survival, as prescribed by the endocrinologist.*
>
> *2. The disease, when well controlled, enables good physical and mental skills. […]*
>
> *3. […] It is impossible to conclude how it was at the time of the offense the blood glucose due to a stressful situation and whether he received in advance insulin. Since the act of theft in question was premeditated and prepared, it is difficult to believe that the accused committed the criminal act without taking insulin and without knowing the blood glucose level.*
>
> *4. [The Applicant] after 2 years with diabetes and acquaintance with hypoglycemia, including subjective signs, seems not likely that he has put himself in such a situation. […]*
>
> *5. […]"*

23. On 9 September 2013, the Applicant again addressed the Basic Court - Department for Serious Crimes with a submission objecting to the medical report of the UCCK on the grounds that the Applicant was not directly examined. The Applicant further requested that the Basic Court - Department for Serious Crimes act in accordance with his request dated 25 January 2013, for a direct examination.

24. On 13 September 2013, the Applicant addressed the Presiding and Members of the Trial Panel of the Basic Court - Department for Serious Crimes (P.No. 2006/12), objecting to the expertise performed by the UCCK on grounds that the conclusions of the report are untenable and unfounded given that the Applicant was not examined directly. Furthermore, the Applicant, in his submission addressed to the Presiding and Members of the Trial Panel of the Basic Court - Department for Serious Crimes (P.No. 2006/12), repeated his request for DNA testing, stating that,

"[…] based on the proposal made to the pre-trial Judge on 11 September 2012, and, necessarily, the proposal made earlier to the Prosecutor on 03 April 2013, because the explanation according to which the traces do not exist or have been lost, is of no importance to us, because this explanation is incomplete and ungrounded. The explanation according to which the decisive evidence from the crime scene is also ungrounded, because the Prosecution and the Police should give grounded and fact-based explanation. The Defense cannot be satisfied in this case by the response that the pieces of evidence are missing and keep silent before this ungrounded explanation, as, unfortunately, the crime is serious, while the Accused, in their statements, contradict each other."

25. On 23 December 2013, the UCCK, as requested by the Basic Court in Gjilan, submitted to the Basic Court in Gjilan a forensic-psychiatric report in respect of the Applicant. The Court had required the Commission of Doctors to give their opinion as to whether the accused person (the Applicant) was able to undertake the actions which he is charged with in the Indictment, taking into account also the diagnosis under which he is treated.

26. The report ascertained, *inter alia,* the following:

1. *"During the ambulant psychiatric examination, it was not ascertained that he suffers from any mental disease of a permanent or temporary nature. No other mental disease has been found.*

2. *[…]*

3. *Regarding personality characteristics: calm, does not manifest irritability, different concerns. He is very concerned and critical for the situation.*

4. *There is no reduction of liability for the criminal offence which he is charged with.*

5. *He can participate in the court session. His testimonies are valid.*

6. *[…]"*

27. On 27 December 2013, the Basic Court in Gjilan - Department for Serious Crimes (Judgment P. No. 206/2012) found the Applicant guilty of having committed the criminal offence under Article 256, paragraph 2 [Grave Cases of Theft in the Nature of Robbery or Robbery], as read in conjunction of Article 23 of the PCCK.

28. With regard to the Applicant's claim of inability to commit the offence due to his Type I Diabetes, the Basic Court concluded that, based on the report compiled by the UCCK, "*since the act of the theft in question has been premeditated and prepared, it is difficult to believe that the [Applicant] has gone to commit the criminal offence without taking and without knowing the level of glycemia.*"

29. The Court, in the main hearing session, heard the Injured Party, Witnesses, and the Forensics Expert, reviewed the Photo-album NJHR-0048/2012 of 12 March 2013 compiled by the Forensics Unit from the crime scene and the sketch of the crime scene; reviewed the photo-album of the reconstruction of the crime scene and Report no. NJHR-0048/12 on the Criminal Scene Inspection, of 03 July 2013; reviewed the CD taken from the photo cameras; read the Autopsy Report, as well as Photo-album MA. no. 12/050 on Abduction, of 12 March 2012; read the Forensics Expertise Report for the Injured, compiled by the Service Office N.SH.Uka. no. 028/050, of 02 October 2012;

read the Forensics Expertise Report no. 3539 of the UCCK, Endocrinological Clinic, of 028/2013, for the [Applicant]; it read Report no. 257 of the UCCK-Psychiatry Clinic, for [the Applicant], of 23 December 2013.

30. From the witness testimonies, the Basic Court ascertained that, *"[…] a man was lying prostrate while the now Late H was hitting him with hands. He heard the person shouting:* "Do not hit me because I suffer from the sugar disease". *This fact was also confirmed by the Injured – V.K., who stated that he had heard the Injured H mentioning that the person who was there had said,* " release me because I suffer from the sugar disease". *Even the [Applicant] himself did not deny the fact that he suffers from the sugar disease."*

31. The Basic Court continues, "*The Court has also considered the Defense argument according to which the [Applicant] could not commit this criminal offence even if he wanted to, due to the diabetes and the high level of sugar and that he had taken insulin. Such defense is not based on any piece of material evidence because based on the Medical Report of the UCCK- Endocrinological Clinic in Prishtina, it was ascertained that the [Applicant] was diagnosed with type I diabetes and that if well controlled, the disease enables good physical and mental abilities and that the theft act has been premeditated and well prepared. It is difficult to believe that the [Applicant] has gone to commit the criminal offence without taking the insulin and without knowing the level of glycemia. Therefore, the Court considers that such defense of the [Applicant] has been addressed by him with the sole purpose of averting the criminal responsibility and that the actions of the [Applicant] contain all the characteristics of the criminal offence of theft or robbery, provided by Article 256, paragraph 2, as read in conjunction with Article 23 of the PCCK."*

32. Against this Judgment, the Applicant filed an appeal with the Court of Appeal. The Applicant challenged the Basic Court's rejection of the proposal for DNA analysis and contended that it "*essentially violated the provisions of the criminal procedure, pursuant to Article 403, paragraph 2, item 1 and 2 of the PCPCK*".

33. The Applicant also alleged a violation of the same provisions of the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK), because the court did not fairly consider his proposal of forming a committee of endocrinology experts to directly examine the Applicant, instead of the report of the experts who provided their opinion without a direct examination.

34. On 30 June 2014, the Court of Appeal (Judgment PAKR. No. 261/2014) rejected the Applicant's appeal and upheld the Judgment of the Basic Court. The Court of Appeal found each individual allegation of the Applicant untenable because the Judgment of the first instance court did not include violations of the provisions of the criminal procedure or violations of the criminal law.

35. According to the Court of Appeal, the allegations in the appeal do not stand, that the DNA analysis should be done and the consultative team of doctors for the ascertainment of the condition of the Applicant should be created for the purpose of a correct ascertainment of facts, whether the Applicant, in the presence of his sickness – diabetes – could have undertaken the actions to commit the criminal offense for which he was found guilty. The Court of Appeals reasoned that,

> *"[…] due to the reason that both expertises of which the Appeal alleges have been conducted, and based on the expertise conducted […], it is not contested that the [Applicant] suffers from type one diabetes, a sickness which is permanent, and based on the same expertise on the actions of the Accused for the commission of the*

criminal offense, in the presence of taking the insulin, the sickness can be controlled well, and the physical and mental abilities are well preserved, and it cannot be concluded that at the moment of the commission of the criminal offense, his glycemia had risen due to the situation where the [Applicant] found himself. […] as regards the DNA analysis, it was not even necessary to be done due to the fact that the perpetrators of the criminal offense the [Applicant] and the Juvenile, as well as the Deceased and the Injured Person, who suffered severe bodily injuries, have been identified, and there was no need for a DNA analysis, because nothing new would have been confirmed by it […]."

36. On 15 September 2014, the Applicant filed a request for protection of legality with the Supreme Court of Kosovo against the Judgment of the Court of Appeal.

37. On 4 December 2014, the Supreme Court (Judgment Pml. no. 230/2014) rejected as ungrounded the Applicant's request for protection of legality. The Supreme Court reasoned that the majority of the Applicant's allegations against the challenged Judgments "[…] *are related to the ascertainment of the factual situation, whereas in conformity with the provision of Article 432, of CPCK, the request for protection of legality cannot be filed for this legal basis.*"

38. With regards to the Basic Court's rejection of the request for a DNA test, the Supreme Court of Kosovo found that the Basic Court in Gjilan "*provided the legal reasons, and those reasons are based on the ascertained factual situation during the procedure of administration of pieces of evidence, and the second instance court has correctly admitted them as lawful.*"

39. Furthermore, with regards to the medical expertise, the Supreme Court found that the Applicant's mental and health condition were ascertained by doctors of relevant fields and, based on these expert reports, it was ascertained that the Applicant was capable of undertaking the actions necessary for committing the criminal offence for which he was found guilty.

Applicant's allegations

40. The Applicant alleges the following:

1. Violation of Article 31 of the Constitution:

Specifically, the Applicant alleges that "*[…] according to the pieces of evidence which are submitted to the Constitutional Court, it results that the Applicant, in order to correctly ascertain the factual situation and find the truth of this criminal case, requested to perform the DNA analysis, to administer a lie-detector test, to establish a Medical Committee in order to certify the physical capabilities of the Applicant to commit the criminal offence wherefore he has been adjudicated, which were disregarded by the Prosecution, the first instance Court, and other Courts, aiming to finalize this criminal case as soon as possible, while it has not been acted in the same manner as in other cases, based on the case law, and in this manner the right for a fair and impartial trial, based on the Constitution of the Republic of Kosovo, has been flagrantly violated.*"

2. Violation of Article 53 of the Constitution:

Specifically, the Applicant alleges that "*[…] the fundamental human rights and freedoms, guaranteed by this Constitution, are interpreted in harmony with the judicial decisions of the European Court of Human Rights, which, in the present*

case, it was not acted in the same manner, because the rights of the parties to the procedure are guaranteed by the Constitution, and the courts of the state in this case should have applied the legal provisions which guarantee the equality of the parties, the human rights and freedoms, by fairly and impartially adjudicating and deciding in relation to the submissions of the Applicant in all stages of the procedure and in all the Courts whereto they have been submitted."

Assessment of the Admissibility of the Referral

41. In order to be able to adjudicate the Applicant's Referral, the Court has to first assess whether the Applicant has met all the requirements for admissibility, which are foreseen by the Constitution, the Law and the Rules of Procedure.

42. The Court needs to determine first whether the Applicant is an authorized party within the meaning of Article 113 (7) of the Constitution, which states that,

> "*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*."

43. In this respect, the Court notes that the Referral was submitted to the Court by an individual.

44. Furthermore, in accordance with Article 49 of the Law, an Applicant must submit the Referral within four (4) months after the final court judgment. On 4 December 2014, the Supreme Court rendered Judgment Pml. no. 230/14, whereas the Judgment was served on the Applicant on 18 December 2014. The Applicant sent the Referral by post to the Court on 17 April 2015. Therefore, the Applicant has complied with the necessary deadline for filing a referral with the Court.

45. In addition, the Supreme Court is considered as a last instance court to adjudicate the issue in this criminal proceeding. As a result, the Court also determines that the Applicant has exhausted all the legal remedies available to him under Kosovo law.

46. Finally, Article 48 of the Law establishes that, "*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*."

47. In this respect, the Court notes that the Applicant challenges the Judgment of the Supreme Court, whereby he alleges that his rights guaranteed by Article 31 [Right to a Fair and Impartial Trial] and Article 53 [Interpretation of Human Rights Provisions] of the Constitution and Article 6 (Right to a fair trial) of the ECHR have been violated. Therefore, the Applicant has also fulfilled this requirement.

48. However, the Court also takes into account Rules 36 (1) (d) and36 (2) of the Rules of Procedure, which provide 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:*

(a) the referral is not prima facie justified, or
(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or
(c) the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or
(d) the Applicant does not sufficiently substantiate his claim."

49. The Court notes that the Applicant's claim relates to the manner in which the various trial courts handled the evidence in the proceedings against him. The principle claim of the Applicant concerns the consistent refusal of the regular courts to authorize a DNA analysis and a direct medical examination of his person in order to verify the factual situation of the events.

50. In this connection, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which, in its fourth paragraph, provides that,

> *"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."*

51. The Court also refers to Article 6 [Right to a fair trial] of the ECHR which, in its third paragraph, provides that,

> *"3. Everyone charged with a criminal offence has the following minimum rights: [...]*
> *(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;"*

52. The Court observes that Article 6 (3.d) consists of three distinct elements, namely: a) the right to challenge witnesses for the prosecution (or test other evidence submitted by the prosecution in support of their case); b) the right, in certain circumstances, to call a witness of one's choosing to testify at trial, i.e. witnesses for the defense; and c) the right to examine prosecution witnesses on the same conditions as those afforded to the defense witnesses.

53. The Court recalls the consistent case-law of the European Court of Human Rights (hereinafter: ECtHR), that, *"As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. More specifically, Article 6 para. 3 (d) (art. 6-3-d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system; it "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter". [...] The task of the European Court is to ascertain whether the proceedings in issue, considered as a whole, were fair as required by paragraph 1 (art. 6-1)."* (*see* Vidal v. Belgium, Application no. 12351/86, Judgment of 22 April 1992).

54. Moreover, in the ECtHR's Judgment in the V.D. case (*see* V.D. v. Romania, Application no. 7078/02, Judgment of 28 June 2010) a Romanian national was sentenced to ten years' imprisonment for rape, five years for incest and six months for armed robbery. The decision was based mainly on statements given to the village police by the applicant's grandmother and her neighbor. It was further based on the statements of

five indirect witnesses and on a forensic medical report which did not include a DNA test, despite the applicant's requests to that effect.

55. In this case, the ECtHR held that, *"A DNA test would at least have confirmed the victim's version of events or provided V.D. with substantial information in order to undermine the credibility of her account. However, the courts had not authorised any such test."* The ECtHR further held that *"There had also been other shortcomings in the investigation conducted on 1 April 2001, including the failure of the police to search for any traces of assault at the scene."* Consequently, the ECtHR held that there had been a violation of Article 6 (1) and (3.d) of ECHR.

56. Following the above-mentioned reasoning, the Court notes that the "Equality of arms" principle requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage vis-à-vis another party. Although, there is no exhaustive definition as to what are the minimum requirements of "equality of arms", there must be adequate procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties. These may include opportunities to adduce evidence.

57. In this respect, the Court notes that the refusal by a court to nominate an expert, hear a witness or to accept other types of evidence might in certain circumstances render the proceedings unfair unless such limitations are consistent with the principle of "equality of arms", the full realization of which is the essential aim of Article 6 (3) (d) and also Article 31 of the Constitution.

58. Furthermore, persons alleging a breach of Article 6 (3) (d) must prove not only that they were not permitted to call a certain witness, but also that hearing the witness was absolutely necessary in order to ascertain the truth, and that the failure to hear the witness prejudiced the rights of the defense and fairness of the proceedings as a whole.

59. In this regard, the question before this Court is whether the regular courts violated the Applicant's Constitutional "[...] *right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence*." However, it is not within the authority of this Court to determine whether under the law there was sufficient evidence to find the Applicant guilty of the crime. The Court only seeks to determine whether procedurally the regular courts violated the Applicant's rights pursuant to the Constitution.

60. In this respect, the Court notes that, from the above-mentioned case law, there are five criteria applicable in determining whether a rejection of a request by the defense to hear a witness has affected whether the proceedings as a whole were fair or not. These criteria are as follows:

(1) the request for a witness is not vexatious;

(2) the request for a witness is sufficiently reasoned;

(3) the request for a witness is relevant to the subject matter of the accusation;

(4) the request for a witness arguably strengthens the position of the defense or may even lead to acquittal; and

(5) relevant reasons are provided by the court for rejecting a request for a witness.

61. As to the first criterion, the Court notes that the requests made by the Applicant were logically consistent with the accusations and the factual events described by the eye-witness testimony and were raised throughout the judicial proceedings in order to build a case for the defense to the charged offence. Therefore, the Court does not consider the Applicant's requests for expert witnesses to be vexatious.

62. With respect to the second criterion, the Court observes that the Applicant made the request for a direct medical examination by expert witnesses on the following grounds: "*The performance of this expertise is proposed since* [the Applicant] *is seriously ill from diabetes, a fact that is known by the Prosecution, and moreover* [the Applicant] *in all stages of the investigation procedure has denied committing the offence for which he is accused, while on the other hand there are contradictions between* [the Applicant] *and the minor defendant*".

63. With regard to the request for DNA testing, the Applicant's proposal was made on the following grounds: "[...] *at all stages of the procedure I have proposed DNA testing to compare the blood samples of the victims with the blood samples of the suspect* [...] *and I consider that it is of vital importance in verifying the facts because until now between* [the Applicant] *but also the minor defendant* [...] *there are major contradictions*".

64. In these circumstances, the Court finds that the Applicant's requests for additional expert witness testimony were sufficiently reasoned.

65. With regard to the third criterion, the Court concludes that the requests for direct examination and DNA testing are relevant to the subject matter of the accusation in the criminal case since the Applicant sought the former to prove that he was unable to undertake the actions he was charged with and the latter to confirm the identity of the actual perpetrator of the criminal offence.

66. As to the fourth criterion, the Court considers that the Applicant's requests for expert witnesses to perform a direct medical examination and DNA testing may have played a significant role in strengthening the position of the Applicant's defense or even led to his acquittal (see, *inter alia, Dorokhov v. Russia*, Application no. 66802/01, Judgment of 14 February 2008), given that the criminal court is bound by the *in dubio pro reo* principle (see *Melich and Beck v. the Czech Republic*, Application no. 35450/04, Judgment of 24 July 2008).

67. Concerning the final criterion, the Court notes that the first instance court, by implicitly rejecting the request for DNA testing, failed to provide relevant reasoning for its decision to reject the Applicant's request. Moreover, the Court notes that the first instance court did not address the Applicant's request for a direct examination by a committee of medical experts, relying instead on the report of the endocrinologists of the UCCK, which provided their professional opinion based on the case-file. As such, the Court considers that the medical expertise expressed an opinion on the status of persons in similar situations as the Applicant, but did not provide an opinion on the exact state of the Applicant.

68. However, the Court notes that the second instance court addressed the Applicant's requests for a medical expertise and for DNA evidence.

69. Regarding the request for a direct medical examination of the Applicant the second instance court reasoned that, "[...] *based on the expertise conducted [...], it is not contested that the [Applicant], suffers from type one diabetes, a sickness which is*

permanent, and based on the same expertise on the actions of the [Applicant] for the commission of the criminal offense, in the presence of taking the insulin, the sickness can be controlled well, and the physical and mental abilities are well preserved, and it cannot be concluded that at the moment of the commission of the criminal offense, his glycemia had risen due to the situation where the [Applicant] found himself."

70. Regarding the request for DNA evidence of the blood stains, the second instance court reasoned that there was a large amount of other corroborating evidence such that, *"as regards the DNA analysis, it was not even necessary to be done due to the fact that the perpetrators of the criminal offense the [Applicant] and the Juvenile, as well as the Deceased and the Injured, who suffered severe bodily injuries, have been identified, and there was no need for a DNA analysis, because nothing new would have been confirmed by it, and in the presence of the pieces of evidence put forward in the court hearing session, hearing of the witnesses, photo documentation, phone tapping, viewing of the CD recordings obtained by NTP "Toqi", in Malisheva, the expertise of experts of endocrinology and internists, the expertise of neuropsychiatry as well as the expertise of the Forensics expert [...]."*

71. In these circumstances, the Court finds that the regular courts have reasoned their decisions to reject the Applicant's requests for DNA testing and direct medical examination, because the regular courts considered that they had sufficient other evidence available to them to support their verdict.

72. Therefore, the Court considers that the Applicant has not substantiated his claims to a violation of the rights to a fair trial due to the failure of the regular courts to call for a DNA test on the blood stains in the victim's and the Applicant's clothing, coupled with the regular courts' decision to reject the Applicant's request for a direct medical examination.

73. In conclusion, the Court considers that the Applicant's Referral has not met the admissibility requirements established by the Constitution, and as further foreseen by the Law and specified by the Rules of Procedure.

74. Therefore, the Referral is manifestly ill-founded on a constitutional basis, and is to be declared inadmissible, in accordance with Rules 36(1)(d) and 36(2)(d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113, paragraphs 1 and 7, of the Constitution, Articles 46 and 48 of the Law and Rules 36 (1) (d) and 36(2)(d) of the Rules of Procedure, at its session held on 28 March 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 Court**
Ivan Čukalović	Arta Rama-Hajrizi

KI 81/16, Applicant Valdet Nikçi, constitutional review of Decision Ac. no. 949/16 of the Court of Appeals, of 20 April 2016

KI81/16 Judgment approved on 31 May 2017, published on 10 July 2017

Key words: *Individual referral, property rights, violation*

The subject matter was the constitutional review of the judgment Ac. no. 949/16, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 21 [General Principles], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo.

The Court noted that the Court of Appeals has confirmed the indefinite suspension of the proceedings *sine die* in the Applicant case. Therefore, the Court fined that there has been a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the ECHR

JUDGMENT

In

Case no. KI81/16

Applicant

Valdet Nikçi

Constitutional review of
Decision Ac. no. 949/16 of the Court of Appeals,
of 20 April 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 Valdet Nikçi, from Peja (hereinafter, the Applicant).

Challenged decision

2. The Applicant challenges Decision Ac. no. 949/16 of the Court of Appeals, of 20 April 2016, which rejected as ungrounded the Applicant's appeal and approved the Decision C. no. 1022/15 of the Basic Court in Peja, of 8 February 2016, on suspending the procedure in his contested case.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 21 [General Principles], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

Legal basis

4. The Referral is based on Article 113.7 of 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

5. On 20 May 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

6. On 14 June 2016, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (Presiding), Snezhana Botusharova and Bekim Sejdiu.

7. On 2 November 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur, replacing Judge Robert Carolan who resigned on 9 September 2016. The President Arta Rama-Hajrizi also appointed herself as judge in the Review Panel replacing Judge Almiro Rodrigues.

8. On 21 November 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeals.

9. On 01 December 2016, the Court informed the Privatization Agency of Kosovo (hereinafter: PAK) about the registration of the Referral and invited them to submit any comments within 7 days of receipt of the invitation.

10. On 12 December 2016, PAK submitted their comments on the Referral.

11. On 14 December 2016, the Court decided to postpone the consideration of the Referral.

12. On 31 May 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral and the finding of a violation of the Constitution.

Summary of facts

A. Initial proceedings

13. The Applicant was employed in the Socially Owned Enterprise "Factory for Metal Constructions" (former "UTVA") in Peja (hereinafter, the FMC), which allegedly had not paid his monthly salaries for the period of 1 June 1995 until 31 March 1997.

14. On 27 May 1997, the Applicant, representing other co-workers, filed a claim with the Municipal Court in Peja against the FMC, requesting the payment of their unpaid salaries.

15. On 27 October 2004, the Municipal Court (Judgment C. no. 133/03) approved the Applicant's claim and obliged the FMC to pay the unpaid monthly income, from 1 June 1995 to 31 March 1999. The Municipal Court *"[…] found that the specified statements of claim of the claimants have legal basis, and as such were approved by the court as grounded"*.

16. On 16 February 2005, the KTA, through the State Public Prosecutor, filed with the Supreme Court a request for protection of legality against the Judgment of the Municipal Court, due to "*essential violations of the provisions of contested procedure and Regulation no. 12/2002 on establishment of Kosovo Trust Agency"*.

17. On 22 March 2005, the Supreme Court (Judgment Mlc. No. 2/2005) rejected as ungrounded the request for protection of legality, reasoning that *"the Municipal Court in Peja had jurisdiction to decide on the claims, in accordance with the Law on Regular*

Courts (No. 21/1978) and it had correctly determined the facts and correctly applied the procedural and the substantive law".

18. Moreover, the Supreme Court assessed the arguments of the request for protection of legality and found that *"the Municipal Courts among other things, are competent to judge the contests regarding the property legal requests" (...) the respondent [FMC] has the quality of the legal person, therefore, the claims that the enterprise, as responding party could not participate in procedure are ungrounded"; (...) "From this provision (Article 29 of that Regulation 12/2002) it is understood that each claim that will be filed after this Regulation enters into force it will be under the regulations determined by this provision, but since the claimants filed the claim before this Regulation entered into force, also the statement in the request for protection of legality that the challenged Judgment violated this provision, is ungrounded".*

B. Repetition of proceedings

19. During the period 2010-2014, the Privatization Agency of Kosovo (hereinafter, PAK), the legal successor to the KTA, submitted two requests for the reopening of proceedings on the Applicant's claim via two parallel proceedings: (A) a first proceeding before the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter, the Appellate Panel) and (B) a second proceeding before the District and Supreme Courts.

B1. Before the Special Chamber of the Supreme Court

20. On 10 January 2011, the PAK filed with the Appellate Panel a request for retrial of the Municipal Court case C.no.133/03 (Judgment C.no.133/03, dated 27 October 2004), on the basis of Article 421 paragraph 3 and 9 of the SFRY Law on Contested Procedure (LCP). The PAK argued that the Municipal Court should have declined jurisdiction to decide the claim as it was filed against FMC, a Socially Owned Enterprise (SOE) under the administration of the Kosovo Trust Agency (KTA), later the PAK.

21. On 3 March 2011, the Appellate Panel (Decision SCPL-11-0001) transferred the request for retrial to the Trial Panel of the Special Chamber in order to take over the case from the jurisdiction of the regular courts pursuant to Section 16, UNMIK Administrative Direction 2008/6.

22. On 4 December 2013, the Specialized Panel of the Special Chamber (the legal successor to the Trial Panel) rejected (Decision SR-11-0001) the PAK request for retrial. The Specialized Panel reasoned that, irrespective of whether or not the Municipal Court had jurisdiction in the case at the time, the decision of the Municipal Court (Judgment C.no.133/03, dated 27.10.2004) had become final and binding (*res judicata)*, because no further appeals against that decision had been filed. The Specialized Panel considered that this decision came within the principle of legal certainty and concluded what follows.

> *"In the case at hand the [PAK] had not raised the matter of lack of jurisdiction during the proceedings at the Pejë/Peć Municipal Court and further it had not filed an appeal against the Judgment of 27 October 2004, received on 16 December 2004. In line with the arguments presented above on the legal status of a Socially Owned Enterprise under the administration of the PAK the fact that the Municipal Court failed to involve the [PAK] in the proceedings does not change the fact [that] the judgment became final.*

The Pejë/Peć Municipal Court Judgment therefore shall not be subject to further review by the Special Chamber".

B2. Before the District and Supreme Courts

23. On 30 April 2010, the PAK filed with the first instance of the District Court in Peja a request for repetition of proceedings regarding case C. no. 133/03, which had been decided by the Municipal Court on 27 October 2004.

24. On 22 November 2010, the first instance of the District Court (Decision Ac. no. 390/2010) rejected as outdated the request for repetition of the proceedings, since the deadline of (5) five years has elapsed.

25. The PAK filed an appeal with the second instance of the District Court, due to violations of the Law on Contested Procedure and erroneous and incomplete determination of the factual situation.

26. On 21 March 2011, the second instance of the District Court (Decision K Ac. no. 4/10) quashed the first instance decision of the District Court and remanded the case to the first instance of the District Court for reconsideration and retrial. That Decision specifically considered that the regularity of the appealed decision "*cannot be assessed because when deciding the* (first instance) *District Court erroneously applied the provision of Article 196, in conjunction with Article 237.2, of the LCP, because the representative of PAK with the proposal regarding the request for repetition of the procedure, its claims were that where upon deciding on merit Article 421, item 3, of the LCP, was violated, because in procedure participated as claimant or respondent the person who cannot be party in the procedure or the party which is legal person did not represent the authorized person. Since this claim was in the proposal for the repetition of the procedure then the Court should have assessed this matter".*

27. On 20 April 2011, the first instance of the District Court (Decision AC. no. 141/2011) annulled the original Judgment (C no. 133/03, of 27 October 2004) of the Municipal Court and allowed the repetition of the procedure.

28. On 3 July 2011, the Applicant filed with the Supreme Court a request for revision of that Decision, "*due to essential violations of the provisions of LCP".*

29. The Applicant namely alleged in his request for revision that KTA *"was notified regarding (...) the contest in the Municipal Court in Peja is being conducted (...). This notification was made on 10 May 2004, at 11:20"; (...) "no appeal was filed against this Judgment so that this Judgment became final"; (...) "the Supreme Court of Kosovo* [Judgment Mlc. No. 2/2005, of 22 March 2005] *responded regarding the doubt (...) if it is in question the matter of legitimacy of the respondent party or not and if the provisions of Article 29, of UNMIK Regulation 12/2002 were violated"; (...) "the Court of the first instance decided for the claim against Metal Construction Factory* [FMC] *in Peja, and not against the Agency".*

30. On 3 April 2014, the Supreme Court (Decision Rev. no. 21/2014) rejected as inadmissible the Applicant's request for revision.

C. Reopening and suspending the proceedings

31. As a consequence of the approval of the repetition of proceedings by the first instance of the District Court, the Basic Court in Peja (legal successor to the Municipal Court in Peja based on the new Law on Courts, which entered into force on 1 January 2013)

started to review the case, now registered with the Basic Court under number C. no. 254/11.

32. On 2 June 2014, the PAK requested the Basic Court *"to terminate all the procedures (...) by also involving the session* [on 8 July 2014 at 10:00] *of Court case C. no. 254/11, of 8 July 2014",* because, under the Law 03/L-067 on Privatization Agency of Kosovo, applicable at that time, any proceedings concerning a Socially Owned Enterprise in a liquidation procedure shall be suspended.

33. On 23 July 2014, the Applicant submitted the Referral KI121/14 to the Constitutional Court alleging, *inter alia,* a violation of the right to a fair trial due to various substantive decisions of the Supreme Court and the District Court. The Basic Court was informed about the registration of the Referral KI121/14.

34. On 3 September 2014, the Basic Court suspended the contested procedure *"for indefinite time and the date of the next hearing will be set after the Constitutional Court decides on the legality* (sic) *of the decision of the Supreme Court [...]".*

35. On 8 September 2015, the Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 47.2. of the Law and Rule 36(1)(a) of the Rules of Procedure, declared the Referral KI121/14 inadmissible, because the Applicant had not exhausted yet all legal remedies.

36. Following the decision of the Constitutional Court, the Basic Court resumed its consideration of the contested proceedings.

37. On 8 February 2016, the Basic Court (Decision C. no. 1022/15) suspended consideration of the contested proceedings in the case C. no. 254/11 pending the conclusion of the liquidation procedure of the FMC. The Basic Court reasoned what follows.

> *"According to provisions of Article 10, paragraph 1, of the Annex of Law no. 04/L-034 on the Privatization Agency of Kosovo, it is determined that any judicial, administrative or arbitration action, proceeding or act involving or against an Enterprise (or any of its assets) that is the subject of a Liquidation Decision shall be suspended upon the submission by the Liquidation Authority of a notice of the Liquidation Decision to the concerned court, public authority or arbitral tribunal.*
>
> *(...)*
>
> *Therefore, based on the above mentioned reasons and also on the above mentioned provisions, since the Metal Construction Factory in Peja is in liquidation from 16 November 2007, based on the Decision of the board of Kosovo Trust Agency, of 1 November 2007, the Court decided to suspend the procedure in this contested case".*

38. The Applicant filed with the Court of Appeals an appeal, alleging *"essential violation of rules of contested procedure, erroneous and incomplete application of the factual situation, erroneous application of the substantive law".*

39. On 20 April 2016, the Court of Appeals (Decision Ac. no. 949/16) rejected as ungrounded the Applicant's appeal and approved the Decision of the Basic Court of 8 February 2016.

40. Moreover, the Court of Appeals acknowledged that Judgment C. no. 133/03 of the Municipal Court, of 27 October 2004, *"became final on 28 December 2004".* It further

acknowledged that "*By Decision Ac. No. 141/2011, of 20 April 2011, the District Court in Peja allows the repetition of the procedure terminated by final Judgment CP. No. 133/03, of the Municipal Court in Peja, of 27 October 2004, and annuls the mentioned Judgment*".

Applicant's allegations

41. The Applicant claims that the decisions of the regular courts, namely of the Court of Appeals (Decision Ac. no. 949/16), violated his rights guaranteed by Article 21 [General Principles], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution.

42. The Applicant primarily alleges that the Court of Appeals, by suspending the contested proceedings until the conclusion of the liquidation of the FMC, has effectively prevented him from ever receiving a final determination on his claim.

43. Furthermore, in the Applicant's own words, *"this procedure is final because after the liquidation procedure is over, this enterprise will not exist anymore and there will be nothing to consider, as the proverb says: 'A dead man has no luck'"*.

44. Moreover, the Applicant requests the Court *"to ascertain the legality and constitutionality"* of the decisions delivered in his case and, namely, *"if the Basic Court in Peja,* [Decision C. no. 1022/15, of 8 February 2016] *decided correctly wherein suspends the procedure because the enterprise is in liquidation procedure, and that the enterprise was in liquidation procedure also at the time when the proposal for the repetition of the procedure was approved, and also if the Court of Appeals* [Decision Ac. no. 949/16, of 20 April 2016] *decided correctly when it rejected the appeal and approved Decision C. no. 1022/15"*.

45. In the end, the Applicant claims a final decision on the payment of unpaid salaries. The challenged Decision, allegedly suspending the proceedings *sine die*, makes the final payment almost not achievable and denies to the Applicant the right to a final decision.

Admissibility of the Referral

46. The Court refers to Article 46 [Admissibility], which provides:

> *The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that all legal requirements have been met.*

47. Thus, the Court first assesses whether the Applicant has met the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

48. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides:

> *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.*

49. The Court also refers to Article 47, 48 and 49 of the Law, which provide as it follows.

Article 47 [Individual Requests]

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.

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.

50. The Court further refers to Rule 36 (1) (b) of the Rules of Procedure which foresees:

(1) The Court may consider a referral if:
[...]
b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.

51. The Court notes that the Applicant filed the Referral on 20 May 2016, challenging the Decision of the Court of Appeals of 20 April 2016, which has indefinitely suspended the proceedings, where he is a claimant, and allegedly violated his rights to equality before the law, to fair and impartial trial and to legal remedies.

52. The Court considers that the Applicant is an authorized party, has exhausted all the legal remedies provided by the law, submitted his Referral within the provided period of four (4) months and accurately clarified what rights have allegedly been violated and specified what concrete act of public authority he is challenging.

53. Therefore, the Court, pursuant to Article 46 of the Law, determines that that the Applicant has met the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

54. Consequently, the Applicant's Referral is admissible and the Court will now assess the substantive legal aspects of his Referral.

Substantive legal aspects of the Referral

55. The Court recalls that the Applicant claims a violation of (i) his rights to a fair and impartial public hearing within a reasonable time and (ii) to legal remedies. The Applicant also claims a violation of (iii) his right to equality before the law and the general principles of the Constitution.

(i) Alleged violation of the right to a fair and impartial public hearing within a reasonable time

56. The Court also recalls that the Applicant alleges that the Decision Ac. no. 949/16 of the Court of Appeals, of 20 April 2016, violated his right to a timely final judicial decision, by approving the decision of the Basic Court on suspending consideration of the

contested proceedings until an unforeseen conclusion of the liquidation procedure of the FMC.

57. The Court observes that the Court of Appeals failed to specify a date either for the period of suspension of the proceedings or any foreseeable indicative date for the conclusion of the liquidation procedure of the FMC.

58. Furthermore, the Court notes that the Court of Appeals and the Basic Court based their Decisions on paragraph 1 of Article 10 [Suspension of actions] of the Annex to Law no. 04/L-034 on the Privatization Agency of Kosovo. This provision foresees:

> *1. Any judicial, administrative or arbitration action, proceeding or act involving or against an Enterprise (or any of its assets) that is the subject of a Liquidation Decision shall be suspended upon the submission by the Liquidation Authority of a notice of the Liquidation Decision to the concerned court, public authority or arbitral tribunal.*

59. The Court recalls that, on 4 December 2013, the Specialized Panel of the Special Chamber (Decision SR-11-0001) decided that the original claim of the Applicant for payment of his unpaid salaries had been determined in final instance by the Municipal Court of Peja in its Judgment C.no.133/03) of 27 October 2004. According to the Specialized Panel, this Judgment was final and binding and had become *res judicata*. The Specialized Panel further concluded that "*the Pejë/Peć Municipal Court Judgment therefore shall not be subject to further review by the Special Chamber*".

60. The Court recalls that, on 20 April 2011, the District Court (Decision AC.no.141/2011) decided to annul the Judgment of the Municipal Court of 27 October 2004 and allowed the repetition of the proceedings. Consequently, the Basic Court reopened the proceedings on the Applicant's claim.

61. The Court considers that the final determination on the long standing Applicant's claim to the payment of unpaid salaries has not been concluded yet. In fact, the contested proceedings on this claim have been reopened and subsequently suspended by the Basic Court pending a conclusion of the liquidation of the FMC. That suspension was confirmed by the challenged Decision of the Court of Appeals.

62. The Court refers to Article 31 [Right to Fair and Impartial trial] of the Constitution, which in its second paragraph provides:

> *2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations [...] within a reasonable time [...].*

63. The Court also recalls paragraph 1 of Article 6 [Right to Fair trial] of the European Convention on Human Rights (hereinafter, the ECHR), which provides:

> *1. In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time [...].*

64. The Court 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"*.

65. In that respect, the Court recalls that the European Court of Human Rights (hereinafter, the ECtHR) has interpreted the scope of application of Article 6 (1) of the ECHR to

provide, at least, that claims related to purely economic rights, such as claims for salary or an 'essentially economic' right, come within the meaning of the phrase "civil rights and obligations". (See, *mutatis mutandis,* ECtHR case *Vilho Eskelin and Others v. Finland*, No. 63235/00, Judgment of 19 April 2007, paragraph 45).

66. Thus the Court considers that the Applicant's claim for payment of unpaid salaries comes within the scope of 'civil rights and obligations' as established in Article 6 (1) of the ECHR and in Article 31 (2) of the Constitution.

67. Therefore, the Court finds that the contested proceedings on the Applicant's claim are 'directly decisive' for the determination of his civil right to payment of unpaid salaries, within the meaning of Article 6 (1) ECHR and Article 31 (2) of the Constitution. (See, *mutatis mutandis*, ECtHR case *Ringeisen v. Austria*, No. 2614/65, Judgment of 16 July 1971, paragraph 94).

68. The Court notes that the Applicant's Referral primarily concerns the suspension of the proceedings on his civil claim, which have started on 27 May 1997 and have been suspended on 20 April 2016, pending the conclusion of a liquidation of the FMC, without any apparent date for the conclusion of all this process.

69. In this connection, the Court notes that the Constitution entered into force on 15 June 2008.

70. The Court also notes that the period to be taken into consideration for these proceedings began on the date of the Constitution entering into force, even though the Applicant entered a claim with Municipal Court in 1997 and a final decision has allegedly been delivered in 2004.

71. The Court further notes that, similarly as to the ECtHR, the Court has no jurisdiction to analyze the juridical quality of the decisions of the regular courts. However, it considers that, since the remittal of cases for reopening is usually ordered as a result of errors previously committed, the repetition of such orders within one set of proceedings may disclose a serious deficiency in the judicial system. (See ECtHR cases *Wierciszewska v. Poland*, no. 41431/98, Judgment of 25 November 2003, paragraph 46; *Šilc v. Slovenia*, No. 45936/99, Judgment of 29 June 2006, paragraph 32).

72. The Court considers that the proceedings had apparently been concluded on the date of entry into force of the Constitution. The additional court proceedings which followed after the entry into force of the Constitution were exclusively concerned with the request of the PAK for reopening of the case and then for the subsequent suspension of the case.

73. These additional proceedings began on 30 April 2010. They included proceedings before three separate instances of the District Court, two instances of the Special Chamber of the Supreme Court, one instance of the Supreme Court in Revision, the initiation of the reopened proceedings before the Basic Court and the decision of the Court of Appeals on 20 April 2016.

74. The Court observes that over a period of nine (9) years the regular courts conducted proceedings in different and separate instances. Even though, on that basis, in and of itself, the Court considers that the KTA/PAK and the regular courts have failed to proceed the Applicant's case with attention to the main questions, diligence in dealing with these questions and effectiveness in reaching the proceedings' objective.

75. The Court recalls that Section 1 [Legal Status] of the Regulation NO. 2002/12 determined that the KTA *"is established as an independent body pursuant to section*

11.2 of the Constitutional Framework". Also Article 5 [Establishment and Legal Status] of the Law No. 03/L-067 determines that the PAK *"is established as an independent public body that shall carry out its functions and responsibilities with full autonomy. (...) The Agency is established as the successor of the Kosovo Trust Agency regulated by UNMIK Regulation 2002/12"*.

76. In fact, the Court observes that initially the KTA and subsequently the PAK, in 2005 and on 2 June 2014 requested the termination and/or suspension of the contested proceedings on the basis of the fact that the FMC was in liquidation.

77. Moreover, the Court notes that KTA has not appealed the Judgment C. no. 133/03 of the Municipal Court of 27 October 2004. However, it has promoted to the State Prosecutor to file a request for protection of legality. One ground for the request was that *"the Special Chamber shall have exclusive jurisdiction for all suits against the Agency"* (Article 30 of the Regulation no. 12/2002 on the Establishment of the Kosovo Trust Agency). The request for protection of legality was rejected as ungrounded by the Supreme Court on 22 March 2005.

78. The Court also notes that, on 30 April 2010, the PAK filed with the first instance of the District Court a request for repetition of proceedings regarding case C. no. 133/03 decided by the Municipal Court on 27 October 2004. The request for the repetition was based on the existence of a liquidation procedure of FMC, which allegedly started on 13 October 2007. On 20 April 2011, the first instance of the District Court (Decision AC. no. 141/2011) annulled the original Judgment C no. 133/03, of 27 October 2004 of the Municipal Court and allowed the repetition of the procedure.

79. The Court further notes that, on 10 January 2011, the PAK filed with the Special Chamber a request for the reopening of proceedings on the Applicant's claim (C no. 133/03, of 27 October 2004), arguing that the Municipal Court should have declined jurisdiction to decide the claim as the matter was under the exclusive jurisdiction of the Special Chamber as it was filed against FMC, a SOE. On 4 December 2013, the Specialized Panel found that the Judgment C.no.133/03 of the Municipal Court dated 27.10.2004 had become final and binding (*res judicata)*. Moreover, the Specialized Panel found that the absence of procedural intervention of the Agency (KTA) in the case C.no.133/03 is not an impeachment to the finality of the judgment and a final judgment in a case in which only the SOE or the Agency has been party is a binding judgment for both, the SOE and the Agency.

80. However, the Court brings together the chronology of procedural initiatives conducted by PAK as it follows.

81. On 30 April 2010, the PAK filed with the first instance of the District Court a request for repetition. On 22 November 2010, the District Court rejected as outdated the request for repetition. The PAK filed an appeal. On 21 March 2011, the second instance of the District Court quashed the first instance decision of the District Court and remanded the case for retrial. On 20 April 2011, the first instance of the District Court annulled the original Judgment of the Municipal Court and allowed the repetition of the procedure. The Applicant filed a revision. On 3 April 2014, the Supreme Court rejected the revision.

82. On 10 January 2011, the PAK filed with the Appellate Panel of the Special Chamber a request for retrial the Municipal Court case. On 4 December 2013, the Specialized Panel of the Special Chamber rejected the PAK request.

83. Before these two sets of facts, the Court observes that PAK filed its request with the District Court on 30 April 2010; similar request was filed with the Special Chamber on 10 January 2011. PAK got a decision on its request filed with the District Court on 3 April 2014; a decision on its request filed with the Special Chamber was delivered on 4 December 2013.

84. The Court concludes that, at least between 10 January 2011 and 4 December 2013, PAK was acting simultaneously with the District Court and Supreme Court, on one side, and with the Special Chamber, on the other side.

85. The Court considers that the conduct of PAK did not contribute to the clarity, transparency, and efficiency and effectiveness of the case.

86. Moreover, the Court observes that, by April 2014, the Basic Court started to review the newly reopened case. However, on 2 June 2014, the PAK requested the suspension of the procedure. On 8 February 2016, the Basic Court suspended the case pending the conclusion of a liquidation procedure of the FMC. As said above, the Basic Court based its decision on Article 10, paragraph 1, of the Annex of Law no. 04/L-034 on the Privatization Agency of Kosovo and that decision was confirmed on 20 April 2016 by the Court of Appeals.

87. The Court considers that KTA/PAK insistently adopted some inconsistent, ambivalent and erratic procedural conduct while, on one side, requesting for repetition of the procedure before the Special Chamber of the Supreme Court because a liquidation procedure started and the subject matter was under the exclusive competence of the Special Chamber; and, on the other side, requesting for repetition of the procedure before the regular courts, because the liquidation procedure was ongoing and the subject matter was also (now not exclusive competence of the Special Chamber anymore) under the competence of the regular courts. Just after having obtained the repetition of the proceedings, PAK requested the suspension of the case until the liquidation procedure is over.

88. The Court recalls again that the Applicant claims that with the indefinite suspension of the proceedings, the Court of Appeals prevented him from receiving a final determination on his unpaid salaries' claim.

89. In that respect, the Court observes that the Supreme Court (Rev. 21/2014) acknowledged the fact that *"by Decision Ac. No. 141/2011, of the District Court in Peja, of 20 April 2011, was allowed the repetition of the procedure terminated by final Judgment C. no. 133/2003, of the Municipal Court in Peja, of 27 October 2004"*.

90. The Court also observes that the Court of Appeals (Ac. No. 949/16) acknowledged that, *"by the request of KTA of 6 July 2004 addressed to the President of the Municipal Court in Peja, KTA requested to suspend the legal process since the Special Chamber of the Supreme Court of Kosovo is competent for this case"; (...) "this Judgment* [C. no. 133/2003, of the Municipal Court, of 27 October 2004] *became final on 28 December 2004"; (...) "By Decision SR-11-0001, the Special Chamber of the Supreme Court decided that the suggestion for the withdrawal of case C. no. 133/03, from the Municipal Court in Peja for the Special Chamber, was rejected"; (...) "on 27 June 2011, PAK again filed request for the termination of the legal procedure in this case because the enterprise is in liquidation procedure"*.

91. The Court considers that the regular courts apparently ignored and disregarded in substance the Decision of the Specialized Panel of the Special Chamber of 4 December

2013 and other aspects of the facts and of law which were relevant for their effective decisions.

92. The Court takes into account that the ECtHR has had regard to the principle of the proper administration of justice, namely, that regular courts are under a duty to deal properly with the cases before them. (See, *mutatis mutandis*, ECtHR case *Boddaert v. Belgium*, Numbered 65/1991/317/389, Judgment of 12 October 1992, § 39).

93. The Court recalls that the ECtHR reiterated that *"it is for Contracting States to organize their legal systems in such a way that their courts can guarantee the right of everyone to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time"*. (See ECtHR case *Mikulić v. Croatia*, No. 53176/99, Judgment of 4 September 2002, § 45).

94. Moreover, the Court reiterates that the right to a court as guaranteed by Article 6 of the ECHR also protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. (See, *mutatis mutandis*, ECtHR Case *Hornsby v. Greece*, Application No. 18357/91, Judgment of 19 March 1997, § 40). Accordingly, the execution of a judicial decision cannot be unduly delayed.

95. The Court also recalls that the ECtHR accepted that *"a stay of execution of a judicial decision for such period as is strictly necessary to enable a satisfactory solution to be found (...) may be justified in exceptional circumstances"*. (See, *mutatis mutandis,* ECtHR case *Immobiliare v. Italy*, Application No. 22774/93, Judgment of 28 July 1999, § 69).

96. The ECtHR concluded that, *"while it may be accepted that Contracting States may (...) intervene in proceedings for the enforcement of a judicial decision, the consequence of such intervention should not be that execution is prevented, invalidated or unduly delayed or, still less, that the substance of the decision is undermined"*. (See *Immobiliare v. Italy*, Ibidem, § 74).

97. In that respect, the Court observes that the KTA/PAK took initiative and the regular courts made their decisions on the repetition and suspension of the proceedings based on the applicable laws regarding a liquidation of FMC as a SOE. However, the regular courts have not taken into consideration legal and factual aspects which were making part of the history of the case, even though the regular courts were aware of them, and which were potentially able to lead the case to an end.

98. Furthermore, the Court notes that, since the date of the Constitution entered into force, the decision on the Applicant's claim for unpaid salaries had already been pending for nine years without a final determination on the Applicant's request. So the case continues after all that period, but mainly continues *sine die*.

99. In fact, the Court considers that the Applicant has been deprived of its right under Article 6 (1) of the Convention to have its request for payment of unpaid salaries finally decided by a court.

100. The Court further considers that that situation is incompatible with the principle of the rule of law.

101. Consequently, the Court finds that there has been a violation of Article 31 of the Constitution, in conjunction with Article 6 (1) of the ECHR.

(ii) Alleged violation of the right to legal remedies

102. The Court recalls that the Applicant also claimed a violation of his right to legal remedies under Article 32 of the Constitution. However, the Applicant does not explain how and why the challenged decision of the Court of Appeals has violated such right.

103. In that respect, the Court refers to Article 32 [Right to Legal Remedies] of the Constitution, which establishes:

> *Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.*

104. The Court also refers to Article 13 [Right to an effective remedy] of the ECHR, which establishes:

> *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

105. The Court considers that the Applicant complains before the Constitutional Court because his right to a final judicial decision within a reasonable time was violated; he is not complaining because he had no legal remedy available to secure his right to a reasonably timed and final decision.

106. In fact, the Court considered his Referral admissible namely because he has exhausted all legal remedies available complying with the principle of subsidiarity. In fact, the Court is aware of that the Kosovo legal system does not foresee legal remedies in order to speed up the proceedings before the public authorities, including the regular courts, and ensure a final decision in due time. Therefore, the Court considers that, in these circumstances, the Constitutional Court itself is the Applicant's only legal remedy to secure his right to a timed and final decision.

107. The Court recalls that the ECtHR considered that *"even though at present there is no prevailing pattern in the legal orders of the Contracting States in respect of remedies for excessive length of proceedings, there are examples emerging from the Court's own case-law on the rule on exhaustion of domestic remedies which demonstrate that it is not impossible to create such remedies and operate them effectively (see, for instance, Gonzalez Marin v. Spain (dec.), no. 39521/98, ECHR 1999-VII, and Tomé Mota v. Portugal (dec.), no. 32082/96, ECHR 1999-IX)"*. (See ECtHR case *Kudla v. Poland*, No. 30210/96, Judgment of 26 October 2000, § 154).

108. In that same case, the ECtHR further considered that, if Article 13 is *"to be interpreted as having no application to the right to a hearing within a reasonable time as safeguarded by Article 6 § 1, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system"*. (See *Kudla v. Poland*, Ibidem, § 155).

109. The Court considers, as the ECtHR also considered, that *"the correct interpretation of Article 13 is that that provision guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time"*. (See *Kudla v. Poland*, Ibidem, § 156).

110. Therefore, having in mind the need for the Kosovo legal system to establish legal remedies ensuring timely decisions, the Court, in these circumstances, finds no violation of Article 32 [Right to Legal Remedies] of the Constitution, in conjunction with Article 13 [Right to an effective remedy] of the ECHR.

(iii) Alleged violation of the right to equality before the law and the general principles of the Constitution

111. The Court has just found a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the ECHR

112. Therefore, the Court considers that it is not necessary to examine the other Applicant's complaints under Articles 21 [General Principles] and 24 [Equality before the Law] of the Constitution.

Conclusion

113. The Court notes that the Court of Appeals has confirmed the indefinite suspension of the proceedings *sine die*. Thus Court considers that the indefinite suspension of the proceedings is depriving the Applicant of a final decision on his request to be paid the unpaid salaries. Therefore, the Court finds that there has been a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the ECHR.

114. The Court also finds that, in the circumstances of the case, there has been no violation of Article 32 [Right to Legal Remedies] of the Constitution.

115. The Court further finds that it is not necessary to examine the Applicant's other complaints under Articles 21 [General Principles] and 24 [Equality before the Law] of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 20 of the Law, and Rule 56 (a) of the Rules of Procedure, in the session held on 31 May 2017,

DECIDES

I. TO DECLARE, by unanimity, the Referral admissible;

II. TO DECLARE, by majority, that there has been a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the European Convention on Human Rights;

III. TO DECLARE invalid the Decision Ac. no. 949/16 of the Court of Appeals, of 20 April 2016, in accordance with Rule 74 of the Rules of Procedure;

IV. TO REMAND the Decision Ac. no. 949/16 to the Court of Appeals for reconsideration in conformity with this Judgment of the Constitutional Court, in accordance with Rule 74 of the Rules of Procedure;

V. TO REQUEST the Court of Appeals to inform the Constitutional Court, as soon as possible, but not later than within six (6) months, regarding the measures taken to implement the Judgment of this Court, in accordance with Rule 63 of the Rules of Procedure of the Court;

VI. TO NOTIFY this Decision to the Parties;

VII. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

VIII. TO DECLARE this Decision effective immediately;

IX. TO SEND a copy of this Judgment to the Kosovo Judicial Council and to the Government for information.

Judge Rapporteur

Almiro Rodrigues

President of the Constitutional Court

Arta Rama-Hajrizi

KI 134/16 Applicant: Dedë Hasani, constitutional review of Judgment PAKR. No. 379/16 of the Court of Appeals of Kosovo, of 21 September 2016

KI 134/16, Resolution on Inadmissibility of 3 May 2017, published on 12 July 2017

Keywords: individual referral, constitutional review of Judgment of the Court of Appeals, criminal proceedings, manifestly ill-founded

The Applicant of this Referral was assailed by a certain person M.C. and sustained heavy bodily injuries. After this, the Public Prosecutor in Gjakova filed Indictment PP. No. 300/2007 against M.C. for criminal offence Grievous Bodily Harm under Article 154 paragraph 1 of the then Provisional Criminal Code of Kosovo and soon changed his indictment for the same criminal offence.

After determining the factual situation and degree of injuries sustained by the Applicant, the Basic Court in Gjakova rendered the Judgment by which M.C. was found guilty and sentenced him to seven (7) months in prison. The Applicant also initiated contested proceedings against M.C. for compensation of pecuniary damage.

The Applicant and the State Prosecutor asked for a more severe sentence, while the representative of M.C. alleged a violation of the procedural law and challenged the imposed criminal sentence.

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By Judgment, the Court of Appeals of Kosovo partially granted the appeal of M.C. and commuted the sentence to six (6) months imprisonment, while the Applicant's appeals were rejected as ungrounded.

The Applicant alleges violation of Articles 21, 22, 31 of the Constitution and Article 1 of Protocol No. 1 of the ECHR. The Applicant complains that his fundamental rights were violated by the two courts because he was assaulted and sustained severe bodily injuries for which M.C. was not punished in proportion to the committed offence, that he was unjustly deprived of his right to indemnity and that his right to a trial within a reasonable time was violated.

In the case at issue, the Court notes that the Applicant's allegation about violation of reasonable time limit of the proceedings is not justified. The courts were active in each instance - trial and appeal instance, and the length of time it took to conclude the proceedings is more due to their considerations for proper administration of justice.

The Applicant, however, has not submitted to the Court any decision pertinent to his claim for compensation in contested proceedings.

Therefore, the Referral upon global assessment of all allegations is to be declared inadmissible, as manifestly ill-founded, in accordance with the Rule 36 (2) (a) and (c) of the Rules of Procedure of the Constitutional Court.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI134/16

Applicant

Dedë Hasani

Constitutional review of Judgment PAKR. No. 379/16 of the Court of Appeals of Kosovo, of 21 September 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 Dedë Hasani (hereinafter: the Applicant) from village of Mejë, Municipality of Gjakovë represented by Teki Bokshi, attorney at law.

Challenged decisions

2. The Applicant challenges Judgment PAKR. No. 379/16 of the Court of Appeals of Kosovo, of 21 September 2016, in connection with Judgment Pkr. No. 174/14 of the Basic Court in Gjakova, of 26 April 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment of the Court of Appeals of Kosovo.

4. The Applicant alleges violation of Articles 21 [General Principles], 22 [Direct Applicability of International Agreements], 31 [Right to Fair and Impartial Trial] of Constitution in connection with Article 1 of Protocol No. 1 (Protection of property) of the European Convention of Human Rights.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Articles 22 and 47 of Law No. 03/L-121 on the 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 23 November 2016, the Applicant submitted a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 14 December 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (presiding), Ivan Čukalović and Bekim Sejdiu.

8. On 2 February 2017, the Court notified the Applicant about the registration of the referral and asked him to fill in the referral form in addition to providing all relevant documents as required by Article 22.4 of the Law and Rule 29 of the Rules of Procedure.

9. On 1 March 2017, the Applicant submitted the relevant documents as required by Article 22.4 of the Law and Rule 29 of the Rules of Procedure. A copy of the referral was sent to the Court of Appeals.

10. On 7 March 2017, the Court in compliance with Rule 29 (c) of the Rules of Procedure asked the Applicant to provide a power of attorney for Teki Bokshi within five (5) days.

11. On 15 March 2017, the Applicant provided the power of attorney for Teki Bokshi.

12. On 3 May 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. According to the submitted documents on 20 June 2007 the Applicant was assailed by and sustained heavy body injuries from M.C.

14. On 17 July 2007, the Public Prosecutor in Gjakova filed Indictment PP. No. 300/2007 against M.C. for criminal offence Grievous Bodily Harm under Article 154 paragraph 1 of the then Provisional Criminal Code of Kosovo (hereinafter, the PCPK) .

15. On 20 July 2007, the Public Prosecutor in Gjakova changed his indictment against M.C. for the same criminal offence, but under Article 154 paragraph 2, sub-paragraph 4 in connection with paragraph 1 of the PCCK.

16. From 2009 until 2014 several court instances dealt with case. They dealt with different issues such as the accuracy of the legal qualification of the criminal offence committed by M.C., the severity of the injuries sustained by the Applicant through relevant medical expertise, as well with the request of the Public Prosecutor to transfer the matter to the Department for Serious Crimes.

17. On 26 April 2016, the Basic Court in Gjakova by Judgment Pkr. No. 174/14 found M.C. guilty for committing the criminal offence Grievous Bodily Harm and sentenced him with imprisonment of seven (7) months. The Basic Court advised Applicant to initiate civil proceedings for pecuniary damages. From the documents is seen that the representative of the Applicant has stated before the Basic Court that the Applicant will seek pecuniary compensation in civil proceedings.

18. The Judgment of the Basic Court was challenged by the Applicant, the State Prosecutor and the representative of the accused M.C. before the Court of Appeal. The Applicant and the State Prosecutor asked for a more severe sentence for the accused M. C. as well

the latter to pay the procedural expenses incurred for the Applicant. The representative of the accused M.C. complained about violation of the procedural law and erroneous and incomplete determination of the factual situation. He challenged the criminal sentence and the decision on the expenses of the criminal proceedings. He asked M.C. to be acquitted from the criminal charge or to remand the case to the Basic Court for a new consideration.

19. On 21 September 2016, by Judgment PAKR. No. 379/16 the Court of Appeals of Kosovo partially granted the appeal of M.C. and commuted his sentence to six (6) months imprisonment. The Applicant's appeal was refused as ungrounded. As to the severity of the sentence of the accused M.C. the Court of Appeal, inter alia, stated as there was a requalification of the criminal offence which necessitated a different sentence. Thus the commuted sentence was proportionate with the intensity of the social dangerousness of the criminal offence and the level of criminal liability of the accused.

Applicant's allegations

20. The Applicant alleges violation of Articles 21 [General Principles], 22 [Direct Applicability of International Agreements], 31 [Right to Fair and Impartial Trial] of Constitution in connection with Article 1 of Protocol No. 1 (Protection of property) of the European Convention of Human Rights.

21. The Applicant complains that his fundamental rights were violated by the two courts because: (i) M.C. assaulted and caused him severe bodily injuries, for which, he was not punished in proportion to the committed offence; (ii) he was unjustly deprived of his right to indemnity; and, (iii) his right to a trial within a reasonable time was violated.

22. With respect to Judgment PAKR. No. 379/16 of the Court of Appeal, the Applicant alleges that: "*... the Court of Appeals has modified the Judgment of the first instance, has declared the Accused person guilty for a more lenient criminal offence, even though it had been proven that he has committed a more severe offence; it has declared him guilty for a criminal offence that impends a punishment by imprisonment for 6 months up to 5 years, and when it has punished him, it has pronounced a sentence against him with a legal minimum".*

Assessment of admissibility

23. The Court will examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

24. In this respect, the Court refers to Article 113.7 [Jurisdiction and Authorized Parties] 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."*

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

> *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".*

26. The Court further takes into account Rule 36 (2) (a) and (c) of the Rules of Procedure which specify:

> *"(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
>
> > *(a) the referral is not prima facie justified, or*
> > *[...]*
> > *(c) the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution".*

27. The Court notes as far as the Applicant complains that his right to a fair and impartial trial and the right to property were violated he uses different arguments. On the first place, that the person who assailed him was not punished in proportion to the committed offence. On the second place, that the trial proceedings went beyond the reasonable time, and thirdly, that he was unjustly deprived of his right to indemnity as the injured party in criminal proceedings.

28. As to the Applicant's allegation on the severity of punishment of M.C., the Court notes that the court of appeal explained that: (i) there was a requalification of the criminal offence which necessitated a different sentence; (ii) the commuted sentence was proportionate with the intensity of the social dangerousness of the criminal offence and the level of criminal liability of the accused; and (iii) there were mitigating circumstances in favor of M.C., because of his young age at the time he committed the offence, that he has to support a family and his good demeanor since the time he committed the offence.

29. The Court emphasizes 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). (See, for example, Case No. KI89/15, Applicant *Fatmir Koci*, Resolution on Inadmissibility of 22 March 2016, paragraph 38).

30. The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of regular courts. 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).

31. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *Garcia Ruiz v. Spain*, and also see mutatis mutandis Constitutional Court of the Republic of Kosovo: Case No. KI156/15, Resolution on Inadmissibility, of 23 December 2016, paragraph 42).

32. It should be borne in mind - since this is a very common source of misunderstandings on the part of applicants - that the "fairness" required by Article 31 of the Constitution and Article 6 of the Convention is not "substantive" fairness (a concept which is part-legal, part-ethical and can only be applied by the trial judge), but "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (See the

case of Star Cate - *Epilekta Gevmata and Others v. Greece*, application no. 54111/07, ECtHR, Decision of 6 July 2010).

33. In the light of the foregoing considerations, the Court notes that the Applicant had the benefit of adversarial proceedings; that he was able, at various stages of those proceedings, to adduce the arguments and evidence he considered relevant to his case; that he had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; that all his arguments which, viewed objectively, were relevant to the resolution of the case were duly heard and examined by the courts; that the factual and legal reasons for the impugned decisions were set out at length; and that, accordingly, the proceedings taken as a whole were fair. (See the Case of *Garcia Ruiz v. Spain*, application no. 30544/96, [GC], Judgment of 21 January 1999, paragraph 29).

34. The fact that the Applicant disagrees with the outcome of the case it cannot serve him as a right to raise an arguable claim on the violation of rights and freedoms guaranteed by the Constitution and the Convention (See Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 may 2012, paragraph 28).

35. As to the Applicant's allegation about the excessive length of proceedings, the Court notes that Article 31 of the Constitution and Article 6 (1) of the Convention oblige the competent authorities to organize the judicial system in such a way that the courts meet all the criteria set out in Articles concerned. (See Case *Abdoella v. the Netherlands,* ECtHR, Application no. 12728/87, Judgment of 25 November 1992, paragraph 24).

36. In the case at issue, the Court notes that the Applicant's allegation about violation of reasonable time limit of the proceedings is not justified. The courts were active in each instance - trial and appeal instance, and the length of time it took to conclude the proceedings is more due to their considerations for proper administration of justice.

37. Moreover, the Court notes that in the case at issue, the proceedings took a while to be concluded because: (i) the applicant, the accused and the State Prosecutor all made use of remedies to their avail in order to challenge the rulings of the courts; (ii) there were changes made to the criminal law, the law on criminal procedure and the law on courts which were implemented in 2013;and (iii) the courts had to reply to the many allegations set forth in this criminal case by different actors. Thus the alleged delay of proceedings cannot be attributable to the courts or at the very the least the Applicant did not substantiate that allegation (see Constitutional Court of the Republic of Kosovo: Case No. KI07/15, Resolution on Inadmissibility of 8 December 2016).

38. As to the Applicant's allegation on being unjustly deprived of his right to indemnity as an injured party in a criminal case, the Court notes that the applicable law in Kosovo provides for the injured parties the right to claim compensation in civil proceedings.

39. The Applicant however has not submitted before the Court any decision pertinent to his claim for compensation in civil proceedings, and that therefore, that allegation is manifestly ill-founded.

40. Finally, the Court considers that the Applicant only enumerates and generally describes the content of constitutional provisions without substantiating exactly how those provisions were violated in his case as is required by Article 48 of the Law.

41. Therefore, the Referral upon global assessment of all allegations is to be declared inadmissible, as manifestly ill-founded, in accordance with the Rule 36 (2) (a) and (c)

of the Rules of Procedure, because the Applicant is not a victim of violation of the rights guaranteed by the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (2) (a) and (c) of the Rules of Procedure, on 3 May 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Arta Rama-Hajrizi

KI55/17, Applicant: Tonka Berisha, Constitutional Review of Decision KGJ. no. 13/2017 of the Kosovo Judicial Council, of 13 January 2017

KI55/17, Judgment approved on 5 July 2017 and published on 17 July 2017

Key words: *individual referral, administrative procedure, right to fair and impartial trial, right to legal remedies, right to election, freedom of election, right to an effective remedy, equality before the law, admissible referral*

The Applicant challenged the decision of the Kosovo Judicial Council. The Applicant alleged that her right to fair and impartial trial, right to legal remedies, freedom of election and participation, judicial protection of rights had been violated along with Article 108.4 of the Constitution and Article 13 [Right to an effective remedy] of ECHR.

The Court found in this case that the voting mechanism implemented by KJC for appointing a candidate as the President of the Court of Appeals did not foresee the necessary measures for guaranteeing the sufficient application of principles of merit, equality, transparency, and openness during the voting process as well. According to the Court, due to the erroneous voting process, all candidates for President of the Court of Appeals were put in a situation of legal uncertainty, inequality, and were selected based on no merits.

Therefore, by a majority vote, the Court decided to declare the Referral admissible and confirm that Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 108 (1) and (4) [Kosovo Judicial Council] of the Constitution had been violated.

JUDGMENT

in

Case No. KI55/17

Applicant

Tonka Berisha

Constitutional review of Decision KGJ No. 13/2017, of the Kosovo Judicial Council, of 13 January 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 Tonka Berisha (hereinafter: the Applicant) represented by lawyer Artan Qerkini from the Law Firm "Sejdiu & Qerkini" with residence in Prishtina.

Challenged decision

2. The Applicant challenges Decision KGJ No. 13/2017 of the Kosovo Judicial Council (hereinafter: the KJC) of 13 January 2017, on the election of Hasan Shala as the President of the Court of Appeals of Kosovo.

3. The Applicant is a judge of the Court of Appeals and she was a candidate for the election in the position of President of the Court of Appeals.

Subject matter

4. The subject matter is the constitutional review of the above-mentioned decision of the KJC, which the Applicant alleges that it violates her rights guaranteed by Article 31 [Right To Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 45 [Freedom of Election and Participation], Article 54 [Judicial Protection of Rights] and Article 108.4 [Kosovo Judicial Council] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). In addition, the Applicant also alleges violation of Article 13 (Right to an effective remedy) of the European Convention of Human Rights (hereinafter: the ECHR). Although the Applicant has not alleged explicitly a violation of Article 24 [Equality Before the Law] of the Constitution, in substance and in reasoning, the Referral relates also to alleged violation of her right to equality before the law.

5. The Applicant also requests the Court to order a hearing session in compliance with Rule 39 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Legal basis

6. The Referral is based on Article 113.7 of 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

7. On 28 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 4 May 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel, composed of Judges Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

9. On 5 May 2017, the Court informed the Applicant about the registration of the Referral and sent a copy to the KJC and asked them to submit comments, if any, until 11 May 2017.

10. On 11 May 2017, the KJC submitted their comments.

11. On 26 May 2017, the comments of the KJC were communicated to the Applicant and she was invited to submit any additional observations by 2 June 2017.

12. The Applicant has not submitted any observations.

13. On 5 July 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare the Referral admissible and to find a violation.

14. On 5 July 2017, the Court approved by majority the admissibility of the Referral.

15. On the same date, the Court voted by majority to find a violation.

Summary of facts

16. On 28 October 2016, the KJC rendered Decision KJC. No. 132/2016 for the announcement of the vacancy for the position of President of the Court of Appeals.

17. On 04 November 2016, a vacancy for the position of President of the Court of Appeals was announced.

18. In the interim, the KJC assigned the Commission for the Evaluation and Interviewing of the Candidates (hereinafter: the Commission).

19. On 19 December 2016, the Commission interviewed the candidates and evaluated them as follows:

    1. Tonka Berisha - 100 points

2. Hasan Shala - 84 points

3. Xhevdet Abazi - 77 points

20. Following that evaluation, the three candidates were voted for the position of President of the Court of Appeals.

21. On 13 January 2017, the first round of voting took place. Tonka Berisha, ranked first in the list based on earned points based on the average of points of the Commission, was voted first and got 2 votes "IN FAVOR", 1 vote "AGAINST" and 6 "ABSTENTIONS". According to the KJC, she did not receive the necessary majority of votes and the voting procedure continued for the second candidate..

22. In the second round which took place on the same day Hasan Shala, ranked as the second candidate on the list, received 7 votes "IN FAVOR", 1 vote "AGAINST" and 1 "ABSTENTION".

23. Then the KJC (Decision No 13/2017) elected Hasan Shala to the position of the President of the Court of Appeals of Kosovo.

Applicant's allegations

24. The Applicant alleges a violation of her rights guaranteed by Article 31 [Right To Fair and Impartial Trial] (in conjunction with Article 24 [Equality Before the Law]), Article 32 [Right to Legal Remedies], Article 45 [Freedom of Election and Participation], Article 54 [Judicial Protection of Rights] and Article 108.4 [Kosovo Judicial Council] of the Constitution. In addition, the Applicant also alleges violation of Article 13 (Right to an effective remedy) of the ECHR.

25. As regards the merits and reasoning of the KJC Decision, the Applicant alleges that the KJC "*did not comply with the constitutional standards for the selection of judges in the leading positions in the Kosovo judiciary. The constitutional norm requires that the selection of the KJC be based on the merits of the candidate, while the KJC Decision above does not contain any reasoning as to why Ms. Tonka Berisha although ranked first by the Commission for Evaluation and Interview of Candidates for the President of the Court of Appeals, did not have sufficient merits to be elected as President of the Court of Appeals of Kosovo*".

26. As to the compliance of the KJC Regulation 14/2016 on Election, Appointment, Evaluation, Suspension and Dismissal Proceedings of the Presidents of Courts, the Applicant alleges that the KJC "*did not apply the standards provided by Article 108.4 of the Constitution. It is clearly noted that the KJC Regulation 14/2016 on Election, Appointment, Evaluation, Suspension and Dismissal Proceedings of the Presidents of Courts does not comply with the requirements laid down in the Constitution. In such a situation, the implementation of the hierarchy of legal acts should come to expression, whereby the Constitution prevails over any other legal act that is in conflict with it*".

27. As to the scope of Article 31 [Right to a Fair and Impartial Trial] of the Constitution, the Applicant asserts that *"the Constitution guarantees equal protection of rights not only in the courts, but also before other state authorities such as is the KJC case. Therefore, there is no dilemma that the effects of Article 31 of the Constitution extend beyond judicial proceedings. On the selection of judges for leading positions in the judiciary, based on the constitutional provisions, the KJC should bear in mind that this state institution should have a very clear picture, a realistic assessment, based on all the*

merits, objective and subjective criteria, and ultimately to get as full as possible candidacies, with a wider support".

28. The Applicant also allege a violation of Article 32 [Right to Legal Remedies] of the Constitution in connection with Article 13 (Right to an effective remedy) of the ECHR because she "*was not served with the Decision on the election of Mr. Hasan Shala in the position of the President of the Court of Appeals. The above-mentioned KJC Regulation does not foresee the possibility of appealing the decision of the KJC on the selection of the President of the Court of Appeals. Consequently, it can be concluded that the aforementioned Regulation violates the Applicant's right under Article 32 of the Constitution of Kosovo and Article 13 of the ECHR".*

29. Furthermore, the Applicant's claims a violation of Article 54 [Judicial Protection of Rights] of the Constitution as "*the administrative activity should be subject to control by the courts in accordance with the legal provisions. The failure to submit a decision on the selection of President of the Court of Appeals, the right to have access to the court has been violated to the Applicant because in the concrete case she was not allowed to initiate the legal proceedings for challenging the decision in the court proceedings. In this case, the judicial control of the decisions of the public administration authorities was also not allowed".*

30. As to the scope of Article 45 [Freedom of Election and Participation] of the Constitution, the Applicant asserts that "*this honored Court should interpret Article 45 more broadly by not allowing it to be used only when it comes to the violation of the right to be elected in national and municipal elections because this right is guaranteed to citizens of the Republic of Kosovo to be elected in any public function. In the present case, the right to be elected has been denied because of the manner of implementation of Article 4 par. 2 of Regulation No. 14/2016".*

31. With respect to the requirement for exhaustion of legal remedies, the Applicant states that *"the European Court of Human Rights has taken the view that to oblige the party to exhaust legal remedies before filing a Referral with the Constitutional Court, those remedies must exist. In Selmouni v. France,8 the European Court emphasized that the legal remedies to be exhausted must exist, and not only in theory but also in practice- that is, to be adequate and effective. This honorable Constitutional Court has also addressed this issue and in the case of Valon Bislimi v. Ministry of Internal Affairs, the Judicial Council and the Ministry of Justice where it concluded that the failure to implement the legal framework by the administration in respect of the appeal proceedings did not provide the Applicant with real and effective legal remedies, in which case the Court admitted the Referral even though all legal remedies provided by law were not exhausted".*

32. Moreover, reinforcing her point on that there are no effective legal remedies in her case, the Applicant refers to the Judgment of this Court in Case No. KI99/14 and KI100/14, *Shyqyri Syla and Laura Pula*, Constitutional Review of the Decisions of the Kosovo Prosecutorial Council related to the election procedure of Chief State Prosecutor, dated 8 July 2014.

33. The Applicant requests the Court "*not to make a finding as to the manner of implementation of the KJC Regulation 14/2016, but, inter alia, to find that it violates* [her] *basic constitutional rights".*

34. Finally, the Applicant requests the Court: (i) to declare the Referral admissible; (ii) to order an oral hearing in accordance with Rule 39 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo; and (iii) to hold that there is a violation

of her rights as guaranteed by Articles 31 in conjunction with Article 24, 32, 54 and 45 of the Constitution in connection with Article 13 of the ECHR.

Comments submitted by the Kosovo Judicial Council

35. The KJC responded to the question whether the Applicant was an authorized party to submit the Referral stating, namely, that the Referral is inadmissible because, *"pursuant to Article 113 par. 7 of the Constitution of the Republic of Kosovo, the Court shall adjudicate only those matters that have been raised before the Court by an authorized party. From this it can be seen that the submitter of the Referral is therefore not an authorized party to refer this matter before the Court"*.

36. On the question of exhaustion of legal remedies, the KJC stated that the KJC Decision *"is an administrative act and as such no administrative dispute can be pursued against it before the Basic Court of Prishtina, namely before the Department for Administrative Matters. The claimant (...) would have been eventually entitled to refer the aforementioned matter before the Constitutional Court only after having exhausted all the legal remedies provided by the law, which she (the claimant) did not do"*.

37. As to the outcome of the voting process in selection of President of the Court of Appeals, the KJC noted that *"in its meeting held on 13 January 2017, following voting on this matter, established the following state of affairs:*

> *On the first round* ***Mrs. Tonka Berisha*** *who was ranked as the first candidate on the list based on the scored points according to the average score of the Review Commission, obtained a total of* ***2 votes IN FAVOUR, 1 vote AGAINST and 6 ABSTENTIONS.***
>
> *On the second round* ***Mr. Hasan Shala*** *who was ranked as the second candidate on the list based on the scored points according to the average score of the Review Commission, obtained a total of* ***7 votes IN FAVOUR, 1 vote AGAINST and 1 ABSTENTION***".

38. The KJC further stated that, "*taking into consideration the manner of voting, pursuant to the Regulation No. 09 / 2016 as amended and supplemented by the Regulation No. 14 / 2016, in presence of the international partners, representatives from the media and public audience, CONCLUDED that Mr. Hasan SHALA on the second round of voting has obtained a total of 7 votes IN FAVOUR, 1 vote AGAINST and 1 ABSTENTION and therefore DECIDED that Mr. Hasan Shala is hereby appointed the President of the Court of Appeals with the mandate of four years' term"*.

39. As to the Applicant's allegation on violation of Article 108 (4) [Kosovo Judicial Council] of the Constitution, the KJC considered that "*Article 108. 4 of the Constitution regulates in an explicit manner the principles on which, the Kosovo Judicial Council makes its proposal for appointment of judges. This legal provision does not determine the principles according to which the President of the Court of Appeals is nominated (...). In this sense, the constitutional provision of Article 108, par. 4 of the Constitution of the Republic of Kosovo constitutes the constitutional grounds incorporating the fundamental principles that are judicial and constitutional prerogatives with reference to the manner of election of these judges. The function of the Court Presidents, as it is the position of the President of the Court of Appeals in the case at hand, does not constitute a specific circumstance presenting the low premise of an abstract application of the constitutional provision of Article 108, par. 4 of the Constitution (...). In addition to this, according to the legal regulations, the*

prerequisite for appointment of the President of the Court of Appeals is rather the functional status of the judge being assigned with the Court of Appeals. (...). At this specific case, the principles envisaged by this article – i.e. the principle of meritocracy, the principle of gender equality and an open and transparent process have all been consumed by the fact that the candidates nominated for the position of the President of the Court of Appeals have all been judges assigned with this court".

40. As to the Applicant's allegation on violation of the principle of meritocracy, the KJC submitted that "*the principle of meritocracy consists on the professional capacity and the competence of a judge to exercise his / her judicial function. The Kosovo Judicial Council (...) took into consideration the fact that all the candidates are judges who have worked with the Court of Appeals and who have applied for this position having the required professional capacity and competence to hold such position. Given, even though the constitutional standard stipulated by Article 108 par. 4 of the Constitution of Kosovo is not applicable, we consider that the principle of the meritocracy has been applied in this specific procedure by conducting the preliminary procedure before the Evaluation Commission, which has evaluated the candidates on the basis of their personal merits. Considering the fact that the KJC acts as a panel authority (...), the decision taking in this collective body consists in the discretion of the members of this body that is in turn expressed through the voting process, based on the procedures regulated by both – relevant internal acts of the respective body as well as the Law on the Kosovo Judicial Council".*

41. As to the Applicant's allegation on violation of the principle of gender equality, the KJC submitted that *"such principle should not be implied in the outcome of election of the candidate as the principle itself as such consists in equal treatment based on the standards applied by the institution that should be done in relation to every candidate by application of the same standards, as it is the case of appointment of the candidate in the position of the president of the Court of Appeals. The Kosovo Judicial Council has therefore applied the same standards towards all the candidates irrespective of their gender or ethnic background. It is for this reason that we consider as inadmissible the allegation on the gender discrimination of the claimant in question, who has applied herself following the public announcement of the vacancy by the Kosovo Judicial Council, when she was subject to the evaluation process by the Commission for Evaluation and Interview".*

42. As to the Applicant's allegation on violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, the KJC submitted that "*from the case files it can be seen that Mrs. Tonka Berishaj has not made use of this constitutional right. This is due to the fact that this constitutional provision guarantees judicial protection of all citizens of the Republic of Kosovo before the regular courts. The Claimant in this Referral could have used this right by filing an administrative dispute before the Basic Court of Prishtina, Department of Administrative Matters. Even though this Department is overloaded, one should not claim a right or seek judicial protection outside the scope envisaged by the Constitution and Law. Article 31, par. 1 of the Law on the Constitutional Court implies that also Mrs. Berisha should have addressed this matter of seeking judicial protection before the Basic Court of Prishtina, i.e. the Department for Administrative Matters with the purpose of being considered equal to all other citizens who have administrative disputes in this Department*".

43. As to the Applicant's allegation on violation of Article 32 [Right to Legal Remedies] of the Constitution, the KJC stated that "*the aforementioned allegation is inconsistent and without any legal ground due to the fact that the Kosovo Judicial Council – following adoption of the specific matters, namely in this case we refer to the appointment of the President of the Court of Appeals, all its decisions including the*

decision on appointment of the President of the Court of Appeals are regularly published on its official website, which is accessible to all interested parties including the Claimant who has filed the Referral. It is an unjustifiable fact to contest the matter that the decision has not been served or the party has not been informed about the decision since the Kosovo Judicial Council has never received any request concerning such decision from Mrs. Berishaj, which would have served as an argument for this allegation".

44. As to the Applicant's allegation on violation of Article 45 [Freedom of Election and Participation] of the Constitution, the KJC noted that "*this legal provision is mandatory to be applied for all candidates and in this case the Kosovo Judicial Council has applied it in an independent and impartial manner.*

45. Responding to the question whether the KJC Regulation No. 14/2016 was in compliance with the Constitution, the KJC noted that, "*at the beginning of the Referral the Constitutional Court was requested not to declare itself with respect to the manner of application of the KJC Regulation No. 14 / 2016, but rather to conclude – amongst other – the violation of the fundamental constitutional right of the claimant submitting the Referral. With reference to this matter, we accordingly emphasize that the aforementioned Regulation has been drafted in compliance with the Constitution of the Republic of Kosovo and other applicable legislation and apart from correct application of this regulation, its provisions have not infringed any of the rights of the candidates for the position of President of the Court".*

46. Due to the comments presented above, the KJC proposed to the Court to consider *"inadmissible the Referral KI 55 / 17 filed by Mrs. Tonka Berishaj" (...),* to consider that "*holding of the hearing session is not indispensable*" and to consider that the *"allegations made with reference to violation of the fundamental rights and freedoms enshrined with the Constitution and applicable legislation are therefore inconsistent".*

Relevant legal and constitutional provisions

Constitution of the Republic of Kosovo

Article 103 [Organization and Jurisdiction of Courts]

[...]

4. The President of the Supreme Court of Kosovo shall be appointed and dismissed by the President of the Republic of Kosovo [...].

5. Presidents of all other courts shall be appointed in the manner provided by law.

Law No.03/L –223 on the Kosovo Judicial Council

Article 22

Appointment *of President Judges and Supervising Judges*

2. The President Judges shall be appointed by the Council in consultation with the judges of the respective courts. In appointing President Judges, the Council shall take into consideration specialized managerial training or experience.

Regulation no. 14/2016 of the Kosovo Judicial Council

Article 4

"2. The Judicial Council votes in the secret ballot and the candidate receiving simple majority of votes is considered as elect candidate for position of the president of the court.
[…]
4. The Judicial Council first votes for the candidate who was ranked first on the list based on points. If none of the candidates receives the simple majority of the votes, the vacancy will be re-announced.
5. after the voting, the Kosovo Judicial Council:
5.1 […]
5.2 appoints the president of the Court of Appeals, presidents of the basic courts and supervising judges of court branches."

Law No. 03/L-040 on Local Self Government

Article 48
Voting

"48.3. Abstentions *shall be noted for the purpose of establishing the quorum, but shall not otherwise be taken into account for the voting results".*

Items 37 and 38 of the Opinion N° 19 (2016) Consultative Council of European Judges (CCJE)

"*37. The* manner *in which presidents of courts are selected, appointed or elected varies in the member states as the responses to the questionnaire show. These procedures are affected by the existing system of judicial administration and the role of presidents of courts. In some systems, presidents are appointed or promoted from among judges, while others allow for appointments or selections to be made from outside. In the case of the former, the merits of the candidate as well as his or her judicial experience are taken into account".*

"38. The CCJE *considers that the procedures for the appointment of presidents of courts should follow the same path as that for the selection and appointment of judges. This will include a process of evaluation of the candidates and a body having the authority to select and/or appoint judges in accordance with the standards established in Recommendation CM/Rec(2010)12 and previous Opinions of the CCJE17".*

Admissibility of the Referral

47. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

48. In this respect, the Court refers to 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.

49. Firstly, the Court considers that the Applicant is authorized party in compliance with Article 113 (7) of the Constitution.

50. Secondly, as far as the deadline is concerned according to Article 49 of the Law:

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

51. Moreover, as to the four (4) month legal deadline set out in Article 49 of the Law, the Court considers that, where it is clear from the outset that the Applicant has no effective legal remedy, the four-month period runs from the date on which the act complained of took place or the date on which the applicant was directly affected by or became aware of such an act or had knowledge of its adverse effects (*Dennis and Others v. the United Kingdom (dec.); Varnava and Others v. Turkey [GC], § 157*).

52. In the light of the above, the Court considers that the Applicant's Referral is submitted in accordance with the legal deadline set out in Article 49 of the Law.

53. Thirdly, in addition with respect to requirements established by Article 113 (7) of the Constitution, the Court considers that the Applicants are only obliged to exhaust legal remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success. The remedy's basis in domestic law must therefore be clear. (See, *inter alia,* ECtHR Judgment of 28 July 1999, *Selmouni v. France*, No. 25803/94, paragraph 74).

54. The Court notes that the provisions of the law in force, Law No. 03/L-223 on the Kosovo Judicial Council, do not envisage legal remedies against the decision challenged by the Applicant.

55. The Court notes that the KJC submitted that, in the concrete case, the Applicant could initiate an administrative conflict and make use of the remedies available to her by the Law No. 03/L-202 on Administrative Conflicts. However, the KJC did not back-up that assertion with relevant case-law, in comparable cases, where it is shown that the Applicant would have had reasonable prospects of success in the event she opted to initiate an administrative conflict (See, as a recent authority, the Constitutional Court Case No. KI34/17, Applicant Valdete Daka, *Constitutional review of Decision KGJK No. 50/2017 of the Kosovo Judicial Council of 6 March 2017,* Judgment of 12 June 2017).

56. On the question of exhaustion of legal remedies, in comparable cases, the Court reiterates its findings in Judgment in cases KI99/14 and KI100/14, where *"the Court notes that even if there are legal remedies, in the Applicants' case they are not proved to be efficient. Moreover, taking into consideration the specificity of the election procedure for the position of Chief State Prosecutor and the necessity this to be done in a timely fashion, the Court is of the opinion that there is no legal remedy to be exhausted"* (Constitutional Court Case No. KI99/14 and KI100/14, Applicants *Shyqyri Syla and Laura Pula, Constitutional Review of the Decisions of the Kosovo Prosecutorial Council related to the election procedure of Chief State Prosecutor*, Judgment of 8 July 2014, paragraph 50).

57. Moreover, where a suggested remedy does not in fact offer reasonable prospects of success, for example in light of settled case law, the fact that the applicant did not use it is no bar to admissibility (Constitutional Court Case No. KI56/09, *Fadil Hoxha and 59 Others vs. the Municipal Assembly of Prizren*, Judgment of 22 December 2010, paragraph 45, with further references).

58. Taking into consideration the specificity of the election procedure for the position of the President of the Court of Appeals and the necessity this to be done in a timely fashion, the Court is of the opinion that there is no legal remedy which addresses effectively the allegations raised by the Applicant.

59. Fourthly, the Court considers that the Applicant has clearly and precisely elaborated on the alleged violation of the constitutional provisions as well pointed out the act of the public authority, namely the Decision of the KJC, complying with to Articles 48 [Accuracy of the Referral] 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.*

60. The Court also takes into account Rule 36 (1) of the Rules of Procedure, which specify that:

> *The Court may only deal with Referrals if:*
> *[...]*
> *b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted, or*
> *(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or*
> *(d) the referral is prima facie justified or not manifestly ill-founded.*

61. Having examined the Applicant's complaints and observations, as well the comments of the KJC, the Court considers that the Referral raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The Referral cannot, therefore, be regarded as being manifestly ill-founded within the meaning of the Rule 36 (1) (d) of the Rules, and no other ground for declaring it inadmissible has been established (See, for example, the Case of A and B v, Norway, [GC], applications nos. 24130/11 and 29758/11, Judgment of 15 November 2016, paragraph 55 and also see *mutatis mutandis* Case No. KI132/15, *Visoki Dečani Monastery*, Judgment of the Constitutional Court of the Republic of Kosovo of 20 May 2016).

62. Therefore, the Court finds that the Referral is admissible.

Merits of the Referral

63. The Court recalls that the Applicant alleges a violation of Article 31 [Right To Fair and Impartial Trial] in conjunction with Article 24 [Equality Before the Law], Article 32 [Right to Legal Remedies], Article 45 [Freedom of Election and Participation], Article 54 [Judicial Protection of Rights] and Article 108.4 [Kosovo Judicial Council] of the Constitution. In addition, the Applicant also alleges violation of Article 13 (Right to an effective remedy) of the ECHR.

64. In this regard, the Court refers to Article 24 [Equality Before the Law], of the Constitution, which establishes:

> *1. All are equal before the law. Everyone enjoys the right to equal protection without discrimination.*

2. No one shall be discriminated on the grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.

3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled."

65. The Court refers to paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

66. The Court also refers to Articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution, which establish that:

Article 32 [Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

Article 54 [Judicial Protection of Rights]

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

67. The Court further refers to Article 45 [Freedom of Election and Participation] of the Constitution, which establishes:

1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.

2. The vote is personal, equal, free and secret.

3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.

68. In addition, the Court refers to Article 108 [Kosovo Judicial Council] of the Constitution, which, inter alia, establishes:

1. The Kosovo Judicial Council shall ensure the independence and impartiality of the judicial system.

2. The Kosovo Judicial Council is a fully independent institution in the performance of its functions. The Kosovo Judicial Council shall ensure that the Kosovo courts are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo and follow the principles of gender equality. The Kosovo Judicial

Council shall give preference in the appointment of judges to members of Communities that are underrepresented in the judiciary as provided by law.

(...)

4. Proposals for appointments of judges must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the territorial jurisdiction of the respective court. All candidates must fulfill the selection criteria provided by law.

69. The Court notes that it is for the Court to characterize the facts of the case vis-à-vis the constitutional norms and that it is not bound by the characterization given by the Applicant or by the KJC (Constitutional Court Case No. KO73/16, Applicant the Ombudsperson, *Constitutional review of Administrative Circular No. 01/2016 issued by the Ministry of Public Administration of the Republic of Kosovo on 21 January 2016*, Judgment of 8 December 2016, at paragraph 78 with further references).

70. With respect to Article 24 (1) of the Constitution, the Court recalls that "*all persons are equal before the law*". The Court considers that this implies that general principles of equality of treatment apply to all actions of public authorities in their dealings with individuals.

71. The Court notes that the present case raises questions of "*equality before the law*" for all the candidates involved in the voting process for the position of President of the Court of Appeals; and by that implication, the Court considers that Article 24 (1) of the Constitution can be engaged as well.

72. This principle is more specifically defined in paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution, which requires all public authorities in their proceedings to guarantee equal protection of the rights of individuals.

73. Furthermore, the Court recalls that Article 108 (1) of the Constitution obliges the KJC to guarantee the independent and impartial functioning of the judicial system. In this regard, the Court considers that the quality of the decision-making procedures within the KJC must also be based upon the principles of independence and impartiality, as a prerequisite to ensuring the impartiality and independence of the justice system as a whole.

74. In addition, the Court recalls that Article 108 (4) of the Constitution requires that proposals for appointment of judges must be based, inter alia, upon the merits of the candidates.

75. The Court notes that the principle of meritocracy is closely linked to the principle of equality before the law, equal protection of rights, the principle of legal certainty and the principle of openness.

76. In the selection process as applied by the KJC, each of the candidates for nomination as President of the Court of Appeals was evaluated according to criteria based on merits to determine their suitability for the position. Based upon the information provided to the Court, it appears that the candidates were evaluated as having sufficient merits for the position, given that the candidates achieved a scoring of at least 77 points. The Court notes that the KJC considered each of the candidates to have sufficient merits to qualify for the position, although neither the Applicant nor the KJC has indicated the exact

meaning of these scores, given that, in principle, all candidates were admitted to the voting process.

77. The voting process was intended to select a candidate from among sufficiently qualified candidates. As such, the fundamental question as to the merits of each of the candidates to qualify for the position of President of the Court of Appeals is not the issue which the voting was intended to address, as this had already been addressed in the prior evaluation process.

78. The Court recalls that in a voting process, a fundamental aspect of the principle of "*equality*" is that each candidate shall benefit from "*equality of opportunity*". This means that all candidates will have the opportunity to be considered fairly and equally.

79. According to the "*general principle of equality*", the Court must assess under a proportionality test if the applicant/candidates were put in an equal position during the voting process for the selection of the candidate for nomination as President of the Court of Appeals.

80. The Court is mindful of the fact that KJC has a wide margin of appreciation to vote the candidate they deem is best fitted to assume the position of the President of the Court of Appeals. However, that discretion is not absolute and cannot be considered to be so wide as to disregard the principles of fairness and equality in the voting process, and so turning into arbitrariness.

81. The Court reviews the "*proceedings as a whole*", which means that the entire voting process is reviewed for compliance with principles of equality and fairness. Thus, the Court considers that the fundamental quality of the voting process in its entirety for all of the candidates and not only as it concerned the Applicant specifically. The Court considers that voting means "*choosing among alternatives*", and abstention means "*not participating in the voting process*".

82. The Court observes that in the voting process applied by the KJC there was, in fact, no choosing among alternatives, because each candidate was voted upon separately, i.e. only once a candidate was rejected, then the next candidate was considered and voted upon.

83. Furthermore, in each round of voting, each of the persons voting had the opportunity again to vote in favor or against the candidate being voted upon. In effect, each voting member of the KJC could avoid making any choice at all, because when looking at the overall procedure, it becomes apparent that each voting member of the KJC could vote in favor of all of the candidates, or could vote against all of the candidates.

84. The Court notes that this is an individual case that discloses the question of legal certainty which is a constitutional category. The way the voting process has been regulated and conducted raises doubts as to its legal certainty and to the proper administration of the judicial system and its formation.

85. As to the abstention, the Court notes that the process allowed that the voting members of the KJC not only could, but indeed did, abstain selectively; in other words, instead of abstaining from participation in the voting process as whole, the voting members of the KJC chose to participate in the vote on one candidate and not to participate in the vote on another candidate, apparently in an arbitrary manner.

86. Furthermore, the Court considers that even in cases where the abstaining vote is applied, the public authority has an obligation to clearly regulate the meaning and value

of the abstaining vote. Failure to foresee the abstaining vote and the failure to foresee its effect on the voting process creates legal uncertainty because it impairs principles of openness, certainty and foreseeability.

87. In these circumstances, the Court considers that the current form of regulating the voting process does not provide *"equal opportunities"* to candidates, because the process does not provide for procedural safeguards pertinent to the guarantee of equality of treatment.

88. The inequality is not based on any particular quality of the candidates, but the fundamentally unfair voting procedure that allows voting members of the KJC to vote multiple times and to abstain selectively per candidate (Constitutional Court Case No. KI34/17, Applicant *Valdete Daka,* cited above).

89. The vacant position of President of the Court of Appeals is only one single vacancy. Only one of the candidates can be nominated for this position. Each voting member of the KJC should only be able to express their vote for one single candidate, not for two or three or more. The voting process is only one single process, and each voting member of the KJC should only be allowed to either participate or abstain – everything or nothing.

90. The Court considers that the voting process conducted by the KJC constitutes unfairness in the proceeding of the vote because it is impossible to know who is participating in the vote and who is not. At the same time it is impossible to know who actually has the support of the majority of the voting members of the KJC and who does not.

91. As such, the Court considers that the inequality of the voting process does not ensure that all candidates benefitted from equality before the law, as guaranteed by article 24 (1) of the Constitution and from equal protection of rights as guaranteed by Article 31 (1) of the Constitution. As a consequence of these inequalities, the Court considers that the KJC has not complied with its Constitutional obligations to ensure the independence and impartiality of the judicial system, and to adopt proposals for appointments in the judicial system based on merits, as required by Article 108 (1) and (4) of the Constitution.

92. In the light of foregoing considerations, the Court considers that the voting process for the nomination of a candidate for the position of President of the Court of Appeals is incompatible with Article 24 (1) and Article 31 (1) in conjunction with Article 108 (1) and (4) of the Constitution. Therefore, the Court finds that the voting process does not provide sufficient procedural safeguards to protect the equality of candidates, and as such, undermines the public perception of the independence and impartiality of the justice system which the KJC is required to ensure.

93. In this respect, the Court even considers that the appearance of the appointment of the President of the Court of Appeals must be seen to be in compliance with principles of openness, meritocracy and foreseeability. It has a bearing on the independence and impartiality in the entire administration of justice in Kosovo, and affects the confidence which the courts in a democratic society must inspire in the public (see, *mutatis mutandis*, ECtHR Judgment of 15 October 2009, *Micallef v. Malta*, [GC], application no. 17056/06, paragraph 99 and references cited therein and also see Constitutional Court Case No. KI34/17 Applicant *Valdete Daka*, cited above, §§ 52-84).

94. Thus, the Court concludes that the KJC has to conduct a new voting process from the candidates to select the nominee for the position of President of the Court of Appeals.

This new voting has to be in compliance with the findings of this Court, and in harmony with the spirit and the letter of the Constitution of the Republic of Kosovo.

95. As to the Applicant's specific request to find that the KJC Regulation 14/2016 violates her constitutional rights rather than review of the manner of interpretation and implementation of that regulation, the Court notes that it is not its task to speculate *in abstracto* whether that regulation violates the Applicant's rights as guaranteed by the Constitution; rather to review whether that Regulation is construed and implemented in compliance with the spirit and the letter of the Constitution.

96. On this point, the Court refers to the well-established case-law of the European Court of Human Rights, which with respect to interpretation and implementation of legal rules held that *"in consequence of the principle that laws must be of general application, the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorizations as opposed to exhaustive lists. That means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application depend on practice"*. (See the Case of *Scoppola v. Italy (no. 2),* [GC], application no. 10249/03, Judgment of 17 September 2009, at paragraph 100 with further references).

97. Thus, the manner of interpretation of any rule is of utmost importance because the way a rule is construed can render the latter in compliance or out of compliance with the Constitution. And the task of this Court is to ensure that that Regulation is construed in compliance with the Constitution.

98. Having found that the voting process conducted by the KJC in the selection of a nominee for President of the Court of Appeals was not in compliance with Articles 24 (1), 31 (1), and 108 (1) and (4) of the Constitution, the Court considers it unnecessary to examine the Applicant's allegations in relation to Articles 32 [Right to Legal Remedies], 45 [Freedom of Election and Participation] and 54 [Judicial Protection of Rights] of the Constitution taken together with Article 13 [Right to an effective remedy] of the ECHR.

Applicant's request to hold an oral hearing

99. As to the Applicant's request to hold an oral hearing, the Court refers to Article 20 of the Law, which, inter alia, provides:

> *1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
>
> *2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files.*

100. The Court considers that the documents contained in the Referral are sufficient to decide this case as per wording of Article 20 (2) of the Law.

101. Therefore, the Applicant's request to hold an oral hearing is rejected.

Conclusion

102. The Court is aware of that it is not its task to speculate which candidate is best suited for the position of President of the Court of Appeals. The Court wants to make sure that the voting and the voting process are in accordance with the Constitution. Compliance with constitutional standards, *inter alia*, entails: (i) a voting process which guarantees

equality, transparency, certainty and openness for the candidates; (ii) logical coherence and connection between the voting process and the selection of the chosen candidate based on the democratically expressed choice of the voting members of the KJC.

103. The Court is mindful of the KJC's margin of appreciation in selecting the candidate for the position of President of the Court of Appeals. However, this margin is not absolute, and cannot be construed in such a manner, as to be in contradiction with the spirit and letter of the Constitution.

104. In conclusion, the Court finds that the mechanism of voting applied by the KJC for the candidates to nominate a candidate for the position of President of the Court of Appeals did not provide for the necessary safeguards to guarantee sufficient implementation of the principles of equality, merits, transparency and openness of and during the voting process. As a result of this flawed and incoherent voting process, all of the candidates for President of the Court of Appeals, including the Applicant, were placed in a position of legal uncertainty, inequality and unmeritorious selection.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113 (7) and 116 (1) of the Constitution, Articles 47 and 48 of the Law and Rule 56 (1) and 63 (1) and (5) of the Rules of Procedure, on 5 July 2017

DECIDES

I. TO DECLARE, by majority, the Referral admissible;

II. TO HOLD, by majority, that there has been a breach of Articles 24 (1) [Equality before the Law], 31 (1) [Right to Fair and Impartial Trial] and 108 (1) and (4) [Kosovo Judicial Council] of the Constitution;

III. TO HOLD that it is not necessary to examine whether there has been a violation of Articles 32 [Right to Legal Remedies], 54 [Judicial Protection of Rights], 45 [Freedom of Election and Participation] of the Constitution in connection with Article 13 (Right to an effective remedy) of the ECHR;

IV. TO DECLARE invalid the Decision KGJK No. 13/2017, of the Kosovo Judicial Council, of 13 January 2017;

V. TO ORDER the Kosovo Judicial Council to conduct a new voting process for the selection of a nominee for the position of President of the Court of Appeals in accordance with the findings in this Judgment;

VI. TO ORDER the Kosovo Judicial Council, pursuant to Rule 63 (5) of the Rules of Procedure, to submit information to the Constitutional Court about the measures taken to implement this Judgment;

VII. TO REMAIN seized of the matter pending compliance with that order;

VIII. TO NOTIFY this Judgment to the Parties.

IX. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20 (4) of the Law;

X. TO DECLARE this Judgment effective immediately.

In compliance with Rule 58 of the Rules of Procedure it is noted that Judges Altay Suroy, Bekim Sejdiu and Gresa Caka-Nimani voted against the admissibility of the Referral and against finding a violation.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Arta Rama-Hajrizi

K0142/16, Applicant: The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, Constitutional review of Articles 10 and 40.1.5 of the Annex to Law no. 04/L-034 on Privatization Agency of Kosovo

KO142/16, Resolution on inadmissibility, approved on 9 May 2017, published on 18 July 2017

Key words: *referral of state bodies, incidental control, protection of property, request admissible for review*

The referring court challenged the constitutionality of Articles 10 and 40.1.5 of Annex to Law No. 04/L-034 on Privatization Agency of Kosovo, approved by the Assembly of the Republic of Kosovo on 31 August 2011, which it alleged had been contradictory to Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol no. 1 to the European Convention of Human Rights.

The Court noted that in the given case the challenged Articles—10 and 40.1.5 of the Annex to Law on PAK—do not infringe the essence of the right to judicial protection of rights and the protection of creditors' property because the limitation has been foreseen by a law adopted by the Assembly of the Republic of Kosovo, the limitation is objective and reasonable as it prevents the creation of confusion arising from the conduct of parallel proceedings before the referring court and the Liquidation Authority. In the present case, the Court considered that the referring court failed to reason that there is an obstacle that makes it impossible for the referring court to apply paragraph 2 of Article 10 of the Annex to Law on PAK. In sum, the Court found that the challenged articles–10 and 40.1.5 of the Annex to Law on PAK–are compatible with the Constitution.

JUDGMENT

in

Case No. KO142/16

Applicant

The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters

Constitutional review of Articles 10 and 40.1.5 of the Annex to Law No. 04/L-034 on Privatization Agency of Kosovo

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 the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the referring court).

2. The Referral was signed by Sahit Sylejmani, Presiding, Vladimir Kanev, Judge, Werner Kannenberg, Judge, Sabri Halili, Judge, and Ilmi Bajrami, Judge.

3. The Referral submitted by the referring court is related to the trial conducted in that court in the case number AC-II-12-0086.

Challenged law

4. The referring court challenges the constitutionality of Articles 10 and 40.1.5 of the Annex to Law No. 04/L-034 on Privatization Agency of Kosovo (hereinafter: the Law on PAK), adopted by the Assembly of the Republic of Kosovo on 31 August 2011.

Subject matter

5. The referring court requests the Constitutional Court of the Republic of Kosovo to assess the constitutionality of Articles 10 and 40.1.5 of the Annex to the PAK Law, which allegedly are in contravention with Article 46 [Protection of Property] of the Constitution of the Republic (hereinafter: the Constitution), in conjunction with Article 1 of Protocol no. 1 of the European Convention on Human Rights (hereinafter: the Convention).

Legal basis

6. The Referral is based on Article 113.8 of the Constitution, Articles 51, 52 and 53 of the Law on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 75 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 6 December 2016, the referring court submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 7 December 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi (judges).

9. On 15 December 2016, the Court notified the referring court and PAK about the registration of the Referral.

10. On 18 January 2017, the Court requested the PAK to reply to some specific questions related to the substance of the Referral under consideration.

11. On 2 February 2017, the PAK replied to the questions raised regarding the Referral under consideration.

12. On 15 February 2017, the Court sent to the members of the Venice Commission Forum a request with several questions for comparative analysis regarding the Referral in review.

13. On 20 February 2017, the PAK responses were sent to the referring court for any eventual comment.

14. On 27 February 2017, the referring court submitted additional comments.

15. Between 28 February 2017 and 6 March 2017, the following members of the Venice Commission's Forum replied: the Constitutional Court of South Africa, the Constitutional Court of the Czech Republic, the Constitutional Court of Bulgaria, the Constitutional Court of Slovakia, the Constitutional Court of Slovenia and the Constitutional Court of Croatia.

16. On 30 March 2017, the Special Chamber of the Supreme Court notified the Court about the claim filed with the Special Chamber by the third parties (in a capacity of creditors) for the imposition of a security measure against "AC Agrokosova", requesting to ban the sale of the cadastral parcels in the liquidation procedure. The Special Chamber notified the third parties that it cannot impose a security measure until the Constitutional Court renders a final decision on the constitutional review of Articles 10 and 40.1.5 of the Annex to the PAK Law.

17. On 12 April 2017, the third parties requested the Court to impose interim measure because the Liquidation Authority would start selling the respective cadastral parcels by 28 April the latest.

18. On 14 April, the legal representatives of the third parties submitted to the Court a notice, which they addressed earlier to the PAK, emphasizing that: *"[...] The Constitutional Court of Kosovo has not yet given its opinion on your request and did not render a*

decision on the imposition of the security measure, so please exclude from the privatization and sale the cadastral parcels with number 1715 in a surface area of 0.65, 17 ha, 1516 in a surface area of 04437 ha, registered in the name of Horticulture-former Mladost in Gjilan, until the proceedings in the Constitutional Court of Kosovo and in the Special Chamber of the Supreme Court of Kosovo are completed."

19. On 9 May 2017, the Court unanimously approved the admissibility of the Referral.

20. On the same date, the Court with a majority of votes found that Articles 10 and 40.1.5 of the Annex to the PAK Law are in compliance with the Constitution.

Summary of facts

21. From the case file it transpires that the Referral under review follows from a claim by the third parties, I.M. and H.M., regarding the confirmation of their property rights over two parcels of land in the Gjilani region. It is alleged that the third parties had acquired the property right over the parcels in question through a 1972 sale-purchase contract concluded between them and AIC "Agrokultura" Gjilan.

22. On 29 December 2009, the Municipal Court in Gjilan, by Judgment C. No. 5/08, when conducting the contested procedure between the third parties, in a capacity of claimants, and AIC "Agrokultura" in a capacity of the respondent, decided that the contested parcels were the property of the claiming parties, who purchased them in 1972.

23. On 5 February 2010, the PAK filed an appeal with the Special Chamber of the Supreme Court against the aforementioned Judgment of the Municipal Court in Gjilan, claiming the existence of violations of the procedural provisions, erroneous and incorrect determination of the factual situation and the erroneous application of the of substantive law.

24. Accordingly, the challenged procedure was transferred to the Special Chamber of the Supreme Court.

25. On 5 December 2013, the Special Chamber of the Supreme Court received a letter from the Liquidation Authority where it was requested to suspend all the court proceedings, in accordance with Article 10 of the Law on PAK, because the AIC "Agrokultura" had entered the liquidation.

26. On 6 December 2016, the referring court filed a Referral with the Court requesting the constitutional review of Articles 10 and 40.1.5 of the Annex to the Law on PAK.

The allegations of the referring court

27. The referring court alleges the existence of violation of Article 46 [Protection of Property] of the Constitution, in conjunction with Article 1 of Protocol no. 1 (Protection of property) of the Convention.

28. The crux of the Referral of the referring court consists in the allegation that the challenged articles infringe upon the property rights of the interested parties, namely the creditors, because any court action and procedure involving a socially-owned enterprise or its assets that is subject to the liquidation decision, is suspended after the notification about the liquidation decision to the relevant court by the Liquidation Authority.

29. The referring court states that *"suspending or dismissing an ownership claim against a SOE in liquidation pursuant to Section 9.3 of UNMIK Reg 2005/18 would not conform with the protection of the property rights according to Art 1, Protocol 1, of the ECHR and the established case law of the European Court of Human Rights, as it would deprive the claimants of their right to have their property rights adjudicated by an independent court. To suspend the adjudication of the property claim of the claimants would constitute a violation of Art 1, Protocol 1 of the ECHR."*

30. The referring court further reasons that "*This line of reasoning is based on the assessment that the suspension of the court case refers the claim first and foremost to Liquidation Authority which is not a court. While any decision of that Liquidation Authority can be challenged in the court, the procedure, given the powers of the Liquidation Authority to use and dispose of assets of the SOE under liquidation, practically creates a risk for the claimants to lose their property in the procedure because the provisions to effectively protect owners of real property potentially are not effective and/or the rank of the property claim in the liquidation proceedings is too low, given the fundamental and human right to property. Namely the affected owners would run the risk of being subject to a de facto expropriation without adequate compensation."*

31. The referring court further adds that "*[…] there is a remaining and serious doubt about whether or not the provisions on suspension of judicial proceedings regarding possession or property are constitutional. If they are not, they would need to be nullified by the Constitutional Court, which would also be relevant for the decision in the pending case."*

32. The referring court also states that *"the question whether the Constitutional Court can review also the compliance of Kosovo legislative acts with Article 1, Protocol 1 of the European Convention on Human Rights, which is an international legal instrument binding in Kosovo based on Article 22 of the Constitution, is not material in this case. Because the fundamental right to protection of property as enshrined in Article 46 of the Constitution is protected…".*

33. Regarding the aim of liquidation, the referring court states that "*The aim of the liquidation is to wrap up all assets of the entity under liquidation to satisfy the creditors as far as possible and in line with the priority class of their claims. The priority classes of claims are defined in Article 40. Claims based on possession and on property are in the fifth class, which is namely ranking below costs of the proceedings and secured claims, but prevails over preferential claims of employees, unsecured claims and claims of owners/shareholders of the entity under liquidation."*

34. Finally, the referring court addresses the Court: "*As it is the exclusive prerogative of the Constitutional Court to formally nullify legislation adopted by the assembly, the court in accordance with Article 113 paragraph 8 of the Constitution and Rule 75 of the Rules of Procedure of the Constitutional Court submits the question of the constitutionality of Articles 10 and 40.1.5 of the Annex Law No. 04jL -034 on the Privatization Agency of Kosovo by way of this Referral to the Constitutional Court."*

Comments submitted by PAK

35. In its comments, PAK initially explains:

> *"Socially Owned Enterprise "AIC Agrokultura" continues to be under the liquidation procedure which is being conducted and which has not been completed yet. As approximately 500 other socially owned enterprises the "AIC Agrokultura"*

is also under this process due to the decision of the Board of PAK, by applying the legal responsibilities stipulated clearly by the Law on PAK. The process of liquidation, as a process of transformation of socially owned property to private ownership, by enabling the transfer of money and revitalization of assets that have been blocked for some time now and which are depreciated, composes the final stage of the mandate of PAK for administering this property. Of course, this process goes through numerous steps and consists of some important activities, among which the most important are the sale or the transformation of ownership over assets of the SOE, the assessment of creditor and property claims by the Liquidation Authority, by including here also the legal assessment based on appealing this assessment and the share of credit funds. At this moment, the Liquidation Authority completed the assessment of all credit and property requests but numerous decision of the Liquidation Authority have been appealed and we are waiting the decisions of the Special Chamber. […]."

36. PAK further points out:

"*The ownership rights of parties that have claims against "AIC Agrokultura" are guaranteed through the review of these claims by the Liquidation Authority […].The review of allegations by the Liquidation Authority is of course the first stage of assessing these allegations, since Article 5.7 of the Law and Article 37.7 of the Annex to the Law on PAK, gives the right to any alleged owner, who is not satisfied with the assessment of the Liquidation Authority, to appeal the decision of the Liquidation Authority on his allegations within a time limit of 30 days to the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo. In the Court procedure, the party has all the procedural rights stipulated in the Law 04/L-033, by including here also the right to request a preliminary injunction for suspension of transfer of the asset (sale under liquidation) based on Article 55 of the Annex to the Law 04/L-033 on Special Chamber […]".The party that is dissatisfied with the Judgment or the Decision of the Specialized Panel, based on the complaint against the Decision of Liquidation Authority on property claims, can address the Appellate Panel […].Therefore, the review of the property claim of the party goes through numerous filters by ensuring not just in entirety but also in every special instance, the application of the rights of a party to a regular legal process.*"

37. PAK further explains:

"*Based on Article 10 of the Annex to the Law on PAK, when the enterprise enters the liquidation procedure, every court or arbitration procedure that is being conducted before a Court or Tribunal Arbitration, including the proceedings before the Special Chamber of the Supreme Court of Kosovo, is suspended. This legal stipulation has been decided by the legislator with the purpose of focusing on reviewing credit or property claims at a single authority only for eliminating the parallel decisions on the same claims, while the enterprise goes through liquidation proceedings. Without this stipulation, we would have a confusing situation for protecting the rights of alleged owners or creditors who could be subject of assessment before any basic court or Special Chamber besides the review by the Liquidation Authority. However, such legal stipulation does not constitute any violations of the rights of the alleged creditor or owner.*"

38. Finally, PAK reiterates:

"The categorization at the level of priorities of distribution of proceeds according to property requests/interests is a substantial characteristic of legislation on

liquidation/bankruptcy in any democratic country of the world that respects the trade economy. Article 40 of the Annex to the Law on PAK serves especially to this purpose. However, it leaves the impression that its subject matter was the provision of Article 40.1.5 and not the one of Article 40.1.8 that places exactly in another category of property rights lower in the payment row. Finally, we want to emphasize that the initiation of the process of liquidation of an enterprise does not mean in any way immediate alienation of its assets. The alienation of the assets of the enterprise under liquidation is conducted by PAK through a tender process that is open and transparent where all the rights of parties are completely respected. Moreover, there is no intention to put in sale any asset against which there is a pending property claim."

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Additional comments of the referring court

39. In the additional comments, the referring court, among others, stated:

a) *The purpose of liquidation is to close all assets (irrespective of their legal nature and value, thus affecting the property, claims, rights of any kind) and use them to satisfy all claims against the entity which is usually referred as a "waterfall" mechanism: Money is used to cover the categories of claimants from top to bottom by following the legal system of priorities (Article 40 of the Annex to the PAK Law) and only after a category is fully satisfied, the remainder, if there is any, is used for the other lower category (Article 41 of the Annex to the PAK Law). Within one category, if the remaining funds are insufficient to cover all creditors, each of them receives the same percentage to cover his claim. After the liquidation closure, the entity legally cease to exist (Article 45 of the Annex to the PAK Law). Creditors who have low priority class claims, for which there are no resources left to be distributed, receive nothing, in other words, suffer a complete loss. Third party claims do not present any exceptions to this system. It is not an exception that the liquidation procedures continue for years. In order to finalize and close a liquidation of a SOE, the liquidation authority must obtain the consent of the SCSC (Article 44 of the Annex to the PAK Law), therefore the SCSC has an overview of the completed liquidation proceedings.*

b) *The PAK rightly pointed out that the lawfulness of the liquidation authority's actions may be subject to judicial review. Except that it is worth mentioning that the property-based claims are attributed to a particular category of priority by law (Article 40 paragraph 1.5 of the Annex to the PAK Law). It should also be noted that the proceeds of the privatization of assets of a SOE are maintained by the PAK in custody or trust, separated from the agency funds. Neither the SOE is responsible for the obligations of PAK nor does the PAK have access to funds belonging to a particular SOE (Article 18 of the PAK Law). In this way, it is ensured that all SOE assets are used only for this SOE and for nothing else. The other aspect of this is clear that there is no obligation of any institution for the claims that cannot be met by SOE funds and assets within the system (priority waterfall distribution), which is mentioned above. In addition to the protection that is inherent in this system, the property claims have not been given any special protection of any kind.*

Main comments received by the Venice Commission Forum

40. The Court notes that from the received responses of the Forum of the Venice Commission, is noted that among the states that submitted responses there are similar legal situations, but that are not identical with the Republic of Kosovo, namely with the present case.

41. The Court also notes that in the majority of the comments received by the Venice Commission Forum is noted that the liquidation and bankruptcy process of enterprises, whether public or private, affects the creditors' position and interests. However, in all the cases in question, the creditors' rights are protected and realized in the court proceedings.

42. In this regard, the Constitutional Court of Bulgaria stated that *"the acts of the authorities conducting the privatization procedure are subject to judicial control. The lawmakers' efforts to release such acts from the administrative judiciary have been declared non-constitutional by the Constitutional Court. Creditors' rights in the liquidation, bankruptcy or privatization proceedings are subject to judicial protection."*

43. The Constitutional Court of Croatia stated that *"the bankruptcy proceedings are conducted in order to satisfy creditors' claims by selling the debtor's assets. The bankruptcy proceeding is conducted exclusively by the competent Commercial Court."*

44. The Constitutional Court of Slovakia clarified that *"a state-owned enterprise may be dissolved with or without liquidation. Liquidation occurs when assets are not transferred to the successor. However, if the enterprise is dissolved according to the rules of the Privatization Law, then the liquidation will not take place. For this reason, the pending court proceedings during the privatization procedure are not suspended and the jurisdiction to decide the property claims remains with the civil courts."*

45. The Constitutional Court of the Czech Republic explained that *"when a decision on liquidation is made, the liquidation is registered in a commercial register and the administrator plays the role of a body established by law. The Administrator takes all necessary actions to decide all claims and obligations so that the enterprise is liquidated as soon as possible. He invites publicly the creditors to file their claims against the enterprise within a certain time limit. The court proceedings initiated prior to the liquidation announcement are further extended with the only difference that in that case the administrator who recently represents the enterprise in the court instead of the body designated by law. Liquidation cannot be closed before the end of the court proceedings because all the claims and obligations filed must be resolved."*

46. The Constitutional Court of South Africa stated that *"when the legal proceedings are suspended as a result of the liquidation order of an enterprise, the person who initiated the liquidation of the enterprise or has made a special decision on the voluntary liquidation of an enterprise, the person who commenced legal proceedings may, after giving the written notice to the administrator, continue those proceedings at the same court."*

47. The Constitutional Court of Slovenia submitted a decision (U-I-288/04 of 17 March 2005) on constitutional review of the Law on Transformation of the Successor Fund of the Republic of Slovenia and the Establishment of the Public Agency of the Republic of Slovenia for Succession. The law in question was declared incompatible with the Constitution of the Republic of Slovenia, as it did not specify the continuation of judicial, civil and enforcement proceedings that were suspended based on that law. The Constitutional Court of Slovenia found that the challenged law violated the rights of individuals to judicial protection of rights.

Relevant legal and constitutional provisions

Relevant constitutional provisions:

Article 46 [Protection of Property]

1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.

4. Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.

Respective provisions of Law No. 04/L-033 on Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters

Article 9 [Conduct of Proceedings by a Sub-Panel or Single Judge]

1. Any specialized panel of the Special Chamber may issue an order delegating to one of its members or to a subpanel consisting of two of its members the responsibility and authority to conduct any or all proceedings for a case within its subject-matter jurisdiction. Judgments and Decisions issued by such a single judge or sub-panel shall be deemed to be issued by the concerned specialized panel.

Challenged provisions of Articles 10 and 40.1.5 of the Annex to the PAK Law

Article 10
Suspension of actions

1. Any judicial, administrative or arbitration action, proceeding or act involving or against an Enterprise (or any of its assets) that is the subject of a Liquidation Decision shall be suspended upon the submission by the Liquidation Authority of a notice of the Liquidation Decision to the concerned court, public authority or arbitral tribunal. Such notice shall refer to this Article 10 and be accompanied by a copy of the Liquidation Decision and a copy of the published Liquidation Notice.

2. Any such suspended action, proceeding or act shall only continue or be effective with the permission of the Liquidation Authority or the Court. Such suspended actions, proceedings and acts shall include, but not be limited to, any action, proceeding or act:

2.1. concerning the collection, recovery or enforcement of a Claim for debts, taxes, penalties or obligations of any kind;

2.2. concerning the creation, recognition, modification, increase, perfection, registration or enforcement of any Claim or Interest against or to the Enterprise or any Asset of the Enterprise;

2.3. any act to realize, seize, or sell any pledged or mortgaged or otherwise encumbered asset or to exercise ownership or control over any Asset of the Enterprise; and

2.4. regulatory proceedings or actions with regard to the prevention of or remedy for any violation of the regulatory provisions, rules or decision, to the extent that these involve monetary Claims against the Enterprise.

3. The suspension of actions, proceedings and acts shall not apply to any of the following:

3.1. court action by or on behalf of the Enterprise directed against third parties;

3.2. criminal proceedings against the Enterprise or one or more members of its Management;

3.3. transfers or dispositions of Assets of the Enterprise in the ordinary course of business of the Enterprise, including transactions provided for under the present Law and in this Article 10 in particular;

3.4. regulatory proceedings or actions with regard to the prevention of or remedy for any violation of regulatory provisions, rules or decision, to the extent that these do not involve monetary Claims against the Enterprise; and

3.5. inspections and requests for inspection made by holders of registered mortgages, perfected pledges or similar encumbrances relating to Assets of the Enterprise.

Article 40
Priorities of Claims and Interests

1. *In liquidation proceedings all Claims of creditors shall be satisfied according to classes 1.1 – 1.8 hereunder and in the following order:*

1.1. the costs of selling or otherwise realizing the property or assets of the Enterprise;

1.2. post Reorganization Petition secured credit incurred in accordance with Article 13 of UNMIK Regulation 2005/48 or the Law on the Reorganization of Certain Enterprises, whichever is then in force, to the extent that such credit was approved by the Court. This priority relates only to proceeds from the sale or other transfer of assets securing the credit;

1.3. priority Claims, in the following order:

1.3.1. court expenses;

1.3.2. expenses of the Liquidation Authority and any supporting advisors;

1.3.3. expenses of the Liquidation Authority required for the maintenance and protection of the property and assets of the Enterprise;

1.3.4. expenses for the continued operation of the Enterprise after the decision of the Agency or Court to commence liquidation proceedings; and

1.3.5. all Administrative Expense Claims incurred during any reorganization or during the liquidation proceedings;

1.4. secured Claims to the extent realized from Assets securing such Claims and in the amount of such Secured Claims and Claims;

1.5. claims based on the ownership of specific assets including real assets;
(...)
1.8. claims of owners, shareholders, founders, participants or partners of the Enterprise.

Assessment of the admissibility

48. The Court will first examine whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and the Rules of Procedure.

49. In this regard, the Court initially refers to paragraphs 1 and 8 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.

(...)

8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.

50. The Court refers to Articles 51 [Accuracy of Referral] of the Law, which stipulates:

1. A Referral pursuant to Article 113, Paragraph 8 of the Constitution shall be filed by a court only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

2. A Referral shall specify which provisions of the law are considered incompatible with the Constitution.

51. The Court also recalls Rules 75 and 76 of the Rules of Procedure, which provide:

Rule 75 [Filing of Referral]

(1) Any Court of the Republic of Kosovo may submit a Referral to the Court pursuant to Article 113.8 of the Constitution, ex officio, or upon the request of one of the parties to the case.

(2) The Referral shall state why a decision of the court depends on the question of the compatibility of the law to the Constitution. The file under consideration by the court shall be attached to the Referral.

(3) Any Court of the Republic of Kosovo may file a Referral to initiate the procedure pursuant to Article 113. 8 of the Constitution regardless of whether a party in the case has disputed the constitutionality of the respective legal provision.

Rule 76 [Notification]

The Court, following filing of the Referral, shall order the court to suspend any ongoing procedures with respect to the case in question until the Court has issued a decision or Judgment in the case.

52. Referring to the abovementioned provisions, the Court must first assess whether the referring court is an authorized party to file such a Referral.

53. The Court refers to its Resolution in case KO126/16, where the Court found that each composition of a regular court having competence to adjudicate the case is an authorized party to file a referral in accordance with Article 113.8 of the Constitution.

54. In this connection, the Court refers to Article 9 [Conduct of Proceedings by a Sub-Panel or Single Judge] of Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters that establishes:

"1. Any specialized panel of the Special Chamber may issue an order delegating to one of its members or to a subpanel consisting of two of its members the responsibility and authority to conduct any or all proceedings for a case within its subject-matter jurisdiction. Judgments and Decisions issued by such a single judge or sub-panel shall be deemed to be issued by the concerned specialized panel."

55. The Court notes that, in the present case, the Referral was submitted by five judges of the Special Chamber, including its President. This composition of the Court has jurisdiction to adjudicate the case AC-II-12-0086.

56. Therefore, taking into account the above-mentioned explanations, the Court considers that the present Referral was submitted by "the court" within the meaning of Article 113.8 of the Constitution.

57. The Court further refers to its decision in Case KO04/11, where it was established that, "*in order to assess admissibility of the Referral, this Court has first to consider if the contested law is to be directly applied by the Applicant with regard to a pending case and secondly if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the Applicant. Thirdly it is important to see if the Applicant specified what provisions of the challenged law are considered incompatible with the Constitution.*"

58. Based on the above, it results that in order that the Referral submitted under Article 113, paragraph 8 of the Constitution, is admissible, must meet the following criteria: a) the referring court should have the case under review; b) the challenged law is to be directly applied by the referring court with regard to a pending case; c) the lawfulness of the challenged law is a precondition for the decision regarding the case pending; and ç) the referring court should specify what provisions of the challenged law are considered incompatible with the Constitution (*Constitutional Court of the Republic of Kosovo: Case no. KO126/16, Resolution on Inadmissibility, published on 1 June 2017).*

59. The Court notes that as an essential requirement for the admissibility of a referral for incidental control of constitutionality, explicitly provided in the Law and the Rules of Procedure, is the existence of the so-called "direct connection element" between the provisions of the challenged law and the issue that is to be adjudicated before the regular courts.

60. The Court considers that "the direct application" of the concrete norm means that the outcome of the decision by the referring court depends on the direct implementation or non-implementation of the contested norm.

61. Therefore, in order to have a direct connection, there must be a necessary relation between the decision of the Constitutional Court (resolution of the case of unconstitutionality of the law by this Court) and resolution of the main issue by the referring court, as an initiator subject of the incidental adjudication - in the sense that the adjudication by the regular court cannot be terminated independently from the adjudication in the Constitutional Court" (*See Constitutional Court of the Republic of Albania - Decision V-30/10 of 17 June 2010; Decision No. 13 of 4 May 2009*).

62. The Court notes that this interpretation is also supported by the case law of other countries. Thus, the Federal Constitutional Court of Germany emphasizes the connecting element between the challenged norm and the specific case, reasoning that "*[...] if the Court declared unconstitutional the challenged provision, the claim would be rejected, whereas declaring those provisions as constitutional would result in the approval of the claim" (See Decision of the Federal Constitutional Court of Germany 2 BvL 12, 13, 14, 15/56, 6 November 1957).*

63. In the present case, in order to assess the admissibility of the Referral, the Court must first ascertain whether the challenged law is to be directly applied by the referring court in the case under review (namely the case number AC-II-12-0086); second, whether the lawfulness of the challenged law (namely its compliance with the Constitution) is a prerequisite for taking a decision on the case under the consideration by the referring court; thirdly, it is important to see whether the referring court has specified what provisions of the Law are considered in contradiction with the Constitution.

64. In the light of the facts of the case and of the foregoing considerations: the Court considers that the Referral raises serious doubts regarding the constitutionality of Articles 10 and 40.1.5 of the Annex to the PAK Law. The referring court has also argued that the specific articles of the Law in question should be applied in the case number AC-II-12-0086.

65. Accordingly, after examining the relevant claims and respective arguments submitted by the referring court and analyzing the main elements of the Referral, the Court considers that the Referral raises serious issues which are of such complexity that their determination should depend on an examination of its merits. The Referral cannot, therefore, be regarded as being manifestly ill-founded, within the meaning of the Rule 36 (1) (d) of the Rules of Procedure and no other ground for declaring it inadmissible has been established (See, for example, Case No. KO73/16, Applicant *the Ombudsperson*, Constitutional Review of Administrative Circular No. 1/2016, issued by the Ministry of Public Administration of the Republic of Kosovo, on 21 January 2016, Judgment of 8 December 2016, paragraph 49 and other references mentioned in that decision).

Assessment of the merits

66. Initially, the Court notes that on 5 December 2013, the Special Chamber of the Supreme Court received a letter from the Liquidation Authority requesting the suspension of all court proceedings pursuant to Article 10 of the PAK Law because KBI "Agrokultura" had entered liquidation. On the other hand, the Referral court submitted the Referral to the Constitutional Court of the Republic of Kosovo on 6 December 2016 (namely after three years).

67. The Court further emphasizes the substance of the allegations of the referring court that the suspension of the proceedings against a SOE against which the liquidation procedure begins - and referring of the case to the Liquidation Authority, deprives the claimants from their right that their property rights are adjudicated by an independent court. In addition, the referring court argues that the provisions to effectively protect the owners of immovable property are potentially ineffective and that the order of property claim in the liquidation proceedings - according to Article 40.1.5 of the Annex to the PAK Law - is very low, bearing in mind the basic human right to property.

68. In this respect, the Court first refers to paragraphs 1 and 2 of Article 10 of the Annex to the Law on PAK, which establish:

> *1. Any judicial, administrative or arbitration action, proceeding or act involving or against an Enterprise (or any of its assets) that is the subject of a Liquidation Decision shall be suspended upon the submission by the Liquidation Authority of a notice of the Liquidation Decision to the concerned court, public authority or arbitral tribunal. Such notice shall refer to this Article 10 and be accompanied by a copy of the Liquidation Decision and a copy of the published Liquidation Notice.*
>
> *2. Any such suspended action, proceeding or act shall only continue or be effective with the permission of the Liquidation Authority or the Court. Such suspended actions, proceedings and acts shall include, but not be limited to, any action, proceeding or act:*
>
> > *2.1. concerning the collection, recovery or enforcement of a Claim for debts, taxes, penalties or obligations of any kind;*
> >
> > *2.2. concerning the creation, recognition, modification, increase, perfection, registration or enforcement of any Claim or Interest against or to the Enterprise or any Asset of the Enterprise;*
> >
> > *2.3. any act to realize, seize, or sell any pledged or mortgaged or otherwise encumbered asset or to exercise ownership or control over any Asset of the Enterprise; and*
> >
> > *2.4. regulatory proceedings or actions with regard to the prevention of or remedy for any violation of the regulatory provisions, rules or decision, to the extent that these involve monetary Claims against the Enterprise.*

69. The Court notes that paragraph 1 of Article 10 of the Annex to the Law on PAK in fact provides that judicial, administrative or arbitral proceedings are suspended upon notice by the Liquidation Authority.

70. However, the Court also notes that in accordance with paragraph 2 of Article 10 of the Annex to the Law on PAK: *"Any such suspended action, proceeding or act shall only continue or be effective with the permission of the Liquidation Authority or the Court"*.

A textual interpretation of this paragraph highlights the fact that it recognizes to the referring court the competence to decide on the conduct of the suspended procedure, to continue or to put into effect the actions, proceedings or suspended acts.

71. The Court notes that, in its Referral, the referring court does not refer to paragraph 2 of Article 10 of the Annex to the Law on PAK. Furthermore, the Court has no knowledge how Article 10 of the Annex to the PAK Law, in particular paragraph 2, applies. Moreover, the referring court did not state whether it is hindered by the Liquidation Authority, in respect of implementation of paragraph 2 of Article 10 of the Annex to the Law on PAK.

72. However, the Court does not note that there is any obstacle for the referring court to take any of the two following actions, as regards the interpretation and application of Article 10 of the Annex to the Law on PAK namely: (i) to allow the suspension of the court proceedings pursuant to paragraph (1) of Article 10, of the Annex to the Law on PAK, or (ii) to continue with actions, proceedings, or such suspended acts, that effectively means to resume the suspended proceedings pursuant to paragraph 2 of Article 10, of the Annex to the PAK Law.

73. Based on the case law of other countries in the cases of incidental control, the referring court has an obligation to: (i) to prove the direct link between the challenged norm and the specific case to be resolved by it; (ii) the necessary relation that the referring court has with the implementation of the specific norm, and (iii) the referring court should ensure that there is no other norm, law that would enable it to resolve the specific case (*see the case law of the Constitutional Court of the Republic of Albania mentioned above*).

74. The Court considers that the referring court has not substantiated that there is an obstacle that in the present case, does not allow it to apply paragraph 2 of Article 10 of the Annex to the PAK Law, as another provision that would enable it to resolve the case.

75. As to the allegations of the referring court raised against Article 40.1.5 of the Annex to the PAK Law, the Court notes that the case under review relates to the privatization process and that the Kosovo legislator has issued laws for the implementation of the relevant economic and social policies, in the public interest.

76. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities (in this case of the legislative), it is bound to review the challenged measures under Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of the Convention, and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted (See case *James and Others v. the United Kingdom*, ECtHR, Application 8793/79, Judgment of 21 February 1986, paragraph 46).

77. Accordingly, the Court must ascertain whether a fair balance has been found between the requirements of the general interest of the society and the requirements for the protection of the fundamental rights of the individual (see Case, *Sporrong and Lonnroth v. Sweden*, ECtHR, Application No 7151/75; 7152/75, Judgment of 23 September 1982, paragraph 69). In particular, there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized, (see *James and others*, cited above, paragraphs 34 and 50).

78. In this regard, the Court again emphasizes the essence of the allegation of the referring court with regard to Article 40.1.5 of the Annex to the PAK Law: "*The priority classes of claims are defined in Article 40. Claims based on possession and on property are in the fifth class, which is namely ranking below costs of the proceedings and secured claims, but prevails over preferential claims of employees, unsecured claims and claims of owners/shareholders of the entity under liquidation.*"

79. The Court also refers to the substance of PAK comments with regard to Article 40.1.5 of the Annex to the PAK Law: "*The review of allegations by the Liquidation Authority is of course the first stage of assessing these allegations, as Article 5.7 of the Law and Article 37.7 of the Annex to the Law on PAK, gives the right to any alleged owner, who is not satisfied with the assessment of the Liquidation Authority, to appeal the decision of the Liquidation Authority on his allegations within a time limit of 30 days to the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo.*"

80. In this regard, the Court notes that Article 40.1.5 of the Annex to the Law on PAK constitutes a restriction of the property right of the interested parties, but this restriction is not automatically a violation of property interests, however, as it is seen from the PAK's response, the applicable law in Kosovo stipulates that the decisions of the Liquidation Authority are not final, but that those decisions may be appealed to the Special Chamber of the Supreme Court.

81. The limitation of the rights of access to a court cannot limit or reduce the access to the court of an individual to such an extent that the very essence of the right is impaired. Moreover, the limitation will not be compatible with Article 31 of the Constitution in conjunction with Article 6 (1) of the Convention if the "legitimate aim" is not respected and there is no "reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (see *Ashigdane v. United Kingdom*, ECtHR, Application No. 8225/78, Judgment of 28 May 1986, paragraph 57).

82. The Court notes that, in the present case, the challenged Articles 10 and 40.1.5 of the Annex to the PAK Law do not infringe the essence of the right to judicial protection of rights and protection of creditors' property because: (i) the limitation is foreseen by law adopted by the Assembly of the Republic of Kosovo; (ii) the limitation is objective and reasonable because it prevents the creation of confusion arising from the conduct of parallel proceedings before the referring court and the Liquidation Authority; and (iii) the principle of proportionality is applied because after the initial conduct of proceedings before the Liquidation Authority - in order to avoid parallel proceedings – the procedural safeguards are offered to challenge the decisions of the Liquidation Authority before the Special Chamber of the Supreme Court (in two instances within this Chamber).

83. In addition, the Court refers to paragraph 3, Article 44 [Case closure], of the Annex to the PAK Law which establishes: *"At the request of the Liquidation Authority, where no creditors have submitted claims by the Claims Submission Deadline, the Court shall issue a decision permitting closure of the liquidation case."*

84. The Court considers that this strengthens the guarantees for judicial protection of the property rights, including the creditors' claims during the liquidation process of the SOEs.

85. In conclusion, the Court considers that the challenged Articles 40.1.5 of the Annex to the PAK Law are compatible with the Constitution.

FOR THESE REASONS,

The Constitutional Court, in accordance with Article 113.8 of the Constitution, based on Articles 51, 52 and 53 of the Law, and pursuant to Rule 75 of the Rules of Procedure, in the session held on 9 May 2017, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD, by majority of votes, that Articles 10 and 40.1.5 of the Annex to Law No. 04/L-034 on Privatization Agency of Kosovo are compatible with the Constitution of the Republic of Kosovo;

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; and

V. This Decision is effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI92/16, Applicant: Jusuf Berisha, constitutional review of Judgment Rev. no. 344/2015 of the Supreme Court of Kosovo, of 12January 2016

KI92/16, Resolution on inadmissibility of 7 December 2016 published on 18 July 2017

Key words: *individual referral, constitutional review of the Judgment of the Supreme Court of Kosovo, manifestly ill-founded*

The Applicant submitted his referral based on Article 113.7 of the Constitution, Article 47 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

The Applicant submitted a statement of claim to the Municipal Court in Podujeva concerning the confirmation of his alleged ownership right over a parcel which is registered under the ownership of the Municipality of Podujeva.

The Municipal Court rejected the Applicant's statement of claim as ungrounded reasoning that the Applicant had not submitted any evidence substantiating his alleged ownership over the disputed parcel.

The Court of Appeals rejected the Applicant's appeal as ungrounded upholding the judgment of the first-instance court – the Municipal Court.

The Supreme Court rejected the Applicant's request for revision as ungrounded upholding the judgments of lower-instance courts.

The Court considers that the Applicant does not show that the court proceedings viewed in entirety were unfair or arbitrary in order for the Constitutional Court to conclude that the very essence of the right to fair and impartial trial was violated.

The Court reiterates that it is not the duty of the Constitutional Court to deal with errors or fact or law which have allegedly been made by ordinary courts when assessing the evidence or applying the law (legality) unless and insofar as such errors may have infringed the rights and freedoms protected by the Constitution (constitutionality).

Therefore, the Court considers that the Referral is manifestly ill-founded on constitutional grounds and must be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case no. KI92/16

Applicant

Jusuf Berisha

Constitutional review of
Judgment Rev. no. 344/2015 of the Supreme Court of Kosovo,
of 12 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 was submitted by Jusuf Berisha from Prishtina (hereinafter: the Applicant), who is represented by Ramiz Suka, lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the Judgment Rev. no. 344/2015 of the Supreme Court of Kosovo of 12 January 2016, which rejected as ungrounded the Applicant's Revision filed against Judgment of the Court of Appeals of Kosovo.

3. The challenged decision was served on the Applicant on 9 March 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on Article 113.7 of 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 15 June 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 12 July 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (Presiding), Bekim Sejdiu and Selvete Gërxhaliu – Krasniqi.

8. On 22 August 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 4 November 2016, the President of the Court appointed Judge Almiro Rodrigues as Presiding Judge of the Review Panel replacing Judge Robert Carolan who resigned on 9 September 2016.

10. On 07 December 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. In 2007, the Applicant filed with the Municipal Court in Podujeva a statement of claim for confirmation of his alleged ownership rights over a parcel, which is registered under the ownership of the Municipality of Podujeva.

12. On 14 September 2007, the Municipal Court [Judgment C. no. 114/2007] rejected as ungrounded the Applicant's statement of claim.

13. The Applicant filed with the District Court appeal against that Judgment.

14. On 22 October 2008, the District Court [Decision Ac. no. 970/2007] approved the Applicant's appeal, annulled the first instance judgment and remanded the case for retrial to the Municipal Court.

15. On 1 December 2009, in the repeated proceedings, the Municipal Court [Judgment C. no. 878/2008] rejected as ungrounded the Applicant's statement of claim, reasoning that the Applicant did not submit any evidence which substantiates his claim of ownership over the disputed parcel.

16. The Applicant filed with the District Court an appeal against that Judgment of the Municipal Court.

17. On 8 April 2015, the Court of Appeal [Judgment CA. no. 1627/2012] rejected as ungrounded the Applicant's appeal and upheld the first instance judgment of the Municipal Court.

18. The Applicant filed a request for revision with the Supreme Court against that Judgment of the Court of Appeal.

19. On 1 December 2015, the Supreme Court [Judgment Rev. no. 344/2015] rejected as ungrounded the Applicant's request for revision and upheld the judgments of the lower instance courts. In the reasoning of its judgment, the Supreme Court *inter alia* stated that:

"[...] the claimant has not provided reasons during the entire proceedings that he or his predecessors have had the ownership right over the contested parcel, based on any legally valid ground for acquiring the ownership right over the immovable property, and that the claimant could not acquire the ownership right over the contested immovable property on the ground of acquisition by prescription [...]".

Applicant's allegations

20. The Applicant claims a violation of Article 31 [Right to Fair and Impartial Trial].

21. In addition the Applicant's alleges that his right to protection of property was violated, because the disputed immovable property was transferred from private to public property in an unlawful manner.

22. The Applicant alleges that the challenged decision violated his rights to fair trial and to protection of property, because of erroneous and incomplete determination of factual situation and erroneous application of the law. The Applicant does not invoke any other Articles of the Constitution.

Admissibility of the Referral

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

24. In this respect, the Court refers to Article 113 paragraph 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."

25. The Court further 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."

26. The Court also takes into account Rule 36 (1) (d) and (2) (b) of the Rules of Procedure, which foresees:

"(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."

27. The Court recalls that the Applicant claims a violation of his right to fair and impartial trial and his right to protection of property.

Alleged violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution

28. The Court notes that the Applicant alleges a violation of his right to fair trial based on erroneous and incomplete determination of factual situation and erroneous application of the law.

29. In that respect, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

> *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.*

30. The Court reiterates that it is not the jurisdiction of the Constitutional Court to substitute, by its own assessment, the assessment of the regular courts and, as a general rule, it is the duty of the regular courts to assess the evidence before them and to apply the law. (See Constitutional Court Case KI47-48/15, constitutional review of Judgment AC-II-14-0057, of the Special Chamber of the Supreme Court of Kosovo, of 12 March 2015, Applicants *Beqir Kosokoviku and Mustafë Lutolli*); It is the role of the Constitutional Court to find whether the court proceedings were fair and impartial in its entirety, as it is required by Article 6 of the European Court of Human Rights. (See ECtHR cases, *inter alia*, *Edwards v. United Kingdom*, 16 December 1992, para.34, Series A, no. 247 and *B. Vidal v. Belgium*, 22 April 1992, 33, Series A, no. 235)·

31. The Court considers that the Applicant does not show that the court proceedings viewed in entirety were unfair or arbitrary in order to the Constitutional Court to conclude that the very essence of the right to fair and impartial trial was violated.

32. Based on the above, the Court reiterates that it is the duty of the regular courts to assess whether the claim for confirmation of the property rights over the disputed immovable property was reviewed in accordance with the law. The claim for confirmation of the property rights was reviewed before the three court instances, with a final Judgment of the Supreme Court, which considered that the Applicant *"has not provided reasons during the entire proceedings that he or his predecessors have had the ownership right over the contested parcel".*

33. Moreover, the Court notes that the Applicant has not provided evidence showing that the regular court proceedings were unfair or arbitrary, and as such degrading substantially the judicial process in its entirety. (See ECtHR case *Dombo Beheer vs. Netherland,* Judgment of 27 October 1993, Series A, no. 274).

34. The Court further considers that the Supreme Court fully reasoned its decision, by explaining in detail why the request for revision is ungrounded, by assessing the determination of the factual situation and the application of the law in force, and by assessing the decision of the lower instance courts based on the allegations raised by the Applicant.

35. Therefore, in these circumstances, the Court finds that the challenged decision did not violate the Applicant's right to a fair and impartial trial as guaranteed by Article 31 of the Constitution.

Alleged violation of Article 46 [Protection of Property] of the Constitution

36. The Court notes that the Applicant also claims a violation of his right to protection of property, because of erroneous and incomplete determination of factual situation and erroneous application of the law.

37. In that connection, the Court refers to Article 46 [Protection of Property] of the Constitution, which establishes:

> *1. The right to own property is guaranteed.*
>
> *2. Use of property is regulated by law in accordance with the public interest.*
>
> *3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*

38. The Court also refers to Art.1 [Property rights] of Protocol 1 of the European Convention on Human Rights (ECHR) which establishes:

> *(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

39. In that regard, the Court considers Article 46 of the Constitution, in connection with Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights (ECHR), refers to the right to protection of an existing property and does not provide a right to acquisition of the property.

40. The Court recalls that the confirmation of the property rights was the object of the dispute before the three regular court instances and the Judgment of the Supreme Court found that the Applicant *"has not provided reasons (...) that he or his predecessors have had the ownership right over the contested parcel"*. Moreover, the Supreme Court also found that the Applicant *"could not acquire the ownership right over the contested immovable property on the ground of acquisition by prescription [...]"*.

41. The Court recalls Article 53 [Interpretation of Human Rights Provisions] which establishes that *"human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Rights"* Thus, the Constitutional Court, as *"the final authority in Kosovo for the interpretation of the Constitution"* (Article 112 of the Constitution), is bound to take into account the case law of the ECtHR when assessing alleged violations of human rights and fundamental freedoms guaranteed by the Constitution.

42. In that respect, the Court refers to ECtHR jurisprudence which held that *"the Court* [the ECtHR] *accepted that Article 1 of Protocol 1 does no more than enshrine the right of*

everyone to the peaceful enjoyment of "his" possessions, but it does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions". (See ECtHR case *Marckx v. Belgium*, Application no. 6833/74, 13 June 1979).

43. Thus, the Court considers that Article 1 of Protocol 1 of the ECHR, in comjunction with Article 46 of the Constitution, does not guarantee a right to acquisition of property (assets); the acquisition of property is regulated by the law and potential disputes are to be resolved in the regular courts.

44. Therefore, in these circumstances, the Court finds that the challenged decision did not violate the Applicant's right to protection of property as guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR .

Conclusion

45. The Court concludes that the Aplicant built his claims on the basis of legality grounds, namely based on erroneous and incomplete determination of factual situation and erroneous application of the law.

46. Based on all the above, the Court considers that the facts presented by the Applicant do not justify a constitutional allegation of a violation of the right to fair and impartial trial, as guaranteed by Article 31 of the Constitution, and of the right to protection of property, as guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR.

47. Therefore, the Court, in accordance with Rule 36 (1) (d) and (2) (b), finds that the Referral is inadmissible as manifestly ill-founded on a constitutional basis.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 1 and 7 of the Constitution, Article 48 of the Law and Rules 36 (1) (d), (2) (b) of the Rules of Procedure, in the session held on 7 December 2016, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Arta Rama-Hajrizi

KI40/17, Muharrem Bytyqi and others, Constitutional review of Judgment No. AC-I-13-0087 and AC-I-13-0091 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 16 March 2017

KI40/17, Resolution on Inadmissibility of 5 July 2017, published on 19 July 2017

Key words: *Individual referral, privation, beneficiaries of 20%, referral manifestly ill-founded*

The applicants filed an appeal with the Appellate Panel of the Special Chamber of the Supreme Court, against the Judgment of the Specialized Panel of the Special Chamber of the Supreme Court (SCEL-11-0014), requesting that the certain individuals who were included in the list by the Specialized Panel be removed from the final beneficiary list of 20%, as they "have not been regular employees of SOE "Lavërtari-Blegtori"". The Appellate Panel rendered Judgment (AC-I-13-0087 and AC-I-13-0091), rejected as ungrounded the Applicants' appeal and the PAK appeal against the complainants, included in the final list by the Specialized Panel,

The applicants contested before the Constitutional Court the Appellate Panel Judgment (AC-I-13-0087 and AC-I-13-0091) which rejected as ungrounded the Applicants' appeal. The applicant did not specify any rights guaranteed by the Constitution of the Republic of Kosovo that allegedly was violated by the Appellate Panel. The Court considered that the facts presented by the applicants did not provide *prima facie* evidence that their rights guaranteed by the Constitution have been infringed. Thus, the Court declared the applicants' referrals inadmissible pursuant to Article 113 (1) and (7) of the Constitution, Articles 48 of the Law on Constitutional Court and Rules 36 (1) (d) and 36 (2) (d) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI40/17

Applicant

Muharrem Bytyqi and others

Constitutional review of Judgment No. AC-I-13-0087 and AC-I-13-0091 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 16 March 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: Muharrem Bytyqi, Hasip Ajvazi, Adem Dragusha, Demir Ukaj, Alush Llumnica, Remzije Bytyqi, Gjylferije Selmani, Murtez Bytyqi, Shaban Hyseni, Naim Gjyrevci, Sabit Krasniqi, Shaip Gerbeshi, Sabit Kadriu, Aziz Shala, Milaim Gerbeshi, Shefki Berjani, Hilmi Kadriu, Shefqet Drenovci, Fazli Demiri, Musa Guxhufi, Tefik Dragusha, Fadil Selmani, Ragip Bislimi, Besim Reçica, Sali Bajrami, Gani Berjani, Qamil Bellagoshi, Shaban Zogaj, Faton Gerbeshi, Nexhmedin Hyseni, Bujar Pacolli, Ujup Reçica, Emrush Gjyrevci, Sali Jashari, Idriz Ramadani, Ismet Raqi, Bejtush Sahiti, Hysen Slivova, Ragip Berjani, Hysen Bislimi, Naser Bytyqi, Isuf Shala, Ajet Shala, Bahri Ajvazi, Bahtir Sahiti, Ramdan Gashi, Qamil Selmani (hereinafter: the Applicants), who are represented by Muharrem Bytyqi, from village Miradi e Epërme, Fushë Kosovë.

Challenged decision

2. The Applicants challenge Judgment No. AC-I-13-0087 and AC-I-13-0091 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel), of 16 March 2017.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly violated their constitutional rights.

4. The Applicants did not specifically state any rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), which they consider that has been violated**.**

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03 / L-121 on the 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

6. On 13 April 2017, the Applicants submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 13 April 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.

8. On 25 April 2017, the Applicants submitted additional documents to the Court including the power of attorney for their representative before the Court.

9. On 27 April 2017, the Court notified the Applicant about the registration of the Referral. On the same date, the Referral was sent to the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Special Chamber) and to the Privatization Agency of Kosovo (hereinafter: the PAK).
10. On 29 June 2017, the Court received a letter from E.Sh, the Secretary of Socially Owned Enterprise SOE "Lavertari- Blegtori" Miradi e Epërme, Fushë Kosovë, requesting the Court to urgently review the Referral.

11. On 5 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. On 1 November 2006, the Socially-Owned Enterprise SOE "Lavertari-Blegtori" (hereinafter: the Socially Owned Enterprise), Miradi e Epërme, Fushë Kosove was privatized.

13. The Applicants, as former employees of the Socially Owned Enterprise, were included in the PAK list to benefit from 20% of the proceeds from the privatization and liquidation of the aforementioned enterprise.

14. On an unspecified date, the following persons filed a complaint against the PAK with the Specialized Panel of the Special Chamber (hereinafter: the Specialized Panel), requesting to be included in the final list of beneficiaries of 20% from the privatization and the liquidation of the Socially-Owned Enterprise: N.S, S.S, G.S, R.M, S.N,M.N, B.M, D.S, I.K, M.C, S.C, S.L.M, N.C, E.C, M.T, J.Z.B, M.S, M.S, T.C, D.B, F.B, S.K, Z.P, I.B, A.A, S.F, E.M, Z.P, R.M, F.D, R.T, M.K, M.C, Q.K and L.K (hereinafter: the Complainants) claiming that they were also the employees of the Socially Owned Enterprise.

15. On 10 May 2013, the Specialized Panel rendered Judgment (SCEL-11-0014), which ruled that the complaints of the complainants above were grounded and decided that they are included in the list of beneficiaries of 20%, except for the complainants Q.K. and L.K., whose complaints were rejected as ungrounded and who were not included in the final list of beneficiaries of 20%.

16. On 6 September 2013, the complainants Q.K. and L.K filed an appeal against the Judgment of the Specialized Panel (SCEL-11-0014) with the Appellate Panel, claiming that they met the requirements to be included in the final list of beneficiaries of 20%.

17. On 20 June 2013, the Applicants filed an appeal with the Appellate Panel, against the Judgment of the Specialized Panel (SCEL-11-0014), requesting that the complainants who were included in the list by the Specialized Panel be removed from the final beneficiary list of 20%, as they *"have not been regular employees of SOE "Lavërtari-Blegtori"*.

18. On 24 June 2013, an appeal against the inclusion of the complainants in the final list of beneficiaries of 20% was also submitted by the PAK.

19. On 16 March 2017, the Appellate Panel rendered Judgment (AC-I-13-0087 and AC-I-13-0091), rejecting as ungrounded the Applicants' appeal and the PAK appeal against the complainants, included in the final list by the Specialized Panel, except for the complainants S.C., Z.P. and M.K., against whom the appeal was approved as grounded and removed from the list of beneficiaries of 20%.

20. The Appellate Panel, *inter alia*, reasoned that the complainants who were included in the final list of beneficiaries *"based on evidence available in the first instance file, their complaints are referred to discrimination, by work booklets or other evidence they proved to have been employees of the SOE and their work booklets are not closed or even if they are closed they have been closed after June 1999, depending on the complainant during the period which by the constant jurisprudence of the Appellate Panel is considered to be a period of dismissal of employees of Serbian or Albanian ethnicity on discriminatory basis."*

21. The Appellate Panel also approved the complaint of the complainants Q.K. and L.K. as grounded and decided that these complainants be included in the final list of beneficiaries of 20%. As for Q.K., the Appellate Panel reasoned that *"he attached to the complaint the work booklet, based on which it is apparent that he started to work in the SOE on 12.07.1980. The booklet is open.* Also for L.K., the Appellate Panel argued that *"she attached to the complaint a work booklet on the basis of which it is apparent that she started working in the SOE on 27.10.1980. The working booklet is open."*

Applicant's allegations

22. The Applicants did not specifically state any right guaranteed by the Constitution, which has allegedly been violated by the challenged Judgment.

23. The Applicants emphasize that *"we have sent to the court the list containing the names of those employees as well as with their signatures – full - time employees of this Enterprise who had Employment Contracts and whose total number was 47, who had been in employment relationship until the day of privatization of the Enterprise on 2 November 2006. As far as other employees whose names have been included on the same list – they were not in employment relationship with the SOE "LAVERTARI – BLEGTORI" and they had never expressed their willingness to work – they have never*

reported to work even though the Enterprise at that time offered good conditions and job opportunities without any racial, ethnic or other types of discrimination. "

24. The Applicants allege that "*the Special Chamber of the Supreme Court rendered [...] Judgment for including in this list also those employees who did not have employment contracts and who were not on the payroll list of employees [...] since they do not fulfill the requirements stipulated by UNMIK Regulation RREG/No: 2003/13, [on the Transformation of the Right of Use to Socially Owned Immovable Property] based on which the rights of workers were regulated [...]".*

25. The Applicants request *"the Constitutional Court to annul the aforementioned Judgment and to annul inclusion of [complainants] who the Special Chamber have included in the list of beneficiaries of 20 % proceeds without any legal ground."*

Admissibility of the Referral

26. The Court first examines whether the Referral has met the admissibility requirements established in the Constitution and as further specified in the Law and foreseen in the Rules of Procedure.

27. In this respect, the Court initially 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".*

28. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

> *"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. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."*

29. Regarding the foregoing, the Court finds that the Applicants have submitted the Referral as an authorized party; that they filed the Referral within the time limits foreseen in Article 49 of the Law and after exhaustion of all legal remedies provided by law.

30. However, the Court also refers to Article 48 [Accuracy of Referral] 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".*

31. In addition, the Court refers to paragraphs (1) (d) and (2) (d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which provide:

> *(1) "The Court may consider a referral if:*
> *[...]*

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

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:
[...]
(d) the Applicant does not sufficiently substantiate his claim".

32. The Court recalls that the Applicants did not specifically state any of the articles of the Constitution or of the European Convention on Human Rights regarding the alleged violations of their rights. However, the Court notes that essentially the Applicants' allegations pertain to the violation of the right to a fair and impartial trial.

33. The Court notes that the Applicants state that in the final list of beneficiaries of 20% of the proceeds from the privatization of the Socially-owned Enterprise were included the workers who have no employment contracts and who have not been on the payroll of the employees and, therefore, do not meet the requirements pursuant to UNMIK Regulation No. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property to benefit from 20%.

34. The Court considers that the Applicants' allegations essentially pertain to the determination of factual situation and the legality of the complainants' inclusion in the list of 20% of proceeds from the privatization and liquidation of the abovementioned enterprise. The Applicants repeat before the Court the same arguments they had filed in the proceedings before the Specialized Panel and the Appellate Panel.

35. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when establishing facts or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). 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*, the ECtHR case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, para. 28).

36. The complete determination of factual situation and the correct application of the law is in the jurisdiction of the regular courts (matter of legality). Therefore, the Constitutional Court cannot act as "fourth instance court" (see: ECtHR case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

37. In the present case, the Court notes that the Appellate Panel in its Judgment addressed the essential issues related to the Applicants' allegations.

38. The Court considers that the conclusions of the Specialized Panel and the Appellate Panel were reached after a detailed examination of all the arguments submitted by the Applicants. In this way, the Applicants were given the opportunity to present at all stages of the proceedings the arguments and evidence which they consider relevant to their case.

39. All the arguments of the Applicants, which were relevant to the resolution of the dispute, were heard and properly reviewed by the courts, that the material and legal reasons for the challenged decision by the Applicants were presented in detail and that the proceedings in the Specialized Panel and the Appellate Panel, viewed in its entirety were fair (See, *mutatis mutandis*, ECHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, para. 29 and 30).

40. In sum, the Court finds that the facts presented by the Applicants do not provide *prima facie* evidence that their rights guaranteed by the Constitution have been infringed.

41. In these circumstances, the Court considers that the admissibility requirements have not been met and the Applicants failed to submit and substantiate the allegations that the challenged decisions violated their constitutional rights and freedoms.

42. Therefore, the Court concludes that the Referral is manifestly ill-founded on a constitutional basis and is to be declared inadmissible pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rules 36 (1) (d) and 36 (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and 36 (2) (d) of the Rules of Procedure, on 5 July 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; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI38/17, Applicant: Meleq Ymeri, Constitutional review of Decisions no. 202108, of the Pension Department–Ministry of Labor and Social Welfare, of 3 June and 18 November 2016

KI38/17, Resolution on inadmissibility, approved on 2 June 2017, published on 19 July 2017

Key words: *individual referral, administrative procedure, right to education, right to work and exercise profession, non-exhaustion of legal remedies, inadmissible referral*

The Applicant alleged that the Ministry of Labor and Social Welfare and its Appeals Council categorized the beneficiaries of the pension schemes in a selective and discriminatory manner. The Applicant alleged that his right to education and right to work and exercise profession had been violated.

The Court established that the Applicant had not addressed himself to the Basic Court concerning his allegedly violated rights. Therefore, the Court found that the Referral does not meet the procedural admissibility requirements because the Applicant had not exhausted the legal remedies provided by the laws applicable in the Republic of Kosovo.

RESOLUTION ON INADMISSIBILITY

in

Case no. KI38/17

Applicant

Meleq Ymeri

Constitutional Review of Decisions No. 202108, of the Ministry of Labor and Social Welfare, Pension Department, of 3 June and 18 November 2016

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 Meleq Ymeri (hereinafter: the Applicant), from the village Kuk, Municipality of Dragash.

Challenged decision

2. The Applicant challenges two Decisions under the same number, namely No. 202108, of the Ministry of Labor and Social Welfare, Pension Department (hereinafter: the MLSW), of 3 June and of 18 November 2016 of its Appeals Council (hereinafter: the challenged decisions). The last decision of the Ministry in question was served on the Applicant on 12 February 2017.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decisions, which allegedly have violated the Applicant's constitutional rights safeguarded by Article 47 [Right to Education] and Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113.7 of 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

5. On 7 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 7 April 2017, the President of the Constitutional Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

7. On 7 April 2017, the Court notified the Applicant about the registration of the Referral and requested him to fill in the referral form, attaching to it as well the supporting documentation.

8. On 18 April 2017, the Applicant submitted to the Court a completed referral form, together with the supporting documentation.

9. On 2 June 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral due to the non- exhaustion of effective legal remedies.

Summary of facts

10. On 26 January 2016, the Applicant submitted a request to the MLSW for the recognition of an age contribution-payer pension.

11. On 3 June 2016, the MLSW approved the Applicant's request for recognition of the right to an age contribution-payer pension at the amount of 172 euro, and categorized him in the second category of the pension scheme.

12. On 17 August 2016, the Applicant appealed to the MLSW Appeals Council against this Decision.

13. On 18 November 2016, the MLSW Appeals Council rejected the Applicant's appeal and upheld the Decision of 3 June 2016 of the MLSW.

Applicant's allegations

14. The Applicant alleges that the MLSW and its Appeals Council, in a selective and discriminatory manner, have categorized the beneficiaries of the pension schemes. Namely, based on Article 5 of the Administrative Instruction No. 09/2015, they did not provide the right to benefit from an age contribution-payer pension to university graduates who graduated after 1 January 1991. As a result of this categorization, the Applicant alleges that his right to education and the right to work and exercise profession have been violated.

Admissibility of Referral

15. The Court first will examine whether the Applicant has met the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

16. The Applicant, in the present case, is an individual who bases his Referral on Article 113.7 of the Constitution.

17. In this respect, the Court refers to Article 113, paragraph (7), 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".

18. In addition, the Court refers to Article 47 [Individual Requests] of the Law, which stipulates that:

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

19. The Court also takes into account Rule 36 [Admissibility Criteria], under Rule (1) letter (b) of the Rules of Procedure, which provides:

"(1) The Court may consider a referral if:
[...]
b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted;
[...]"

20. From the case file the Court notes that the Applicant challenges the decision of the MLSW of 3 June 2016 and of its Appeals Council of 18 November 2016.

21. The Court notes that the Applicant as an individual is an authorized party to submit the Referral against two decisions being of a public authority and alleging violation of his constitutional rights.

22. The Court considers that as far as the constitutional requirement for exhaustion of all legal remedies provided by law are concerned, the Applicant has not addressed the Basic Court regarding the alleged violations of his rights, as stipulated by the legal advice of the Decision of the MLSW Appeals Council of 18 November 2016 as he should have done.

23. The MLSW Appeals Council explicitly advised in its decision that "*The unsatisfied party, within 30 days of service of this decision may file a lawsuit with the Department of Administrative Matters of the Basic Court of Prishtina".*

24. It stems from the submitted documents that the Applicant had not used this legal possibility and thus waved his right to file a suite before the respective Court.

25. The Court reiterates that the rationale of the exhaustion rule of legal remedies is to afford competent authorities, including the courts, the opportunity to prevent or remedy an alleged violation of the Constitution. The rule is based on the assumption that Kosovo legal order provides an effective remedy for violations of constitutional rights. This is an important aspect of the subsidiary character of the Constitution Court and its jurisdiction (See: Resolution on Inadmissibility, KI142/13, *Fadil Maloku*, of 22 October 2014, Constitutional Review of the Decision of the President of the Republic of Kosovo, no. 686-2013, of 6 September 2013).

26. The Court finds for the reasons above that the Referral does not meet the procedural admissibility requirements stipulated by Article 113.7 of the Constitution, Art. 47 of the Law and Rule 36(1) (b) of the Rules of Procedure, and is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 36 (1) (b) and 56 (2) of the Rules of Procedure, on 2 June 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; and

IV. This Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Arta Rama-Hajrizi

KI04/17, Applicant, Z. K., Assessment of Applicant's request to withdraw the Referral

KI04/17, Decision on withdrawal of referral of 2 June 2017, published on 28 July 2017

Key words: *Individual referral, criminal proceedings, request for withdrawal, nondisclosure of identity*

The Applicant had submitted a Referral to the Court whereby he had sought to review the constitutionality of the Judgment of the Supreme Court and impose the interim measure consisting of postponing the execution of the imprisonment sentence. He also requested that his identity not be disclosed.

The Applicant had already reported to a correctional center to serve his sentence. As a result, he submitted a request to the Constitutional Court to withdraw his/her referral/case.

Having regard to the circumstances of the case and the Applicant's request, the Court considered that there is no reason to continue with the assessment of the referral for constitutional review of the Judgment of the Supreme Court and acting in line with Rule 32 (1) of the Rules of Procedure granted the Applicant's request to withdraw the Referral.

DECISION ON WITHDRAWAL OF REFERRAL

in

Case No. KI04/17

Applicant

Z. K.

Assessment of Applicant's request to withdraw the Referral

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 Z. K. (hereinafter: the Applicant).

Subject matter

2. The subject matter is the assessment of the Applicant's request to withdraw the Referral and the request for nondisclosure of identity.

Legal basis

3. The Referral is based on Article 113 paragraph 7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 22 and 23 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rules 29 (6) and 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

4. On 13 January 2017, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

5. On 20 February 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

6. On 24 February 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Ivan Čukalović (presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka- Nimani (judges).

7. On 27 March 2017, the Applicant submitted a letter to the Court requesting withdrawal of the Referral.

8. On 2 June 2017, after having reviewed the report of the Judge Rapporteur, the Review Panel recommended to the Court to grant the Applicant's request to withdraw the Referral and the request to not disclose the identity.

Summary of facts

9. As a result of judgments of lower instance courts the Applicant was found guilty for the commission of a criminal offence and was punished by imprisonment.

10. The last decision in the Applicant's case is a judgment of the Supreme Court which rejected as ungrounded the Applicant's request for protection of legality.

11. On 13 January 2017, the Applicant submitted a Referral to the Constitutional Court requesting constitutional review of the judgment of the Supreme Court.

12. In his Referral submitted to the Constitutional Court, the Applicant requested imposition of the interim measure, namely to postpone the execution of the imprisonment sentence, and he also requested nondisclosure of his identity.
13. As a result of the decisions of the lower instance courts which rejected the Applicant's request to postpone the execution of the imprisonment sentence, in February 2017, the Applicant reported to a correctional center to serve his sentence.

Request for withdrawal of Referral KI04/17 and nondisclosure of identity

14. On 27 March 2017, the Applicant filed a request for withdrawal of the Referral. In his letter, the Applicant among others states: *"[...] on which occasion you were notified that I have already volunteered and I am serving the sentence in prison according to decision in force of the Court of Appeal [...]."*

15. In his Referral filed with the Constitutional Court on 13 January 2017, the Applicant also requested that his identity be not disclosed.

Assessment of the request to withdraw the Referral

16. In order to be able to decide on the Applicant's request to withdraw the Referral, the Court must first examine whether the Applicant has met the requirements provided by the Law and the Rules of Procedure.

17. The Court refers to the Article 23 [Withdrawal of a party] of the Law, which provides that,

> *"The Constitutional Court shall decide on matters referred to it in a legal manner by authorized parties notwithstanding the withdrawal of a party from the proceedings. "*

18. The Court also refers to the Rule 32 [Withdrawal, Dismissal and Rejection of Referrals] of the Rules of Procedure, which provides that,

> *"(1) A party may withdraw a filed referral or a reply at any time before the beginning of a hearing on the referral or at any time before the Court decision is made without a hearing.*

(2) Notwithstanding a withdrawal of a referral, the Court may determine to decide the referral. [...]"

19. Taking into account the Applicant's request and the circumstances of the case, the Court considers that there is no reason to continue with the assessment of the request for constitutional review of the abovementioned Judgment of the Supreme Court and the Applicant's request for the imposition of an interim measure.

20. Consequently, the Court, pursuant to Rule 32 (1) of the Rules of Procedure, grants the Applicant's request to withdraw the Referral.

Assessment of the request for non-disclosure of identity

21. The Court recalls that the Applicant in his Referral filed on 13 January 2017 requested that his identity be not disclosed. In his Referral to the Court, the Applicant has stated the circumstances and the reasons for non-disclosure of the identity.

22. In this respect, the Court refers to the Rule 29 (6) of the Rules of Procedure, which provides that

"*The party filing the referral may request that his or her identity not be publicly disclosed and shall state the reasons for the request. The Court may grant the request if it finds that the reasons are well-founded.*"

23. Based on the reasoning provided by the Applicant in his Referral filed with the Court, the circumstances of the case, and taking into account the fact that he filed a request for withdrawal of the Referral, the Court grants his request for non-disclosure of identity as grounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 23 of the Law and Rules 29 (6) and 32 of the Rules of Procedure, on 2 June 2017, unanimously

DECIDES

I. TO GRANT the request for withdrawal of the Referral;

II. TO GRANT the request for non-disclosure of identity;

III. TO NOTIFY the Parties of this Decision;

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

V. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI107/16, Applicant Safet Muhaxheri et alii, Constitutional Review of Judgment SCEL-09-0022-C13 of the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters of 28 June 2013

KI107/16, Decision on Inadmissibility of 2 June 2017, published on 31 July 2017.

Key words: *Individual Referral, civil proceedings, equality before the law, non-exhaustion of legal remedies*

The Applicants requested from the Court the constitutional review of the Judgment of the Specialized Panel of the Supreme Court. They alleged violation of Article 21.4 of the Constitution, inter alia, alleging that the judgment of this court placed them in an unequal position with their colleagues because their claims, for inclusion on the list of beneficiaries of 20% of the proceeds from the privatization process of the enterprise where they used to work, were not examined at all.

The Court found that the Applicants' Referral was inadmissible because it was submitted to the Court prior than submitting an appeal to Appellate Panel of the Special Chamber of the Supreme Court and subsequently all legal remedies were not exhausted, thus in such circumstances of the case it found that is unreasonable to examine the allegations for violation of Article 24.1 of the Constitution.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI107/16

Applicant

Safet Muhaxheri and others

Constitutional review of
Judgment SCEL-09-0022-C13 of the
Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on
Privatization Agency of Kosovo Related Matters,
of 28 June 2013

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 Safet Muhaxheri, Safet Rrustemi and Sinan Jashari, all from the Municipality of Ferizaj (hereinafter, the Applicants).

Challenged decision

2. The Applicants challenge Judgment SCEL09-0022-C13 of the Specialized Panel of Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter, the Specialized Panel) of 28 June 2013, which *"did not include in the main hearing the requests of these employees which were presented orally"*.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly is *"contradictory to Article 24, paragraph 1, of the Constitution of Kosovo which guarantees equality before the law for all citizens"*.

Legal basis

4. The Referral is based on Article 113 (7) of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court (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

5. On 8 August 2016, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

6. On 9 September 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Ivan Čukalović (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

7. On 23 September 2016, the Court notified the Applicants about the registration of the Referral and sent a copy of the Referral to the Privatization Agency of Kosovo (hereinafter, the PAK) and to the Specialized Panel.

8. On 2 June 2017, the Review Panel considered the report of Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On 9 July 2009, the PAK publicly announced the final list of the employees entitled to compensation of 20% from the privatization of the SOE "Plantacioni" in Ferizaj (hereinafter, Plantacioni).

10. That public announcement informed that all persons claiming any rights in the process of privatization of Plantacioni could file a complaint to the Specialized Panel, until 1 August 2009.

11. On 28 June 2013, the Specialized Panel delivered its Judgment SCEL09-0022-C13 dealing with the complaints of 34 other complainants, but without referring at all the situation of the Applicants.

12. The Applicants state that they *"made their appearance at the Court on the occasion of deciding regarding the appeals of their colleagues"*. On that occasion, they *"requested their inclusion in the list of 20%"*. However, they also say that their requests *"were not registered in the minutes of the main hearing due to oral reasoning that they are not part of this process because they did not file any appeal against the final list"*.

13. The case file does not show either that the Applicants have applied for inclusion in the final list or have they filed with the Appellate Panel an appeal against the Judgment of the Specialized Panel.

Applicant's allegations

14. The Applicants claim that they were employed in the now privatized Plantacioni and thus they were "*eligible to a share of 20% of the proceeds from the privatization of SOE 'Plantacioni'"*

15. The Applicants allege that the Judgment of Specialized Panel, and the PAK Decision on the final list, did not treat them same as other employees, they were not informed about the privatization process; thus they were unjustly deprived of the right to compensation from the privatization process and, consequently, paragraph 1 of Article 24 [Equality Before the Law] of the Constitution has been violated.

16. The Applicants request the Court to hold that "*there has been violation of Article 24 para. 1 of the Constitution of Kosovo by Judgment of SCSC*".

Admissibility of the Referral

17. The Court first examines whether the Applicants have met the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

18. In this respect, the Court refers to 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.*

19. The Court also refers to Article 47 (2) of the Law, which provides:

> *[...]*
> *The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.*

20. In addition, the Court takes into account Rule 36 (1) b) of the Rules of Procedure which foresees:

> *The Court may consider a referral if: (...) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.*

21. In that respect, the Court recalls that the exhaustion of legal remedies, pursuant to Article 113 (7) of the Constitution, Article 47 of the Law and Rule 36 (1) b) of the Rules of Procedure, obliges those who want to bring their case before the Court to first use all legal remedies provided by law.

22. Thus the regular courts will have an opportunity to put matters right through their own legal decisions. In fact, the rule of exhaustion is based on the assumption that there is an effective remedy available in respect of the alleged breach in the regular courts. In this way, the machinery of constitutional protection established by the Constitution is subsidiary to the regular courts safeguarding human rights. See, *mutatis mutandis*, ECtHR cases *Akdivar and Others v. Turkey*, 16 September 1996, paragraph 51; *Handyside v. United Kingdom,* 7 December 1976, paragraph 48; see also Constitutional Court case KI42/15, 4 July 2016, paragraph 34 and 35.

23. The Court recalls that the Applicants argued that PAK has not informed them at all about the privatization process and about the possibility of application or filing an appeal against its decisions, thus putting them in an unequal position in relation to other colleagues who have enjoyed these rights.

24. The Court considers that the Applicants were able, like all other colleagues, to submit an appeal to the Appellate Panel against the decision of the Specialized Panel, of 28 June 2013, within 21 days from the day when they received or became aware of it; in that appeal they could submit their allegations prior to addressing the Constitutional Court. However, the Applicants have not done so.

25. The Court concludes that the Applicants had at their disposal two legal remedies before the regular courts which were available to the Applicants and which could remedy the violations in relation to the objections of the Applicants; but the Applicants have not used these effective legal remedies.

26. Thus, the Court considers that the Applicants have waived their right to further complain and thus have not exhausted all legal remedies provided by law. See Constitutional Court Case No. KI07/09, *Demë and Besnik Kurbogaj,* 19 May 2010, paragraphs 28-29).

27. That consideration is in conformity with the jurisprudence of the ECtHR, which upheld that *"the applicant has never raised this complaint (...). Thus this complaint needs to be rejected for non exhaustion of domestic remedies (...)".* See ECtHR *Erzebet PAP v. Serbia*, Application No, 44694, 21 June 2011, chapter the Law, para. 3.

28. Therefore, the Court finds that the Applicants have not exhausted all legal remedies provided by law and that the Referral is inadmissible, in accordance with Article 113 (7) of the Constitution, Article 47 (2) of the Law and Rule 36 (1) (b) of the Rules of Procedure.

29. Accordingly, for the reasons above, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (7) of the Constitution, Article 47 of the Law, and Rules 36 (1) (b) and 56 (b) of the Rules of Procedure, on its session held on 2 June 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Arta Rama-Hajrizi

KI131/16, Applicant: Tahir Cukaj, constitutional review of Decision Rev. No. 184/2016 of the Supreme Court of Kosovo of 1 September 2016

KI131/16, Resolution on inadmissibility of 2 June 2017 published on 1 August 2017

Key words: *individual referral, constitutional review of the decision of the Supreme Court of Kosovo, manifestly ill-founded*

The Applicant submitted his Referral on the basis of Article 113.7 of the Constitution, Article 47 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo, and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

The Applicant had worked for some time as Director of the Directorate for Agriculture, Municipality of Peja. Upon the Mayor's decision of 2013, the Applicant was dismissed from his position as director.

The Applicant submitted an appeal to the Independent Oversight Board of the Civil Service of Kosovo ("IOB") against the decision dismissing him from the position of director.

Acting on the Applicant's appeal, the IOB declared itself as having no jurisdiction.

Afterwards, the Applicant filed a claim with the Basic Court in Peja, requested the confirmation of the existence of an employment relationship as a civil servant in the Municipality of Peja, reinstatement to his previous position, and compensation of his personal income.

These court proceedings ended with the Decision of the Supreme Court which rejected the Applicant's request for revision as ungrounded.

The Applicant mainly invites the Court to "*define the body which (. . .) is competent to decide on the matter of the applicant*". The definition of the competent body to decide on the matter of the Applicant was the very same question which crossed over all the proceedings in the regular courts and has just arrived before the Court.

The Court considers that it is not the task of the Constitutional Court to deal with the matter of jurisdiction. Indeed, the role of regular courts is to determine the territorial and subject matter jurisdiction in addition to assessing the evidence and applying the law.

Therefore, the Court considers that the Referral is manifestly ill-founded on constitutional basis and must, therefore, be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI131/16

Applicant

Tahir Cukaj

Constitutional review of
Decision Rev. No. 184/2016 of the Supreme Court of Kosovo of
1 September 2016

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 Tahir Cukaj from village Nakell, Municipality of Peja (hereinafter, the Applicant), who is represented by Mustafë Kastrati, a lawyer from Peja.

Challenged decision

2. The Applicant challenges Decision Rev. No. 184/2016 of the Supreme Court of Kosovo of 1 September 2016, which rejected as inadmissible the Revision of the Applicant filed against Decision AC. No. 321/2015 of the Court of Appeals, of 13.05.2016.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly has violated the Applicant's right as guaranteed by Article 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 Article 113 (7) of 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 Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 14 November 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 December 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

7. On 18 January 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 02 June 2017, the Review Panel considered the report of the Judge Rapporteur, and recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. The Applicant from 2008 until 2013 served as a Director of the Department of Agriculture in the Municipality of Peja.

10. On 31 December 2013, the President of the Municipality [Decision No. 112-8192-11/2013] dismissed the Applicant from his position of Director.

11. On 10 January 2014, the Applicant filed with the Municipality an appeal against that Decision.

12. On 13 January 2014, the Municipality [Notification No. 02-112-761] rejected the appeal and upheld the Decision of the President of the Municipality.

13. On 2 March 2014, the Applicant filed with the Independent Oversight Board of Civil Service of Kosovo (hereinafter, the IOB) an appeal against the Decision dismissing him from the position of the Director.

14. On 05 March 2014, the IOB (Decision A/02/68/2014) declared itself incompetent. The IOB stated that *"the Board does not have subject matter jurisdiction to review this administrative matter, due to the fact that pursuant to Article 4 of Law No. 03/L-149 on the Civil Service of the Republic of Kosovo '[...] political appointees and all the persons appointed in positions by the political appointees [...]' are not civil servants"*.

15. The Applicant filed a claim with the Basic Court in Peja, requesting the confirmation of the existence of an employment relationship as a civil servant in the Municipality of Peja, reinstatement to his working place and compensation of personal income.

16. On 18 December 2014, the Basic Court [Decision C. No. 254/14] rejected the claim due to lack of jurisdiction, stating that: *"[...] the claimant's issue in the present case represents an administrative matter for which the courts of the general departments do not have subject matter jurisdiction to decide [...]"*.

17. The Applicant filed with the Court of Appeals an appeal against the decision of the Basic Court, due to erroneous and incomplete determination of factual situation, erroneous application of legal provisions and erroneous application of the procedural provisions.

18. On 13 May 2016, the Court of Appeals [Decision AC. No. 321/2015] rejected as ungrounded the Applicant's statement of claim and upheld the Decision of the Basic Court, *"[...] as the claimant in the present case does not request the annulment of the*

Decision by which he was discharged from the position of director, a position which he exercised until 31.12.2013 [...]."

19. The Applicant submitted a request for revision to the Supreme Court of Kosovo against the decision of the Court of Appeals, "*due to violations of the provisions of LCP and erroneous application of the substantive law*".

20. On 2 September 2016, the Supreme Court [Decision Rev. No. 184/2016] rejected as inadmissible the Applicant's request for revision, because *"pursuant to the provision of Article 228.1 of LCP, it has been provided that parties may file a revision only against a final decision, by which the procedure of the second instance is concluded"*.

Applicant's allegations

21. The Applicant alleges a violation of the right to fair and impartial trial, *"because the right to protection before courts and other state authorities as the holders of public competencies was denied to the Applicant"*.

22. The Applicant requests the Court *"to instruct the competent bodies to define the body which carrier body of the public competence is competent to decide on the matter of the applicant"*.
23. The Applicant further *"invites"* the Court *"to define which is the competent authority for resolving the request of the Applicant because all other authorities until now have been declared as incompetent and there is no decision based on merit"*.

Admissibility of the Referral

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

25. 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."*

26. The Court also refers to Article 49 of the Law which provides:

> *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.*

27. Thus, the Court considers that the Applicant is an authorized party, has exhausted all available legal remedies and filed the Referral within the deadline of four (4) months.

28. However, the Court further refers to Article 48 [Accuracy of the Referral] 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".

29. In addition, the Court recalls Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, which 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:
[...]
(d) the Applicant does not sufficiently substantiate his claim."

30. The Court recalls that the Applicant claims that the regular courts and other state authorities denied him the right to protection before the courts and thus violated his right to fair and impartial trial. However, the Applicant does not substantiate and prove his claim.

31. In fact, the Court notes that the Applicant initiated the administrative proceedings before the IOB, requesting the annulment of Decision No. 112-8191-11/2013 of the President of the Municipality of Peja, which dismissed him from the position of Director of the Department of Agriculture.

32. The Court recalls that the IOB [Decision A/02/68/2014] declared itself incompetent, because the position of directors does not fall into the category of civil servants and IOB is competent only for considering civil servants cases.

33. The Court observes that the conclusion on incompetence was upheld by the Basic Court [Decision C. No. 254/14], by the Court of Appeals [Decision AC. No. 321/2015] and somehow by the Supreme Court [Decision Rev. No. 184/2016].

34. As matter of fact, the Supreme Court rejected the request for revision of the Applicant, because there was no merit final decision, as the dispute was about competence and having a final decision is a legal requirement for submitting the request for revision.

35. The Court observes that the Supreme Court considered that *"a revision is not allowed against the Decision of the second instance court, by which the Decision of the first instance court was upheld, in which this Court has been found to have no subject matter jurisdiction, due to the fact that we do not have a final decision in terms of Article 228.1 of LCP".*

36. The Court recalls that the Applicant mainly requests the Court *"to define the body which (...) is competent to decide on the matter of the applicant".* The definition of the competent body to decide on the matter of the Applicant was the very same question which crossed over all the proceedings in the regular courts and has just arrived before the Court.

37. The Court considers that the regular courts assessed the facts and interpreted and applied the procedural and substantive law provisions regarding the Applicant's claim and provided detailed response to his question.

38. In addition, the Court notes that the Applicant presents before the Court the same arguments he had submitted to the regular courts, in particular regarding the competent body to decide on the matter of his case.

39. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact 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). In fact, the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. See, *mutatis mutandis*, the European Court of Human Rights (hereinafter: ECtHR) case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, para. 28.

40. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as "fourth instance court". See: ECtHR case *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012.

41. The Court also emphasizes that it is not the task of the Constitutional Court to deal with the question of jurisdiction. In fact, the role of regular courts is, in addition to the assessment of evidence and application of law, to determine the territorial and subject matter jurisdiction.

42. The Constitutional Court can only consider whether the regular court's proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial. See, *inter alia,* case *Edwards v. United Kingdom*, No 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991.

43. In that respect, the Court considers that a detailed response to the Applicant's question provided by the regular courts is justified and that the proceedings before the regular courts have been fair. See ECtHR case *Shub vs. Lithuania*, No. 17064/06, Judgment of 30 June 2009.

44. In fact, the Court also considers that the Applicant has not submitted any *prima facie* evidence nor has he substantiated his allegation indicating that the regular court's proceedings were in any wat unfair or arbitrary.

45. Furthermore, the Court considers that the Applicant disagrees with the challenged decision. However the Applicant's disagreement cannot of itself raise an arguable claim for breach of his right to fair and impartial trial. When alleging such violation of the Constitution, the Applicant must present convincing evidence to prove and compelling arguments to substantiate his allegation, in order for the Referral to be grounded on a constitutional basis. See Constitutional Court case KI198/13, *Privatization Agency of Kosovo,* Resolution on Inadmissibility, of 30 June 2014.

46. Therefore, the Referral is manifestly ill-founded on a constitutional basis, and is inadmissible in accordance with Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (1) and (7) of the Constitution, Article 48 of the Law, and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, in the session held on 02 June 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Arta Rama-Hajrizi

KI23/17, Applicant: Besim Krasniqi, Constitutional review of Decision PML. no. 246/2016 of the Supreme Court of Kosovo, of 31 October 2016

KI23/17, Decision to reject the referral, of 4 July 2017, published on 2 August 2017

Key words: *Individual referral, decision, criminal procedure*

The Applicant had submitted a referral to the Court whereby he had requested the constitutional review of the Decision of the Supreme Court. The Applicant had also requested that another person be included in the referral he had submitted to the Court, and had filled in the Court application form by hand.

Given that some parts of the form filled in by the Applicant were impossible to read because of handwriting, and since no power of attorney was submitted for the other person, the Court had tried twice to communication with the Applicant but to no avail. The address provided by the Applicant was incomplete and the Applicant had provided no other contact.

Pursuant to Rule 32 (5) of the Rules of Procedure, the Court decided to summarily reject the Applicant's referral. The Court noted that the formal criteria had not been met and that the burden of liability for the failure to complete and clarify the Referral with supporting documentation falls on the Applicant.

DECISION TO REJECT THE REFERRAL

in

Case No. KI23/17

Applicant

Besim Krasniqi

Constitutional review of Decision PML. No. 246/2016 of the Supreme Court of Kosovo, of 31 October 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 Besim Krasniqi, residing in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision PML. No. 246/2016 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 31 October 2016, which rejected the Applicant's request for protection of legality as out of time. The Applicant alleges that the challenged decision was served on him on 1 December 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly has violated the Applicant's rights guaranteed by Article 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 Article 113.7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the 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

5. On 1 March 2017, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral submitted through mail service on 27 February 2017.

6. On 7 April 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

7. On 14 April 2017, the Court tried to notify the Applicant about the registration of the Referral and requested him to clarify the Referral and his allegations, to sign the referral form and to submit the valid power of attorney for representation of another person (namely, person B.P).

8. On 18 April 2017, the Post of Kosovo notified the Court that the letter could not be served on the Applicant**.**

9. On 20 April 2017, the Court again made an attempt to notify the Applicant about the registration of the Referral**.**

10. On 21 April 2017, the Post of Kosovo notified the Court that the letter could not be served on the Applicant, because the address given by the Applicant is incomplete.

11. On 4 July 2017, after considering the report of the Judge Rapporteur, the Review Panel recommended to the Court to summarily reject the Referral.

Summary of facts

12. On 15 June 2015, the Basic Court in Gjilan, branch in Kamenica (Judgment P. No. 340/2006) found the Applicant guilty of committing the criminal offense of fraud and sentenced him to a suspended sentence of one (1) year, from the day the judgment becomes final if he does not commit another criminal offense within a period of one (1) year.

13. Against the Judgment of the Basic Court in Gjilan, the Applicant and Prosecutor of the Basic Prosecution in Gjilan filed an appeal with the Court of Appeal.

14. On 3 August 2015, the Court of Appeal (Judgment PA1. No. 826/15) rejected the appeal of the Applicant and of the Prosecutor of the Basic Prosecution in Gjilan as ungrounded and upheld the Judgment of the Basic Court in Gjilan.

15. On 13 June 2016, the Applicant submitted a request for protection of legality to the Supreme Court.

16. On 31 October 2016, the Supreme Court (Decision Pml. No. 246/2016) rejected the request for protection of legality as out of time.

17. The Court notes that in the same proceedings before the regular courts, the party to the proceedings, in addition to the Applicant was also B.P. In his Referral submitted to the Constitutional Court, the Applicant requested the inclusion of B.P as an Applicant, but did not attach the valid power of attorney given by B.P.

Applicant's allegations

18. The Applicant alleges a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution.

19. The Applicant alleges that *"at the period when the criminal offence was committed the previous Criminal Code was applicable [...] the Court was obliged to decide based on merits, in accordance with applicable Criminal Code."*

20. The Applicant further emphasizes that *"It is worth mentioning that the case (circumstances) of the criminal offence the accused are charged with is subject to statute of limitation."*

21. The Court notes that the part relating to the statement of the relief sought in the referral form is unreadable.

Assessment of the Referral

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

23. In this respect, the Court refers to Article 22, paragraph 4 [Processing Referrals] of the Law, which establishes that:

> *"4. If the referral or reply to the referral is not clear or is incomplete, the Judge Rapporteur informs the relevant parties or participants and sets a deadline of not more than fifteen (15) days for clarifying or supplementing the respective referral or reply to the claim."*

24. The Court further refers to Rule 29 [Filing of Referrals and Replies] subparagraphs (1) and (2) (c) of the Rules of Procedure, which stipulate:

> *"(1) A referral shall be filed in writing [...] shall include the date of filing, and the signature of the person filing the referral.*
>
> *"(2) The referral shall also include:*
> *[...]*
> *(c)* a *power of Attorney for representative."*

25. The Court also refers to Rule 32 [Withdrawal, Dismissal and Rejection of Referrals], subparagraph (5) of the Rules of Procedure, which provides that:

> *[...]*
>
> *"(5) The Court may summarily reject a referral if the referral is incomplete or not clearly stated despite requests by the Court to the party to supplement or clarify the referral [...]".*

26. The Court recalls that the Applicant alleges that the regular courts violated his right to a fair trial.

27. The Court notes that the Applicant did not sign the referral form. In addition, in his referral, the Applicant also requested the inclusion of B.P as an Applicant, but did not

attach the power of attorney given by B.P. Finally, the Applicant filled in the Referral by hand, but his handwriting in the main parts of the Referral was unreadable.

28. Pursuant to the abovementioned provisions of the Law and Rules of Procedure, the Court cannot take into account the Applicant's allegations, as the Referral is incomplete and unclear (see: Decision to reject the Referral of the Constitutional Court, in Case KI03/15, Applicant *Hasan Beqiri*, of 13 May 2015, paragraphs 14, 15, 17, 19, 20 and 21, and Case KI07/16, Applicant *Rifat Abdullahi*, 14 July 2016, paragraph 22).

29. The Court, through regular post service, tried to communicate with the Applicant for the purpose of completing the Referral, namely signing the form; clarify Referral and submit the valid power of attorney. However, the communication with him was impossible since the address of the Applicant, as stated in the case file, was incomplete.

30. The Court notes that the Applicant has not provided another address or a contact number as an alternative to be contacted. In this context, the Court notes that the burden of liability for the failure to complete and clarify the Referral with the supporting documentation falls on the Applicant.

31. In sum, the Court considers that the Applicant's Referral does not meet the formal requirements for further consideration, because the Referral is incomplete and unclear.

32. Therefore, in accordance with Article 22.4 of the Law, Rules 29 (1) and (2) (c) and 32 (5) of the Rules of Procedure, the Court concludes that the Applicant's Referral is to be summarily rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 22.4 of the Law, Rules 29 (1) and (2) (c) and 32 (5) of the Rules of Procedure, in its session held on 4 July 2017, unanimously

DECIDES

I. TO REJECT the Referral;

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 Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI33/16, Applicant: Minire Zeka, Constitutional review of Decision AC. no. 4276/2014 of the Court of Appeals of the Republic of Kosovo, of 9 June 2015

KI33/16, Judgment approved on 6 July 2017 and published on 4 August 2017

Key words: *individual referral, civil procedure, equality before the law, right to fair and impartial trial, judicial protection of rights, admissible referral*

In this case, the Applicant challenged two decisions of regular courts which made reference to Article 313 of Law on Enforcement Procedure (LEP) whereby they established that she had submitted her proposal for execution out of time. The Applicant complained about the violation of Constitutional provisions, namely Articles 21, 24, 31, 54, and Articles 6 and 13 of the ECHR, and Article 7 of the Universal Declaration of Human Rights.

Having entirely reviewed the proceedings conducted before the regular courts, the Court reached the conclusion that the failure of the Ministry of Culture, Youth, Sports, and Non-Resident Matters to enforce the decision of the Independent Oversight Board of Kosovo constitutes a violation of Articles 31 and 54 of the Constitution in conjunction with Articles 6.1 and 13 of ECHR. The Court further added that the fact that IOBK decision rendered in favor of the Applicant was not enforced by regular courts and the Ministry within a period of 10 (ten) years resulted in human rights and fundamental freedoms being violated and non-observance of constitutional proceedings.

JUDGMENT

in

Case no. KI33/16

Applicant

Minire Zeka

Constitutional review of Decision No. Decision AC. no. 4276/2014 of the Court of Appeals of the Republic of Kosovo of 9 June 2015

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 Minire Zeka, from Prishtina (hereinafter: the Applicant).

Challenged Decision

2. The Applicant challenges Decision AC. no. 4276/2014 of the Court of Appeals of 9 June 2015, in connection with the non-execution of Decision No. 879/2007 of the Independent Oversight Board of Kosovo (hereinafter: the IOBK) of 4 September 2007.

Subject Matter

3. The subject matter is the constitutional review of the challenged which allegedly violated the Applicant's rights guaranteed by Articles 21 [General Principles], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Articles 6 (Right to a fair trial), 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: the ECHR) and Article 7 of the Universal Declaration of Human Rights.

Legal Basis

4. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 47 and 48 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

5. On 16 February 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 March 2016, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues, Snezhana Botusharova and Bekim Sejdiu.

7. On 6 April 2016, the Applicant sent a letter of urgency to the Court asking to speed-up the resolution of her case.

8. On 11 May 2016, the Applicant was notified about the registration of the Referral and was asked to provide evidence of service of the challenged decision of the Court of Appeals. On the same date, a copy of the referral was sent to the Court of Appeals and the Basic Court in Prishtina.

9. On 28 July 2016, the Court sent a copy of the Referral to the Ministry of Culture, Youth and Sport in Prishtina (hereinafter, the Ministry).

10. On 9 September 2016, Judge Robert Carolan resigned from the position of the Judge of the Constitutional Court

11. On 2 November 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur replacing Judge Robert Carolan. The composition of the Review Panel remained unchanged.

12. On 6 July 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare the Referral admissible and to find a violation.

Summary of facts

13. It transpires from the submitted documents that the Applicant was employed by the Ministry in the position of "Manager of Personnel" with coefficient nine (9).

14. On 2 February 2007, the Ministry (Decision 199/2007) reassigned the Applicant to the position of "Official Staff" in the Human Resources Office with coefficient eight (8).

15. The Applicant submitted a complaint to the IOBK against the abovementioned re-assignment Decision.

16. On 4 September 2007, the IOBK (Decision No. 879/2007) held that the "*Ministry of Culture, Youth, Sports and Non-Residential Matters, in the capacity of Employer, is OBLIGED that according to the employment contract of Employee Minire Zeka for 2007, pursuant to the conditions foreseen by Article 3.3 of Regulation no. 2001/36 and Article 4, item a) of the MPS/DCSA Administrative Direction no. 2003/02 on Contract Procedures, to reinstate the Appellant to her previous job position".*

17. On several occasions, the Applicant informed the IOBK that the Ministry has not executed the final and binding Decision of the IOBK. The Applicant asked the IOBK to undertake the necessary legal measures in order to execute the final and binding Decision of the IOBK.

18. IOBK reported to the Prime-Minister of Kosovo that demotion and promotion of employees, including the Applicant, within the Ministry was done in breach of the Law on Civil Servants. The Ministry did not execute the IOBK Decision as it was required by the then applicable law in Kosovo.

19. The Applicant filed an appeal with the Committee on Human Rights, Gender Equality, Missing Persons and Petitions of Assembly of Kosovo, requesting implementation of the Decision of IOBK.

20. On 26 May 2009, the Committee on Human Rights recommended to the Applicant to "*address herself to the Municipal Court in Prishtina and request that it executes Decision no. 1764/2007, of 04 September 2007 of the Independent Oversight Board of Kosovo".*

21. The Applicant filed with the Municipal Court in Prishtina a proposal for execution of the above-stated decision of the IOBK. There ensued a host of different decisions by the then Municipal and District courts in Prishtina, rejecting the proposal of the Applicant on various legal grounds such as being untimely, unsuitable document of enforcement, lack of passive legitimacy of the Ministry or lack of subject-matter jurisdiction of the courts to implement the IOBK decisions.

22. On 11 May 2011, the Municipal Court (Decision E. no. 487/09) rejected the proposal of the Applicant for the execution of the IOBK Decision. The Municipal Court considered that, in accordance with the applicable law on administrative proceedings, the execution is carried out only on matters pertaining to monetary obligations and that, therefore, the proposal is not suitable for execution.

23. The Applicant filed with the District Court an appeal against the above-stated decision.

24. On 28 June 2011, the District Court (Decision Ac. no. 462/2011) rejected as ungrounded the appeal of the Applicant and upheld the impugned decision of the Municipal Court. The District Court adopted the rationale of the Municipal Court and further considered that, in accordance with the applicable law, documents are suitable for execution when they expressly provide for the name of the creditor, the executing debtor in addition to the object, type, sum and time for fulfillment of the obligation.

25. The Applicant then proposed to the State Prosecutor to file with the Supreme Court a request for protection of legality.

26. The State Prosecutor filed with the Supreme Court the request for protection of legality. The State Prosecutor considered that the challenged decisions were marred by erroneous application of the substantive law and that the matter must be referred back to the court of first instance for fresh consideration.

27. On 10 April 2014, the Supreme Court (Decision CML. no. 14/2013) approved the request for protection of legality, quashed both decisions of courts of lower instance and referred the matter back to the court of first instance for fresh consideration. The Supreme Court held that the courts of lower instance had erroneously applied the substantive law and that the IOBK decision was an enforceable judicial document.

28. On 24 June 2014, the Basic Court (Decision E. no. 487/2009) held that the IOB decision was final and executable and that the Ministry is obliged to reinstate the Applicant into a job position of the same level and salary as she had before the reassignment.

29. The Ministry filed a complaint alleging that *"the proposal for allowing the execution was filed after the lapse of more than two years"*.

30. On 24 October 2014, the Basic Court (Decision E. no. 487/2009) approved the objection of the Ministry and rejected the proposal of the Applicant for the execution of the IOBK decision as untimely. The Basic Court held that the Applicant had filed the execution proposal after more than two years, whereas, in accordance with Article 313 of the Law No. 04/L-139 on Enforcement Procedure, the Applicant should have filed the proposal for execution within ninety (90) days.

31. The Applicant filed with the Court of Appeals an appeal against the above-stated decision of the Basic Court.

32. On 9 June 2015, the Court of Appeals (Decision AC. no. 4276/2014) rejected the appeal of the Applicant and upheld the impugned decision of the Basic Court. The Court of Appeals adopted the reasoning of the Basic Court and held that the latter rendered a fair and correct decision when it found that the Applicant's proposal was untimely.

33. The Applicant submitted a new proposal to the State Prosecutor to file a request for protection of legality against the above-stated decisions of the basic and the Court of Appeals.

34. On 19 October 2015, the State Prosecutor (Notification KMLC. No. 110/2015) informed the Applicant that it was unable to file a request for protection of legality because her proposal for execution of the IOBK decision was untimely.

Relevant Law

UNMIK REGULATION NO. 2001/36 ON THE KOSOVO CIVIL SERVICE

Section 11
Appeals

11.3 Where the Board is satisfied that the challenged decision breached the principles set out in section 2.1 of the present regulation, it shall order an appropriate remedy by written decision and order directed to the Permanent Secretary or chief executive officer of the employing authority concerned, who shall be responsible for effecting the employing authority's compliance with the order.

11.4 Where the employing authority concerned does not comply with the Board's decision and order, the Board shall report the matter to the Prime Minister and the Special Representative of the Secretary-General.

ADMINISTRATIVE DIRECTION NO. 2003/2 IMPLEMENTING UNMIK REGULATION NO. 2001/36 ON THE KOSOVO CIVIL SERVICE

Section 11
Mobility

11.1 Where the needs of the Civil Service so require, civil servants may be reassigned to a different post at the same level and salary rate by the employing authority, provided the new post is appropriate to their qualifications and competence. Such reassignments may involve a move to a different location, provided that reasonable allowance is made for personal circumstances.

Law No.03/L –192 ON INDEPENDENT OVERSIGHT BOARD FOR CIVIL SERVICE OF KOSOVO

Article 12
Appeals

4. Where the Board is satisfied that through challenged decision there are breached the principles or rules set out in Civil Service of the Republic of Kosovo, it shall issue a written decision directed to the senior managing officer or the chief executive officer of the respective employing authority, who shall be responsible for implementation of Board's decision.

Article 13
Decision of the Board

Decision of the Board shall represent a final administrative decision and shall be executed by the senior managing officer or the person responsible at the institution issuing the original decision against the party. Execution shall be effected within fifteen (15) days from the day of receipt of the decision.

Article 15
Procedure in case of non-implementation of the Board's decision

1. Non-implementation of the Board's decision by the person responsible at the institution shall represent a serious breach of work related duties as provided in Law on Civil Service in the Republic of Kosovo.

Applicant's Allegations

35. The Applicant claims a violations of Articles 21 [General Principles], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], and 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 6 [Right to a fair trial], Article 13 [Right to an effective remedy] of the ECHR and Article 7 of the Universal Declaration of Human Rights.

36. The Applicant alleges that *"the Basic Court in Prishtina rendered an unlawful decision, violating the provisions of the Constitution, namely those of Article 31 - right to fair and impartial trial and the right of parties for a public, fair, and impartial hearing related to their allegations, the Court acted in contradiction to, or violated the provisions of Article 6 of the European Convention of Human Rights for a fair trial, the right of every person to be fairly and publicly heard, within a reasonable time limit and in an impartial manner".*

37. The Applicant also alleges that *"the challenged decisions have severely violated the rights and fundamental freedoms of the* [Applicant] *by the mere fact that the* [Applicant] *was given no chance and opportunity to declare herself before the Court about her allegations, much more when we are dealing with a final decision of a public authority, which was rendered on 31 August 2006 by the Independent Oversight Board of Kosovo, which had to be executed within the time limit of 15 days, always based on the Law on the Independent Oversight Board, by a high-ranking official, head, or responsible person of the institution, which had rendered the decision and how more than 10 (ten) years have passed and such decision remained nowhere by in letter. It is, therefore, clear that the [Applicant's] freedoms and fundamental rights were violated by not executing the decision".*

38. Furthermore, the Applicant further alleges that *"the first instance court - the Basic Court in Prishtina and the second instance court – Court of Appeals of Kosovo, referred to the provision of Article 313 of the LEP – namely that the Creditor, Proposer Minire Zeka had allegedly filed the proposal for reasoning out of time, reasoning that the Creditor had been served with the Decision of the Independent Oversight Board on 04 September 2007, while filing the Proposal for Execution on 05 June 2007. These reasons are ungrounded because of the fact that the provision of Articles 13, 14, and 15 of the Law on the Independent Oversight Board of Kosovo Civil Service and UNMIK Regulation no. 2001/36, of 22 December 2001, which was applicable at that time, namely Article 11.3 and 11.4, had foreseen the time limits and the responsible persons having jurisdiction to execute such decisions."*

39. The Applicant requests the Court *"TO DETERMINE that the provisions of Articles 21, 24, 31 and 54 of the Constitution and Articles 6 and 13 of the ECHR and Article 7 of the Universal Declaration of Human Rights, were violated"* and *TO ANNUL the final Decision no. E. no. 487/2009 of the Basic Court in Prishtina of 24 October 2014, and Decision AC. no. 4276/2014 of the second instance court – Court of Appeals of Kosovo, of 09 June 2015"*.

Admissibility of the Referral

40. In respect to the Admissibility of the Referral, the Court refers to Article 46 [Admissibility] of the Law, which provides:

The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that all legal requirements have been met.

41. Thus the Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

42. In that respect, the Court also refers to Article 113 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.

43. The Court notes that the Applicant legitimately claims to be the victim because of the non-execution of the IOBK Decision. Thus, she is an authorized party.

44. The Court also notes that the Applicant has exhausted all legal remedies provided for by law and, due to lack of any other available effective remedy, she has addressed the Constitutional Court with the request for execution of Decision no. 879/2007 of the IOBK of 4 September 2007.

45. The Court also refers to Article 49 of the Law, which provides:

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.

46. The Court reiterates that the requirement for the submission of the Referral within the time limit of four (4) months does not apply in the case of the non-execution of the decisions by the public authority. The European Court of Human Rights (hereinafter: ECtHR) explicitly noted, in a similar situations, that the time limit rule does not apply where there is a refusal of the executive to comply with a specific decision. (See, *mutatis mutandis,* ECtHR case *Iatridis v. Greece,* No. 59493/00, Judgment of 19 October 2000. See also Constitutional case No. KI50/12, *Agush Lolluni,* Constitutional review of non-execution of the Decision No. 02 (207) 2010 of 4 October 2010, of the Independent Oversight Board of the Republic of Kosovo by the Municipality of Junik, Judgment of the Constitutional Court of 20 July 2012).

47. 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.

48. The Court considers that the Applicant has accurately specified what rights, guaranteed by the Constitution and the Convention have allegedly been violated to her detriment, by the non-execution of the IOBK Decision.

49. Thus, the Court concludes that the Applicant is an authorized party; she has exhausted all legal remedies; she complied with the requirement of the legal deadline as a result of a continuing situation, she has accurately clarified the alleged violation of rights and freedoms, and she has indicated what concrete act of public authority is subject to challenge.

50. In sum, the Court considers that the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure have been met.

51. Therefore the Court, pursuant to Article 46 of the Law, determines that the Referral is admissible for consideration of its substantive legal aspects.

Substantive legal aspects of the Referral

52. While analyzing the Substantive legal aspects of the Referral, the Court will consider whether (i) the IOBK Decisions are final, binding and executable and (ii) there is a violation of the Applicant's right to fair and impartial trial and to judicial protection of rights.

(i) Whether the IOBK Decisions are final, binding and executable

53. In that connection, the Court refers to Article 101 [Civil Service] of the Constitution, which establishes:

1. The composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognized principles of gender equality.
2. An independent oversight board for civil service shall ensure the respect of the rules and principles governing the civil service, and shall itself reflect the diversity of the people of the Republic of Kosovo.

54. The Court emphasizes that the IOBK is empowered by the Constitution to "*ensure the respect of the rules and principles governing the civil service*". In that sense, the IOBK enjoy the prerogatives of a tribunal in the meaning of Article 6 of the European Convention of Human Rights (hereinafter, the Convention).

55. In fact, according to the ECtHR's case-law, *"a 'tribunal' is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (see, as the most recent authority, the judgment of 30 November 1987 in the case of H v Belgium, Series A no. 127, p. 34, § 50)".* See ECtHR case *Belilos v. Switzerland*, Application No. 10328/83), Judgment of 29 April 1988, § 64

56. The Court, also referring to its own case law, notes that the IOBK is an independent institution established by the Constitution, in accordance with Article 101 (2) of the Constitution. Therefore, all obligations arising from decisions of this institution, regarding the matters that are under its jurisdiction, produce legal effects for other relevant institutions, where the status of employees is regulated by the Law on Civil Service of the Republic of Kosovo. The decision of the IOBK provides final and binding decisions, and that the appeal filed against the IOBK decision does not stay the execution of the Decisions of IOBK. (See, for example, Constitutional Court case No. KI29/11, *Viktor Marku*, Judgment of 17 July 2012).

57. The Court reiterates that a decision of IOBK produces legal effects for the parties and, therefore, such a decision is a final administrative and executable decision. (See Constitutional Court cases No. KI04/12, *Esat Kelmendi*, Judgment of 20 July 2012 and No. KI74/12, *Besa Qirezi*, Judgment of 4 April 2015 and the references cited therein).

58. Moreover, the Court considers that the relevant constitutional and legal provisions, in addition to the IOBK subject matter jurisdiction to settle labor disputes for civil servants, denote a legal obligation for the addressee institutions to respect and implement IOBK Decisions.

59. Therefore, the Court concludes that the IOBK Decisions are final, binding and executable.

(ii) Whether there is violation of the Applicant's right to a fair and impartial trial and to judicial protection of rights

60. The Court recalls that the Applicant claims a violations of her rights as guaranteed by Articles 21 [General Principles], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 [Right to a fair trial] and Article 13 [Right to an effective remedy] of the ECHR.

61. In that respect, the Court will analyze the substantive aspects of the Referral, in relation to the Applicant's rights to fair and impartial Trial and to judicial protection of rights.

62. The Court notes that the Applicant's main allegation is that the delays and non-execution of the IOBK Decision violate her rights to a fair and impartial trial.

63. In this regard, the Court refers to Article 31 [Right to a Fair and Impartial Trial] of the Constitution, which establishes:

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.

64. In addition, paragraph 1 of Article 6 [Right to a fair trial] of the ECHR establishes:

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.

65. The Court recalls that the Applicant approached several times the Ministry and the IOBK, requesting to have the IOBK final decision in her case executed. The Applicant has continuously made efforts in order to see her final decision executed.

66. In this regard, the Court reiterates that it would be meaningless if the legal system allowed that a final judicial decision remains ineffective in disfavor of one party. Therefore, the non-effectiveness of procedures and the non-implementation of the decisions produce effects that raise situations that are inconsistent with the principle of the Rule of Law (Article 7 of the Constitution), a principle that the Kosovo authorities are obliged to respect. (See ECtHR case *Romashov v. Ukraine*, No. 67534/01, Judgment of 25 July 2004).

67. The Court considers that the execution of a decision rendered by a court should be considered as an integral part of the right to a fair trial guaranteed by the abovementioned constitutional provisions. (See ECtHR case *Hornsby v. Greece,* No. 18357/91, Judgment of 19 March 1997, § 40). In that specific case, the ECtHR held that the Applicants should not have been deprived of the benefit of the execution of a final decision, which is in their favor.

68. Furthermore, the Court considers that no authority can justify the non-execution of decisions, intending to obtain revision and fresh review of the case. (See ECtHR case *Sovtransavto Holding v. Ukraine*, No. 48553/99, Judgment of 25 July 2002, para. 72, and ECtHR Judgment of 24 July 2003, *Ryabykh v. Russia*, No. 52854/99, § 52).

69. The Court emphasizes that it is not its duty to determine the most appropriate way for the regular courts and the Ministry to find efficient mechanisms of execution, within their competencies, in the sense of completely fulfilling the obligations they have under the Law and the Constitution. However, every individual is entitled to judicial protection in case of violations or denials of any rights guaranteed by the Constitution or by law (see Article 54 of the Constitution).

70. The Court also emphasizes that it already dealt with the constitutional review of the non-execution of IOBK decisions. In that Judgment, the Court held that there was a violation of Articles 31, 46 and 54 of the Constitution in conjunction with Articles 6 (1) and 13 as well as Article 1 of the Protocol No. 1 of the Convention, as a consequence of the non-execution. (See Constitutional Court Case No. KI72/14, *Besa Qirezi,* Judgment of 4 February 2015 and the references cited therein).

71. Therefore, the burden of the execution of the final decision of the IOBK in the case of the Applicant falls solely on the regular courts and the Ministry. Lack of implementation mechanisms of this institution should not in any way be a reason for denial of the Applicant's right to a fair and impartial trial, i.e. to have the final and binding decision executed in her favor.

72. As to the decisions of the Basic and Appeals Courts finding that the Applicant's proposal to implement the IOBK Decision untimely, the Court notes that, based on the IOBK Decision and the applicable law in Kosovo, the Ministry as the employer of the Applicant was, and still is, under a legal obligation to execute the final and binding Decision of the IOBK within fifteen days from the day it received the decision.

73. The Court notes that the Decision of the IOBK was rendered in the Applicant's favor on 4 September 2007, and that, at the material time the applicable legislation were UNMIK REGULATION No. 2001/36 on the Kosovo Civil Service and Administrative Direction No. 2003/2 on Implementing UNMIK REGULATION No. 2001/36 on the Kosovo Civil Service which entered into force on 22 December 2001 and 25 January 2003 respectively.

74. The Court also notes that both the Basic Court and the Court of Appeal ruled that the applicants' request to enforce the IOBK Decision was untimely because it was not filed within the deadline of ninety (90) days as stipulated by Article 313 of Law No. 04/L- 139 on Enforcement Procedure.

75. In this respect, the Court notes that Law No. 04/L-139 on Enforcement Procedure was promulgated on 3 January 2013, which means that in the applicant's case, the law in question was applied retroactively. The Applicant got the IOBK Decision in her favor on 4 September 2007 which denotes that she could not possibly have observed the legal deadline of ninety (90) days simply because that remedy was not at her avail at the material time. Therefore, the non-observance of the ninety (90) day legal deadline as stipulated by Article 313 of the Law No. 04/L-139 on Enforcement Procedure cannot be imputable to the Applicant.

76. The Court emphasizes that there occurred changes in legislation-as regards enforcement proceedings and the status of the IOBK- which were beyond the applicants' control; and for which, the responsibility for the enforcement of the IOBK Decision is-by virtue of law and fact-is attributable to the Basic Court, the Court of Appeals and the Ministry.

77. The Court also takes into account the fact that legislation regulating the IOBK position in the legal system of the Republic of Kosovo stipulates the obligation of the Employing Authority to enforce the final and binding decisions of the IOBK arising out of disputes in the Civil Service of Kosovo. (For more details on the responsibility of the Employing Authority to enforce the IOBK Decisions see Section 11.3 and 11.4 of the UNMIK REGULATION No. 2001/36 on the Kosovo Civil Service and Articles 12.4, 13 and 15 of the Law No. 03/L-192 on the Independent Oversight Board for Civil Service of Kosovo for Civil Service of Kosovo which superseded UNMIK REGULATION No. 2001/36).

78. Moreover, the Court refers to the case law of the ECtHR which specifies that a person who has obtained judgment against the State at the end of legal proceedings may not be expected to bring separate enforcement proceedings. (See ECtHR case *Burdov v. Russia* (no. 2), , no.33509/04, Judgment of 15 January 2009, § 68).

79. In fact, the burden to ensure compliance with a judgment against the State lies with the State authorities, starting from the date on which the judgment becomes binding and enforceable. (See ECtHR cases *Yavorivskaya v. Russia*, No. 34687/02, Judgment of 21 July 2005, § 25, and *Burdov v. Russia* (no. 2), Ibidem, § 69).

80. The Court is struck by the inconsistent approach of the regular courts and of the Ministry when noting that the Applicant, in spite of all her efforts for over ten years, has not enjoyed yet the rights recognized to her by the final Decision of the IOBK. In fact, that Decision, as a matter of fact and of law, should have been implemented by the Basic

Court, the Court of Appeals and the Ministry within the time-limit set by the IOBK and the applicable law in Kosovo.

81. The Court also is struck by the fact that the Applicant's claim has not been taken seriously and sent back and forth, for over ten years, by the Ministry and the regular courts. The problem is additionally compounded when the courts dismissed the Applicant's proposal to execute the IOBK Decision, in spite of the Decision of the Supreme Court which held that the IOBK Decision is a final and executable document.

82. In this respect, the Court recalls that the Supreme Court found that *" such a legal stance of the lower instance courts on the basis of which the proposal of the Creditor for the enforcement of the Decision of IOBK mentioned above was rejected, with the reasoning that this Decision is not a suitable document for enforcement cannot be accepted as fair and lawful due to the reason that, based on the assessment of this court, on such an ascertained factual situation, the substantive law was erroneously applied when they found that the proposal for enforcement must be rejected; this is due to the reason that the Decision mentioned above presents and executive and enforceable title, in terms of Article 24, item (b) and 26 of the Law on Enforcement Procedure. Pursuant to this legal provision, it results without a doubt that for the application of the Decision of IOBK mentioned above, the Municipal Court in Prishtina is competent, since such a Decision presents an executive and enforceable judicial document. Due to these reasons, during the retrial, by accepting the Decision of IOBK mentioned above as an executive title, the first instance court shall allow the enforcement proposed by the Creditor, and shall continue the enforcement based on her proposal, by which the substantive law shall be applied correctly".*

83. Accordingly, the Court further emphasizes that the regular courts and the Ministry are under obligation to execute the Decision of the IOBK.

84. In addition, the Court refers to Article 54 [Judicial Protection of Rights] which provides:

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

85. The Court also refers to Article 13 [Right to an effective remedy] of the ECHR which stipulates:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity

86. In that respect, the Court notes that the Applicant exhausted all legal remedies available regarding the execution of the IOBK Decision. However, despite her all efforts, that Decision was not executed either by the Ministry or by the regular courts.

87. Furthermore, the Court reiterates that *"the competent authorities have the obligation to organize an efficient system for the implementation of decisions which are effective in law and practice, and should ensure their application within a reasonable time, without unnecessary delays". (*See Constitutional Court case No. KI50/12*, Agush Lolluni,* Judgment of 16 July 2012, par. 41. See also ECtHR case *Pecevi v. Former Yugoslavian Republic of Macedonia,* No. 21839/03, Judgment of 6 November 2008).

88. The Court further reiterates that the inexistence of legal remedies or of other effective mechanisms for the execution of the IOBK Decision affects the right guaranteed by

Article 54 [Judicial Protection of Rights] of the Constitution, and Article 13 [Right to an effective remedy] of the ECHR. (See Constitutional Court case No. KI74/12, *Besa Qirezi*, Judgment of 4 April 2015).

89. Based on the foregoing considerations, the Court finds that a failure to execute final and binding Decision of the IOBK constitutes a violation of the right to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6 (1) of the ECHR, as well as of the right to judicial protection of rights and the right to an effective remedy as guaranteed by Article 54 of the Constitution in connection with Article 13 of the ECHR.

90. Having found violation of articles 31 and 54 of the Constitution in connection with articles 6 (1) and 13 of the ECHR, the Court deems it unnecessary to review allegations on violation of article 21, 24 of the Constitution and Article 7 of the Universal Declaration on Human Rights.

Conclusion

91. The Court reiterates that in its case law on many occasions it has held that questions of fact and questions of interpretation and application of law are within the domain of the regular courts and other public authorities within the meaning of Article 113.7 of the Constitution and as such are a matter of legality, unless and in so far, such questions result in a breach of fundamental human rights and freedoms or create an unconstitutional situation. Thus, the Court is under constitutional obligation to ensure that in proceedings developed before public authorities the fundamental human rights and the supremacy of the Constitution have been respected.

92. In conclusion, the Court finds that the non-execution of the IOBK Decision by the Ministry and the regular courts-during a ten year period- for reinstating the Applicant to her previous position "Manager of Personnel", with coefficient nine (9) or alternatively reassigning her in another position of the same level and salary constitutes a violation of Articles 31 and 54 of the Constitution in connection with Articles 6 (1) and 13 of the ECHR. As a result of this violation, the Applicant was deprived from her right to be reinstated in a job position in accordance with the findings and injunction of the IOBK Decision rendered in her favor.

93. The Court finds that the fact that the IOBK Decision rendered in the Applicant's favor was not executed by the regular courts and the Ministry-within a time span of 10 years-have resulted in a breach of fundamental human rights and freedoms and non-observance of the constitutional procedure.

94. In sum, in accordance with the Rule 63 (5) of the Rules, the Decision of the IOBK No. 879/2007 of 4 September 2007 is to be implemented by the Ministry.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113 (7) of the Constitution, Articles 47 and 48 of the Law and Rules 56 (1) and 63 (5) of the Rules of Procedure, on 6 July 2017, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO HOLD that there has been a violation of Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 13 [Right to an effective remedy] of the ECHR;

IV. TO DECLARE INVALID Decision of the Basic Court in Prishtina no. E. no. 487/2009 of 24 October 2014; and Decision of the Court of Appeals AC. no. 4276/2014 of 9 June 2015;

V. TO ORDER the Ministry of Culture, Youth, Sports and Non-Resident Matters, to implement the IOBK Decision No. 879/2007 of 4 September 2007 rendered in the Applicant's favor, in accordance with *ratio decidendi* of this Judgment;

VI. TO ORDER the Ministry of Culture, Youth, Sports and Non-Residential Matters, pursuant to Rule 63 (5) of the Rules of Procedure, to submit information to the Constitutional Court about the measures taken to enforce this Judgment of the Constitutional Court;

VII. TO REMAIN seized of the matter pending compliance with that order;

VIII. TO NOTIFY this Judgment to the Parties;

IX. TO PUBLISH this Judgment, in accordance with Article 20 (4) of the Law, in the Official Gazette;

X. TO DECLARE this Judgment effective immediately.

Judge Rapporteur

Altay Suroy

President of the Constitutional Court

Arta Rama-Hajrizi

KI 104/16 Applicant Miodrag Pavić, constitutional review Judgment PML-KZZ. No. 110/2016 of the Supreme Court of 16 May 2016

KI104/16 Judgment approved on 29 May 2017, published on July 2017

Key words: *Individual referral, Right to Fair and Impartial Trial, Violation*

The subject matter was the constitutional review of the Judgment PML-KZZ. No. 110/2016 of the Supreme Court, which allegedly have violated the Applicant's rights guaranteed by the Constitution of the Republic of Kosovo, namely Article 31 [Right to Fair and Impartial Trial], Article 54 [Judicial Protection of Rights] and Article 6 (Right to a fair trial) of the European Convention on Human Rights.

The Court find 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 1and 3, under (c) and (d), of the ECHR.

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 Gërxhaliu-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 prejudges 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

President of the Constitutional Court

Arta Rama-Hajrizi

KI30/17, Applicant, Muharrem Nuredini Constitutional review of Judgment Rev. No. 206/2016, of the Supreme Court, of 13 October 2016

KI30/17, Resolution on Inadmissibility of 4 July 2017, published on 31 July 2017

Key words: *Individual referral, damage compensation, revision, non-exhaustion*

The Applicant filed a claim against the respondent - Insurance Company "Iliria" for compensation of material and non-material damage caused in an accident. The Basic Court in Gjilan-Branch in Viti, by Judgment C. No. 269/2010 approved the Applicant's statement of claim as partially grounded and obliged the respondent to compensate the Applicant a certain amount for material and non-material damage. Upon the appeal of the Respondent, the Court of Appeals (CA. No. 4130/13) partially approved the respondent's appeal and modified the Judgment of the Basic Court, by reducing the amount of compensation for the non-material damage. The Respondent submitted a revision against the above judgment while the Applicant did not submit a revision against the Judgment of the Court of Appeal, but only a response to the revision of the Respondent by proposing that the revision of the respondent be rejected, whereas the amounts adjudicated be modified to the extent of the amounts adjudicated by the Basic Court. The Supreme Court (Judgment Rev. No. 206/2016) rejected the revision of the respondent as ungrounded.

The Applicant contested before the Constitutional Court the above Judgment of the Supreme Court. He did not specify the constitutional rights which allegedly have been violated by the Supreme Court, respectively, the Court of Appeal, but alleged that the Judgments of the Supreme Court and the Court of Appeal violated the rights under the ECHR and the rights guaranteed by the Constitution of Kosovo.

The Constitutional Court considered that the Supreme Court did not review the Judgment of the Court of Appeal with regard to the Applicant's request to modify the amounts adjudicated by the Court of Appeal in favor of the Applicant since the Applicant did not file a revision against the Judgment of the Court of Appeal (CA. No. 4130/13), but only a response to the respondent's revision, which revision was rejected by the Supreme Court as ungrounded. Thus, the Constitutional Court found that the Applicant has not exhausted effective legal remedies available according to the applicable laws, in this case the revision, in order for the Supreme Court to assess his allegations of legal violation by the Court of Appeal. Therefore, pursuant to Article 113.7 of the Constitution, Article 47 of the Law, and in accordance with Rule 36 (1) (b) of the Rules of Procedure, declared the Referral inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI30/17

Applicant

Muharrem Nuredini

Constitutional review of Judgment Rev. No. 206/2016, of the Supreme Court, of 13 October 2016

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 Applicant is Muharrem Nuredini from the village Sllatinë e Epërme, Municipality of Viti (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment (Rev. No. 206/2016) of the Supreme Court of Kosovo of 13 October 2016 (hereinafter: the Supreme Court) and Judgment (CA. No. 4130/13) of the Court of Appeals of Kosovo, of 18 May 2016 (hereinafter: the Court of Appeals). The Judgment of the Supreme Court was served on the Applicant on 14 November 2016.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged judgments, which allegedly violated the Applicant's rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and the European Convention on Human Rights (hereinafter: the ECHR). The Applicant did not specify the constitutional provisions or any right of the ECHR he considers has been violated.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the 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 the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 9 March 2017, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral, submitted through mail service on 27 February 2017.

6. On 7 April 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.

7. On 19 April 2017, the Court notified the Applicant about the registration of the Referral. On the same date, the Court sent a copy of the Referral to the Supreme Court and to the Insurance Company "Iliria", as a respondent to the proceedings before the regular courts (hereinafter: the respondent).

8. On 9 May 2017, the Applicant submitted additional documents to the Court, including the respondent's revision and the Applicant's response to the revision.

9. On 4 korrik 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 6 November 2010, in a traffic accident in Sllatina village, the Applicant was hit by the driver of the "Golf" vehicle, insured to the respondent, causing him serious bodily injury.

11. On an unspecified date, the Applicant filed a claim against the respondent for compensation of material and non-material damage caused in the accident.

12. On 10 July 2013, the Basic Court in Gjilan-Branch in Viti, by Judgment C. No. 269/2010 (hereinafter: the Basic Court) approved the Applicant's statement of claim as partially grounded and obliged the respondent to compensate the Applicant a certain amount for material and non-material damage, while rejected the statement of claim for a part of the request, as ungrounded.

13. On 19 November 2013, the respondent filed an appeal against the Judgment of the Basic Court (C. No. 269/2010) requesting the case to be remanded for reconsideration and retrial, on the grounds of *"essential violations of the provisions of [Law on Contested Procedure] LCP, erroneous and incomplete determination of factual situation and erroneous application of the substantive law."*

14. On 26 November 2013, the Applicant replied to the appeal, claiming that the Judgment of the Basic Court was fair and based on the law, while the claims of the respondent were ungrounded, proposing that the respondent's appeal be rejected, while the Judgment of the Basic Court be upheld.

15. On 18 May 2016, the Court of Appeals (CA. No. 4130/13) partially approved the respondent's appeal and modified the Judgment of the Basic Court, by reducing the amount of compensation for the non-material damage in terms of physical pain, fear, reduce of overall life activity and light bodily disfigurement.

16. On an unspecified date, the respondent submitted a revision to the Supreme Court due to erroneous application of the substantive law proposing that both judgments of the lower instance courts be modified with respect to the adjudicated amounts for non-

material damage or that it be quashed and the case be remanded to the first instance court for retrial.

17. The Applicant did not submit a revision against the Judgment of the Court of Appeals, but only a response to the revision by proposing that the revision of the respondent be rejected, whereas the amounts adjudicated be modified to the extent of the amounts adjudicated by the Basic Court.

18. On 13 October 2016, the Supreme Court (Rev. No. 206/2016) rejected the revision of the respondent as ungrounded.

19. On 6 January 2017, the Applicant submitted to the Office of the State Prosecutor a proposal for filing a request for protection of legality against the Judgment of the Supreme Court and the Court of Appeals.

20. On 18 January 2017, the Office of the Chief State Prosecutor notified the Applicant that the *"Office of the Chief State Prosecutor cannot file a request for protection of legality, because pursuant to Article 245.3 of Law on Contested Procedure, request for protection of legality is not allowed against the decision that was taken during revision or request for protection of legality by the court which had competencies to decide for that legal remedy, which in the present case is the Supreme Court."*

Applicant's allegations

21. The Applicant does not specify the constitutional rights which allegedly have been violated by the Supreme Court, respectively, the Court of Appeals, but alleges that the Judgments of the Supreme Court and the Court of Appeals *"violated the legal provisions to the detriment of [the Applicant]*" and violated the rights under the ECHR and the rights "*guaranteed by the Constitution of Kosovo*."

22. Regarding the Judgment of the Supreme Court (Rev. No. 206/2016), the Applicant considers that the Supreme Court, when deciding upon the revision filed by the respondent and the respondent's response to the revision does not consider any fact, evidence or circumstance filed by the Applicant and rejects the revision.

23. Regarding the Judgment of the Court of Appeals (CA. No. 4130/13), the Applicant alleges that *"the Court of Appeals [...] modifies the first instance court judgment by seriously injuring me"* whereas *"it does not elaborate the written expertise at all, nor the statement of the expert in the court session, whereas is called in this expertise while decreasing the amounts and expenses so staggering by intervening in every part of the judgment of [the Basic Court], and by not referring to the question of responsibility of 10 % in the way that every appealed allegation of the respondent is approved"*.

24. Regarding the proposal for protection of legality submitted by the Applicant to the State Prosecutor, the Applicant alleges that this proposal was rejected by the State Prosecutor through notification KLMC. No. 01/2017 of 18 January 2017, *"although we have presented evidence of serious violations by the Court of Appeals."*

25. Finally, the Applicant proposes to the Court to approve the Referral and the case be quashed by remanding it for reconsideration to the Basic Court, or the Judgment of the Court of Appeals be modified, taking into account the Judgment of the Basic Court.

Admissibility of the Referral

26. The Court first examines whether the Applicant has met the admissibility requirements established in the Constitution and as further specified in the Law and foreseen in the 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 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."*

28. In addition, the Court refers to Article 47 [Individual Requests] of the Law, which establishes:

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

29. The Court also takes into account Rule 36 [Admissibility Criteria], sub-paragraph (1) (b) and (c) of the Rules of Procedure, which provides:

> *"(1) The Court may consider a referral if:*
> *[...]*
> *b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted;*
> *[...]."*

30. The Court notes that the Applicant alleges that the Supreme Court did not take into account the facts and evidence submitted by the Applicant in response to the revision even though the Applicant *"had hope that the case would be remanded for retrial."*

31. However, the Court notes that the Applicant did not submit a revision against the Judgment of the Court of Appeals (CA. 4130/13), but he challenged the Judgment of the Court of Appeals by responding to the revision filed by the respondent, by requesting that "*the revision of the respondent be rejected, and the amounts adjudicated be modified"* in favor of the Applicant.

32. In this regard, the Supreme Court "*reviewed the Judgment of the Court of Appeals only by the revision of the respondent within the meaning of Article 215 of the Law on Contested Procedure"* which specifies that *"the court of revision reviews the challenged judgment only in its challenged part by revision and only within the limits of the reasons indicated in the revision*."

33. Accordingly, the Court notes that the Supreme Court did not review the Judgment of the Court of Appeals with regard to the Applicant's request to modify the amounts adjudicated by the Court of Appeals in favor of the Applicant since the Applicant did not file a revision against the Judgment of the Court of Appeals (CA. No. 4130/13), but only

a response to the respondent's revision, which revision was rejected by the Supreme Court as ungrounded.

34. As regards the present case, the Court finds that the Applicant has not exhausted effective legal remedies available according to the applicable laws, in this case the revision, in order for the Supreme Court to assess his allegations of legal violation by the Court of Appeals.

35. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo shall provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (See Resolution on Inadmissibility in Case KI142/13, *Fadil Maloku*, of 22 October 2014, Constitutional Review of the Decision of the President of the Republic of Kosovo, No. 686-2013 of 6 September 2013).

36. The Court refers also to the principle of subsidiarity, which requires that the Applicants exhaust all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. Otherwise, the Applicant is liable to have its case declared inadmissible by the Constitutional Court, when failing to avail itself of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings.

37. This failure to use this possibility shall be understood as a giving up of the right to further object the violation and complain (*See, Resolution in Case KI139/12, Besnik Asllani, constitutional review of Judgment PKL. no. 111/2012 of Supreme Court, of 30 November 2012, paragraph 45;* and cases of ECtHR *Selmouni v. France,* Application no. 25803/94, Judgment of 28 July 1999, paragraph 74*; Kudla v. Poland,* Application No. 30210/96 of 26 October 2000, paragraph 152*).*

38. For the reasons mentioned above, the Court finds that the Referral does not meet the admissibility requirements as the legal remedies have not been exhausted provided by Article 113.7 of the Constitution, Articles 47 of the Law and Rule 36 (1) (b) of the Rules of Procedure, therefore, as such the Referral is to be declared inadmissible on constitutional basis.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law, and in accordance with Rule 36 (1) (b) of the Rules of Procedure, on 4 July 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; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI25/16, Applicant Veselin Miloševič and Vesna Miloševič, Constitutional review of Decision AC-I-13-0127 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 1 October 2015

KI25/16, Resolution on Inadmissibility of 30 May 2017, published on 17 August 2017

Keywords*: Individual referral, protection of property, right to a fair trial, premature referral.*

The Appellate Panel of the Special Chamber of the Supreme Court on PAK Related Matters approved the appeal of the Privatization Agency of Kosovo and annulled the Decision of the Specialized Panel of the Special Chamber of the Supreme Court on PAK Related Matters. The Appellate Panel of the Special Chamber of the Supreme Court on PAK Related Matters remanded the case to the Specialized Panel of the Special Chamber of the Supreme Court on PAK Related Matters, for further proceedings.

The Applicant complained to the Constitutional Court of violations of the rights protected by the Constitution, namely the right to fair and impartial trial and the protection of property, alleging that there was a retroactive annulment of the final Judgment of the Municipal Court in Prishtina.

The Court found that the Applicants' referral is premature, as it is pending in the proceedings before the regular courts.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI25/16

Applicants

Veselin Miloševič and Vesna Miloševič

Constitutional review of Decision AC-I-13-0127 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 1 October 2015

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

Applicants

1. The Referral was submitted by Veselin Miloševič and Vesna Miloševič from Prishtina (hereinafter: the Applicants), who are represented by Basri Jupolli, a lawyer from Prishtina.

Challenged decision

2. The challenged decision is Decision AC-I-13-0127, of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel), of 1 October 2015, which was served on the Applicants on 21 October 2015.

Subject matter

3. The subject matter is the constitutional review of Decision AC-I-13-0127, of the Appellate Panel, of 1 October 2015, which according to Applicants' allegations, violated Article 22 [Direct Applicability of International Agreements and Instruments], and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), and Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of 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

5. On 4 February 2016, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 March 2016, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur, and the Review Panel, composed of Judges Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.

7. On 30 March 2016, the Court notified the Applicants about the registration of the Referral and requested the Applicants' representative to submit a power of attorney, based on which he represents the Applicant Vesna Milošević. On the same date, the Court notified and sent a copy of the Referral to the Appellate Panel.

8. On 21 April 2016, the Applicants' representative submitted to the Court a power of attorney, by which he represents the Applicant Vesna Milošević.

9. On 1 December 2016, the Court requested the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC) to submit Decision SCA-08-037 of 27 June 2008, of the Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters (hereinafter: SCSC).

10. On 2 December 2016, the SCSC submitted to the Court the Decision of the Specialized Panel of the SCSC (hereinafter: the Specialized Panel) SCA-08-0037 of 28 June 2013.

11. On 6 December 2016, the SCSC submitted to the Court the SCSC Decision of SCSC-08-037 of 27 June 2008.

12. On 30 May 2017, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

13. On 19 January 2006, the Applicants filed a claim with the Municipal Court in Prishtina, requesting the annulment of the sale-purchase agreement (Ov. No. 69/62), of 12 January 1962, concluded between their legal predecessor, the deceased D. M., and the Socially Owned Enterprise PIK "Kosovo Export" (hereinafter: the Socially Owned Enterprise), as invalid. The Applicants requested the Municipal Court, *"to oblige the respondent to return the possession of their property, the cadastral parcels No. 1339, 1520/1, 1877/12 registered on the possession list No. 260 CZ Llapna Sellë and cadastral parcel No. 222 Çagllavica CZ."*

14. The representative of the Socially Owned Enterprise participated in the court proceedings before the Municipal Court in Prishtina as a respondent party, and requested that the claim be rejected as ungrounded.

15. On 26 June 2007, the Municipal Court in Prishtina rendered Judgment C. No. 53/06, approved the claim of the Applicant and declared invalid the sale-purchase agreement Ov. No. 69/62 of 12 January 1962.

16. On 9 July 2007, the Judgment of the Municipal Court was served on the representative of the Socially Owned Enterprise, who on 23 July 2007, filed an appeal against the Judgment. The representative then withdrew the appeal on 28 September 2007.

17. On 11 January 2008, the Kosovo Trust Agency (hereinafter: the KTA) was notified that a proceedings had been conducted related to socially owned property which is under its administration.

18. On 11 March 2008, the KTA filed a complaint with the SCSC, noting that the Municipal Court in Prishtina acted without jurisdiction, because the SCSC had exclusive jurisdiction over the claims against socially owned enterprises and, therefore, the judgment C. No. 53/06 of the Municipal Court is invalid.

19. On 27 June 2008, the Specialized Panel of the SCSC, by Decision SCA-08-037, approved the appeal of the KTA as timely, with the reasoning that:

> *"Although in this case the KTA is not a party to the proceedings, the KTA as an administrator of socially and publicly owned property should have been notified regarding the challenged judgment in accordance with Article 5 and 6 of the KTA Regulation 2005-18. Taking into account that the KTA has received the notification about the legal issue through a letter of the Municipal Court in Prishtina dated 11.01.2008, the Special Chamber considers that this is the date when the period of 2 months for filing a complaint begins to run [...]."*

20. On 15 June 2008, the Law no. 03/L-067 on Privatization Agency of Kosovo entered into force and the Privatization Agency of Kosovo (hereinafter: the PAK) was established as a legal successor to the KTA.

21. On 1 January 2012, the Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Law on the Special Chamber) entered into force, which established the Special Chamber as the legal successor of the SCSC. In accordance with this Law, the parties were able to comment on the change of Article 4.5.1 of the Law on the Special Chamber in relation to this case.

22. The Applicants submitted their appeal to the Specialized Panel stating that the appeal of the KTA, now the PAK, was filed out of time.

23. On 28 June 2013, the Specialized Panel rendered Decision SCA-08-0037, which declared the KTA, now PAK, appeal of 11 March 2008 against the decision of the Municipal Court in Prishtina as out of time. The Specialized Panel reasoned that, "*The challenged judgment was sent to the respondent, the SOE on 23.07.2007. The KTA complaint was filed on 11.03.2008. The complaint was filed after the deadline provided for Socially Owned Enterprises, respectively for KTA. The Judgment of the Municipal Court became final at the moment when the remedy was sought.*"

24. The PAK filed an appeal with the Appellate Panel against this Decision SCA-08-0037 of the Specialized Panel of 28 June 2013.

25. On 1 October 2015, the Appellate Panel by Decision (AC-I-13-0127) approved the appeal and annulled the Decision (SCA-08-0037, of 28 June 2013), of the Specialized Panel. In addition, the Appellate Panel declared invalid the Judgment (C. No. 53/06), of the Municipal Court in Prishtina of 26 June 2007, and remanded the case to the Specialized Panel for further proceedings.

Applicant's allegations

26. The Applicants allege that the decisions of the regular courts violated Article 22 [Direct Applicability of International Agreements and Instruments] and Article 46 [Protection of Property] of the Constitution, as well as Article 6 [Right to a fair trial] of the ECHR.

27. The Applicants argue that, "*the retroactive repeal of the final Judgment of the Municipal Court in Prishtina, in case C. No. 53/06, of 26 June 2007 has occurred. [...] The Special Chamber, with its Decision in case AC-01-13-0127, dated 01 December 2015, caused legal uncertainty, by seriously violating the fundamental human rights and freedoms of citizens.*"

28. The Applicants conclude by requesting the Court to annul Decision AC-I-13-0127 of the Appellate Panel of the Special Chamber, of 1 October 2015.

Admissibility of the Referral

29. In order to adjudicate the Applicants' Referral, the Court should examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and Rule of Procedure.

30. In this case the Court refers to Article 113.7 of the Constitution, which establishes that:

> *"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."*

31. In addition, Article 47.2 of the Law, stipulates that:

> *"The* individual *may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law".*

32. Furthermore, Rule 36 (1) (b) of the Rule of Procedure provides that:

> *"The* Court *may consider a referral if: all effective remedies that are available under the law against the judgment or decision challenged have been exhausted".*

33. The Court notes that the Applicants consider that the decisions of the regular courts violated the rights and freedoms guaranteed by Articles 22 and 46 of the Constitution and Article 6 of ECHR.

34. The Court notes in the present case there are four decisions of the competent courts, and that in accordance with its content, character and subject, they may be classified into two categories.

35. Judgment C. No. 53/06, of the Municipal Court of 26 June 2007 belongs to the first category, in which the Court exclusively dealt with the subject of the property claim, which, pursuant to Article 5.1 of UNMIK Regulation 2002/12, is treated as a social property.

36. The three subsequent decisions of the panels of the Special Chamber belong to the second category, which deal exclusively with the procedural question of the time limits for filing the complaint of the KTA.

37. The Court notes that the preliminary question before the Specialized Panel in Decision SCA-08-037 of 27 June 2008, was whether the complaint of the KTA against the Judgment of the Municipal Court was submitted in time.

38. In this regard, the Court notes that the Specialized Panel approved the KTA complaint of 11 March 2008 as timely, pursuant to Article 56.1 of the Administrative Instruction 2006/17 which states that, *"the complaints should be filed with the Special Chamber within a deadline of 2 months after the decision was served on the parties to the proceedings."*

39. The Court notes that the Specialized Panel based its decision on the specific circumstances of the case, namely that the KTA was never informed about the proceedings before the Municipal Court, despite the fact that the KTA, is authorized, according to UNMIK Regulation 2002/12 (On the Establishment of the Kosovo Trust Agency), to be a party to the proceedings because the original case concerned the socially owned property. Therefore, the Specialized Panel found that the time limits for filing the complaints, pursuant to Article 56.1 of the administrative instruction could not run.

40. The Court further notes that the KTA was notified about the judgment of the Municipal Court only on 11 January 2008. According to the reasoning in the decision of the Specialized Panel, the deadline of 2 months for the KTA to file an appeal formally began to run from the date the KTA was informed, and stated that:

> "*Taking into account that the KTA received the notification about this legal issue through a letter dated 11.01.2008 of the Municipal Court in Prishtina, the Special Chamber considers that this is the date when the deadline of 2 months for filing appeal begins to run. The KTA respected this time lime and it filed appeal on 11.03.2008, two months after the date…"*

41. Furthermore, the Court notes that, in the second Decision SCA-08-0037 of 28 June 2013, the Specialized Panel annulled the decision of the Specialized Panel of 27 June 2008, basing its decision on the fact that the judgment of the Municipal Court was sent on 23.07.2007 to the Socially Owned Enterprise, which the KTA should have known about. Therefore, the Specialized Panel reasoned that the deadline for filing the appeal started to run on the same date, "*since the Special Chamber considers the relationship between the SOE and PAK, as an internal matter."*

42. The Court further notes that the Appellate Panel in its decision finally resolved the subject of the dispute and removed any ambiguity regarding the time limits, and thus concluded that the appeal of the KTA, now PAK, of 11 March 2008 was submitted on time. Therefore, the Appellate Panel declared the Judgment (C. No. 53/06) of the Municipal Court in Prishtina of 26 June 2007 invalid, and remanded the case on the substance of the disputed property to the respective Specialized Panel for further proceedings.

43. Accordingly, the Court considers that the issue related to the deadlines whether the KTA, now PAK, appeal was filed within the time limit or not, was concluded by a final decision of the Appellate Panel, and that the issue of confirmation of the rights to the disputed property was remanded to the Specialized Panel, Thus, the proceedings regarding the substantive issue of the property rights is currently pending.

44. The Court notes that the Applicants' allege that their property rights have been violated by the decision of the Appellate Panel. However, the Court notes that the proceedings before the Appellate panel only concerned a procedural question of deadlines, and, in fact, the Applicants' property rights claims have not yet been adjudicated.

45. Based on the fact that the Applicants' case is still pending in the regular court proceedings before the Specialized Panel for retrial, the Court considers that the Applicants' Referral is premature.

46. The Court recalls that the rationale for the exhaustion of effective legal remedies, as in the present case, is to afford the regular courts the opportunity to remedy the alleged violation of the Constitution. The rule is based on the assumption that Kosovo legal order provides an effective legal remedy against the violation of constitutional rights (See Resolution on Inadmissibility: *AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo*, KI41/09, of 21 January 2010, and see *mutatis mutandis*, ECHR, *Selmouni vs. France*, no. 25803/94, Decision of 28 July 1999).

47. The principle of subsidiarity requires that the Applicants exhaust all procedural possibilities in the regular proceedings, administrative or judicial proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of fundamental rights (See Resolution on case KI07/09, *Demë Kurbogaj and Besnik Kurbogaj*, Constitutional review of Judgment Pkl. no. 61/07, of 24 December 2008, para. 18).

48. Therefore, the Court concludes that the Applicant's Referral is premature.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution, Article 47 of the Law, and Rule 36 (b) of the Rules of Procedure, on 30 May 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 Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI51/17, Applicant KB "Cërmjani", Constitutional review of Decision E. Rev. no. 28/2016 of the Supreme Court of Kosovo of 5 January 2017

KI51/17, Resolution on Inadmissibility of 5 July 2017, published on 6 September 2017

Key words: *Individual referral, damage compensation, revision, referral manifestly ill-founded*

The Applicant filed a claim with the Commercial Court of Kosovo against the Kosovo Energy Company requesting compensation for the damages caused in his farm as a result of fire, allegedly caused by electricity. The Commercial Court (IC. C. nr. 255/2007) obliged the Respondent Kosovo Energy Company to pay certain amount of compensation for material damages as well as lost benefits, and for procedural expenses. The Court of Appeals (Judgment Ae. nr. 44/2014) rejected as ungrounded both the appeals of the Applicant and of the Respondent. The Supreme Court (Decision E. Rev. no.28/2016), deciding on the revisions of the Responded, approved as grounded the revision and changed the Judgment of the Court of Appeals (Ae.nr.44/2014) and Judgment of the Commercial Court (C.nr.255/2007) and rejected as ungrounded the Applicant's claim for compensation of damages against the Respondent.

The Applicant contested before the Constitutional Court the Supreme Court Decision (E. Rev. no.28/2016) which allegedly violated his rights guaranteed by Articles 3 [Equality Before the Law], 7 [Values], 21 [General Principles], 24 [Equality Before the Law], 31 [Right to a Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 54 [Judicial Protection of Rights] and 119 [General Principles] of the Constitution of the Republic of Kosovo. The Court considered that the Applicant has not presented facts showing that the proceedings before the regular courts were in any way a constitutional violation of its guaranteed rights under the Constitution. Thus, the Court declared the Applicant's referral inadmissible pursuant to Article 113 (1) and (7) of the Constitution, Articles 48 of the Law on Constitutional Court and Rules 36 (1) (d) and 36 (2) (d) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI51/17

Applicant

KB "Cërmjani"

Constitutional review of Decision E. Rev. no. 28/2016 of the Supreme Court of Kosovo of 5 January 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 KB "Cërmjani" based in Cërmjan, municipality of Gjakova (hereinafter, the Applicant). The Applicant is represented by Bajram Morina, a lawyer, based on the power of attorney signed by the Applicant's Administrator.

Challenged decision

2. The Applicant challenges the Decision E. Rev. no. 28/2016 of the Supreme Court of Kosovo (hereinafter, the Supreme Court) of 5 January 2017, which approved as grounded the Revision of the Kosovo Energy Corporation (hereinafter, the Respondent) and changed the Judgment Ae. nr. 44/2014 of the Court of Appeals in Prishtina (the Court of Appeals) of 14 December 2015 and Judgment C. nr. 255/2007 of the District Commercial Court in Pristina (the Commercial Court) of 11 June 2009, and rejected as ungrounded the Applicant's claim for compensation of damages against the Respondent.

3. The challenged Decision was served on the Applicant on 4 February 2017.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Decision which allegedly violated the rights of the Applicant guaranteed by Articles 3 [Equality Before the Law], 7 [Values], 21 [General Principles], 24 [Equality Before the Law], 31 [Right to a Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 54 [Judicial Protection of Rights] and 119 [General Principles] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 [Filling of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Court

6. On 18 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 24 April 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of the judges Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

8. On 26 April 2017, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 4 May 2017, the Court requested the Basic Court in Prishtina (hereinafter, the Basic Court) to submit evidence on the date of receipt of the Revision by the Applicant and on which the Applicant submitted the response to the Revision.

10. On 8 May 2017, the Basic Court delivered to the Court the receipt showing the date the Applicant received the response to the Revision and the receipt showing the date the Applicant submitted the response to the Revision.

11. On 5 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. On 14 September 2006, as a result of high tension of electricity, the poultry farm (hereinafter, the farm) of the Applicant was burned.

13. On 5 May 2007, the Applicant filed a Claim with the Commercial Court against the Respondent requesting compensation for the damages caused in the farm.

14. On 11 June 2009, the Commercial Court (IC. C. nr. 255/2007) obliged the Respondent to pay certain amount of compensation for material damages as well as lost benefits, and for procedural expenses.

15. The Applicant appealed that Judgment due to erroneous and incomplete ascertainment of the factual situation, essential violations of the provisions of the contested procedure, wrong application of substantive law.

16. The Respondent also filed an appeal against the above Judgment due to essential violations of the provisions of the contested procedure, erroneous and incomplete ascertainment of the factual situation and wrong application of substantive law.

17. On 14 December 2015, the Court of Appeals (Judgment Ae. nr. 44/2014) rejected as ungrounded both the appeals of the Applicant and of the Respondent.

18. On 18 February 2016, the Respondent filed with the Supreme Court a Revision due to *"violation of the provisions of the [Law on Contested Procedure] and erroneous application of material law"*.

19. On 29 February 2016, the Applicant received the Revision of the Respondent.

20. On 9 April 2016, the Applicant filed a response to the Revision, proposing that the Supreme Court rejects *"on its entirety the Revision of the Respondent"*.

21. On 5 January 2017, the Supreme Court (Decision E. Rev. no.28/2016) approved as grounded the Revision of the Respondent and changed the Judgment of the Court of Appeals (Ae.nr.44/2014) and Judgment of the Commercial Court (C.nr.255/2007) and rejected as ungrounded the Applicant's claim for compensation of damages against the Respondent.

Applicant's allegations

22. The Applicant claims that the Supreme Court (Decision E. Rev. no. 28/2016) violated its rights guaranteed by Articles 3 [Equality Before the Law], 7 [Values], 21 [General Principles], 24 [Equality Before the Law], 31 [Right to a Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 54 [Judicial Protection of Rights] and 119 [General Principles] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

23. The Applicant alleges that "*the Supreme Court in the reasoning stated that the Applicant did not provide Answer to the Revision, a fact which proves that the Supreme Court when deciding the Revision of the Respondent was bias and did not decide fairly the legal matter of the Applicant based on the uncontested fact that the Applicant on time has submitted the Answer to the Revision [...] on 08.03.201[6] which can be proved with the Answer to the Revision of the Applicant of 08.03.201[6] and the receipt of the postal service of Prishtina no. 2052205 of 09.03.201[6]*".

24. The Applicant claims that *"the Supreme Court did not adjudicate fairly in Applicant's legal matter based on uncontested facts"* confirmed by the Expert Prof Dr. J.K who concluded that *"the cause of fire in the Farm of the Applicant was high tension as a result of irregular and non-continues supply of electricity by the Respondent [...]."*

25. The Applicant further considers that *"lack of Consent (of the Respondent to connect to electricity), on which decision of the Supreme Court was based when they approved the Revision of the Respondent does not exculpate the Respondent from the responsibility*" and that *"the electrical installations of the Respondent from which the Farm was supplied met all the technical norms"*.

26. The Applicant states that it *"was in legal relationship with the Respondent before the building was burned but also now is in legal relationship as a commercial consumer, which proves that that the Applicant was never illegally connected in the network of the Respondent"*.

27. Finally, the Applicant requests the Court to approve the Referral as grounded and to annul the challenged Decision.

Admissibility of the Referral

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

29. 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.*

30. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

> *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.*

31. The Court considers that the Applicant is an authorized party, has exhausted the available legal remedies and submitted the Referral in due time.

32. However, the Court refers to Article 48 [Accuracy of the Referral] 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.*

33. In addition, the Court also refers to paragraphs (1)(d) and (2)(d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresee:

> *(1) The Court may consider a referral if:*
> *[...]*
> *(d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
> *[...]*
> *d) the Applicant does not sufficiently substantiate his claim.*

34. In that respect, the Court recalls that the Applicant claims that the Supreme Court violated numerous rights protected by the Constitution; however, its main claim is in essence related to its right to fair and impartial trial.

35. In this respect, the Court notes that the Applicant claims that:

> *(i)* the Supreme Court decided the Revision without considering its Answer to the Revision although it was submitted in a timely manner which can be proved with the receipt of the postal service of Prishtina no. 2052205 of 9 March 2016; and,

(ii) the Supreme Court ignored uncontested facts confirming that the fire in its farm occurred as a result of high tension of electricity due to irregular and non-continuous supply of electricity by the Responded, while, the lack of Consent to connect to the electrical network does not exculpate the Responded from his responsibility.

36. Regarding allegation *(i)* the Court notes that the Supreme Court considered that *"the respondent did not file response to the Revision"* In fact, the Applicant received the Revision of the Respondent on 29 February 2016, while he filed the Response to the Revision, through the postal services, on 9 March 2016.

37. The Court considers that the Supreme Court, even though not explicitly, took into account Article 219 (2) of the Law on Contested Procedure which provides that *"the opposing party has the right that within seven days starting from the day of receiving the revision, to file a response to the revision through the court of first instance"*.

38. Consequently, the Court also considers that the Applicant did not submit the response to the revision within the calendar deadline prescribed by law, which means that *"the respondent did not file response to the Revision"*. Therefore, the allegation *(i)* of the Applicant is not grounded.

39. Regarding allegation *(ii),* the Court recalls that the Supreme Court considered that the Applicant has connected the electricity to its farm in violation of the Rules on the General Conditions for Energy Supply, because the Applicant *"conducted an unauthorised use of electricity and as a household consumer used electricity as [commercial] consumer since he supplied the building of the Farm with electricity from the household building*.
[...]

Based on Article 29.2 of the above Regulation, the [Applicant] as a consumer for every change or any issue of connection, measuring device or any other device could not have done without the written consent of the energy company [...]. Article 29.1 [of the Regulation] specifies that an unauthorised connection is considered if the electricity is used in a manner or quantity that has not been authorised by the energy company.

Based on Article 48 of the Regulation, on the de-connection and re-connection of the consumers in the electricity sector it is specified that only the authorised persons can do the connection and de-connection of the consumers. [The Applicant] has done himself the connection of his commercial building from the household building in an unauthorised manner".

40. The Court notes that the Supreme Court assessed the facts determined by the Commercial Court and the Court of Appeals and interpreted and applied the procedural and substantive law provisions regarding his claim. Their conclusions were reached after detailed examination of all the arguments presented and dealt with by the Commercial Court and Court of Appeals.

41. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact 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). In fact, the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (See, *mutatis mutandis*, the European Court of Human Rights (hereinafter: ECtHR) case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, para. 28).

42. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as "fourth instance court". (See ECtHR case *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

43. In other words, the complete determination of the factual situation and the correct application of the law is within the full jurisdiction of the regular courts (matter of legality).

44. In that respect, the Court considers that the reasoning provided by the Supreme Court when referring to Applicant's allegations of violations of procedural and material law is justified and that the proceedings before the regular courts have not been unfair or arbitrary. (See ECtHR case *Shub vs. Lithuania*, No. 17064/06, Judgment of 30 June 2009).

45. With regard to Applicant's allegation regarding violation of its rights guaranteed by Articles 3 [Equality Before the Law], 7 [Values], 21 [General Principles], 24 [Equality Before the Law], 53 [Interpretation of Human Rights Provisions], 54 [Judicial Protection of Rights] and 119 [General Principles] of the Constitution, the Court notes that the Applicant has not substantiated any of allegations indicating how and why the Supreme Court has violated its rights.

46. In sum, the Court further considers that the Applicant has not presented facts showing that the proceedings before the regular courts were in any way a constitutional violation of its guaranteed rights under the Constitution.

47. Consequently, the Referral is manifestly ill-founded on a constitutional basis and it should be declared inadmissible pursuant to Rules 36 (1) (d) and 36 (2) (d) of the Rules of Procedure.

FOR THESE REASONS,

The Constitutional Court of Kosovo, in accordance with Article 113 (1) and (7) of the Constitution, Article 48 of the Law and Rules 36 (1) (d) and 36 (2) (d) of the Rules of Procedure, in the session held on 5 July 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law; and

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Arta Rama-Hajrizi

KI20/17, KI21/17 and KI22/17, Applicant: Banka e Kosovës J .S.C. Belgrade; Jugobanka J.S.C., Beobanka J.S.C., Constitutional review of Law no. 05/L-120 on Trepça

KI20/17; 21/17 and 22/17, Resolution on inadmissibility, approved on 21 August 2017, published on 6 September 2017

Key words: *individual referral, civil procedure, protection of property, right to fair and impartial trial, request for interim measure, inadmissible referral, unauthorized party*

Applicants' allegations in Referrals KI20/17 and KI21/17 where entirely identical, and they alleged that their right to property had been violated upon the entry into force of Law on Trepça. Third Referral, KI22/17, was submitted by Momčilo Nedeljković on behalf of 140 other workers of mines of Kishnica and Novobrdo, who requested the constitutional review of Articles 1, 2, 3, 4, 5, 6, 14, 15, 16 and 17, of Law on Trepça, alleging that these articles have led to the transformation of ownership in favor of the newly established enterprise Trepça SH.A. In addition, the Applicants requested the Court to impose an interim measure to suspend the application of Law no. 05/L-120 on Trepça pending the decision of this Court on the compatibility of this law with the Constitution of the Republic of Kosovo.

The Court decided that the Applicant's Referrals are inadmissible because the Applicants are not authorized parties to request the constitutional review of the compatibility of Law on Trepça with the Constitution. Furthermore, the Court rejected the request for interim measure given that the requests were declared inadmissible in line with Articles 113.2 and 116.2 of the Constitution, Articles 27 and 29.1 of the Law, and rules 36 (1) (a) and 54 (4) and 55 (5) and 56 (b) and (c) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Referrals No. KI20/17, KI21/17 and KI22/17

Applicants

Banka e Kosovës J.S.C. Belgrade;
Jugobanka J.S.C., Beobanka J.S.C., Beogradska Banka J.S.C.;
and Momčilo Nedeljković and 410 employees of Mines Kishnica and Novo Brdo

Constitutional review of the Law No. 05/L-120 on Trepca.

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 and
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicants

1. The Referral KI20/17 was submitted by Banka e Kosovës J.S.C**.** Belgrade, with its seat in Belgrade (hereinafter, the first Applicant), which is represented by Dobrica Lazić, a lawyer from Gračanica.

2. The Referral KI21/17 was submitted by Jugobanka J.S.C.; Beobanka J.S.C. and Beogradska banka J.S.C., with their seat in Belgrade (hereinafter, the second Applicant), which are represented by Dobrica Lazić, a lawyer from Gračanica.

3. The Referral KI22/17 was submitted by Momčilo Nedeljković on behalf of other 410 employees of the Mine Kishnica and Novo Brdo (hereinafter, the third Applicant), who are as it follows:

1.	Momčilo Nedeljković,	2.	Stana Ivanović,
3.	Slobodan Krstić,	4.	Zagorka Jovanović
5.	Tihomir Nedeljković,	6.	Voja Micić,
7.	Jovica Milanović,	8.	Nuredin (Sadula) Gradina,
9.	Zorica Simić,	10.	Hazir Haziri,
11.	Srbobran Maksimović ,	12.	Dušanka Jovanović,
13.	Uroš Maksimović,	14.	Dragoljub Trajković,
15.	Ljifa Ramić,	16.	Slobodan (Srećko)Kostić,
17.	Šema Jašari,	18.	Svetlana Milovanović,
19.	Trajko Andrejević,	20.	Ljubiša Trajković
21.	Radojica Grbić,	22.	Slavica (Živojin) Marković 22,11,1956
23.	Lutfi Breznica,	24.	Trifun Jovanović,
25.	Jovica Jorgić,	26.	Sretko Janićijević,

27.	Mirko (Petar) Aritonović,	28.	Predrag (Ranko) Arsić,
29.	Ljubiša(Milorad) Simić,	30.	Novica Milošević,
31.	Milorad (Jordan) Simić	32.	Iljmija Zećiri,
33.	Zivorad Nedeljković,	34.	Stojanka (Radovan) Sekulić, 3
35.	Zoran (Stanko) Stošić,	36.	Slobodan Janićijević,
37.	Zorica Maksimović,	38.	Vesna Maksimović,
39.	Mirjana Ćirković,	40.	Hamdi Garip,
41.	Gorica Popović,	42.	Milivoj Đorđević,
43.	Vesna Krstić,	44.	Milica Andrejević,
45.	Dobri Filipović,	46.	Vlastimir Simić,
47.	Jordan Stojanović,	48.	Slaviša Krstić,
49.	Zoran Lazarević,	50.	Pavle Maksimović,
51.	Gradimir Mirković,	52.	Slaviša (Milivoja) Trajković,
53.	Dragoslav Marković,	54.	Milorad Mladenović,
55.	Miroslav Ivanović,	56.	Dragan Aleksić,
57.	Ljiljana Filić	58.	Slađana Đurović,
59.	Zoran Ivić,	60.	Branko Pavić,
61.	Dobrivoje Dimić	62.	Dragiša Todorović
63.	Vehbi Bitić	64.	Milka Ivanović
65.	Bogoljub Micić	66.	Živorad Stević
67.	Časlav Nedeljković	68.	Slavica (Živojin) Marković11,031959
69.	Enver Fazlija	70.	Radisav Dimitrijević
71.	Ljiljana Dimitrijević	72.	Stana Kostić
73.	Srđan (Novica) Ristić	74.	Blagoje Marković
75.	Nuredin (Sadula) Gradina,	76.	Milica Milanović
77.	Javorka Spasić	78.	Srbobran Janićijević
79.	Branko (Vladimira) Jovanović	80.	Stanimirka Trajković
81.	Blagica Živić	82.	Živka Stević
83.	Veljko Jovanović	84.	Ferdane Nikšić
85.	Zoran (Stanko) Stošić	86.	Slavica Stalević
87.	Jagodinka Vujević	88.	Branislav Andrejević
89.	Živka Ćurčić	90.	Milan Danić
91.	Osman Jašari	92.	Branko Đorđević
93.	Dema Jašarević	94.	Radomir Ćirković
95.	Ranko Velić	96.	Dana Milovanović
97.	Velimir Milovanović	98.	Radoslav Miladinović
99.	Branislav Nićić	100.	Slobodan Petrović
101.	Stana Maksimović	102.	Radisav Ivanović
103.	Slavica Vanić	104.	Vojislav Stević
105.	Momčilo Mirković	106.	Vidosav Ilić
107.	Elez Jašarević	108.	Nikola Gudžić
109.	Žika Stević	110.	Milance Ćurčić
111.	Dojčin Sekulić	112.	Negovan Marinković
113.	Uroš Stević	114.	Olgica Gudžić
115.	Senad Salijević	116.	Dimitrija Đorđević
117.	Blagica Perić	118.	Zvonimir Marković
119.	Ljubiša Pavić	120.	Živojin Andrejević
121.	Sretko Nićić	122.	Srđan Jovanović
123.	Borisav Andrejević	124.	Branko Todorović
125.	Slobodanka Perić	126.	Miloš Nedeljković
127.	Branka Anderjević	128.	Zoran Stević
129.	Mladen Karadžić	130.	Danica Gudžić

131.	Slađana Dragutinović	132.	Biserka Bulajić
133.	Rodoljub Micić	134.	Jugoslav Nedeljković
135.	Milorad (Miladin) Velić	136.	Draguljub Sevanović
137.	Milan Milić	138.	Zoran Nojić
139.	Milan Jocić	140.	Vlajanka Perić
141.	Branislav Arsić	142.	Milenko Cvejić
143.	Namon Statovci	144.	Verica Vasić
145.	Siniša Maksimović	146.	Veselj Muslijević
147.	Dragan Krstić	148.	Titomir Ivić
149.	Danilo Stevanović	150.	Džema Garip
151.	Dragiša Perić	152.	Emin Gradina
153.	Živojin Živić	154.	Milivoje Simijonović
155.	Medenica Andrejević	156.	Jelica Adamović
157.	Dojčin Đorđević	158.	Dobrila Nedeljković
159.	Milivoje Đekić	160.	Milorad Milovanović
161.	Miloš Radovanović	162.	Dragoljub Stojanović
163.	Šašivar Salijević	164.	Desanka Nikolić
165.	Slobodan Lazarević	166.	Vladimir Petrović
167.	Strahinja Kostić	168.	Nadežda Samardžić
169.	Dejan (Ljubinko) Stojanović	170.	Ljubinko Petrović
171.	Novica Ćurčić	172.	Ajredin Gaši
173.	Slađana Ilić	174.	Radomir Ničić
175.	Naser Jašarević	176.	Slaviša Nedeljković
177.	Stanimir Živić	178.	Suzana Stevanović
179.	Ljubinko Jovanović	180.	Refki Salijević
181.	Novica Trajković	182.	Olga Danić
183.	Slobodanka Ničić	184.	Dobrivoje Nedeljković
185.	Svetomir Cvejić	186.	Dejan Živić
187.	Gligorije Stoiljković	188.	Nenad Filić
189.	Mile Jović	190.	Saša Dragutinović
191.	Miro Mirković	192.	Živko Marković
193.	Srboljub Pavić	194.	Srba Marinković
195.	Ljubičica Živanović	196.	Vesna Džunić
197.	Zoran Milovanović	198.	Radovan (Božidar) Perić
199.	Živorad (Srećko) Jovanović	200.	Goroljub Dimić
201.	Slavica Golubović	202.	Milivoje Janković
203.	Vlastimir Petrović	204.	Miodrag Kostić
205.	Slavica Arsenijević	206.	Jovan Ivković
207.	Slobodan Arsić	208.	Žikica Perić
209.	Živojin Zlatković	210.	Branka Stojaović
211.	Jagoš Stojković	212.	Živorad Stošić
213.	Mića Martinović	214.	Grade Filić
215.	Vladimir Mitrović	216.	Dejan Simijonović
217.	Tihomir Miljković	218.	Milorad (Đorđe) Miljković
219.	Srećko (Dobri) Savić	220.	Srđan Kostić
221.	Dobri Savić	222.	Ivica Vasić
223.	Slađan Simonović	224.	Ranko Simonović
225.	Svetozar Tasić	226.	Živko Maksimović
227.	Ljuba Miljković	228.	Bojan Pavić
229.	Goran Stojanović	230.	Ljubisav Savić
231.	Slaviša Ristić	232.	Živojin Kostić
233.	Dragan Marković	234.	Mliladin Kostić
235.	Srećko (Stanko) Savić	236.	Dragi Stojanović

237.	Momčilo Ivković	238.	Bojan Jovanović
239.	Vlada Stošić	240.	Branko Dikić
241.	Dragan Milovanović	242.	Branko (Aleksandar) Jovanović
243.	Goran Stošić	244.	Slaviša Đokić
245.	Branislav Perić	246.	Zoran Pavić
247.	Stanoja Đorđrvić	248.	Goran Filić
249.	Zoran Simijonović	250.	Janko Lukić
251.	Elez Jašari,	252.	Dobrivoje Stević
253.	Branislav Dikić	254.	Dragan Filić
255.	Miodrag Svilanović	256.	Stojan Đorđević
257.	Mira Antić	258.	Goran Ivanović
259.	Mira Marković	260.	Srđan Vučković
261.	Zoran (Slavko) Jovanović	262.	Milovan Andrejević
263.	Vlastimir Andrejević	264.	Trajan (Uroš) Ivković
265.	Miodrag Jovanović	266.	Vladimir Živković
267.	Dragiša Ivanović	268.	Miodrag Simijonović
269.	Obrad Perić	270.	Zoran Ivković
271.	Mirna Živić	272.	Slavko Trajković
273.	Trajan Filić	274.	Goran Pešić
275.	Zoran Dikić	276.	Svetozar Jovanović
277.	Dragan (Novica)Trajković	278.	Siniša Stanković
279.	Velibor Stajković	280.	Predrag (Živko) Arsić
281.	Mladen Savić	282.	Zaoran Stojković
283.	Miodrag Trajković	284.	Miro Stojković
285.	Trajan (Milutin) Ivković	286.	Živorad (Srboljub) Jovanović
287.	Nebojša Kostić	288.	Miodrag Simonović
289.	Nazmi Bunjaku	290.	Mileva Danić
291.	Mehmet Jašari	292.	Alija Osmani
293.	Slaviša Kostić	294.	Vlastimir (Nikodije) Jovanović
295.	Miroslav Andrejević	296.	Dragan (Svetko)Trajković
297.	Nebojša Stanković	298.	Branko Lazić
299.	Tihomir Marković	300.	Slobodan Marković
301.	Goran Ristić	302.	Azir Jašari
303.	Aleksandar Stanković	304.	Negovan Ristić
305.	Slobodan (Đorđe) Kostić	306.	Slavica Mitić
307.	Slobodanka Zdravković	308.	Boško Milovanović
309.	Goran Stojković	310.	Velibor Mirković
311.	Vlastimir (Slavko)Jovanović	312.	Zlatko Kostić
313.	Ismeta Jašari	314.	Radovan (Božidar) Perić
315.	Boža Ristić	316.	Radmila Vasić
317.	Milorad (Serafin) Miljković	318.	Jana Janković
319.	Dragoljub Nedeljković	320.	Živko Stojanović
321.	Srđan Stanković	322.	Branko Ristić
323.	Dušica Nedeljković	324.	Rada Savić
325.	Rasim Shala	326.	Anđel Nedeljković
327.	Biserka Vasić	328.	Nada Josifović
329.	Mirko (Petar) Aritonović	330.	Milorad (Jordan) Simić
331.	Vesna Kostić	332.	Stojanka (Radovan) Sekulić 3
333.	Slavica Bulajić	334.	Srđan Milovanović
335.	Milorad Filić	336.	Srđan (Novica) Ristić
337.	Ivana Ristić	338.	Dobrinka Trajković
339.	Milan Živković	340.	Velimir Ivković
341.	Tomislav Perić	342.	Ranđel Milić

343.	Ranko Marković	344.	Rexhep Bytyqi
345.	Obrad Jovanović	346.	Dejan (Bogoljub)Stojanović
347.	Vlastimir Perić	348.	Dragan Živković
349.	Zvonimir Đokić	350.	Svetozar Lazić
351.	Ljubisav Simić	352.	Vojislav Stojković
353.	Milorad Vasić	354.	Hamit Bytyqi
355.	Slaviša (Stojan) Trajković	356.	Goran Trajković
357.	Ljubiša (Milorad) Simić	358.	Vebija Tahiri
359.	Vladimir Jovanović	360.	Mića Kostić
361.	Aleksandar Stevanović	362.	Saša Jovanović
363.	Milorad (Miladin)Velić	364.	Branislav Micić
365.	Živojin Aleksić	366.	Džemalj Salijević
367.	Živorad (Sava) Jovanović	368.	Zoran Zlatković
369.	Stojanka (Radovan) Sekulić 3	370.	Dragan Vasić
371.	Vojislav Filić	372.	Trajan Bogdanović
373.	Negovan Mladenović	374.	Ljubivoje Nedeljković
375.	Živojin Jovanović	376.	Ilija Milić
377.	Aleksandar Jovanović	378.	Miloš Stević
379.	Nadežda Trajković	380.	Vasiljko Stolić
381.	Velija Tairović	382.	Milivoje Mitić
383.	Miloš Danić	384.	Šukrija Šerifović
385.	Miodrag Šešlija	386.	Živorad Mirković
387.	Vladimir Dašić	388.	Smiljana Žarković
389.	Miodrag Nedeljković	390.	Dejan (Novica) Stojanović
391.	Slaviša Denić	392.	Ljubica Živić
393.	Duška Petrović	394.	Elena Stanojkovski
395.	Ivan Mikić	396.	Zorica Velić
397.	Radojica Ristić	398.	Slavica Kostić
399.	Radislav Perić	400.	Snežana Živić
401.	Zoran Nedeljković	402.	Zoran Ničić
403.	Goran Miljković	404.	Ramadan Jašarević
405.	Gordana Popović	406.	Nebojša Veselinović
407.	Zoran (Dobrivoje) Jovanović	408.	Siniša Perenić
409.	Zvonimir Stojanović	410.	Ivan Đorđević
411.	Verica Velić		

4. The third Applicant is represented by Žarko Gajić, Vasilije Arsić and Zoran Popović, lawyers from Gračanica.

Challenged Law

5. All Applicants challenge the compatibility with the Constitution of the Law No. 05/L-120 on Trepça (hereinafter, the Law on Trepca) adopted by the Assembly on 08 October 2016, and promulgated, published and entered into force on 31 October 2016.

Subject matter

6. The subject matter of the Referrals KI 20/17 and KI 21/17 is the assessment of the constitutional compatibility of the challenged Law on Trepça, which allegedly is contrary to the Applicant's rights guaranteed by Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution) and Article 1

of Protocol 1 [Protection of property] of the European Convention of Human Rights (hereinafter, Article 1 of Protocol 1)

7. The subject matter of the Referral KI 22/17 is the assessment of the constitutional compatibility of the challenged Law on Trepça, which allegedly "*denied*" the Applicant's rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 46 [Protection of Property], 53 [Interpretation of Human Rights Provisions] and 156 [Refugees and Internally Displaced Persons] of the Constitution, as well as Article 1 of Protocol 1 [Protection of property] of the European Convention of Human Rights (hereinafter, Article 1 of Protocol 1).

8. The Applicants request the Court to impose an interim measure *"and to suspend the application (...) of the Law on Trepca No. 05/L- 120 (...) until the Court decides on the compatibility of this law with the Constitution of Kosovo"*

Legal basis

9. The Referrals are based on Article 21 (4), 113 (7) and 116 of the Constitution, Articles 20, 27 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rules 29 and 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

10. On 27 February 2017, the Applicants submitted the Referrals KI 20/17, KI 21/17 and KI 22/17 to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
11. On 20 March 2017, in the Referral KI 20/17, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu.

12. On 20 March 2017, in the Referral KI 21/17, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (Presiding), Ivan Cukalovic and Selvete Gërxhaliu Krasniqi.

13. On 20 March 2017, in the Referral KI 22/17, the President of the Court appointed Judge Selvete Gërxhaliu Krasniqi as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding) Snezhana Botusharova and Gresa Caka Nimani.

14. On 31 March 2017, in the Referral KI 22/17, the Court notified the third Applicant about the registration of the Referral and requested them to submit the power of attorney on the representation of Momčilo Nedeljković and of 410 other employees of the Mine Kishnica and Novo Brdo.

15. On 12 April 2017, in the Referral KI20/17 and KI21/17, the Court notified the first and second Applicants about the registration of their Referrals.

16. On 13 April 2017, the third Applicant submitted to the court the power of attorney for the representation of Momčilo Nedeljkovic and of 410 other employees of the Mine Kishnica and Novo Brdo.

17. On 27 April 2017, the Court notified the Assembly of the Republic of Kosovo (hereinafter, the Assembly) about the Referral KI22/17 and invited them to submit any comments they may have within 15 (fifteen) days of receipt of the notification.

18. On 03 May 2017, the Court notified the Assembly about the Referrals KI20/17 and KI21/17 and invited them to submit any comments they may have within 15 (fifteen) days of receipt of the notification.

19. On 04 May 2017, in accordance with Rule 37 (1) of the Rules of Procedure, the President of the Court ordered the joinder of Referrals KI21/17 and KI22/17 to the Referral KI20/17 and, accordingly, the Judge Rapporteur and the composition of the Review Panel in all three cases remained the same as in the Referral KI20/17.

20. On 05 May 2017, the Court notified all the three Applicants and the Assembly about the joinder of the Referrals.

21. On 3 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts related to Referrals KI20/17 and KI21/17

22. On 28 December 2012, the first and second Applicant filed a claim with the Privatization Agency of Kosovo (hereinafter: the PAK) as an administrator of the Mining, Metallurgical and Chemical Combine -Trepça (hereinafter, the RMHK Trepca).

23. On 13 March 2013 and 20 March 2013, the PAK notified, respectively, the first and second Applicants about the registration of the claim against the RMHK Trepca.

24. On 31 October 2016, the challenged Law on Trepça entered into force.

Summary of facts related with Referral KI22/17

25. The third Applicant claims that they were working until 1999 in the Mine Kishnica and in the Mine Novo Brdo, which are parts of RMHK Trepça.

26. The third Applicant claims that, in June 1999, third parties prevented the regular attendance at their working places and, due to the security situation, they were not able to be reinstated to their working places. They did not receive from the management of the RMHK Trepca neither any notice about the possibility of returning to their working places nor any information about their legal status. They have never been served with the decisions on termination of employment relationship in the Mines of Kishnica and Novo Brdo.

27. The third Applicant further claims that, in 2006, they initiated before the Special Chamber of the Supreme Court proceedings against the KTA and UNMIK administration, where they requested the payment of unpaid salaries, as well as the payment of the corresponding contributions to the pension fund. However, they could not realize their statements of claim due to the moratorium which suspended the implementation of all measures against the property or the enterprises that are a part of the RMHK Trepça.

28. On 08 October 2016, the Assembly adopted the Law on Trepça, which was promulgated, published and entered into force on 31 October 2016.

The Applicant's allegations

Allegations of first and second applicant

29. The allegations of the first and second Applicants are completely identical, and as such will be mentioned together.

30. The first and second Applicants claim that the entry into force of the Law on Trepça violated their right to property.

31. The first and second Applicants request the Court to declare the Law on Trepça incompatible with the Constitution and the ECHR, and to repeal that Law.

Allegations of the third Applicant

32. The third Applicant requests the constitutional compatibility of Articles 1, 2, 3, 4, 5, 6, 14, 15, 16, and 17 of the Law on Trepça, considering that allegedly these Articles carried the ownership transformation in favor of the newly formed company Trepca J.S.C..

33. The third Applicant claims that this ownership transformation transferred only the rights but not the obligations. They support their position on the fact that *"the law does not contain provisions on the legal successor of liabilities"*.

34. The third Applicant further claims that this failure *"places all Trepça creditors, who had claims before the entry into force of this law, into the worst situation possible, because their debtor has been deprived all of a sudden from all assets, without receiving anything as compensation. And, if law is adhered to, then it will receive nothing"*.

35. The third Applicant explains these claims by citing Articles 14, 15, 16 and 17 of the Law on Trepça and consider that these "*provisions deal with such expropriation, consequences, its management and similar topics"*.

36. The third Applicant points out that "*the approved legal solutions, which imply the separation of business units without transferring the obligations and the valid license of Trepça on the newly-founded enterprise, demonstrate to a great extent the need to immediately open the proceedings for the liquidation of Trepça, which clearly has all the obligations and charges of the enterprise, which were created following the entry into force of the Law on Trepça. Given such circumstances, it is evident that only the claims that have been determined as priority claims will be fulfilled during the proceedings for the liquidation of Trepça J.S.C"*.

37. The third Applicant requests from Trepca the "*reinstatement to work, payment of salaries earned in the amount of 200 euro per month from the date of its suspension of payments as well as payment of the corresponding contributions to the pension fund in his name, and all of this constitutes the property of the Applicants"*.

38. The third Applicant reasons the incompatibility with the Constitution by claiming that Article 53 of the Constitution provided for the interpretation of human rights in accordance with the decisions of the ECtHR and that Article 22 of the Constitution for provided direct application of the ECHR. In addition, the third Applicant refers to a large number of decisions of the ECtHR by which they justify the admissibility of their Referral.

39. Furthermore, the third Applicant considers that, with the adoption of such a law on Trepca, they cannot exercise their rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 46 [Right to Property] and 156 [Refugees and Internally Displaced Persons] of the Constitution and Article 1 of Protocol 1 [Protection of Property] of the ECHR, which is directly applicable in the legal system of Kosovo.

40. The third Applicant requests the Court to find "*that their rights, guaranteed by Article 46 [Right to Property] as read in conjunction with Article 156 (the rights of special groups) and Article 31, par. 2 (the right to fair and impartial trial) of the Constitution and Law No. 05/L–120 on Trepça (Official Gazette No. 36/2016) – is hereby declared UNCONSTITUTIONAL and thereby abrogated as such*".

Request for interim measure

41. The second and third Applicants request the imposition of interim measure, repeating the already presented allegations and claiming that the creditors issue is not resolved, the law prevents the exercise of human rights, the law does not contain a minimum of justice, the law is not of general interest, this law harms even Trepça itself.

42. Further, they allege *"the existence of an irrevocable damage which endangers the system of the rule of law and its consequences may spread all across the entities related to it"*.

43. Finally, the Applicants consider that "*the requirements provided under Article 116, paragraph 2, of the Constitution and Article 27 of the Law on the Constitutional Court have been met"*. Therefore they propose to the Court to grant the interim measure by suspending *"the application... of the Law on Trepça no. 05/ L- 120 ... until the Court renders decision on compatibility of this Law with the Constitution of Kosovo"*.

Admissibility of the Referrals

44. The Court first examines whether the Referrals have fulfilled the admissibility requirements established in the Constitution, and as further provided in the Law and foreseen in the Rules of Procedure.

45. In this regard, the Court refers to 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.*
> *2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:*
>
> > *(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government' [...]*
>
> *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*

46. The Court also refers to Article 29 [Accuracy of the Referral] of the Law, which provides:

> *1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, the Government or the Ombudsperson.*

47. In addition, the Court takes into account Rule 36 (1) (a) of the Rules of Procedure, which foresees:

(1) The Court may consider a referral if:
a) the referral is filed by an authorized party …

48. The Court reiterates that Article 113 (2) of the Constitution establishes that only the Assembly, the President of the Republic of Kosovo, Prime Minister and Ombudsperson are authorized to refer to the Constitutional Court the question of the compatibility with the Constitution of laws.

49. The Court notes that the Applicants as individuals are excluded of the exhaustive list of authorized parties established by the Constitution to refer to the Court the matter of the compatibility with the Constitution of laws, including the challenged Law on Trepça itself.

50. The Court reminds that individuals are only authorized parties to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, after having exhausted all legal remedies provided by law. (See Constitutional Court joined cases KI03/13 and KO28/13, Applicants *Demë Dashi and Others, and Ali Lajçi,* Resolution on Inadmissibility, of 28 June 2013).

51. In fact, Article 113 (7) of the Constitution presupposes individual and direct grievances to approach the Constitutional Court as an instance of last resort for an alleged violation by public authorities of individual rights and freedoms guaranteed by the Constitution.

52. Therefore, the Court considers that the Applicants are not authorized party to refer constitutional matters *in abstract* regarding the constitutional assessment of a Law in order to obtain a remedy in the name of the collective interest. Thus, the Applicants are not authorized parties to request the assessment of the constitutional compatibility of the challenged Law on Trepça.

53. In this regard, the Court reiterates that the Constitution does not provide for an "*action popularis",* i.e. individuals can not complain in abstract about legislation which have not been applied to them personally through measure of implementation. (See ECtHR case *Dudgeon v. the United Kingdom*, Application No. 7525/76, Decision of 22 October 1981. See also Constitutional Court case KI 117/11, Applicant *Ridvan Hoxha,* Resolution on Inadmissibility of 18 July 2012).

54. The Court reminds that a complaint must be brought by or on behalf of persons who claim to be victims of a violation of constitutional provisions. Such person must be able to show that they were "directly affected" by the measure complained of. (See ECtHR case *Ilhan v. Turkey*, Application No. 22277/93, Judgment of 27 June 2000).

55. Moreover, the Court also reminds that it has already decided that *"the Law No. 05/L-120 on Trepça is constitutional as regards its substance and the procedure followed for its adoption by the Assembly of the Republic of Kosovo".* (See Constitutional Court case KO 118/16, Applicant *Slavko Simić and 10 other deputies of the Assembly of the Republic of Kosovo*, Constitutional review of Law No. 05/L-120 on Trepça, Resolution on Inadmissibility, of 31 October 2016).

56. Therefore, in accordance with Article 113 (1) and (2) of the Constitution, Article 29 (1) of the Law and Rule 36 (1) (a) of the Rules of Procedure, the Court finds that the Referrals KI20/17, KI21/17 and KI22/17 are inadmissible

The request for interim measure

57. The Court recalls that the Applicants request the Court *"to suspend the application ... of the Law on Trepca No. 05/L- 120 ... until the present Court decides on the compatibility of this law with the Constitution of Kosovo. "*

58. The Applicants base the request on the risk of occurrence of *"irrevocable damage which endangers the system of the rule of law and its consequences may spread all across the entities related to it".*

59. In order to impose an interim measure, in accordance with Rules 54 and 55, it is required:

> *Rule 54*
> *[...]*
> *(4) (a) the party requesting interim measures has shown [...] a prima facie case on the merits of the referral;*
> *[...]*
> *Rule 55*
> *[...]*
> *(5) If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.*
> *[...]*

60. As noted above, the Referrals KI20/17, KI21/17 and KI22/17 are inadmissible because the Applicants are not authorized parties to request the assessment of the constitutional compatibility of the Law on Trepça. Thus, the Applicants are not authorized to request the interim measure either. Accordingly, the Court rejects the request for interim measure.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113 (1) and (2) and 116 (2) of the Constitution, Articles 27 and 29 (1) of the Law and Rule 36 (1) (a), 54 (4), 55 (5) and 56 (b) and (c) of the Rules of Procedure,

DECIDES

I. *TO DECLARE the Referrals KI20/17, KI21/17 and KI22/17 as inadmissible;*

II. *TO REJECT the request for interim measures;*

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	**President of the Constitutional Court**
Almiro Rodrigues	Arta Rama-Hajrizi

KI158/15, Applicant: Minir Krasniqi, Constitutional review of Decision PA-II-KZ-II-7/15 of the Supreme Court of Kosovo, of 26 November 2015

KI158/15, resolution on inadmissibility of 30 May 2017, published on 6 September 2017

Key words: *individual referral, right to fair and impartial trial, manifestly ill-founded.*

The Supreme Court of Kosovo had granted the appeal of the State Prosecutor and annulled the Decision of the Court of Appeals, ordering that the case be remanded to the Court of Appeals for reconsideration by a new panel of judges. The Applicant had filed a request for protection of legality against Decision PA-II-KZ-II-7/15 of the Supreme Court, of 26 November 2015.

The Supreme Court by Decision [Pml. Kzz 14/2016] rejected the Applicant's request for protection of legality as inadmissible.

In essence, the Applicant claimed before the Constitutional Court that his right to fair and impartial trail had been violated, alleging that the Supreme Court had violated the Criminal Procedure Code of Kosovo and the Constitution when granting the appeal of the State Prosecutor as admissible.

The Court found that the Applicant had not presented any convincing arguments that would prove that the alleged violations referred to in the Referral constitute a violation of his right to fair and impartial trial. The Referral was declared inadmissible as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI158/15

Applicant

Minir Krasniqi

Constitutional review
of Decision PA-II-KZ-II-7/15 of the Supreme Court of Kosovo,
of 26 November 2015

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 Minir Krasniqi from Prizren (hereinafter: the Applicant), represented by Pjetër Përgjoka and Bashkim Nevzati, both lawyers from Prizren.

Challenged decision

2. The Applicant challenges the Decision [PA-II-KZ-II-7/15] of 26 November 2015, of the Supreme Court of Kosovo, which was served on him on 24 December 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's rights guaranteed by Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial] and Article 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113 [Jurisdiction and Authorized Parties], paragraphs 1 and 7 of the Constitution, Article 47 [Individual Requests] of Law No. 03/L-121 on the 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

5. On 29 December 2015, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 22 January 2016, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu.

7. On 4 March 2016, the Court notified the Applicant about the registration of the Referral and requested him to submit the challenged Decision.

8. On 23 March 2016, the Applicant submitted the requested documents to the Court.

9. On 31 May 2016, the Court requested the representatives of the Applicant to submit their power of attorney representing the Applicant.

10. On 15 June 2016, the Applicant's representatives submitted the requested power of attorney to the Court.

11. On 22 September 2016, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur, replacing Judge Robert Carolan, who on 9 September resigned from the position of the Judge of the Court. The composition of the Review Panel remained unchanged.

12. On 29 September 2016, the Court requested the Applicant to notify the Court if he had taken any other legal action after submitting his Referral to the Court.

13. On 13 October 2016, the Applicant submitted to the Court the Decision of the Supreme Court [Pml. Kzz 14/2016] of 8 March 2016.

14. On 30 May 2017, the Review Panel considered the report of the Judge Rapporteur and by majority made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

15. On 27 February 2013, the State Prosecutor of the Republic of Kosovo (hereinafter: the State Prosecutor) filed an indictment against the Applicant and others, based on the grounded suspicion that they committed the criminal offense of Abusing Official Position or Authority.

16. On 13 March 2014, the Basic Court in Prizren by Judgment [P. No. 171/13; PP. No. 147/2011] found the Applicant guilty of committing criminal offenses of abuse of official position or of authority in continuity and in co-perpetration, in accordance with the provisions of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCK).

17. On 27 May 2014, the Applicant filed an appeal with the Court of Appeals of Kosovo against the Judgment of the Basic Court in Prizren.

18. On 22 July 2015, the Court of Appeals by Decision [PAKR 349/14] approved the appeal filed by the defense counsel of the Applicant and annulled the Judgment of the Basic Court in Prizren, ordering that the case be remanded to the Basic Court in Prizren for

retrial on the grounds that *"the appealed Judgment of the Basic Court was legally ungrounded and as such should have been annulled."*

19. On 4 September 2015, the EULEX Prosecutor of the State Prosecution filed appeal with the Supreme Court against the Decision of the Court of Appeal [PAKR 349/14] of 22 July 2015.

20. On 8 and 9 September 2015, the Applicant filed a response to the appeal of the State Prosecutor against the Decision of the Court of Appeals [PAKR 349/14] of 22 July 2015, stating that the appeal of the State Prosecutor is inadmissible based on Article 407 of the CPCK, because the latter accurately describes cases when an appeal may be filed against the decisions of the Court of Appeals, and that the respective appeal of the State Prosecutor is not allowed by CPCK.

21. On 26 November 2015, the Supreme Court of Kosovo by Decision [PA-II-KZ-II. 7/15] approved the appeal of the State Prosecutor, annulled the Decision of the Court of Appeals [PAKR 349/14] of 22 July 2015 and ordered that the case be remanded to the Court of Appeals for reconsideration by a new panel of judges.

22. On 29 December 2015, the Applicant filed a request for protection of legality with the Supreme Court against the Decision [PA-II-CE-II. 7/15] of 26 November 2015 of the Supreme Court.

23. On 8 March 2016, the Supreme Court by Decision [Pml. Kzz 14/2016] rejected the Applicant's request for protection of legality as inadmissible.

Applicant's allegations

24. The Applicant alleges that the challenged Decision violated his rights freedoms guaranteed by Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial] and Article 102 [General Principles of the Judicial System] of the Constitution.

25. The Applicant alleges that the Supreme Court by Decision [PA-II-C2-II. 7/15] of 26 November 2015, violated the provisions of the CPCK and the Constitution, when it approved the appeal of the State Prosecutor as admissible.

26. The Applicant addresses the Court with the request to annul the Decision [PA-II-C2Z-II-7/2015] of 26 November 2015 of the Supreme Court of the Republic of Kosovo.

Admissibility of the Referral

27. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, and as further specified in the Law and foreseen by the Rules of Procedure.

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

> *"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."

29. In continuation, the Court examines whether the Applicant has fulfilled the admissibility requirements as further specified in the Law. In this respect, the Court 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..."

30. Regarding the fulfillment of these requirements, 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 Decision [PA-II-KZ-II-7/15] of 26 November 2015, 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.

31. However, the Court must further assess whether the criteria foreseen in Rule 36 of the Rules of Procedure have been met.

32. Rule 36 [Admissibility Criteria] paragraphs (1) (d) and (2) (b) and (d) of the Rules of Procedure, 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

[...]

(e) the Applicant does not sufficiently substantiate his claim."

33. The Court recalls that the Applicant challenges the Decision [PA-II-C2Z-II-7/15] of 26 November 2015 of the Supreme Court of Kosovo, which approved the appeal of the State Prosecutor against the Decision [PAKR 349/14] of 22 July 2015 of the Court Appeals, annulling the latter and ordering that the case, namely, the appeal against the Judgment [P. No. 171/13; PP. No. 147/2011] of 13 March 2014 of the Basic Court in Prizren, be remanded to the Court of Appeals for reconsideration by a new panel of judges.

34. The Applicant alleges that the appeal of the State Prosecutor against the Decision of the Court of Appeals is not permitted under Article 407 of the CPCK, and accordingly, the Decision of the Court of Appeals [PAKR 349/14] of 22 July 2015, should remain in force, according to which the Judgment of the Basic Court in Prizren [P. No. 171/13; PP. No. 147/2011] was annulled and that the merits of the question should be retried before the Basic Court in Prizren.

35. In essence, the Applicant alleges that the Supreme Court, by approving the State Prosecutor's appeal as admissible, has erroneously interpreted and applied the provisions of the CPCK and thereby violated Articles 21 [General Principles], Article 31 [Right to a Fair Trial and Impartial Trial] and Article 102 [General Principles of the Judicial System] of the Constitution.

36. The Court also notes that at the same time this Referral has been submitted to the Court, the Applicant also filed a request for protection of legality with the Supreme Court, regarding the admissibility of the appeal filed by the State Prosecutor. In this respect, the Supreme Court decided on 8 March 2016 and by the Decision [Pml. Kzz 14/2016] rejected the request for protection of legality as inadmissible, on the grounds that *"no appeal against the decision of the Supreme Court of Kosovo is allowed"*.

37. The Court notes that the merits of the case are under consideration by the Court of Appeals. However, the Court, without prejudice to the merits of the case which is under consideration by the regular courts, notes the Applicant's allegations addressed to the Court in this specific case, pertain only to the final decision, namely Decision [PA-II-CE-II. 7/15] of 26 November 2015 of the Supreme Court, on whether the appeal of State Prosecutor before the Supreme Court against the decision of the Court of Appeals [PAKR 349/14] of 22 July 2015, is permitted.

38. In this regard, the Court considers that the Applicant bases his allegation on the erroneous interpretation of the provisions of the CPCK, allegedly made by the Supreme Court. The Court recalls that this allegation relates to the scope of legality and as such does not fall within the jurisdiction of the Constitutional Court, and, therefore, cannot be considered by the Court.

39. Moreover, the Court considers that the Applicant did not show and prove that the proceedings before the Supreme Court were unfair or arbitrary or that his fundamental rights and freedoms protected by the Constitution were infringed by the alleged erroneous interpretation of Article 407 of the CPCK. The Court emphasizes that interpretation of Article 407 of the CPCK is a matter of legality. No constitutional matter has been substantiated by the Applicant. (See, case KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility, of 8 August 2016, para. 44. and see, also case KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants *Arben Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku dhe Sami Lushtaku*, Resolution on Inadmissibility, 15 November 2016, para. 62.).

40. In addition, the Court considers that the Supreme Court reasoned in detail and specifically addressed and elaborated all the Applicant's allegations regarding the alleged erroneous interpretation of the CPCK.

41. In this regard, the Court refers to the Decision of the Supreme Court of Kosovo [PA-II-KZ-II-7/15] of 26 November 2015, which, *inter alia,* reasons:

> *"The Criminal Procedure Code of Kosovo does not clearly determine whether the procedures are in two or three instances. Therefore, pursuant to Article 102 (5) of the Constitution, an appeal may be filed against any court decision rendered during the criminal procedure, unless otherwise provided by law. [...] As it clearly results from the expression "unless otherwise provided for under the present code", this is not a closed catalog of legal remedies [...] This leads to the conclusion that in cases of lack of a specific prohibition, the general constitutional principle prevails, whereas the parties are allowed to file an appeal against the decisions of the Court of Appeals. The Code also provides a specific procedure to empower the right to appeal against a ruling of the Court of Appeals, which at the end is decided by the Supreme Court (Article 411 and 412 of CPC). The mere fact that the Supreme Court finds that the law allows a ruling of the Court of Appeals to be appealed, does not lead to the conclusion that the Code enables the parties to file an appeal against every decision with the third instance court [...] In particular situations, provided for by Article 407 of CPC, the judgment of the Court of Appeals may be appealed before the Supreme Court [...] the decision on annulling the judgment and remanding the case for retrial, is rendered only in particular cases, when it is proved that certain procedural violations exist; the Court of Appeals finds that it cannot act in accordance with Article 403, of CPC and modify the challenged judgment of the court of the first instance. In its decision, the Court of Appeals must present the reasons as to why it was not possible to proceed as determined in the mentioned provision [...]. The Court of Appeals has not clarified why the judgment of the court of the first instance could not be modified pursuant to Article 403 of CPC. Therefore, it is clear that the Court of Appeals has avoided rendering the decision, which is unacceptable, according to the opinion of the majority of the present trial panel."*

42. In fact, it is the role on the regular courts to interpret and apply the relevant rules of the procedural and substantive law. (See, ECtHR case, *Garcia Ruiz v. Spain,* Application No. 30544/96, 21 January 1999, para 28).

43. In this respect, the Court reiterates that it is not its task to deal with errors of facts or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed the fundamental 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 o Inadmissibility, of 16 December 2011).

44. Finally, the Court reiterates that the Applicant has not presented any convincing arguments that would prove that the alleged violations referred to in the Referral, constitute a violation of his rights to a fair and impartial trial. (See case: ECtHR, *Vanek vs. Slovak Republic,* No. 53363/99, ECtHR, Decision of 31 May 2005).

45. The Court recalls that the fact that the Applicant disagrees with the outcome of the proceedings, cannot of itself raise an arguable claim of a breach of the Constitution. (see case *Mezotur - Tiszazugi Tarsulat v. Hungary*, No. 5503/02, ECtHR, Judgment of 26 July 2005).

46. Therefore, the Court finds that the Applicant's Referral does not meet the admissibility requirements established in the Rules of Procedure.

47. Accordingly, the Referral is manifestly ill-founded on constitutional basis and, in accordance with Rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure, is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution, Article 48 of the Law and Rules 36 (1) (d) and 2 (b) and (d) of the Rules of Procedure, on 30 May 2017, by majority

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 Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI15/17, Applicant: Haxhi Islamaj, Constitutional review of Judgment PML. no. 112/16 of the Supreme Court, of 17 August 2016

KI15/17, Resolution on inadmissibility of 4 July 2017, published on 6 September 2017

Key words: *Individual referral, criminal procedure, referral manifestly ill-founded, non-exhaustion of legal remedies*

The Applicant had submitted a Referral to the Court whereby he had requested the constitutional review of the Judgment of the Supreme Court. He alleged that Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, among others, had been violated, stating that the reasoning of regular court was unclear and that the regular courts had failed, in his case, to apply the Law on Amnesty.

The Court found that the Applicant's referral concerning his allegation that the regular courts had provided unclear reasoning was manifestly ill-founded on constitutional grounds. As regards the Applicant's allegation concerning the application of the Law on Amnesty, the Court found that his Referral was inadmissible because not all legal remedies had been exhausted.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI15/17

Applicant

Haxhi Islamaj

Constitutional Review of the Judgment, PML. No. 112/16 of the Supreme Court of 17 August 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 Haxhi Islamaj with residence in Madanaj village, Municipality of Gjakova (hereinafter: the Applicant).

Challenged decision

2. The challenged decision is the Judgment, PML. No. 112/16 of the Supreme Court of Kosovo of 17 August 2016, which rejected the Applicant's request for protection of legality against the Judgment of the Basic Court in Gjakova (PKR. No. 93/2011 of 3 July 2015) and the Judgment of the Court of Appeals (PAKR. No. 529/2015 of 22 December 2015) as ungrounded.

3. The challenged decision was served on the Applicant on 1 December 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged decision which has allegedly violated the Applicant's right guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter: ECHR).

Legal Basis

5. The Referral is based on Article 113, paragraph 7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 18 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 20 March 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Ivan Čukalović and Selvete Gërxhaliu- Krasniqi.

8. On 3 April 2017, the Court notified the Applicant of the registration of the Referral. A copy of the Referral was also sent to the Supreme Court. On the same day the Court requested the Basic Court in Gjakova to provide a copy of the receipt of service, which shows when the challenged decision was served on the Applicant

9. On 20 April 2017, the Basic Court in Gjakova submitted the copy of the receipt to the Court, which shows that the Applicant received the challenged decision on 1 December 2016.

10. On 4 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of Facts

11. On 16 February 2010, the District Public Prosecution Office in Peja (PP.nr.368/2009) filed an indictment accusing the Applicant for committing the criminal offense of attempted aggravated murder and the criminal offence of unauthorized ownership, control, possession or use of weapon.

12. On 3 July 2015, the Basic Court in Gjakova, Department for Serious Crimes (hereinafter: the Basic Court), Judgment, PKR.nr. 93/2011 found the Applicant guilty for committing the criminal offences of attempted aggravated murder and unauthorized ownership, control, possession or use of weapon.

13. On 26 October 2015, against the Judgment of the Basic Court of 3 July 2015, the Applicant filed an appeal with the Court of Appeals. In his appeal he alleged essential violation of the provisions of the criminal procedure and criminal law, incorrect and incomplete determination of factual situation and decision on criminal sanction. In addition, the Applicant alleged that the Judgment of the Basic Court is unclear, unreasoned and contradictory.

14. On 22 December 2015, the Court of Appeals (Judgment PAKR.nr.529/15) rejected the Applicant's appeal as ungrounded and upheld the Judgment of the Basic Court in Gjakova.

15. In its Judgment, the Court of Appeals, based on the appeal and *ex officio* decided to amend the Judgment of the Basic Court of 3 July 2015 only for the part concerning the victim [D.K], who initially was accused and convicted by the Basic Court for committing the criminal offence of unauthorized ownership, control, possession or use of weapon. In this respect, the Court of Appeals, pursuant to Article 363, paragraph 1, sub-paragraph 1.3 of the Criminal Procedure Code (hereinafter: the CPC) rejected the indictment for the aforementioned criminal offence against [D.K] with the reasoning that the aforementioned criminal offence was covered by Article 3 of the Law on Amnesty.

16. With regard to the Applicant's appeal, the Court of Appeals reasoned that:

> *"[...] the challenged judgment does not contain violations of criminal procedure provisions as stated in the appeal. The enacting clauses were drafted in compliance with provisions of Article 365 paragraph 1 subparagraph 1.1 of CPCK; [...] The first instance court produced its findings through the administered evidence and presented facts as clear and complete, giving the reasons why these facts are considered as confirmed. "*
>
> *Whereas the allegations of the defense that in the enacting clause of judgment it was concluded, that the weapon was confiscated from the defendant with identified number and type, the court considers it as a technical error of the first instance court [...] In the reasoning of the judgment, the circumstances, which the court took into consideration when imposing the sentence are included, which are accepted by this court as legal and rightful, since they are supported with administered evidence. Based on the abovementioned reasons, the allegations of the defense of the defendant that judgment comprises with essential violation of criminal procedure provisions are ungrounded allegations. "*

17. On 26 April 2016, against the Judgments of the Basic Court (PKR.nr 93/2011 of 3 July 2015) and the Court of Appeals (PAKR. Nr. 529/2015 of 22 December 2015), the Applicant filed a request for protection of legality with the Supreme Court. In his request for protection of legality, the Applicant claimed essential violations of the provisions of the criminal procedure and criminal law. In addition he alleged that the Judgment of the Basic Court is unclear and contradictory.

18. Based on the case files, the Court notes that the Applicant didn't raise the issue of the application of the Law on Amnesty neither before the Court of Appeals nor before the Supreme Court.

19. On 17 August 2016, the Supreme Court of Kosovo (Judgment, 112/2016) rejected the Applicant's request for protection of legality as ungrounded.

20. The Supreme Court, in its Judgment held that*: "In fact it is true that the judgment contains shortcomings that however are not of essential nature of violation of criminal procedure provisions on which basis they would annul it. Despite those errors, the judgment contains legal justifications regarding the all administered evidence in the court session, all legal justifications were given in relation to the assessment of the evidence and the reasons why the trust was given to evidence that confirmed guiltiness of the convicted and to the evidence that the trust was not given. "*

21. The Supreme Court in its Judgment concluded that the Judgments of the lower court instances do not contain violations of the provisions of the criminal procedure and criminal law.

Applicant's allegations

22. The Applicant alleges that the regular courts violated his right to fair and impartial trial guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Articles 6 of the ECHR.

23. Firstly, the Applicant claims that: *"The reasoning of the Basic Court decision is unclear and it has been confirmed as well by the Supreme Court which states that the judgment of the first instance court indeed has contradictions and errors."*

24. In this respect, the Applicant alleges that the shortcomings in the Judgment of the Basic Court limited his right to appeal.

25. Furthermore, the Applicant referring to the jurisprudence of the Court, *inter alia*, claims that "*[…] the right to receive a reasoned decision includes the obligation of the authorities to provide reasoning for their judgments with reasonable grounds on procedural and substantive level.*"

26. The Applicant, regarding this allegation concludes that: *"[…] judgment of the Basic Court- Department of Serious Crimes in Gjakova violated the constitutional principles of preventing arbitrariness in decision makings, because the given reasoning does not comprise the defined facts, legal provisions and their logical relation in between."*

27. Secondly, the Applicant holds that *"[…] there is no explanation by the Court of Appeal why the Law on Amnesty is not applied in my favor. With regards to this issue neither the Supreme Court provided statement on this matter in its Judgment. This fact is important to me for my final sentence and I want to know the reason of this unequal treatment because I have been punished for the criminal offence of unauthorized ownership, control or possession of weapon whereas D.K. is acquitted from this criminal offence based on the Law on Amnesty."*

28. Finally, the Applicant concludes his Referral by requesting the Court:

> "*To annul the decisions of regular Courts and to remand the case for the retrial at the Basic Court in Gjakova and reconsideration by this Court and avoid constitutional violations of Article 31 of Constitution and article 6 of ECHR."*

Relevant provision of the Law on Amnesty No. 04/L-209

Article 7
Decision for Granting Amnesty from execution of the punishment

> *The decision for granting amnesty shall be rendered, with EULEX assistance, by the first instance court, respectively the court that has subject matter and territorial jurisdiction to adjudicate the respective issue that is addressed to it:*
>
> > *1.1 . ex officio; or*
> > *1.2. requested by the convicted person, the perpetrator, the State Prosecutor or the persons who according to Criminal Procedure Code may appeal against the judicial decision.*
>
> *2. The Court renders a decision where it determines the part of the punishment that shall be waived, unless otherwise provided by this law.*

Admissibility of the Referral

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

30. 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.

31. The Court also refers to Article 47 of the Law which provides:

"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided *by the law".*

32. Further, the Court is to assess whether the Applicant has met the required Rules of Procedure, namely Rule 36 (1) (b) and (d) and 36 (2) (b) and (d) of the Rules of Procedure, which provides that:

"(1) The Court may consider a referral if:

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted".

[...]

(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;"

As to the Applicant's allegation concerning the unclear and unreasoned decision

33. Firstly, the Court recalls that the Applicant alleges that the Judgment of the Basic Court is unclear and not reasoned.

34. The Court notes that the Applicant raised the same allegations concerning the unreasoned Decision in the proceedings before the Court of Appeals and the Supreme Court. His allegations were addressed by the respective courts and reasoned accordingly. Therefore, the Judgment of the Supreme Court is now the final decision on the contested subject matter.

35. In this respect, the Court recalls the reasoning of the Supreme Court, which held that: "*In fact it is true that the judgment contains shortcomings that however are not of essential nature of violation of criminal procedure provisions on which basis they would annul it. Despite those errors, the judgment contains legal justifications regarding all administered evidence in the court session, all legal justifications were given in relation to the assessment of the evidence and the reasons why the trust was given to evidence that confirmed guiltiness of the convicted and to the evidence that the trust was not given."*

36. In this relation, the Court notes that the Applicant has not sufficiently substantiated his claim on violation of Article 31 of the Constitution and Article 6 of the ECHR. Furthermore, the Court considers that the Supreme Court in its Judgment addressed the essential issues raised in the Applicant's request for protection of legality, in particular the allegation concerning the unreasoned and contradictory decision of the Basic Court.

37. In relation to this, the Court considers that the reasoning in the Judgment of the Supreme Court is clear and, after having reviewed all the proceedings, the Court has also found that the proceedings before the lower court instances have not been unfair or arbitrary (See ECtHR case *Shub vs. Lithuania,* No. 17064/06, Decision of 30 June 2009).

38. Furthermore, the Court emphasizes that it does not act as a court of fourth instance in respect of the decisions taken by the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law (See ECtHR case *Garcia Ruiz vs. Spain,* no. 30544/96, Judgment of 21 January 1999; see also Constitutional Court case KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima,* Resolution on Inadmissibility of 16 December 2011).

39. Therefore, as to the Applicant's allegation that the Basic Court's Judgment is unclear and not reasoned, the Court finds that the Referral is inadmissible for being manifestly ill-founded on constitutional basis because the facts presented by the Applicant do not in any way justify the alleged violation of Article 31 of the Constitution and Article 6 of the ECHR invoked by him and that he has not sufficiently substantiated his claim.

As to the Applicant's allegation concerning application of the Law on Amnesty

40. Secondly, the Court recalls that the Applicant claims that concerning the criminal offence, unauthorized ownership, control, possession or use of weapon the Court of Appeals did not apply the Law on Amnesty in his favour.

41. In this respect, the Applicant claims that "[...] *there is no explanation by the Court of Appeal why the Law on Amnesty is not applied in my favor. With regards to this issue neither the Supreme Court provided statement on this matter in its Judgment. This fact is important to me for my final sentence and I want to know the reason of this unequal treatment because I have been punished for the criminal offence of unauthorized ownership, control or possession of weapon whereas D.K. is acquitted from this criminal offence based on the Law on Amnesty."*

42. In this regard, the Court notes that the Applicant alleges unequal treatment.

43. The Court recalls Article 7 (Decision for Granting Amnesty from execution of the punishment), paragraph 1, of the Law on Amnesty which provides that:

> *1. The decision for granting amnesty shall be rendered, with EULEX assistance, by the first instance court, respectively the court that has subject matter and territorial jurisdiction to adjudicate the respective issue that is addressed to it:*
>
> *1.1 . ex officio; or*

1.2. requested by the convicted person, the perpetrator, the State Prosecutor or the persons who according to Criminal Procedure Code may appeal against the judicial decision.

44. Based on the aforementioned provision, the Courts could have adjudicated on the application of the Law on Amnesty *ex officio* or the Applicant could have requested to be granted an amnesty for the criminal offence he was accused of.

45. Based on the submitted case file, including the Judgments of the regular courts, the Court notes that the Applicant did not raise this issue neither in his appeal submitted to the Court of Appeals nor in his request for protection of legality submitted to the Supreme Court.

46. Thus, the Applicant for the first time raises the issue of application of the Law on Amnesty before the Constitutional Court alleging unequal treatment.

47. Therefore, the Court considers that in accordance with the principle of subsidiarity, the Applicant should have presented the issue of the application of the Law on Amnesty and his allegation of unequal treatment in his request for protection of legality before the Supreme Court. However it was not presented.

48. Based on the foregoing, the Court considers that the Applicant's failure to complain about the application of the Law on Amnesty before the regular courts shall be understood as a waiver of the right to further object the violation. Thus, the Applicant has not exhausted all legal remedies afforded to him by the applicable law (See *mutatis mutandis*, ECtHR Case *Selmouni v. France*, No. 25803/94, Decision of 25 November 1996, Constitutional Court case KI 07/09, *Demë and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paras. 28-29).

49. The principle of subsidiarity requires that the applicants exhaust all procedural possibilities in the regular proceedings in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right before coming to the Constitutional Court. (See *mutatis mutandis*, ECtHR Case *Selmouni v. France*, No. 25803/94, Decision of 25 November 1996, see Constitutional Court cases KI120/11, *Ministry of Health*, Resolution on Inadmissibility of 4 December 2012, par. 32, KI118/15, *Dragiša Stojković*, Resolution on Inadmissibility of 17 May 2016, par. 34).

50. Therefore, the Court, based on the principle of subsidiarity finds that the Applicant's allegation regarding the application of the Law on Amnesty in his favour is inadmissible because he didn't exhaust all legal remedies in the regular courts proceedings before coming to the Constitutional Court.

51. In conclusion, the Court, in accordance with Article 113, paragraph 7 of the Constitution, Article 47 of the Law and Rule 36 (1) (b) and 36 (2) (b) and (d) finds that the Referral:

a) with regard to the Applicant's allegation concerning the unreasoned decision is inadmissible for being manifestly ill- founded on constitutional basis; and
b) with regard to the Applicant's allegation that the Court of Appeals didn't apply the Law on Amnesty in his favour is inadmissible due to non-exhaustion of legal remedies.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113, paragraph 7 of the Constitution, Article 47 of the Law and Rules 36 (1) (b) and (d) and 36 (2) (b) and (d) of the Rules of Procedure, in its session held on 4 July 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Arta Rama-Hajrizi

KI57/16, Applicant: Water and Waste Regulatory Office, which requests the constitutional review of Judgment ARJ-UZVP. no. 37/2015 of the Supreme Court of Kosovo, of 30 November 2015

KI57/16, Resolution on inadmissibility of 4 July 2017, published on 7 September 2017

Key words: Individual referral, constitutional review of the Judgment of the Supreme Court of Kosovo, administrative procedure, manifestly ill-founded

The Applicant's Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court.

The Applicant submitting the Referral initiated court proceedings against "Pastrimi JSC", Prishtina, with the District Commercial Court in Prishtina, claiming the payment of debt on the grounds of license fees. After the new law on courts entered into force, the case was transferred to the Court of Appeals.

The Court of Appeals rendered a decision on the appeal stating that the Basic Court in Prishtina, Department for Administrative Matters, had jurisdiction to decide on that matter.

The Basic Court rendered a decision whereby it rejected the Applicant's claim as inadmissible, reasoning that the Applicant's claim could not be admitted without initiating an administrative dispute and without a final decision in administrative proceedings. The Applicant submitted an appeal to the Court of Appeals – Department for Administrative Matters against the decision of the Basic Court, but the Court of Appeals rejected the Applicant's appeal as inadmissible.

After a request for review of the decision of the Court of Appeals was submitted to the Supreme Court, the Supreme Court rendered a judgment whereby it rejected the Applicant's request as ungrounded, reasoning that the second-instance court had completely and correctly applied the provisions of the law, the provisions of the administrative procedure, and those of the Law on Administrative Conflicts. Therefore, the Claimant's allegations regarding the violations are ungrounded, because the challenged decision was clear and understandable.

The Court noted that the Applicant had neither submitted any *prima facie* evidence nor substantiated its allegations indicating how and why the Supreme Court had violated its rights under Article 119.8 of the Constitution.

The Court further considered that the Applicant had not presented relevant facts demonstrating that the proceedings before the regular courts had been in any way a constitutional violation.

Having regard to the foregoing, the Court found that the Applicant's Referral was manifestly ill-founded, thereby declaring it inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 57/16

Applicant

Water and Waste Regulatory Office
(Water Service Regulatory Authority)

Constitutional review of Judgment ARJ -UZVP.no.37/2015 of the Supreme Court of 30 November 2015

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 Water and Wastewater Regulatory Office, now called Water Services Regulatory Authority, under Law No. 05/L-042 for Regulation of Water Services of 14 January 2016 (hereinafter: the Applicant). In the proceedings before the Constitutional Court the Applicant is represented by Mejrem Cërnobregu, Head of the Department of Law and Licenses of the Applicant.

Challenged decision

2. The Applicant challenges Judgment [ARJ LNG-No. 37/2015] of the Supreme Court of 13 November 2015, which was served on it on 14 January 2016.

Subject matter

3. The subject matter is the constitutional review of the abovementioned Judgment of the Supreme Court, which, allegedly violated the Applicant's rights and freedoms guaranteed by Chapter IX [Economic Relations], Article 119 [General Principles], paragraph 8 [Every person is obliged to pay taxes and other contributions as provided by law], of the Constitution of the Republic of Kosovo (hereinafter Constitution).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 24 March 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 13 April 2016, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.

7. On 29 April 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court

8. On 02 November 2016, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur, replacing Judge Robert Carolan, who resigned on 9 September 2016. The composition of the Review Panel remained unchanged.

9. On 04 July 2017, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the referral.

Summary of facts

10. The regional waste company "Pastrimi" JSC Prishtina (hereinafter Pastrimi) was authorized to provide utility services on the basis of the service license [No. 571/DL] issued by the Applicant.

11. Due to non-payment of the annual fee for the license [No. 571/DL], on 20 July 2012, the Applicant initiated court proceedings against Pastrimi with the District Commercial Court in Prishtina, requesting the payment of the license fees.

12. On 1 January 2013, the new law on courts entered into force, which provided a different organizational structure and jurisdiction of the courts. The case was transferred from the old District Court to the new Court of Appeals.

13. On 18 July 2014, the Court of Appeals rendered Decision [AN. No. 4/2014] which stated, *inter alia*, that, "*For the adjudication of this case is competent the Basic Court in Prishtina - Department for Administrative Matters, as a court with territorial and subject matter jurisdiction. The case file to be sent to this court for further proceeding.*"

14. On 18 September 2014, the Basic Court rendered Decision [A. No. 1645/2013] which rejected the Applicant's claim as inadmissible. The Decision reasons that,

> *"To assess the admissibility of the claimant's claim, the court based itself on the provisions of the Law on Administrative Disputes, namely on Article 13, paragraph 1, [...].*
> *[...]*
> *"In the concrete case, the Claimant has filed a claim for the payment of the debt for the damage caused due to the use of the license, but the Court observes that in the contested matter, there is no final decision in the administrative procedure or silence of an administrative body, except for the bills for payment which do not constitute a final administrative act in the administrative procedure, as provided by the aforementioned legal provision, meaning that against the same contest, neither can a claim be filed, nor can the administrative conflict be initiated."*

15. The Applicant filed an appeal with the Court of Appeals-Department for Administrative Matters (hereinafter: the Court of Appeals) against this Decision of the Municipal Court.

16. On 2 July 2015, the Court of Appeals rendered a Decision [AA. No. 444/2014], which rejected the Applicant's appeal as inadmissible. In the reasoning of the decision it is stated that,

> *"In the present case, [...] the court noted that in this disputed matter there is no final decision in an administrative procedure nor a silence of an administrative authority, except the bills for payment, which are not final administrative acts in the administrative procedure as provided by the abovementioned legal requirements."*

17. The Applicant filed with the Supreme Court a request for an extraordinary review of this Decision of the Court of Appeals.

18. On 29 July 2015, the Supreme Court rendered Judgment [ARJ-UZP- No. 37/2015] which rejected the Applicant's request as ungrounded. The Supreme Court reasoned that,

> *"The Supreme Court concluded that the second instance court has applied completely and correctly the provisions of the law, the provisions of the administrative procedure, as well as those of the Law on Administrative Conflicts. The claimant's allegations regarding violations are ungrounded, because the challenged decision was clear and understandable. The reasoning of the decision contains sufficient reasons and decisive facts for rendering legal decisions. Similarly, the Supreme Court held that there has been a correct application of the substantive law."*

Applicant's allegations

19. The Applicant alleges that, *"no court entered the assessment of the grounds of appeal (debt), but exclusively dealt with "strictly formal legal requirements that must be considered ex officio."*

20. The Applicant requests that, *"The Constitutional Court considers the case under the applicable laws and grounds of appeal - payment of debt - within the meaning of Article 119, paragraph 8, of the Constitution of the Republic of Kosovo, or that the Supreme Court remands the case for retrial - decision to the Basic Court-Department for Commercial Matters."*

Relevant Law

21. The provision of water and waste water services is regulated by Law no. 05/L-042 for the Regulation of Water Services. This Law provides, inter alia, that,

> *"**Article 4***
> ***Water Services Regulatory Authority***
> *1. The Authority is an independent institution in performing its functions according to this Law.*
> *2. The Authority is responsible for regulating the activities of all Service Providers.*
> *3. The Authority has competencies for:*
> *3.1. licensing service providers and supervision of application of conditions defined with service license;*

[…]

Article 14
Authority Fees
1. The Service Provider shall pay a non-refundable application fee to the Authority, on the date that the application form applying for the issuance or renewal of a Service License is submitted to the Authority.
2. A Service Provider shall pay an annual license fee to the Authority in an amount of one and a half per cent (1.5%) of gross annual billing reported in its income statement for the previous year. Licensing annual fee shall be paid in twelve (12) equal installments. The first installment is due and payable on the first day of the calendar month following the month in which the Service License was issued to that Service Provider or renewed, and each subsequent installment becomes due on the first day of each subsequent calendar month.
[…]"

Assessment of the Admissibility of the Referral

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

23. 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.

24. The Court first considers that, pursuant to Article 21.4 of the Constitution, which provides that *"fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable"*, the Applicant is entitled to submit a constitutional complaint, invoking fundamental rights which are valid for individuals as well as for legal persons (See, *mutatis mutandis*, Resolution of 27 January 2010, Referral KI41/09, AAB-RIINVEST University L.L.c., Pristina vs. Government of the Republic of Kosovo).

25. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

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.

26. The Court considers that the Applicant is an authorized party, has exhausted the available legal remedies and submitted the Referral in due time.

27. However, the Court refers to Article 48 [Accuracy of the Referral] 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.

28. In addition, the Court also refers to paragraphs (1)(d) and (2)(d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresee:*(1)*

The Court may consider a referral if:
[...]
(d) the referral is prima facie justified or not manifestly ill-founded.

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:
[...]
d) the Applicant does not sufficiently substantiate his claim.

29. In that respect, the Court recalls that the Applicant claims that the Supreme Court violated its right to a fair trial by only deciding on procedural aspects and refusing to decide on the merits of its claims against the licensed service provider in administrative proceedings.

30. The Court notes that the Supreme Court assessed the facts determined by the Commercial Court and the Court of Appeals and interpreted and applied the procedural and substantive law provisions regarding his claim. Their conclusions were reached after detailed examination of all the arguments presented and dealt with by the Basic Court and the Court of Appeals.

31. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact 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). In fact, the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (See, *mutatis mutandis*, the European Court of Human Rights (hereinafter: ECtHR) case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, para. 28).

32. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as "fourth instance court". (See ECtHR case *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

33. In other words, the complete determination of the factual situation and the correct application of the law is within the full jurisdiction of the regular courts (matter of legality).

34. In that respect, the Court considers that the reasoning provided by the Supreme Court when referring to Applicant's allegations of violations of procedural and material law is justified and that the proceedings before the regular courts have not been unfair or arbitrary. (See ECtHR case *Shub vs. Lithuania*, No. 17064/06, Judgment of 30 June 2009).

35. The Court notes that the Applicant also alleges that the regular courts have violated Article 119(8) of the Constitution.

36. The Court recalls that Article 119 [General Principles] falls within Chapter IX [Economic Relations] of the Constitution. Article 119 (8) states that, *"8. Every person is required to pay taxes and other contributions as required by law."*

37. However, the Court notes that the Applicant has not submitted any *prima facie* evidence nor has it substantiated its allegations indicating how and why the Supreme Court has violated its rights under this provision.

38. In sum, the Court further considers that the Applicant has not presented facts showing that the proceedings before the regular courts were in any way a constitutional violation of its guaranteed rights under the Constitution.

39. Consequently, the Referral is manifestly ill-founded on a constitutional basis and it should be declared inadmissible pursuant to Rule 36, paragraphs (1) (d) and (2) (d), of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113, paragraphs 1 and 7, of the Constitution, Articles 46 and 48 of the Law and Rules 36 (1)(d) and 36(2)(d) of the Rules of Procedure, at its session held on 04 July 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 Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI151/16, Applicants: Gani Sopi and Sabri Sopi, constitutional review of Judgment Rev. No. 108/2016 of the Supreme Court of Kosovo of 13 July 2016

KI151/16, Resolution on inadmissibility of 29 May 2017 published on 13 September 2017

Key words: *individual referral, constitutional review of the Judgment of the Supreme Court of Kosovo, interim measure, manifestly ill-founded*

The Applicants submitted their Referral based on Article 113.7 of the Constitution, Articles 24 and 47 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo, and Rule 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

In 2004, the Applicants initiated before the regular courts the proceedings to confirm their ownership rights. The trial was related to the confirmation of property rights over the parcel which was subject of a verbal agreement in 1999.

The criminal proceedings ended in 2016 with the Judgment of the Court of Appeals rejecting the Applicants' statement of claim, and the Supreme Court rejecting the Applicants' request for review as ungrounded and upholding the Judgment of the Court of Appeals.

In their referral, the Applicants allege that their rights guaranteed by Articles 31 and 46 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights were violated.

The Court notes that the Applicants have not substantiated that the relevant proceedings have been in any way unfair or arbitrary. In fact, the Applicants have not substantiated the claim that the challenged decisions had violated their constitutional rights and freedoms guaranteed by the Constitution and the ECHR.

Therefore, the Court considers that the Applicants' Referral has not met the admissibility requirements, as established in the Constitution, foreseen by the Law and further specified in the Rules of Procedure.

Consequently, the Court considers that the Referral is manifestly ill-founded on constitutional basis and must therefore be declared inadmissible. Since there is no *prima facie* case for the imposition of an interim measure, the Court rejected the request for an interim measure, too.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI151/16

Applicant

Gani Sopi and Sabri Sopi

Request for constitutional review of Judgment Rev. No. 108/2016 of the Supreme Court of Kosovo of 13 July 2016

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 Gani Sopi and Sabri Sopi from Bujanovc, Republic of Serbia (hereinafter: the Applicants), who are represented by Abdylaziz Sadiku, a lawyer from Gjilan.

Challenged decision

2. The Applicants challenge Judgment Rev. No. 108/2016 of the Supreme Court of Kosovo of 13 July 2016.

3. The challenged judgment was served on the Applicants on 7 September 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly, violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

5. The Applicant also requests the Court to impose an interim measure and suspend Judgment Rev. No. 108/2016 of the Supreme Court from the date of filing the Referral until the decision on the merits on this case is rendered.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 27 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 30 December 2016, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 16 January 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Arta Rama Hajrizi and Selvete Gërxhaliu-Krasniqi.

9. On 2 February 2017, the Court notified the Applicants and the Supreme Court of Kosovo about the registration of the Referral.

10. On 29 May 2017, the Review Panel considered the report of the Judge Rapporteur, and recommended to the full Court the inadmissibility of the Referral.

Summary of facts

11. In 2004, the Applicants filed a statement of claim for confirmation of ownership rights with the Municipal Court in Gjilan. The statement of claim was related to the confirmation of property rights over the parcel which was the subject of a verbal agreement of 1999, reached between the Applicant and the S.S.
12. On 21 September 2005, the Municipal Court in Gjilan [Judgment C. No. 704/2004] approved the Applicants' statement of claim and confirmed that the Applicants are the owners of the disputed parcel that was a subject of a verbal agreement of 1999. In the reasoning of its judgment, the Municipal Court *inter alia* states:

> *"[...] on the basis of Article 73 of the Law on Contracts and Torts "Official Gazette SFRY, No. 29/78", the Court concludes that a contract for the conclusion of which a written form is required, is considered applicable, despite the fact that it was not concluded in this form; if the contracting parties have applied the entirety, or a dominant part of the obligations that stem from it [...]".*

13. Against Judgment of the Municipal Court in Gjilan S.S. filed appeal with the District Court in Gjilan, on the grounds of erroneous determination of factual situation and erroneous application of the law.

14. On 30 January 2006, the District Court [by Judgment Ac. No. 320/2005] rejected as ungrounded the appeal of S.S. and upheld the first instance judgment.

15. S.S filed a request for revision with the Supreme Court against the Judgment [Ac. No. 320/2005] of the District Court in Gjilan on the grounds of erroneous determination of factual situation and erroneous application of the law.

16. On 29 May 2008, the Supreme Court [by Decision Rev. No. 115/2006] approved the request for revision of S. S., quashed the second-instance and first instance judgment and remanded the case for retrial to the first instance court. In the reasoning of its decision the Supreme Court *inter alia* states:

"[...] the court ascertained that between the claimants was established another civil - legal relation for sale-purchase of the surface area of 2.000 square meters, therefore it is unclear whether in the present case if the litigants had joint investments or verbal agreement on a sale-purchase of a parcel [...]

17. On 21 December 2009, the Municipal Court in Gjilan [Judgment C. No. 355/08] in the repeated proceeding confirmed the factual situation of the previous proceedings and approved the statement of claim of the Applicants. In the reasoning of its judgment, the Municipal Court *inter alia* states:

"[...] Based on the fact that the verbal contract on sale-purchase is co validated in entirety by the litigants, it has been decided to approve the statement of claim of the claimants [...]".

18. S.S filed appeal with the District Court in Gjilan against Judgment [C. No. 355/08] of the Municipal Court in Gjilan, on the grounds of erroneous determination of factual situation and erroneous application of the law.

19. On 7 June 2010, the District Court [by Judgment Ac. No. 108/2010] rejected the appeal of S. S as ungrounded and upheld the first instance judgment.

20. The State Prosecutor filed a request for protection of legality with the Supreme Court against Judgment [Ac. No. 108/2010] of the District Court in Gjilan.

21. On 20 May 2013, the Supreme Court [Decision Rev. Mlc. No. 272/2010] approved the request for protection of legality of the State Prosecutor, and therefore, annulled the judgment of the District Court and remanded the case for retrial to the same court. In the reasoning of its judgment, the Supreme Court stated *inter alia* states:

"[...] the Judgment of the second instance court does not contain any statement regarding the assessment of the allegations in the appeal for the substantial violations of the provisions of the contested procedure which were mentioned in the appeal, [...] Therefore, the second instance court committed substantial violations of the contested procedure provisions [...]".

22. On 15 January 2016, the Court of Appeal [Judgment CA. No. 1812/13] in the repeated proceedings modified Judgment [C. No. 355/08] of the Municipal Court and rejected the Applicant's statement of claim.

23. The Applicants filed a request for revision with the Supreme Court against Judgment [CA. No. 1812/13] of the Court of Appeal, on the grounds of essential violation of the provisions of the Law on Contested Procedure, and erroneous application of the substantive law.

24. On 13 July 2016, the Supreme Court [Judgment Rev. No. 108/2016] rejected as ungrounded the Applicant's request for revision and upheld the Judgment [CA. No. 1812/13] of the Court of Appeal.

Applicant's allegations

25. According to the Applicants' allegations :

„The Court of Appeal by Judgment CA. No. 1812/2013 of 15.01.2016 and the Supreme Court of Kosovo, by Judgment Rev. No. 108/2016 of 13/07/2016 assessed in an impartial and unfair manner the evidence presented at the

hearing of first instance on the basis of which was rendered Judgment C. No 355/2008, of 21.12.2009. "

26. The Applicants further allege:

„This unfair assessment of evidence, and clinging to formal issues [...] of the sale-purchase of the immovable property, have deprived the claimants Gani and Sabri Sopi of their property rights."

27. The Applicants request the Court as it follows:

"We request from the Court to render a decision on temporary suspension of Judgment Rev. No. 108/2016 of the Supreme Court of Kosovo, of 13.07.2016, by which the revision of claimants Gani and Sabri Sopi was rejected as ungrounded. To uphold the Decision on interim measure...

To approve the request filed by Gani and Sabri Sopi, in relation to constitutional and legal assessment of the Judgment of the Supreme Court, and the recognition of the property right for cadastral parcel No. 624/20, in the place called "Petigovc", with a culture: third class arable field, with a surface area of 1975 m2, registered in Possession list No. 6236, CZ Gjilan, registered in the name of Skender (Behxhet) Shaqiri from Gjilan, namely to uphold Judgment C. No. 355/2008 of the Municipal Court in Gjilan, of 21.12.2009, and in this manner, protect the property rights of the Applicants – Gani and Sabri Sopi."

Admissibility of the Referral

28. The Court first examines whether the Applicants have fulfilled the admissibility requirements established in the Constitution and as further provided in the Law and specified in the Rules of Procedure.

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

„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."

30. The Court further refers to Article 48 [Accuracy of the Referral] of the Law, which provides that:

"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 ".

31. Moreover, the Court takes into account paragraphs (1) d) and (2) d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresee:

(1) The Court may consider a referral if:
[...]
d) the referral is prima facie justified or not manifestly ill-founded.

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

[...]

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

32. In the present case, the Court notes that the Applicants are authorized party to submit a Referral to the Constitutional Court, they have exhausted the effective legal remedies and therefore met the procedural requirements provided for in Articles 113.7 of the Constitution. The Referral was also filed within legal time limit of four months, as required by Article 49 of the Law.

33. However, to determine the admissibility of the Referral, the Court still has to assess whether the Applicants have met the requirements of Article 48 of the Law and the admissibility criteria stipulated in Rule 36 of the Rules of Procedure.

34. In this regard, the Court notes that the Applicants have built their case claiming:

(i) violation of Article 31 of the Constitution and
(ii) violation of Article 46 of the Constitution

(i) Allegations regarding violation of Article 31 (Right to Fair and Impartial Trial) of the Constitution

35. As regards the Applicant's allegation that the regular courts assessed impartially and unfairly the evidence presented at the hearings and erroneously applied the substantive law, the Court emphasizes that the determination of factual situation and the application of the substantive law is the jurisdiction of the regular courts.

36. The Court notes that the Applicants repeat the same allegations which have stated in the proceedings before the regular courts, where the regular courts gave detailed answers to all these allegations of the Applicants.

37. 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). When alleging violation of the rights and freedoms guaranteed by the Constitution by the public authority, the Applicant must present a reasoned and a convincing argument.

38. The Court first recalls that it is not the role of the Constitutional Court to deal with the alleged material errors or legal flaws of the regular courts, unless these errors, namely the flaws, may have infringed rights and freedoms protected by the Constitution, and only to the extent that such violations have occurred.

39. Furthermore, it is not the role of the Constitutional Court to determine whether the certain types of evidence is allowed, what evidence should be taken, nor to specify what evidence is acceptable and what is not. That is the role of the regular courts. The role of the Constitutional Court is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way the evidence was taken (see: Case *Dukmedjian v. France*, Application no. 60495/00, paragraph 71, ECtHR Judgment of 31 January 2006).

40. In addition, the Court also reiterates that the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, and, and not to deal with, the interpretation and application of the domestic law, it is

the role of regular courts (see case: *Garcia Ruiz vs. Spain*, No. 30544/96, ECtHR, Judgment of 21 January 1999, see also case: KI70/11, Applicants: *Faik Hima, Magbule Hima and Bestar Hima* Constitutional Court, Resolution on Inadmissibility of 16 December 2011).

41. The Court considers that the Applicants had the opportunity to present before the regular courts the factual and legal reasons for the resolution of dispute; their arguments were duly heard and examined by the regular courts; the proceedings taken as a whole were fair and the rendered decisions were reasoned in detail.

42. Accordingly, the Court notes that the regular courts have taken into account all the allegations of both parties to the proceedings, of the Applicant as a claimant and the respondent, when establishing the property right over the immovable property concerned and placed them in an equal position, by allowing them to present their arguments, documents and evidence.

43. The Court further notes that the Court of Appeal concluded "*the verbal agreement on sale was entered into formally and the purpose of the reached agreement results to be different, so the return of the debt.*" Therefore, the Court of Appeal in the repeated proceedings without not accepting "*the validation of the contract, the purpose of which is the return of the debt since such form of validation is not recognized by the law.*"

44. The Court further notes that the Supreme Court held that "*The facts which were assessed by the Court of the second instance are not put in question in the statements of the revision, the other evidence that were analyzed in details by the second instance court materialize the conclusion of the latter regarding the application of the substantive law on the occasion of the rejection of the appeal of the claimants. The challenged Judgment does not contain in substantial violations of the provisions of the contested procedure for which this Court takes care ex-officio or in the violations that are alleged in the revision as well.*"

45. The Court considers that the Applicants do not agree with the outcome of proceedings before the regular courts. However, the disagreement of the Applicants with the outcome of the proceedings before the regular courts cannot of itself raise an arguable claim of a breach of the right to fair and impartial trial (see: *mutatis mutandis* case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005).

46. The Court notes that the Applicants did not accurately and specifically state violation of their rights and did not explain how and why the judgment of the Supreme Court may have violated their constitutional rights; they only emphasized the there has been a violation of their constitutional rights. They did not provide any *prima facie* evidence which would indicate a violation of their constitutional rights (see *Trofimchuk v. Ukraine*, ECtHR, paragraph 50-55, Judgment no. 4241/03, of 28 October 2010).

47. Accordingly, the Court considers that the Judgment of the Supreme Court is reasoned and in accordance with the requirements of Article 31 of the Constitution and Article 6 of ECHR.

ii) Allegations regarding violation of Article 46 (Protection of Property) of the Constitution

48. The Court notes that the Applicants also referred to Article 46 [Protection of Property] of the Constitution. However, the Applicants do not justify the allegations that their constitutional right to property has been violated.

49. The Court recalls that Article 46 of the Constitution and Article 1 of Protocol No. 1 do not guarantee the right to acquisition of property (see *Van der Mussele v. Belgium*, paragraph 48, ECHR Judgment of 23 November 1983, and *Slivenko and others v. Lithuania* paragraph 121 ECtHR Judgment of 9 October 2003).

50. The Applicants may allege a violation of Article 46 of the Constitution only in so far as the challenged decisions related to his "*possessions*"; within the meaning of this provision "*possessions*" can be "*existing possessions*", including claims, in respect of which an applicant can argue that he has at least a "*legitimate expectation*" that the effective enjoyment of a property right will be realised.

51. No "legitimate expectation" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts (see *Kopecký v. Slovakia*, paragraph 50 of the Judgment of the ECtHR, of 28 September 2004).

Conclusion

52. In sum, the Applicants have not substantiated that the relevant proceedings have been in any way unfair or arbitrary. In fact, the Applicants have not substantiated that the challenged decisions violated their constitutional rights and freedoms guaranteed by the Constitution and the ECHR.

53. Therefore, the Court considers that the Applicants' Referral has not met the admissibility requirements, as established in the Constitution, foreseen by the Law and as further specified in the Rule of Procedure.

54. For these reasons, the Applicants' Referral is manifestly ill-founded on constitutional basis, and as such, inadmissible.

Assessment of the request for interim measure

55. The Court notes that the Applicants request the Court to impose an interim measure and to repeal the judgment of the Supreme Court of Kosovo Rev. No. 108/2016, of 13 July 2016, from the date of submission of the Referral until the Constitutional Court renders its decision on the merits on this issue, which is the subject of proceedings.

56. In order for the Court to impose interim measure, in accordance with Rule 55 (4) of the Rules of Procedure, it is necessary that:

> *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;;*
>
> *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted;*
>
> *(c) the interim measures are in the public interest."*

57. As previously concluded, the Referral is inadmissible, and, therefore, there is no *prima facie* case for the imposition of interim measure. For these reasons, the request for an interim measure is to be rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to 113.1 and 7 of the Constitution, Article 48 of the Law, and Rules 36 (1) (d), 36 (2) (b), 55 and 56 of the Rules of Procedure, in the session held on 29 May 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measure;

III. TO NOTIFY this Decision to the Parties;

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

V. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI139/16, Applicant: Sefedin Jetullahu, Constitutional review of Judgment Rev. no. 168/16 of the Supreme Court of Kosovo, of 14 July 201

KI139/16, Resolution on inadmissibility, approved on 17 August 2017, published on 13 September 2017

Key words: *individual referral, civil procedure, protection of property, right to fair and impartial trial, protection of property, manifestly ill-founded referral, inadmissible referral*

The Applicant challenged Judgment Rev. no. 168/16 of the Supreme Court of the Republic of Kosovo, of 14 July 2016. The Applicant alleged that the decisions of the regular courts had violated his rights to fair trial, protection of property, and his human rights and fundamental freedoms guaranteed by ECHR.

The Court found that the Applicant did not provide any reasoning as to how and why her rights were violated, and that the facts presented by him did not, in any way, demonstrate that the regular courts had denied him his rights guaranteed by the Constitution and the Convention. For these reasons, the Court decided that the referral is to be declared manifestly ill-founded on constitutional grounds, hence inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI139/16

Applicant

Sefedin Jetullahu

Constitutional review of Judgment Rev. No. 168/16, of the Supreme Court of Kosovo, of 14 July 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 Sefedin Jetullahu (hereinafter: the Applicant), residing in village Vernica, Municipality of Vushtrri, represented by Sabri Kryeziu, a lawyer from Lipjan.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 168/2016 of 14 July 2016, (hereinafter: the challenged decision) of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), which was served on the Applicant on 13 September 2016.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which has allegedly violated Article 31 [Right to Fair and Impartial Trial], Article 53 [Interpretation of Human Rights Provisions] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 [Right to a fair trial] and Article 1 of Protocol 1 to the European Convention on Human Rights (hereinafter: the Convention).

Legal basis

4. The Referral is based on Article 113 paragraph (7) of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of Law No. 03/L-121 on the 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

5. On 1 December 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 16 January 2017, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel, composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka- Nimani.

7. On 8 February 2017, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Supreme Court.

8. On 3 July 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court to declare the Referral inadmissible as manifestly ill-founded on constitutional basis.

Summary of facts

9. The Applicant worked for several years in the Kosovo Energy Corporation, namely in the Generation Division - Power Plant Kosovo B (hereinafter: KEK).

10. On 18 December 2003, the Medical Commission recommended to the Applicant to submit to the Disability Commission to verify the degree of invalidity.

11. The Applicant then requested from the KEK authorities to approve the request for recognition of the labor invalid status and the request for the enjoyment of the supplementary pension under the KEK Pension Fund.

12. On 9 March 2004, KEK (Decision No. 60/1) approved the Applicant's request for the recognition of the status of first-class labor invalid and the request for supplementary pension, in the amount of 105 euro, starting on 1 March 2004 until 31 March 2009.

13. On 27 November 2008, the Applicant submitted a request to KEK authorities for reinstatement to work, as according to him, by KEK Decision No. 60/1, of 9 March 2004, his employment status was not determined after 31 March 2009.

14. In January 2009, the Applicant submitted a request to the Pension Administration Department of the Republic of Kosovo (hereinafter: PAD) for the approval of the pension request of persons with disabilities.

15. On 27 February 2009, PAD (Decision 5092190) rejected the Applicant's request for the enjoyment of the disability pension, on the grounds that full and permanent disability degree does not exist with the latter.

16. On 14 April 2009, the Applicant filed a complaint against PAD Decision of 27 February 2009 with the Appeals Disability Commission.

17. On 27 May 2009, the Appeals Commission rejected the Applicant's appeal as ungrounded and upheld the PAD Decision of 27 February 2009.

18. On an unspecified date, the Applicant filed a claim with the Municipal Court in Prishtina for reinstatement to work or the extension of the supplementary pension, until he reaches the retirement age, namely until 19 March 2016.

19. On 2 September 2013, the Basic Court in Prishtina (Judgment C. No. 109/2009) rejected the Applicant's claim as ungrounded, reasoning as it follows:

> *"The approval of the claimant's request for pension, by the Respondent – KEK, due to invalidity, was legally based on UNMIK Regulation No. 2001/35, and the Statute of Supplementary Pension Fund of 2002; provisions of Article 2, item b) of the Statute. It transpires from the consideration of the Court that the legal grounds for retirement of the claimant due to invalidity at the work place, by the respondent, was correct. The court accordingly considers that the claimant's statement of claim is to be rejected as grounded, because the rights that the claimant would realize if his pension request was approved were clear to him at the moment he filed the application with the Pension Fund".*

20. The Applicant filed an appeal within legal time limit with the Court of Appeal, against the Judgment of 2 September 2013 of the Basic Court in Prishtina.

21. On 24 September 2015, the Court of Appeal (Judgment Ac. No. 3870/2013) rejected the Applicant's appeal as ungrounded and upheld the Judgment of 2 September 2013 of the Basic Court in Prishtina as fair and lawful.

22. The Applicant filed a request for revision with the Supreme Court against the Judgment of the Court of Appeal of 24 January 2015, on the grounds of erroneous application of the substantive law.

23. On 14 July 2016, the Supreme Court (Judgment Rev. No. 168/2016) rejected the request for revision of the Applicant as ungrounded and upheld the Judgment of the Court of Appeal of 24 January 2016 and the Judgment of 2 September 2013 of the Basic Court in Prishtina.

Applicant's allegations

24. The Applicant alleges that the regular courts, by their actions, have violated his rights to a fair trial under Article 31 of the Constitution and Article 6 of the Convention, protection of property under Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the Convention, and his rights as guaranteed by Article 53 of the Constitution due to the fact that the regular courts have not taken into consideration the requirements of the above provisions when adjudicating the case.

25. In addition, the Applicant attached to his Referral the Judgment of the Constitutional Court of 18 October 2010 in Joined cases KI58/09, KI59/09, KI60/09, KI64/09, KI66/09, KI69/09, KI70/09, KI72/09, KI75/09, KI76/09, KI77/09, KI78/09, KI79/09, KI3/10, KI5/10, KI13/10.

26. As a result, the Applicant requests that the challenged decision be declared null and void and the case be remanded to the Supreme Court for reconsideration.

Admissibility of the Referral

27. The Court will examine whether the Applicant has met the admissibility requirements, as established in the Constitution and further specified in the Law and the Rules of Procedure.

28. 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."

29. The Court further refers to Article 49 [Deadlines] of the Law, which stipulates:

"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…".

30. In that regard, the Court concludes that the Applicant is an authorized party, has exhausted all available legal remedies and submitted his Referral within the four month deadline in accordance with the requirements of Article 49 of the Law.

31. The Court further refers to Article 48 [Accuracy of the Referral] of the Law, which stipulates:

"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."

32. The Court also takes into account Rule 36 [Admissibility Criteria], specifically paragraph (1) (d) and paragraph (2) (b) of the Rules of Procedure, which provide:

"(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".
(…)

33. The Court recalls that the Applicant alleges that the challenged decision has violated his rights guaranteed by Articles 31, 46 and 53 of the Constitution, as well as Article 6 and Article 1 of Protocol 1 to the Convention, however he does not substantiate further how and why his rights were violated.

34. In this regard, the Court notes that the Applicant is merely dissatisfied with the outcome of the completed procedure before the regular courts.

35. In this regard, the Court considers that the mere fact that the Applicant does not agree with the outcome of the decisions of the regular courts, in particular the challenged decision, is not sufficient for the Applicant to build a claim of constitutional violation. When alleging such violations of the Constitution, the Applicant must substantiate those allegations with convincing arguments and evidence so that the referral is successful.

36. In this respect, the Court recalls that it is not a fact finding court and correct and complete determination of factual situation is a full jurisdiction of the regular courts, while the role of the Court is only to ensure compliance with the rights guaranteed by the Constitution. Therefore, the Court cannot act as a fourth instance court (see: case *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65;

see also: case KI86/11, Applicant: *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012.

37. In addition, it is not the role of the Constitutional Court to substitute its own assessment of the facts for that of the regular courts and, as a general rule, it is the duty of these courts to assess the evidence made available to them. The Constitutional Court can only consider whether the proceedings before the regular courts, in general, have been conducted in such a way that the Applicant had a fair trial (See: case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991).

38. The Court considers that the Applicant failed to substantiate and prove that the regular courts acted in an arbitrary or unfair manner when adjudicating his case. Therefore, the mere fact that the Applicant is dissatisfied with the outcome of the proceedings cannot raise an arguable claim of the violation right to fair and impartial trial (see: case *Mezotur - Tiszazugi Tarsulat v. Hungary*, no. 5503/02, ECtHR Judgment of 26 July 2005).

39. As to the Judgment of the Constitutional Court of 18 November, to which the Applicant refers, the Court notes that in the joined cases KEK, the Applicants (former KEK employees) requested the regular courts to decide on their property dispute with KEK, expressly referring to provisions of Article 3 of the Agreement and reiterating that the Law on Pensions, which establishes the Pension and Invalidity Insurance Fund, had not been approved yet and this fact was verified by the competent representatives of the Ministry of Labor and Social Welfare. As it can be observed, from the signed Agreement with KEK, the Applicants had a legitimate expectation that they would be entitled to the monthly indemnity in the amount of 105 Euro subject to the establishment of the Pension and Invalidity Insurance Fund in the future (See: Judgment of the Constitutional Court*, Gani Prekshi and 15 other KEK employees, paragraphs 60, 67, 68, 70*).

40. However, in the Applicant's case, the Court notes that by KEK Decision of 9 April 2003, the payment of the supplementary pension was not conditioned to be extended until the establishment of the Pension and Invalidity Fund. This decision (agreement) contains a strict deadline for exercising the supplementary pension payments of 105 euro, which was set to end on 31 March 2009, namely after 60 (sixty) months.

41. This difference (conditioning) in the Applicant's case is dealt with by the Supreme Court, which states that, *"...the obligation of the respondent (KEK) in aspect of the duration of the claimant's right (the Applicant) cannot be related or conditioned with the establishment of Pension and Invalidity Insurance Fund ..."*

42. In addition, the Supreme Court reasoned: *"Based on the above mentioned agreement – Decision which was not challenged by the claimant, the period of obligation of the respondent for compensating the payment of pension until 31 March 2009, was accurately defined, this obligation was performed by the respondent for the period of 5 years (60 months), in amount of 105 Euros per month, as it is defined in the Decision."* It can be clearly seen that the Applicant at that time agreed to the criteria established by KEK, as the decision (agreement) in question was never challenged by the Applicant.

43. In this regard, the Court considers that the case that the Applicant refers to does not correspond to the circumstances of his case.

44. Based on all the circumstances elaborated above, the Court considers that the facts presented by the Applicant do not in any way show that the regular courts had denied him the rights guaranteed by the Constitution and the Convention.

45. Therefore, the Referral is manifestly ill-founded on constitutional basis and as such is to be declared inadmissible, in accordance with Rule 36 (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rules 36 (1) (d) and 36 (2) (b), and 56 (2) of the Rules of Procedure, on 3 July 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; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Arta Rama-Hajrizi

KI 36/17 Applicant Bashkim Berisha, constitutional review of Judgment Rev. No. 358/2016 of the Supreme Court of 16 January 2017

KI36/17 Resolution on Inadmissibility approved on 5 July 2017, published on 13 September 2017

Key words: *Individual referral,* Right to Fair and Impartial Trial, *referral manifestly ill-founded*

The subject matter is the constitutional review of the challenged judgment, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 21 [General Principles] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights.

the Court considered that nothing in the case presented by the Applicant indicate that the proceedings before the regular courts were unfair or arbitrary in order that the Constitutional Court would be satisfied that the essence of the right to fair and impartial trial was violated or that the Applicant was denied any procedural guarantees, which would lead to a violation of the right according to Article 31 of the Constitution or paragraph 1 of Article 6 of the ECHR.

Therefore, the Court Referral declared as manifestly ill-founded on constitutional basis in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI36/17

Applicant

Bashkim Berisha

Constitutional review of Judgment Rev. No. 358/2016 of the Supreme Court of 16 January 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 Bashkim Berisha from village Prugovc, Municipality of Prishtina (hereinafter: the Applicant), represented by lawyer Fatlum Podvorica.

Challenged decision

2. The Applicant challenges Judgment [Rev. No. 358/2016] of the Supreme Court of 16 January 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 21 [General Principles] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereafter: the Constitution), and Article 6 of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of 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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 31 March 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 7 April 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.

7. On 28 April 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 5 July 2017 the Review Panel considered the report of the Judge Rapporteur and made a recommendation on inadmissibility to the Court.

Summary of facts

9. On 07 December 2010, there was a traffic accident in which the Applicant sustained bodily injury.

10. The Applicant filed a claim with the Basic Court in Prishtina against the Insurance Company "Illyria" (hereinafter: Insurance "Illyria") for compensation of material and non-material damage.

11. On 29 January 2014, the respondent Insurance „Illyria" in response to the Applicant's claim, did not challenge the legal basis of the statement of claim, but proposed to be rendered an admissible judgment.

12. On 25 May 2014, the Basic Court rendered Judgment [C. No. 616/11], which partially approved the Applicant's statement of claim and ordered the Insurance Company "Illyria" to pay the Applicant a certain amount of money as compensation for material and non- material damage.

13. The Judgment of the Basic Court reads: *„In determining the amounts for every form of damage compensation, non-material and material, the Court has decided on the basis of the opinion of medical experts. Accordingly the Court considers that the adjudicated amounts present real and fair reward/compensation, by which the claimant would be able to meet his needs due to the damages suffered, although they do not present an absolute reward/compensation of the damage caused to him. ".*

14. Against Judgment [C. No. 616/11] of the Basic Court, the respondent Insurance „Illyria" filed an appeal with the Court of Appeal on the grounds of substantial violation of the contested procedure provisions, erroneous and incomplete determination of factual situation and the erroneous application of the substantive law.

15. On 14 September 2016, the Court of Appeal rendered Judgment [Ac. No. 4270/14], which partially approved the appeal of the respondent Insurance "Illyria", thereby reducing the amount of compensation for material and non-material damage. In the reasoning of the judgment of the Court of Appeal is stated:

> *„The Court of Appeal found that the first instance court has decided correctly and lawfully in this legal matter on the approved part of the Judgment, whereas in the other part, the Judgment had to be modified, due to erroneous application of the substantive law... "*

16. The request for revision to the Supreme Court against the judgment of the Court of Appeal was submitted simultaneously by the Applicant and the Insurance "Illyria" due to incomplete determination of factual situation and erroneous application of the substantive law.

17. On 16 January 2017, the Supreme Court rendered Judgment [Rev. No. 358/2016] rejecting the Applicant's request for revision as ungrounded, while it partially approved the request for revision of the Insurance "Illyria" and reduced the monetary amount for material compensation.

18. The reasoning of the judgment reads:

> *„The subject matter in the Supreme Court were the allegations of the claimant (Applicant), according to which by the reduction of the amount of compensation as determined by the first instance court, the second instance court has erroneously applied the substantive law. However, the Supreme Court found that such allegations of the claimant are ungrounded."*
>
> *„ The Supreme Court has partially approved the request for revision of the respondent (Insurance "Illyria") as grounded and reduced the monetary amounts [...] The Court notes that, taking into account the aforementioned criteria for compensation of non-material damage caused in a traffic accident, as well as the case law so far, the amounts determined by the second instance court as compensation in respect of physical pain, fear and decrease of overall daily life activities, are also too high and in contradiction with the criteria mentioned "*

Applicant's allegations

19. The Applicant alleges that "*that there has been a violation of Article 31, Right to a Fair and Impartial Trial, of the Constitution of the Republic of Kosovo, as read in conjunction with paragraph 1 of Article 6, Right to a Fair Trial, of the European Convention on Human Rights... because by erroneous determination of factual situation and by erroneous application of legal provisions by the Court of Appeal and the Supreme Court the monetary compensation was reduced to him. "*

20. The Applicant requests the Court to *"declare Judgment Rev. No. 358/2016 of the Supreme Court of Kosovo, of 16 January 2017, and Judgment AC. No. 4270/14 of the Court of Appeal of Kosovo, of 14 September 2016, invalid and to remand the case for retrial."*

Admissibility of the Referral

21. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and foreseen in the Rules of Procedure.

22. 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."*

23. The Court notes that the Applicant is an authorized party; the referral was submitted in accordance with the time limits stipulated in Article 49 of the Law and the Applicant has exhausted all legal remedies.

24. However, the Court also refers to Article 48 [Accuracy of the Referral] of the Law, which foresees:

> *"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."*

25. The Court further refers to Rule 36 (1) d) and (2) (b) of the Rules of Procedure, which provides:

> *"(1) The Court may consider a referral if:*
> *[...]*
> *d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
> *[...]*
> *b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights".*

26. In essence, the Court observes that the Applicant considers that the courts have violated his rights under Article 31 of the Constitution in conjunction with Article 6 of the ECHR because in their decisions they erroneously established the facts and erroneously applied the substantive law, which had the effect of reducing the amount of compensation for material and non-material damage he considers is entitled to in the form given to him by the decision of the Basic Court.

27. In this regard, the Court reiterates that the European Court of Human Rights (hereinafter: ECtHR) found that *„the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law (See: mutatis mutandis, García Ruiz v. Spain* [GC], no. 30544/96, paragraph 28, European Court of Human Rights[ECtHR] 1999-I). "

28. The Court also reiterates that the complete determination of the factual situation is within the full jurisdiction of regular courts, and that the role of the Constitutional Court is merely 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, see also: *mutatis mutandis* case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

29. Accordingly, the Court finds that the Applicant's allegations of erroneous application and the inconsistent interpretation of the relevant legal provisions, as well as allegations of erroneous determination of factual situation allegedly committed by the regular courts, raise questions that fall within the scope of the regular courts (legality), and not the domain of the Constitutional Court (constitutionality).

30. The task of the Constitutional Court is to examine whether the constitutional rights (*right to a fair trial, the right to access to a court, the right to effective legal remedies etc.*) have been violated or neglected, and whether the implementation of the law was arbitrary or discriminatory.

31. This Court will therefore only exceptionally examine the manner in which the competent courts have established the facts and based on such determined factual situation applied positive-legal rules, when it is apparent that there has been an arbitrary procedure of the regular court, in a procedure of determining the facts, as well as in the process of applying the relevant positive-legal rules.

32. However, the Court notes that the Applicant initiated the same questions regarding the procedural omissions allegedly made by the Court of Appeal when deciding on the appeal of the respondent, namely the Insurance Company "Illyria".

33. In this regard, the Court notes that these identical objections were brought by the Applicant before the Supreme Court, which, in its judgment [Rev. No. 358/2016] dealt with them thoroughly, and it also assessed these allegations as ungrounded, with an explanation that do not seem to this Court arbitrary.

34. Moreover, the Court notes that the Supreme Court also examined other allegations related to the incorrect determination of factual situation, which, according to the Applicant's allegations "*influenced the Court of Appeal to reduce the amount of compensation*". However, the Supreme Court found those allegations as ungrounded.

35. Furthermore, the Court does not find arbitrary the Judgment [Rev. No. 358/2016] of the Supreme Court, because the Supreme Court provided clear explanations with legal foundation for all its decisions, both in terms of the grounds for rejecting the Applicant's request for revision and in respect of the partial approval of the request for revision of the respondent.

36. Bearing in mind the above, as well as the circumstances of the particular case, the Court in the reasoning of the challenged decisions does not see any arbitrariness in the application of the substantive law. It cannot also find the elements that would indicate irregularity or arbitrariness in rendering the challenged decisions to the detriment of the Applicant.

37. Accordingly, the Court considers that nothing in the case presented by the Applicant indicate that the proceedings before the regular courts were unfair or arbitrary in order that the Constitutional Court would be satisfied that the essence of the right to fair and impartial trial was violated or that the Applicant was denied any procedural guarantees, which would lead to a violation of the right according to Article 31 of the Constitution or paragraph 1 of Article 6 of the ECHR.

38. The Court considers that the Applicant is obliged to substantiate his constitutional allegations and submit *prima facie* evidence indicating a violation of his rights guaranteed by the Constitution and the ECHR. That assessment is in line with the jurisdiction of the Court (see: case of the Constitutional Court No. KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

39. However, the Court finds that the Applicant did not substantiate his allegations nor has he indicated that there has been a violation of his rights.

40. The Court further considers that it cannot act as a "court of fourth instance."

41. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 47 of the Law and Rules 36 (1) d) and (2) b) of the Rules of Procedure, in its session held on 5 July 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 Court**
Altay Suroy	Arta Rama-Hajrizi

KI123/16, Applicant: Vullnet Berisha, Constitutional review of Decision PN. no. 23/16 of the Court of Appeals, of 18 January 2016.

KI123/16, Resolution on inadmissibility, approved on 3 July 2017, published on 27 September 2017

Key words: *individual referral, criminal procedure, right to fair and impartial trial, return to the previous situation, out-of-time referral*

The Applicant alleged that his rights guaranteed by the Constitution, such as the right to fair and impartial trial and right to a fair trial as foreseen by ECHR, had been violated, and sought to have his case returned to the previous situation, reasoning that while serving his sentence he had not been timely informed of the time limit for submitting a referral to the Constitutional Court.

The Court considers that the Applicant has not provided any item of evidence that would prove that he did not, due to objective circumstances, manage to submit the referral within the time limit of 4 months. For this reason, the Court found that the Applicant's Referral is out of time, therefore inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI123/16

Applicant

Vullnet Berisha

Constitutional review of Decision PN. No. 23/16, of the Court of Appeal, of 18 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 was submitted by Vullnet Berisha (hereinafter: the Applicant), imprisoned in the Dubrava prison and represented by his father Daut Berisha from village Llukare, Municipality of Prishtina.

Challenged decision

2. The Applicant challenges Decision PN. No. 23/16, of the Court of Appeal of 18 January 2016, in conjunction with Judgment P. No. 342/2012, of the District Court in Prishtina, of 17 December 2012.

Subject matter

3. The subject matter is the constitutional review of the challenged decisions, whereby the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6 (1) of the European Convention on Human Rights (hereinafter: the Convention), have allegedly been violated.

4. The Applicant alleges that his Referral should be reviewed in accordance with Article 50 [Return to the Previous Situation] of the Law on Constitutional Court of the Republic of Kosovo, referring to his limited possibilities to be informed in time about the deadline for submission of the Referral as he is serving the imprisonment sentence.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 and 49 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 24 October 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 14 November 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

8. On 15 February 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeal.

9. On 5 May 2016, the Court requested the Basic Court in Prishtina to submit to the Court the evidence (acknowledgment of receipt) confirming the date of receipt of the Decision of the Court of Appeal (PN No. 23/16 of 18 January 2016) by the Applicant.

10. On 16 May 2016, the Basic Court in Prishtina filed the evidence (acknowledgment of receipt) confirming that the aforementioned decision was served on the Applicant on 26 January 2016.

11. On 3 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on inadmissibility of Referral.

Summary of facts

12. On 10 May 2012, the Public Prosecutor in Prishtina, by Indictment PP. No. 267-10/2012 and PPM. No. 27-5/2012 accused the Applicant, in co-perpetration with the juvenile B. Q., of committing the criminal offenses of theft in the nature of robbery or robbery under Article 256, paragraph 1 of the Criminal Code of the Republic of Kosovo (hereinafter: CCK) and unauthorized ownership, control, possession, or use of weapons under Article 328 paragraph 2 of CCK.

13. On 17 December 2012, the District Court in Prishtina by Judgment P. No. 342/2012, found the Applicant guilty of commission of the criminal offences of theft in the nature of robbery or robbery and unauthorized ownership, control, possession, or use of weapons sanctioned by the relevant provisions of the CCK. The Applicant was sentenced to five (5) years of imprisonment and a fine of € 1000.

14. On 18 March 2013, the Applicant challenged the aforementioned judgment of the District Court with the Court of Appeal, claiming essential violation of the criminal procedure provisions, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on punishment, proposing that the appealed judgment be annulled and the case be remanded to the first instance court for retrial.

15. On 22 July 2014, the Court of Appeal by Judgment PAKR. No. 419/13 rejected as ungrounded the Applicant's appeal regarding the criminal offense of theft in the nature of robbery, while it modified the challenged judgment of the District Court and rejected as ungrounded the charges for the criminal offense of unauthorized possession or use of weapons, because this criminal offense was included in the Law on Amnesty of the Republic of Kosovo.

16. On 10 November 2014, the Applicant filed a request for protection of legality with the Supreme Court alleging violation of the criminal procedure, erroneous application of the substantive law, and proposed that he be imposed a significantly more lenient sentence or that the challenged judgments be remanded for retrial.

17. On 26 March 2015, the Supreme Court by Judgment PML. No. 15/2015, rejected the request for protection of legality as ungrounded and upheld the challenged judgments of the lower instance courts.

18. On 17 September 2015, the Applicant filed a request for reopening of the criminal proceedings with the Basic Court in Prishtina, claiming that the court decisions were based on inadmissible evidence, unlawful identification and false statement of the witness B.Q. because the identification was based on a more circumstantial description.

19. On 16 December 2015, the Basic Court by Decision Kp. No. 601/2015, rejected the request for reopening of criminal proceedings as ungrounded. The Basic Court, among others, reasoned that in the request for reopening of the criminal proceedings was not provided any fact or new evidence that was unknown to the courts at the time of the challenged decisions; and which, on its own or together with other evidence would prove the innocence of the Applicant or that he would be sentenced under a more lenient criminal provision.

20. On 31 December 2015, the Applicant filed an appeal against the above mentioned decision with the Court of Appeal claiming violation of the provisions of the CPC and Article 31 of the Constitution, proposing that his appeal be approved as grounded and that challenged decision be annulled and the case be remanded for retrial.

21. On 18 January 2016, the Court of Appeal by Decision PN. No. 23/16 rejected the appeal of the Applicant as ungrounded and upheld the challenged decision of the Basic Court. The Court of Appeal upheld the reasoning of the Basic Court that the legal presumptions for the reopening of the criminal proceedings are not met because it is not proven that the sentencing judgments were based on false testimony of the witness B. Q, and moreover, the witness B. Q. was not found guilty because of false testimony as it is provided by the relevant provisions of the CPC.

Applicant's allegations

22. The Applicant alleges violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) [Right to a fair trial] of the Convention. The Applicant also alleges violation of Article 7 [General Duty to Establish a Full and Accurate Record] of the Criminal Procedure Code in conjunction with Article 7 [Access to the Courts] of Law No. 03/L-199 on Courts.

23. Regarding the request for return to previous situation based on Article 50 of the Law, the Applicant alleges: "*Pursuant to Article 50 of the Law on Constitutional Court, I file this request for return to previous situation... I was not able to use this opportunity, as I am serving the imprisonment sentence in Dubrava prison and the possibility to know about all the laws, and my rights are very much limited, and I was not able to be notified in time for the deadline of submitting my Referral to the Constitutional Court of the Republic of Kosovo*".

24. Regarding the conduct and regularity of the proceedings, the Applicant, *inter alia*, alleges: *"During the court proceedings the Criminal Procedure Code was not correctly applied, the evidence was not correctly assessed, my alibi was not proved, the statements of the minor B.Q. and of the injured E. H. were not carefully examined, the*

identification by the injured was not correctly assessed (which during the entire proceedings had irregularities and was contradictory and not based on legal provisions), imaginary (inexistent) evidence was created, such as for example the weapon that was taken as an evidence based solely on a recording that was found in my telephone, in the minutes were introduced new untrue evidence".

25. The Applicant claims to have recorded a telephone conversation between him and the witness B. Q. and that he will bring this recording in a electronic form CD, as a new fact and evidence that would prove his innocence.

26. Finally, the Applicant requests the Court: *"To assess the legality of incriminatory judgment P. no. 342/2012 of the Basic Court in Prishtina and all evidence taken by the police, the Prosecution and Court based on which was rendered the incriminatory judgment of 17.12.2014, which is ungrounded and not based on facts and evidence, which is in the contradiction with the laws in force, general obligation for full and accurate determination of factual situation under Article 7 of the Criminal Procedure Code of Kosovo, due to the fact that nobody can be adjudicated and sentenced for the criminal offence he did not commit as it is provided by Article 1 and 2 of the Criminal Procedure Code of Kosovo, due to the fact that complete factual situation was not determined, new facts are discovered, which alone, or together with the previous evidence justify the innocence of the convicted person, and also the Judgment in contradiction with the Criminal Procedure Code was rendered, and DECISION Pn. No. 23/16 of the Court of Appeal, which rejected the appeal as ungrounded against the DECISION of the Basic Court in Prishtina for reopening of the criminal proceedings terminated by the final judgment."*

Admissibility of Referral

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

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

> *"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."*

29. The Court refers to Article 49 [Deadlines] of the Law, which foresees:

> *"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. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."*

30. The Court also takes into account Article 50 [Return to the Previous Situation] of the Law, which provides:

> *"If a claimant without his/her fault has not been able to submit the referral within the set deadline, the Constitutional Court, based on such a request, is obliged to return it to previous situation. The claimant should submit the request for returning to previous situation within 15 days from the removal of obstacle and should justify such a request. The return to the previous situation is not permitted*

if one year or more have passed from the day the deadline set in this Law has expired."

31. The Court also refers to Rule 36 (1) c) of the Rules of Procedure which specifies:

(1) "The Court may consider a referral if:
(...)

c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or".

32. The Court notes that the Applicant requested that in his case be applied Article 50 [Return Return to the Previous Situation] of the Law because: "*...I was not able to use this right, as I am serving the imprisonment sentence in Dubrava prison and the possibility to know about all the laws, and my rights are very much limited, and I was not able to be notified in time about the deadline of submitting my Referral to the Constitutional Court of the Republic of Kosovo."*

33. The Court also notes that the Applicant raises allegations of the irregularity of the court proceedings against him, claiming that his guilt was based on unsubstantiated evidence and false testimony of the witness B. Q.

34. Without prejudice to the claims raised by the Applicant and the proceedings conducted before the regular courts, the Court considers that first of all, as a preliminary question, it must examine whether the Applicant justified the application of Article 50 of the Law on return to previous situation, and consequently to be exempted from the obligation to submit the Referral within the legal deadline of 4 (four) months as required by Article 49 of the Law.

35. In the present case, the Court notes that the Applicant's justification for failure to submit the Referral to the Court in accordance with the legal deadline specified in Article 49 of the Law is of a subjective nature and is related to his impossibility to know the law and his rights. However, the Court considers that the Applicant has not provided any evidence that would document that due to objective circumstances that are beyond his control, he has failed to submit the referral within the legal deadline of 4 (four) months.

36. In this regard, the Court considers that serving the imprisonment sentence in itself does not constitute a reason for exemption from the obligation to submit the referral within the legal deadline of 4 (four) months; and moreover, the Applicant has not provided any evidence that he was prevented by the prison authorities to submit his referral in accordance with Article 49 of the Law.

37. The Court also considers that the Law on the Constitutional Court meets the requirements of predictability and is accessible because it is published in the Official Gazette of the Republic of Kosovo, and that is generally accessible electronically on the Internet.

38. The Applicant cannot justify himself that not knowing the law can serve him as a basis for exemption from the obligation to submit the referral within the legal deadline of 4 (four) months because he had the opportunity to submit the referral, if necessary with the appropriate legal advice, within the deadline of 4 (four) months (for further elaboration of principle that not knowing the law does not exempt the Applicant of responsibility, see, for example, *mutatis mutandis*, Case *Cantoni v. France* [GC], application no. 17862/91, Judgment of 11 November 1996, §§ 35).

39. The Court recalls that the purpose of the four-month legal time limit under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure is to promote legal certainty, to ensure that cases raising constitutional issues are dealt with within a reasonable time and that previously rendered decisions are not endlessly open to challenging (See case of *O' Loughlin and Others v. the United Kingdom* no. 23274/04, ECtHR Decision of 25 August 2005 and *mutatis mutandis* see case no. KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 3 March 2014).

40. The Court notes that it is the duty of the applicants or of their representatives to act with *'due diligence'* to ensure that their claims for protection of rights and fundamental freedoms are filed within the legal deadline of four (4) months provided for in Article 49 of the Law and further specified in Rule 36 (1) (c) of the Rules of Procedure (See, for example, the Constitutional Court of the Republic of Kosovo: case. No. KI07/15, Resolution on Inadmissibility of 8 December 2016, § 52 and other references mentioned in that decision).

41. Based on the elaborations above, the Court considers that in the present case the conditions to return to previous situation have not been met as it is provided in Article 50 of the Law, because the Applicant failed to substantiate his claim and has not presented any evidence which indicate how and why he failed to submit the Referral within the provided time limit, without his fault (See Constitutional Court of the Republic of Kosovo, Case no. KI25/15, Resolution on Inadmissibility of 2 December 2015, para. 29).

42. In addition, from the documents submitted, the Court notes that the Decision of the Court of Appeal (PN No. 23/16 of 18 January 2016) was served on the Applicant on 26 January 2016; while the Referral was submitted to the Court on 24 October 2016.

43. Based on the above, the Referral was not submitted in accordance with Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.

44. The Court finds that the Applicant's Referral is out of time and is to be declared inadmissible, because it was not submitted in accordance with Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law and Rule 36 (1) c) of the Rules of Procedure, on 3 July 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; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI116/16, Applicant: Asrije Muçolli, Constitutional review of Judgment Rev. no. 68/2016 of the Supreme Court of Kosovo, of 19 April 2016

KI116/16, Resolution on inadmissibility, approved on 03 July 2017, published on 27 September 2017

Key words: *individual referral, civil procedure, right to fair and impartial trial, protection of property, manifestly ill-founded referral, inadmissible referral*

The Applicant contested before the Court Judgment Rev. no. 68/2016 of the Supreme Court of the Republic of Kosovo of 19 April 2016. The Applicant alleged that the decisions of the regular courts had violated her rights to fair trial, and the fundamental human rights and freedoms guaranteed by ECHR.

The Court found that the Applicant did not provide any reasoning as to how and why her rights were violated, and that the facts presented by the Applicant did not, in any way, demonstrate that the regular courts had denied her her rights guaranteed by the Constitution and the Convention. For these reasons, the Court decided that the referral is to be declared manifestly ill-founded on constitutional grounds, hence inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI116/16

Applicant

Asrije Muçolli

Constitutional review of Judgment Rev. No. 68/2016, of the Supreme Court of Kosovo, of 19 April 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 Asrije Muçolli (hereinafter: the Applicant) from Podujeva.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 68/2016 of the Supreme Court of 19 April 2016 in conjunction with Judgment No. 2017/2015, of the Court of Appeal, of 21 December 2015 and Judgment C. No. 2934/11 of the Basic Court in Prishtina of 27 February 2015.

3. The Applicant was served with the Judgment of the Supreme Court on 8 June 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment Rev. No. 68/2016 of the Supreme Court of 19 April 2016.

5. The Applicant alleges violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 47 and 48 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

7. On 22 September 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 19 October 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi (judges).

9. On 29 November 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court. On the same date, the Court requested the Applicant to submit an evidence (acknowledgment of receipt) indicating the date when the challenged decision was served on her.

10. On 6 December 2016, the Basic Court in Prishtina submitted to the Court the acknowledgment of receipt indicating that the Applicant received the challenged decision of the Supreme Court on 8 June 2016.

11. On 3 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. On 9 December 2003, the Kosovo Energy Corporation (hereinafter: KEK) by Decision No. 5594 established that the Applicant is recognized the right to compensation for medical expenses for recovery abroad due to workplace injury.

13. On 17 December 2003, KEK by letter of urgency requested the German Office in Kosovo to allow the Applicant to obtain a visa for Germany because of the medical treatment as she was injured in the working place.

14. On 7 July 2005, the Applicant filed a claim against KEK with the Municipal Court in Prishtina for compensation of damage from employment relationship. The Applicant at that time had sought, *inter alia*, compensation in the amount of € 69,000 due to physical and mental anguish, reduction of life activity, reduction of working ability-invalidity, bodily disfigurement and medical costs. The Applicant also attached evidence of her health status issued by medical experts.

15. On 19 July 2007, the Municipal Court in Prishtina by Judgment C1. No. 230/2005 partially approved the Applicant's claim and obliged the respondent KEK to compensate the Applicant, among the other, in the name of the physical and mental anguish, reduction of life activity- invalidity and bodily disfigurement, within 15 days from the day the Judgment was received.

16. The Municipal Court, among other things, found that among the parties is not disputable that the Applicant was injured in the workplace and that this finding is also supported by the documents issued by KEK itself and medical experts. The Municipal Court, among other things, also added that KEK did not take adequate measures to protect the Applicant at her workplace and that based on the relevant legal provisions and the objective right it was responsible for her injury in the workplace.

17. KEK filed an appeal against the aforementioned judgment with the District Court in Prishtina with the proposal that the challenged judgment be modified or quashed and the case be remanded for retrial.

18. On 11 March 2009, the District Court in Prishtina by Judgment Ac. No. 771/2008 found that:

> *"I. The appeal of the respondent Kosovo Energetic Corporation in Prishtina is REJECTED as ungrounded whereas paragraph 1 of Judgment C1. No. 230/05, of the Municipal Court in Prishtina, of 19 July 2007,which is related to the compensation of the damage for physical pain in amount of 7.000 Euros, reduction of life activity in amount of 15.000 Euros, bodily disfigurement in amount of 14.000 Euros, for the foreign help and care in amount of 200 Euros, for enriched food in amount of 300 Euros, with legal interest rate which is paid by the bank for money deposited for one year, starting from the day of medical expertise, 20 December 2006, until the final payment and paragraph III which is related to the compensation of costs of the contested procedure in amount of 1.366.00 Euros, is UPHELD***.**
>
> *II. The appeal of the respondent is PARTLY approved and paragraph 1 of the enacting clause of the appealed Judgment which is related to the compensation of the damage for mental anguish in amount of 7.000 Euros, for the reduction of working ability – invalidity in amount of 15.000 Euros, is QUASHED and the case is remanded to the Court of the first instance for retrial.*
>
> *Paragraph II of the enacting clause of the same Judgment remains unchanged."*

19. Meanwhile, KEK filed a request for revision against the abovementioned judgment with the Supreme Court on the grounds of substantial violations of the contested procedure provisions and erroneous application of the substantive law by proposing that the two lower instance court judgments be modified and the Applicant's statement of claim be rejected as unfounded.

20. On 8 November 2011, the Supreme Court by Decision Rev. No. 289/2009 approved KEK revision as grounded, quashed the judgments of the lower instance courts and remanded the case to the first instance court for retrial. The Supreme Court reasoned, *inter alia*, that the lower instance courts erroneously applied the substantive law and that it was not established whether the Applicant had requested protective measures at the workplace; and whether it was necessary for KEK to provide her the necessary equipment for protection at work.

21. On 1 January 2013, began the implementation of the Law on Courts (No. 03/L-199) to: "*Article 2.1.1.2 Basic Court - the court of first instance comprised of seven geographic areas as established by this Law; Article 17.1 The Court of Appeals is established as the second instance court with territorial jurisdiction throughout the Republic of Kosovo.*"

22. On 27 February 2015, the Basic Court in Prishtina by Judgment C. No. 2934/11 rejected as unfounded the Applicant's statement of claim that in the name of material and non-material damage be compensated the amount of 69,000 euro. The Basic Court administered the evidence provided by the medical experts and heard three witnesses regarding the Applicant's injury at the workplace.

23. On 10 April 2015, the Applicant filed an appeal against the aforementioned Judgment of the Basic Court with the Court of Appeal on the grounds of substantial violations of the contested procedure provisions, erroneous and incomplete determination of the

factual situation and erroneous application of the substantive law. The Applicant, *inter alia*, complained that the Basic Court had not given proper and convincing reasoning why it did not accept the statements of the witnesses that she was injured in the workplace based on the absurd reasoning that no minutes nor a report of the accident at work was compiled.

24. On 21 December 2015, the Court of Appeal by Judgment Ac. No. 2017/2015 rejected the Applicant's appeal as ungrounded and upheld the Judgment of the Basic Court. The Court of Appeal, *inter alia*, found that the Applicant failed to prove with concrete evidence that she was injured in the workplace.

25. On 3 February 2016, the Applicant filed a request for revision against the Judgment of the Basic and the Court of Appeal with the Supreme Court due to substantial violations of the provisions of the contested procedure and erroneous application of the substantive law. The Applicant stated that: (i) the lower instance courts did not act according to the remarks of the Supreme Court because they did not establish the fact if the KEK as an employer, had an obligation to secure the protective equipment at work; (ii) the lower instance courts did not justify why the statements of witnesses that indicated that the Applicant was injured in the workplace were unreliable, and that (iii) the injury at work is not proved only with a work accident report; but this can be proved even with witnesses who know and have shown that the Applicant was injured in the workplace.

26. On 19 April 2016, the Supreme Court by Judgment Rev. No. 68/2016 rejected the Applicant's revision against the Judgment of the Court of Appeal as ungrounded. The Supreme Court, *inter alia*, argued that (i) the lower instance courts have reasoned why they did not take into account the statements of the heard witnesses, (ii) on the basis of the administered evidence it was not established that the Applicant was injured in the workplace, and (iii) since it has not been established that the claimant was injured in the workplace, then there is no need to prove the fact whether the respondent KEK provided the means for protection at work.

27. The relevant part of the abovementioned Judgment of the Supreme Court reads:

> *"The of the second instance court found that in this legal matter the first instance court correctly applied the substantive law when it ascertained that the accident happened on 4 November 2002, the original of report of the accident does not exist neither in the professional service of the respondent nor in the health record of the claimant in the health institute of KEC, it results that the claimant was injured in March of 2003 whereas the health institute of KEC was informed 6 months after the injury. Based on the written report of expert Dr. Ing. Hamit Nuredini, it has been ascertained that the claimant was not injured at work.*
>
> *In order to exist the obligation of compensation for the damage there are 4 conditions that should be fulfilled: 1. To exist the objects of the obligational relationship and the responsibility for the caused damage, the one who caused the damage and the one who suffered the damage, 2. To exist the damaging fact which derives from the damage, 3. To exist the caused damage, 4. To exist the connection between the action and the caused damage, 5. To exist the illegality of the action, respectively, the inaction which caused the damage. In the present case, it has not been confirmed that the injury was caused at the workplace for which the respondent would be responsible.*
>
> *The statements in the revision that the first instance court did not act in accordance with the remarks of the Supreme Court of Kosovo made by Judgment Rev. no.*

289/2009, of 8 November 2011, whether the respondent provided the protection equipments for work due to the reason that by the examined evidence it was not confirmed that the claimant was injured at work and also that it is not necessary to confirm the fact whether the respondent provided the equipments for work, do not stand. The first instance court reasoned the fact that it did not consider as basis the statement of heard witnesses because they are not trustful for confirming the fact that the claimant suffered injuries at work, therefore, the statements in the revision that the first instance court did not take into account the statements of heard witnesses upon deciding on this legal matter, do not stand."

Applicant's allegations

28. The Applicant alleges violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution.

29. The Applicant alleges that: "*in a judgment dated 19.07.2007 it is obvious that the respondent has not contested my injury at the workplace and has also received the report with protocol number 547 of 08.05.2003, but has contested the type of damage and the amounts claimed by the claimant, and the court by judgment CI. no. 230/2005 of 19.07.2007 partially approved the statement of claim of the claimant, which was partially upheld by the District Court in Prishtina AC. no. 77112008 of 11 March 2009 by quashing only the part relating to the adjudicated part of mental anguish and the reduction of working ability".*

30. The Applicant alleges that: "*The Court in its Judgment C.nr.2934/2011 of 27.02.2015 did not take into account the visits to the Physician at Podujeva Health Center, the testimonies of the witnesses who were present at the time I suffered the injuries, as well as the report of injury with no. 547, registered on 08.05.2003, which was issued and signed by the supervisor respectively Director Musa Jusufi on 10.11.2002."*

31. The Applicant alleges that: "*The representative of KEK Osë Kuqi who during the main trial on 23.12.2014 stated that there is a grounded suspicion that the claimant was injured outside the workplace, with this statement of the respondent's representative it is seen what treatment have the workers who suffer injuries at their place of work at KEK, namely in the Elektro Kosova, because Osë Kuqi was previously aware of my injury at the workplace and was authorized by KEK to go to the German Office in Pristina, to urgently obtain my German visa as soon as possible, and this is see in the power of attorney with protocol no. 5882 of 19.12.2003".*

32. The Applicant alleges that the Supreme Court and the Court of Appeal rendered unreasoned judgments: "*The Court of Appeal, in addition that it did not justify its decisions/conclusions, it even did not repeat the reasoning of the first instance court - it did not explain why it agrees with the reasoning of the first instance court... The Supreme Court of Kosovo has silently repeated all violations of the previous instances, turning them into a constant violation of fundamental rights and freedoms by the state's judicial power. The court, among other things, does not reasonably justify its decisions that there has been no violation of the formal right and that there has been no violation of the substantive law".*

33. Finally, the Applicant requests the Court to declare invalid the Judgment C. No. 2934/2011 of the Basic Court in Prishtina of 27 February 2015, Judgment Ac. No. 2017/2015 of the Court of Appeal of 21 December 2015 and Judgment Rev. No. no. 68/2016 of the Supreme Court of 19 April 2016 and that the case be remanded for retrial in order that she is provided the opportunity for fair and impartial trial.

Admissibility of Referral

34. The Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution, and, as further specified in the Law and foreseen in the Rules of Procedure.

35. 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".*

36. The Court refers to Articles 48 and 49 of the Law, which stipulate:

> *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. […]".*

37. The Court also refers to Rule 36 (2) d) of the Rules of Procedure which specifies:

> *"(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".*

38. In the present case, the Court notes that the Applicant is an authorized party to submit the Referral, that she has exhausted all legal remedies in accordance with Article 113.7 of the Constitution and submitted the Referral within the 4 (four) month legal deadline as defined in Article 49 of the Law.

39. The Court must also ascertain whether the Applicant has presented and substantiated her allegations filed in accordance with Article 48 of the Law.

40. The Applicant essentially claims that the regular courts did not take into account the evidence presented by her to ascertain that she was injured in the workplace and to determine the obligation of KEK as an employer to compensate her for material and non-material damage she suffered when she was injured in the workplace.

41. The Constitutional Court recalls that it is not a fact-finding Court and the correct and complete determination of the factual situation is within the full jurisdiction of the regular courts. The role of the Constitutional Court is to ensure compliance with the constitutional standards during the court proceedings before the regular courts 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, see also *mutatis mutandis* case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012

and case No. KI86/16, Applicant *"BENI" Trade Company*, Resolution on Inadmissibility, of 11 November 2016).

42. The Court reiterates that it is its duty to consider whether the proceedings before the regular courts, in general, including the way the evidence was taken were fair (See case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991.

43. The Court also notes that it is not its duty to deal with the errors of fact or law allegedly made by regular courts when assessing evidence or applying the law (legality), unless this may have resulted in a violation of the rights and freedoms protected by the Constitution (constitutionality).

44. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See *mutatis mutandis*, *Garcia Ruiz v. Spain,* [GC] No. 30544/96, para. 28, European Court of Human Rights [ECtHR] 1999-I).

45. As to the allegation of admissibility of evidence, the Court considers that although Articles 31 of the Constitution and 6 of the Convention guarantee the right to a fair trial, they do not lay down any rules on admissibility of such evidence, which under the applicable law in Kosovo is primarily a matter of legality. In particular, it is not the function of the Court to deal with errors of fact or law allegedly committed by regular courts unless and in so far as they may have infringed rights and freedoms protected by the Constitution (Constitutional Court of the Republic of Kosovo: Case no. KI114/15, Applicant *Feride Aliu-Shala*, Constitutional Review of the Judgment of the Supreme Court of Kosovo Pml. Nr. 95/2015, of 12 May 2015, Resolution on Inadmissibility of 17 May 2016, paragraph 39 with further references).

46. In addition, the Court notes that the Applicant had the benefit of adversarial proceedings; that she was able, at various stages of those proceedings, to adduce the arguments and evidence she considered relevant to her case; that she had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; and that all the arguments that were relevant to the resolution of the case were duly heard and examined by the regular courts; that the factual and legal reasons for the impugned decisions were set out at length. Accordingly, the proceedings taken as a whole were fair. (See case *Garcia Ruiz v. Spain*, application no. 30544/96, [GC], Judgment of 21 January 1999, paragraph 29).

47. It is not for the Court to speculate whether the testimonies of witnesses invited by the Applicant are stronger evidence compared to the evidence provided by the opposing party and the conclusions issued by the regular courts. There is no element which might lead the Court to conclude that the regular courts acted in an arbitrary or unreasonable manner in establishing the facts or interpreting the domestic law. (See Case *Alimuçaj v. Albania*, ECtHR, Application no. 20134/05, Judgment of 7 February 2012, paragraph 176).

48. In this respect, It should be borne in mind, since this is a very common source of misunderstandings on the part of applicants - that the "fairness" required by Article 31 of the Constitution and Article 6 of the Convention is not "substantive" fairness (a concept which is part-legal, part-ethical and can only be applied by the trial judge), but "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (Constitutional Court of the Republic of Kosovo: Case no. KI42/16 Applicant *Valdet Sutaj*, constitutional review of the Decision Rev. No. 201/2015, of the Supreme Court of Kosovo, of 8 September 2015, Resolution on Inadmissibility of 7 November 2016, paragraph 41 and other references referred to in that decision).

49. Article 31 of the Constitution does not guarantee favorable outcome to the Applicants' case nor does it allow the Court to question the substantive fairness of the outcome of a civil dispute, where more often than not one of the parties wins and the other loses (Constitutional Court of the Republic of Kosovo: Case no. KI142/15 Applicant *Habib Makiqi*, Constitutional Review of the Judgment of the Supreme Court of Kosovo, Rev. No. 231/2015, of 1 September 2015, Resolution on Inadmissibility of 1 November 2016, paragraph 43).

50. The fact that the Applicant disagrees with the outcome of the case cannot serve her as a right to raise an arguable claim on violation of Article 31 of the Constitution (See Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 may 2012, paragraph 28).

51. In these circumstances, the Court considers that the Applicant failed to substantiate her allegations of a violation of fundamental human rights as guaranteed by the Constitution and the Convention. The facts of the case do not show that the regular courts have acted contrary to the procedural guarantees established by the Constitution and the Convention.

52. Accordingly, the Referral, on constitutional basis, is manifestly ill-founded and is to be declared inadmissible as established in Article 113.7 of the Constitution, foreseen by Article 48 of the Law and further specified in Rule 36 (2) d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 and 48 of the Law and Rule 36 (2) (d) of the Rules of Procedure, on 3 July 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; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI32/17, Applicant: Afrim Radoniqi, Constitutional review of Judgment Pml. no. 276/2016 of the Supreme Court, of 5 December 2016

KI32/17, Resolution on inadmissibility of 5 September 2017, published on 27 September 2017

Key words: *Individual referral, criminal procedure, equality before the law, right to fair and impartial trial, manifestly ill-founded*

The Applicant submitted a referral to the Constitutional Court whereby he requested the constitutional review of the Judgment of the Supreme Court. The Applicant alleged that the criminal offence of conflict of interest, wherewith he was charged, was not applicable in his case because he had acted in the capacity of private and not official person as regards the registration of the private property.

The Applicant alleged that Articles 24, 31, and 42 of the Constitution had been violated.

The Constitutional Court found that the Applicant's referral is manifestly ill-founded on constitutional grounds because the facts that the Applicant submitted do not substantiate his allegation that his right to equality before the law, fair and impartial trial, and protection of property had been violated.

RESOLUTION ON INADMISSIBILITY

in

Case KI32/17

Applicant

Afrim Radoniqi

Constitutional review of
Judgment Pml.no. 276/2016 of the Supreme Court,
of 5 December 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 Afrim Radoniqi from Gjakova (hereinafter, the Applicant).

Challenged decision

2. The challenged decision is the Judgment Pml.no. 276/2016 of the Supreme Court of 5 December 2016, which rejected as ungrounded the Applicant's request for protection of legality against the Judgment of the Court of Appeals PAKR.no.497/2016 and Judgment of the Basic Court in Gjakova PKR.no.105/2015.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment, which allegedly violates the Applicant's rights as guaranteed by Article 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

Legal basis

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

Proceedings before the Court

5. On 13 March 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

6. On 7 April 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu.

7. On 14 April 2017, the Court notified the Applicant of the registration of the Referral and requested him to fill out the Referral Form and to attach the Judgments of the Basic Court and Court of Appeals. On the same date the Court sent a copy of the Referral to the Supreme Court.

8. On 3 May 2017, the Applicant submitted the completed Referral Form and the requested judgments.

9. On 5 September 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 14 September 2012, the Applicant, who was a public attorney of the Municipality of Gjakova, purchased an immovable property from ZD. The contract was confirmed by the Basic Court in Kraleva on the same day. Then, the Directorate of Cadaster, Property and Geodesy of the Municipal Assembly of Gjakova suspended and later on refused the registration of the immovable property.

11. On 11 April 2013, the Applicant as a representative of ZD filed an appeal with the Ministry of Environment and Spatial Planning-Kosovo Cadastral Agency, requesting the registration of the immovable property in the Public Cadastral Registry.

12. On 10 June 2015 and on 27 October 2015, the Prosecutor in Gjakova filed, respectively, the Indictments PP/I. No. 35/2015 of and PP/I. No. 22 / 2015 against the Applicant for having committed the criminal offences of falsifying official document, abusing official position or authority and conflict of interest.

13. On 18 July 2016, the Basic Court in Gjakova (Judgment PKR.no.105/2015) found the Applicant guilty and sentenced him with a fine payment, because, while employed as the Public Attorney of the Municipality of Gjakova, he submitted an appeal to the Cadastral Agency of Kosovo, presenting himself as the private legal representative of ZD.

14. On an unspecified date, the Applicant filed with the Court of Appeals an appeal alleging *"essential violations of provisions of the criminal procedure, erroneous and incomplete determination of the factual situation, violation of the criminal law and decision on the punishment"*.

15. On 20 September 2016, the Court of Appeals (Judgment PAKR.no.497/2016), partially approved the Applicant's appeal, namely sentencing him with a lower fine, considering that the Applicant *"was simultaneously representing his client Z. D. acting as his legal representative (...), addressing also to the Ministry of Environment and Spatial Planning in Pristina (...), filing thereby a complaint on his behalf against the Decision of the Directorate of Geodesy, Cadastre and Property of the Municipality of Gjakova, while holding at the same time his position of the Public Attorney"*.

16. On an unspecified date, the Applicant filed a request for protection of legality, alleging "*the violation of criminal code"* and *"the essential violation of CPCRK"*. In addition, the Applicant argued that *"the Substantive Law was violated which is subject of reasonable doubt of legality of the challenged Judgments"*.

17. On 5 December 2016, the Supreme Court (Judgment Pml.no.276/2016) rejected as ungrounded the request for protection of legality, considering that the Applicant "*was involved in the administrative procedure at the Directorate of Cadastre, Property and Geodesy of the Gjakova Municipality even though he is in position of Public Attorney at Gjakova Municipality. Therefore, substantial elements of the criminal offense have been met in regards for what the convicted person was found guilty (...).*"

Relevant Law

Criminal Code of the Republic of Kosovo No. 04/L-082

Article 424
Conflict of interest

1. An official person who participates personally in any official matter in which he or she, a member of the family, or any related legal person, has a financial interest shall be punished by a fine or imprisonment up to three (3) years.

[...]

4. For purposes of this Article, "official matter" means a judicial or other official proceeding; an application, request for a ruling or other official determination; a contract or claim; a public auction or other procurement action; or, another matter affecting the financial or personal interests of the official or another person.

Applicant's allegations

18. The Applicant claims that the challenged decision violated his rights to equality before the law, to fair and impartial trial and to protection of property.

19. The Applicant alleges that the "*provisions of the Constitution and Substantive Law (...) were violated*", because the challenged decision *"is extremely contradictory and confusing, whereby it does not argue on where it stands the consummation of criminal offense-violation of criminal code"*.

20. The Applicant also claims that he "*is denied on the Constitutional right for the rights on immovable property, is denied to take right for legal circulation on purchase-on-sale of immovable property"*.

21. The Applicant also alleges that *"provisions of the Constitution of the Republic of Kosovo have been violated, namely Article 24, item 1, item 2 (Equality before law), Universal Declaration on Human Rights, European Convention on Protection of Human Rights and Fundamental Freedoms with its Protocols (applied directly in the Republic of Kosovo, applicable through Article 22 of the Constitution)"*.

22. The Applicant further alleges that his rights "*have been violated in spite of the fact that such rights have been guaranteed with the Constitution of the Republic of Kosovo and with International instruments on the human rights (...). These rights are liberty, PROPERTY, security, and resistance to oppression"*.

23. The Applicant requests the Court that, *"upon administration and confirmation of appellant's allegations, to adopt merit decision on allegations submitted in appeal by appellant Afrim Radoniqi"*, here the Applicant.

Admissibility of the Referral

24. The Court refers to Article 46 [Admissibility] of the Law, which provides:

> *The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that all legal requirements have been met.*

25. Thus the Court examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

26. In this respect, the Court refers to 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.*

27. The Court also refers to Article 49 [Deadlines] of the Law which provides:

> *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. [...].*

28. In that connection, the Court notes that the Applicant is an authorized party, challenges an act of the Supreme Court as a public authority, has exhausted the legal remedies available to him and has submitted his referral within the provided four (4) months period.

29. However, the Court further 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.*

30. In addition, the Court refers to Rule 36 (1) (d) and 36 (2) (b) (d) of the Rules of Procedure, which foresees:

> *(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."

31. In that respect, the Court recalls that the Applicant requested for protection of legality alleging *"essential violation of CPCRK"* and "*violation of criminal code"*. However, these allegations pertain to the domain of legality and as such does not fall under the jurisdiction of the Constitutional Court.

32. In fact, the Applicant requests the Court "*to adopt merit decision on allegations submitted in appeal by appellant Afrim Radoniqi"*. In essence, the Applicant is repeating the same allegations before this Court.

33. The Court observes that the Supreme Court considered that *"the essential violations of criminal procedural provisions (...) are not specified"* and *"it is not explained which violation (...) is in question. In addition, it was not given explanation of concretely where are the shortcomings of the judgments about the reasoning of decisive facts, but it is just mentioned to be lacking. Therefore, the court* [the Supreme Court] *concluded that the allegations are ungrounded"*.

34. The Applicant also alleged "*violation of criminal code",* mainly considering that the criminal offence of conflict of interest was not applicable in his case and that the reasons given by the judgment of the Supreme Court are contradictory and confusing; they do not explain on "*where it stands the consummation of the criminal offense"*.

35. In this regard, the Court observes that the Supreme Court considered that the lower instance courts *"correctly found that in concrete case it is not about decision making by the convicted person or the Office of Public Attorney but about other actions of convicted person",* because *"the law does not require that he personally must be a person who makes decision but it is sufficient that he personally participate in any official matter in which there is a financial interest"*.

36. In addition, the Supreme Court explained that *"as 'official matter' pursuant to provision of paragraph 4 of Article 424 of CCK means 'judicial or other official proceeding; an application, request for a ruling or other official determination; a contractor claim; a public auction or other procurement action; or, another matter affecting the financial or personal interests of the official or another person'"*.

37. The Supreme Court concluded that *"substantial elements of the criminal* offense *have been met in regards for what the convicted person was found guilty"*.

38. In this relation, the Court considers that the Judgment of the Supreme Court thoroughly justifies the allegations made by the Applicant. The Supreme Court explains in detail why the request for protection of legality was rejected as ungrounded, by considering that the facts of the case are not disputable, by assessing the allegations of essential violations of criminal procedural provisions and violation of criminal code, namely referring to the legal interpretation of the pertinent and relevant Criminal Code provisions applicable, and by assessing the decisions of the lower instance courts based on the allegations raised by the Applicant.

39. Moreover, the Applicant has not proved and substantiated that the proceedings and the challenged Judgment were unfair or arbitrary. (See ECtHR case *Shub vs. Lithuania*, Application No. 17064/06, Decision of 30 June 2009).

40. At the outset, the Court recalls Article 53 [Interpretation of Human Rights Provisions] which establishes that *"human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Rights"* Thus, the Constitutional Court, as *"the final authority in Kosovo for the interpretation of the Constitution*" (Article 112 of the Constitution), is bound to take into account the case law of the ECtHR when assessing alleged violations of human rights and fundamental freedoms guaranteed by the Constitution.

41. In that respect, the Court reiterates that it is not its task under the Constitution to act as a court of fourth instance, in respect of the decisions taken by the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (See ECtHR case: *Garcia Ruiz vs. Spain,* no. 30544/96, Judgment of 21 January 1999; see also Constitutional Court case: No. KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima,* Resolution on Inadmissibility, of 16 December 2011).

42. The mere fact that the Applicant disagrees with the outcome of the proceedings in his case, cannot of itself, raise an arguable claim for a breach of the Constitution. (See ECtHR case *Mezotur Tiszazugi Tarsulat vs. Hungary,* Application No.5503/02, Judgment of 26 July 2005).

43. The Constitutional Court can only consider whether the evidence has been presented in a correct manner and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial. (See case *Edwards v. United Kingdom*, Application No 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991).

44. The Applicant further claims that he "*is denied on the Constitutional right for the rights on immovable property".* In this regard, it appears that the Applicant is trying to make an allegation on a violation of Article 46 of the Constitution.

45. Article 46 [Protection of Property] of the Constitution establishes:

> *1. The right to own property is guaranteed.*
>
> *2. Use of property is regulated by law in accordance with the public interest.*
>
> *3. No one shall be arbitrarily deprived of property. [...]*

46. However, the Applicant does not succeed to build an argument on a constitutional basis. In fact, the Court recalls that the right to property applies only to a person's existing possessions and does not guarantee the right to acquire property. (See, *mutatis mutandis*, ECtHR case *Marckx v. Belgium,* Application No. 6633/74, Judgment of 13 June 1879, § 50).

47. The Court considers that the circumstances of the case did not confer on the Applicant a title to a substantive interest protected by Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR.

48. Lastly, the Court further recalls that the Applicant claims that he "*is denied to take right for legal circulation on purchase-on-sale of immovable property".* He considers that this denial is a violation of the right to *"equality of the citizens to freely engage in legal*

transactions was violated as well". Thus he also alleges that the regular courts violated his right to equality before the law guaranteed by Article 24 of the Constitution.

49. In that connection, the Court recalls that a treatment is discriminatory if an individual is treated differently to others in similar positions or situations, and if that difference in treatment has no objective and reasonable justification.

50. The Court reiterates that the different treatment must pursue a legitimate aim in order to be justified and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized. (See ECHR case *Marckx v. Belgium,* Application No. 6833/74, Judgment of 13 June 1979, § 33.)

51. The Court considers that the Applicant has not submitted any *prima facie* evidence nor has he substantiated an allegation indicating that he was discriminated against in the Supreme Court's proceedings.

52. In sum, the Court concludes that the facts presented by the Applicant do not justify the Applicant's allegation of a violation of his rights to equality before the law, to fair and impartial trial and to protection of property. In fact, the Applicant has neither proved nor substantiated his allegation that the conducted proceedings before the Supreme Court were unfair or arbitrary.

53. Therefore, in accordance with Article 48 of the Law and Rule 36 (1) (d) and 36 (2) (b) (d) of the Rules of Procedure, the Court finds that the Referral is manifestly ill-founded on a constitutional basis and, pursuant to Article 46 of the Law, that the Referral is inadmissible.

FOR THESE REASONS

In accordance with Article 113 (7) of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, in the session held on 5 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Arta Rama-Hajrizi

KI03/17, Applicant: Ahmet Buçaj, Constitutional review of Decision AC-I.-16-0125-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related matters (SCSC), of 20 December 2016

KI03/17, Resolution on inadmissibility, approved on 3 July 2017, published on 27 September 2017

Key words: *individual referral, civil procedure, manifestly ill-founded referral, inadmissible referral*

The Applicant did not allege that any particular constitutional rights of his had been violated, but he requested that he be paid part of 20% of proceeds and a part of proceeds from the sale of premises following the privatization of SOE Hotel Grand, currently Hotel Iliria, because he alleged that he has been a worker of the latter.

The Court considered that the Applicant had not specify any violation of concrete constitutional provisions. He did not support his allegation that any of his rights protected by the constitution had been violated. The Court found that the Applicant's referral is manifestly ill-founded, hence inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI03/17

Applicant

Ahmet Buçaj

Constitutional review of Decision AC-I.-16-0125-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related matters (SCSC), of 20 December 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 Ahmet Buçaj (hereinafter: the Applicant) from village of Nabërgjan, Municipality of Pejë.

Challenged decisions

2. The Applicant challenges Decision AC-I.-16-0125-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related matters (hereinafter, the Appellate Panel), of 20 December 2016.

Subject matter

3. The subject matter is the constitutional review of the above-stated Decision of the Appellate Panel.

4. The Applicant requests the Court to enable him to benefit from the share of proceeds of privatization of the SOE "Grand Hotel", however, he does not refer to any constitutional provision in particular.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Articles 22, 47 and 48 of Law No. 03/L-121 on the 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 10 January 2017, the Applicant submitted a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 27 February 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (presiding), Ivan Čukalović and Gresa Caka-Nimani.

8. On 2 May 2017, the Court notified the Applicant about the registration of the referral and asked him to fill in the referral form in addition to providing all relevant documents as required by Article 22.4 of the Law and Rule 29 of the Rules of Procedure.

9. On 18 May 2017, the Applicant submitted the relevant documents as required by Article 22.4 of the Law and Rule 29 of the Rules of Procedure.

10. On 25 May 2017, a copy of the Referral was sent to the Special Chamber of the Supreme Court of Kosovo.

11. On 3 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. On an unspecified date, the Applicant filed an appeal with the Special Chamber against the Kosovo Privatization Agency (hereinafter, the PAK), requesting inclusion in its final list to benefit 20 per cent of proceeds from privatization of "Grand" Hotel in Prishtina. The Applicant stated that he has worked at this SOE for 28 years and that his employment relationship was terminated by "*Serbian interim measures*".

13. On 20 January 2016, the Specialized Panel of the Supreme Court (hereinafter, the Specialized Panel) by Decision C-II.-13-0447, rejected the appeal of the applicant as inadmissible.

14. On 9 March 2016, the Applicant, for the same matter, filed a fresh appeal with the Specialized Panel, registered under no. C-II-16-0033. The Applicant had filed an appeal against that decision which was registered for the Appellate Panel under no. AC-I-16-0011.

15. On 24 May 2016, the Specialized Panel of the Supreme Court rendered Decision C-II.-0033-C0001, whereby the appeal was rejected as inadmissible on the grounds of two legal basis "*res iudicata*" and "*lis pendens*".

16. The reasoning of the above-stated decision may be summarized as follows: "*In the reasoning of the challenged decision, it is stated that the Specialized Panel, through Decision C-II.-13-0447, dated 20 January 2016, had rejected the appeal of the Appellant as inadmissible. The Appellant had filed an appeal against that decision and this appeal was registered for the Appellate Panel under no. AC-I.-16-0011. The Appellant, for the same matter, filed an appeal on 09.03.2016 and the case was registered under no. C-II.-16-0033. Since case file C-II.-13-0447 is older than case C-II.-16-0033, the second one should be rejected as inadmissible because the case is considered lis pendens. Since case C-II-13-0447 (older) is already decided, the appeal in case C-II.-16-0033 is rejected as inadmissible, as it is considered res iudicata".*

17. The Applicant filed a "Motion" against that decision, which was registered as appeal no. AC-I.-16-0125-A0001. In that submission, the Applicant requested from the Appellate Panel to recognize his right to 20 per cent of proceeds from the sale of the SOE, in which he claimed to have worked for more than 28 years.

18. On 20 December 2016, the Appellate Panel rendered Decision AC-I.-16-0125-A0001:

> *1. The appeal of the Appellant is rejected as ungrounded.*
>
> *2. Decision C-II.-16-0033-C0001 of the Specialized Panel of the SCSCK, dated 24 May 2016, is upheld.*

19. The above-stated Decision of the Appellate Panel may be summarized as follows: "*The Specialized Panel had rejected the appeal of the Appellant as inadmissible on the grounds of two legal basis – res iudicata and lis pendens. The Appellate Panel completely agrees with this decision of the Specialized Panel, too, by rejecting the submission (appeal) of the Appellant as ungrounded. By Decision C-II.-13-0447, dated 20 January 2016, the Specialized Panel had rejected the appeal of the Appellant as inadmissible, because this matter was adjudicated by the Specialized Panel, while it is pending as regards appeal AC-I.-16-0011 submitted to the Appellate Panel. The Specialized Panel has rightly decided in this way, because case file C-II.-13-0447 is older than case C-II.-16-0033, which is pending in the Appellate Panel. For these reasons, the Appellate Panel rejects the submission of the Appellant as ungrounded and upholds the challenged decision as fair and grounded*".

Applicant's allegations

20. The Applicant does not refer to a violation of any constitutional provision in particular, however, he, inter alia, states that: "*In 1999, when the war ended, Director of the Hotel and Tourism Company "Grand Hotel" - now "Iliria" Hotel, ZÇ, reinstated all the employees to work. Although I requested, he did not accept me. I was left without anything, therefore I have verbally and officially requested to be paid in respect of 20% of proceeds and the sale of facilities, but he refused to pay me. I have contributed for 28 years. He has paid all the employees except me, therefore, I was obliged to address the KTA, PAK, the Special Chamber, the Supreme Court and now I address you – the Constitutional Court of Kosovo - in order to win my rights like all my colleagues*".

Assessment of admissibility

21. The Court will examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

22. In this respect, the Court refers to Article 113.7 [Jurisdiction and Authorized Parties] 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."*

23. The Court also refers to Article 48 [Accuracy of the Referral] of the Law, which provides:

Article 48

"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".

24. The Court further takes into account Rule 36 (2) (a) of the Rules of Procedure which specify:

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

(a) the referral is not prima facie justified, or

[...]".

25. In the present case, the Court notes that the Applicant is an authorized party to submit the Referral, has exhausted all legal remedies in accordance with Article 113.7 of the Constitution and the Referral was submitted within the deadline of 4 (four) months as established in Article 49 of the Law.

26. The Court should also determine whether the Applicant has specified and substantiated the allegations filed in accordance with Article 48 of the Law.

27. The Court notes that the gist of the Applicant's complaint is that this Court should enable him: "*to benefit from 20% of proceeds from the privatization of the SOE "Grand Hotel now "Iliria".*

28. 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).

29. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See mutatis mutandis *Garcia Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-1). The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of regular courts. 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).

30. The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of the regular courts. The role of the Constitutional Court is to ensure compliance with the constitutional standards during the court proceedings before the regular courts and cannot, therefore, act as a "fourth instance court" (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment 6 of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012 and case No. KI86/16, Applicant *"BENI" Trade Company*, Resolution on Inadmissibility, of 11 November 2016).

31. The Court reiterates that its role is to assess whether the proceedings before the regular courts were fair in entirety, including the way the evidence was taken (See case *Edwards*

v. United Kingdom, No. 13071/87, Report of European Commission on Human Rights, of 10 July 1991).

32. In the light of the foregoing considerations, the Court notes that the Applicant had the benefit of adversarial proceedings; that he was able, at various stages of those proceedings, to adduce the arguments and evidence he considered relevant to his case; that he had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; that all his arguments which, viewed objectively, were relevant to the resolution of the case were duly heard and examined by the courts; that the factual and legal reasons for the impugned decisions were set out at length; and that, accordingly, the proceedings taken as a whole were fair. (See the Case of *Garcia Ruiz v. Spain*, application no. 30544/96, [GC], Judgment of 21 January 1999, paragraph 29).

33. It should be borne in mind - since this is a very common source of misunderstandings on the part of applicants - that the "fairness" required by Article 31 of the Constitution and Article 6 of the Convention is not "substantive" fairness (a concept which is part-legal, part-ethical and can only be applied by the trial judge), but "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (See the case of Star Cate - *Epilekta Gevmata and Others v. Greece*, application no. 54111/07, ECtHR, Decision of 6 July 2010).

34. The fact that the Applicant disagrees with the outcome of the case it cannot serve him as a right to raise an arguable claim on the violation of rights and freedoms guaranteed by the Constitution and the Convention (See Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 may 2012, paragraph 28).

35. In this respect, the Court notes that the Applicant's request to enable him to benefit from a share of proceeds deriving from privatization of the SOE "Grand Hotel" is not an allegation that raises constitutional issues.

36. Therefore, the Court considers that the Applicant only enumerates and generally describes the content of constitutional provisions without substantiating exactly how those provisions were violated in his case as is required by Article 48 of the Law.

37. Therefore, the Referral upon global assessment of all allegations, on a constitutional basis, is to be declared inadmissible as manifestly ill-founded, 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) (a) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (2) (a) of the Rules of Procedure, on 3 July 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Arta Rama-Hajrizi

KI 17/17 Applicant Alfred Bobaj, constitutional review of Decision Pzl. No. 182/16 of the Supreme Court of 30 January 2017

KI17/17 Resolution on Inadmissibility approved on 5 July 2017, published on 29 September 2017

Key words*: Individual referral*, *Right to Fair and Impartial Trial*, *referral manifestly ill-founded*

The Applicant in the Referral does not challenged any specific Article of the Constitution of the Republic of Kosovo, nor any Article of the European Convention on Human Rights. Based on the Referral, the Court may notice that the Applicant considers that the Judgment of the Supreme Court has allegedly violated the rights and freedoms guaranteed by Article 31 (Right to Fair and Impartial Trial) of the Constitution and Article 6 of the ECHR.

The Court noted that the Applicant dissatisfied with a length of the imposed sentence which, according to the plea agreement, voluntarily agreed with, initiated before the Court of Appeal, and later the Supreme Court the allegations referred to the existence of *„new circumstances that could affect the length of the imposed sentence.“*

The Court fined that the regular courts completed an extensive and comprehensive presentation of evidence where the evidence presented by the defense and prosecution was adduced, and that imposed sentence resulted from a plea agreement.

Court concluded that the Referral is manifestly ill-founded and is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI17/17

Applicant

Alfred Bobaj

Constitutional review
of Decision Pzl. No. 182/16 of the Supreme Court
of 30 January 2017

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 Alfred Bobaj, from village Korishe, Municipality of Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision [Pzl. No. 182/16] of the Supreme Court of 30 January 2017, in relation with the Decision PAKR. No. 87/16 of the Court of Appeal, of 15 March 2016 and Judgment [P. No. 82/15] of the Basic Court in Prizren, of 05 January 2016.

Subject matter

3. The Applicant does not specifically state what rights and freedoms guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and by the European Convention on Human Rights (hereinafter: ECHR) have allegedly been violated by the Judgment of the Supreme Court. However, the crux of the Applicant's Referral is related to fair trial, which is guaranteed by Article 31 of the Constitution (Right to Fair and Impartial Trial) and Article 6 (Right to a fair trial) of the ECHR.

Legal basis

4. The Referral is based on Article 113.7 of 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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 21 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 20 March 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

7. On 28 March 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 5 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility.

Summary of facts

9. On 21 May 2008, in the course of an attempted robbery, one person was killed.

10. On 29 January 2014, due to a reasonable suspicion that the Applicant had committed the criminal offense of aggravated murder under Article 147, paragraph 1, sub paragraph 7, in conjunction with Article 23 of the Criminal Code of Kosovo, the Basic Prosecution in Prizren - Serious Crimes Department, filed the Indictment PP. No. 4/2013.

11. In the hearing before the Basic Court, the state prosecutor made a proposal for negotiating a guilty plea. Based on the case file it follows that the proposal was supported by the defense counsel of the accused and the accused.

12. On 31 December 2015, a hearing was held in the Basic Court on the guilty plea agreement in the presence of all parties to the proceedings, and the agreement was officially approved by the Municipal Court.

13. On 05 January 2016, the Basic Court rendered Judgment [P. No. 82/2015] which found the Applicant guilty of a criminal offense and sentenced him to imprisonment of 17 (seventeen) years, in which was counted the time served in detention on remand.

14. In the reasoning of the Judgment [P. No. 82/2015], the Basic Court stated, "*In measuring the type and length of sentence, taking as the basis the recommendations made in the guilty plea agreement, the court took into account all the circumstances which affect the type and the length of sentence under Articles 73 and 74 of the Criminal Code, from aggravating circumstances for the accused (as it is about a returnee recidivist who has already been convicted for criminal offenses), the court also assessed the degree of social danger and protected values, as well as mitigating circumstances ...*"

15. The Applicant filed an appeal with the Court of Appeals of Kosovo - Serious Crimes Department (hereinafter: the Court of Appeals), due to the length of sentence, with the proposal that the judgment of the Basic Court be modified, so that he be imposed a more lenient punishment than the one agreed by plea agreement.

16. The Appellate Prosecution filed a response to the Applicant's appeal, in which it proposed to reject the appeal as ungrounded.

17. On 15 March 2016, the Court of Appeal rendered Decision [PAKR. No. 87/16] which rejected the Applicant's appeal as inadmissible, reasoning that, *"In the plea agreement submitted in writing before the court, among other things, the parties envisaged also the provision which specified the limits of sentence for criminal offenses for which the accused pleaded guilty - it is understood on the basis of plea agreements where the parties have agreed also on the limits of punishment, so that the sentence that will be imposed by the court will be the imprisonment of 17 (seventeen) years."*

18. The Applicant submitted to the Supreme Court a request for extraordinary mitigation of sentence on the grounds that, *"... after the judgment became final, new circumstances appeared which did not exist during the time of rendering judgment, which could affect the length of sentence ..."*

19. On 30 January 2017, the Supreme Court rendered Decision [Pzd. No. 182/2016], which rejected the request for extraordinary mitigation of punishment as ungrounded. The Supreme Court reasoned that, *"The court considers that the circumstances specified in the request, as far as the overall economic condition, could be considered as new circumstances that were not assessed when calculating the sentence. However, they are not of such a nature that would justify the extraordinary mitigation of punishment, taking into account the gravity of the offense and the degree of criminal liability of the convict, and particularly the manner of committing the criminal offence."*

Applicant's allegations

20. The Applicant alleges that the courts did not take into account the newly created circumstances that could affect the length of sentence and if they were known at the time of imposing the imprisonment sentence.

21. The Applicant requests the Court, *"[...] to remand the case for retrial from the very beginning."*

Admissibility of the Referral

22. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, as further specified in the Law and the Rules of Procedure.

23. 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."*

24. The Court notes that the Applicant is an authorized party, the Referral was submitted in accordance with the deadlines specified in Article 49 of the Law, and the Applicant has exhausted all legal remedies.

25. However, the Court also refers to Article 48 of the Law [Accuracy of the Referral], which stipulates that:

> *"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."*

26. The Court further refers to Rule 36 (1) d) and (2) (b) of the Rules of Procedure, which provides:

> *"(1) The Court may consider a referral if:*
>
> *[...]*
>
> *d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
>
> *[...]*
>
> *b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights."*

27. The Court recalls that the Applicant has not stated what rights were directly violated by the Judgment of the Supreme Court, however, the Applicant in the Referral stated that *"the courts did not take into consideration the new circumstances that could affect the sentence,"* by which he raises the issue of guarantees provided by Article 31 of the Constitution and Article 6 of ECHR.

28. The Court notes 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."*

29. In this regard, the Court recalls that the European Court of Human Rights (hereinafter: the ECtHR) has found that, *"the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law" (*see: *mutatis mutandis, García Ruiz v. Spain* [GC], No. 30544/96, paragraph 28, European Court for Human Rights [ECtHR] 1999-1).

30. The Court also reiterates that the complete determination of the factual situation is within the full jurisdiction of the regular courts and that the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Court cannot act as "fourth instance court". (See ECtHR Judgment of 16 September 1996, *Akdivar v. Turkey*, No. 21893/93, para. 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, of 5 April 2012).

31. In this regard, the Court states that in determining the grounds of the Applicant's appealing allegations it will comply with the principle established in the ECHR case law according to which *"the fairness of a proceeding is assessed on the basis of the proceedings as a whole" (*see ECtHR*, Barberá, Messegué and Jabardo v. Spain,* Judgment of 6 December 1988, series A, number 146, paragraph 68).

32. Accordingly, in the present case, the Court notes that the Special Prosecution proposed to the Applicant an agreement to plead guilty to the criminal offence he is suspected of having committed, to which he and his attorney agreed, and the Court concluded this based on the examination of the case file.

33. The Court further notes that all the parties to the proceedings were familiar with the content of the plea agreement, as well as the restrictions and conditions which such an agreement entails.

34. The Court also notes that all the parties to the proceedings have had the opportunity to negotiate the terms, modality and the length of the prescribed punishment, with which, according to the case file, they agreed in the agreement. The parties could also voluntarily refrain from signing such an agreement if they did not agree with the conditions provided therein.

35. The Court further notes that such an agreement reached in writing was proposed to the first instance court, which then acted in accordance with the provisions of Article 233, paragraph 18 of CPCK, where it determined that, *"in the present case, the Applicant understood the nature and consequences of a guilty plea, that the guilty plea was committed voluntarily after sufficient consultations with his defense counsel."*

36. The Court also notes that the Applicant was dissatisfied with the length of the imposed prison sentence which, according to the plea agreement, he voluntarily agreed to. The Applicant appealed to the Court of Appeals, and later the Supreme Court, on the basis of alleged, *"new circumstances that could affect the length of the imposed sentence."*

37. Precisely those allegations were dealt with by the Court of Appeals and the Supreme Court, where they concluded that, *"... the new circumstances are not of such a nature that would justify the extraordinary mitigation of punishment ..."*

38. The Court reiterates that it is beyond its competence to assess the quality of the conclusions of the regular courts regarding the assessment of evidence and interpretation of laws, unless they are manifestly arbitrary. The Court has already assessed that the regular courts completed an extensive and comprehensive presentation of evidence where the evidence presented by the defense and prosecution was adduced, and that the imposed sentence resulted from a plea agreement.

39. The Court reiterates that the task of the Court is to assess whether the regular courts' relevant proceedings were in any way unfair or arbitrary (see: *mutatis mutandis*, ECtHR cases:, *Shub v. Lithuania*, Decision on admissibility, application of 30 June 2009, paragraph 16; *Edwards v. United Kingdom*, Judgment of 16 December 1992, paragraph 34; *Barberá, Messegué and Jabardo v. Spain,* Judgment of 6 December 1988, paragraph 68).

40. In this respect, the Court considers that nothing in the case presented by the Applicant indicates that the proceedings before the regular courts were unfair or arbitrary such that the Constitutional Court would be convinced that the essence of the right to fair and impartial trial was impaired or that the Applicant was denied any procedural guarantees, which would lead to a violation of the right enshrined on Article 31 of the Constitution and paragraph 1 of Article 6 of the ECHR.

41. The Court recalls that the Applicant is obliged to substantiate his constitutional allegations and submit *prima facie* evidence indicating a violation of his rights guaranteed by the Constitution and the ECHR. That assessment is in line with the jurisdiction of the Court (see: case of the Constitutional Court No. KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

42. In sum, the Court considers that the Applicant did not substantiate his allegations nor has he submitted any *prima facie* evidence indicating a violation of his rights guaranteed by the Constitution and the ECHR.

43. Therefore, the Referral is manifestly ill-founded on a constitutional basis and is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 47 of the Law and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, in the session held on 5 July 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 paragraph 4 of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI127/16 and KI35/17, Applicant: Private Trade Enterprise "Riar-Alfis", Constitutional review of Decision IV. C. no. 408/15 of the Basic Court in Prishtina, of 7 July 2016, Decision GJA. no. 1214/2016 of the Basic Court in Prishtina, of 25 July 2016, and Decision Ac. no. 2685/17 of the Court of Appeals of Kosovo, of 31 January 2017

KI127/16 and KI35/17, Resolution on inadmissibility, approved on 5 September 2017, published on 12 October 2017

Key words: *individual referral, civil procedure, equality before the law, right to fair and impartial trial, right to legal remedies, prohibition of discrimination, protection of property, premature referral, manifestly ill-founded referral, inadmissible referral*

Applicant's allegations in Referrals KI127/16 and KI35/17, were essentially identical and he alleged that his right to fair trial and equality before the law had been violated because the regular courts had allowed the counter-enforcement proceedings to take precedence over the retrial on the merits of the contested proceedings on the fundamental dispute. In addition, the Applicant requests that the Court annul the Decision of the Basic Court in Prishtina–Department for Commercial Matters, and order the court to initiate the retrial on the contested matter and order the Basic Court in Prishtina–Civil Division, to terminate the counter-enforcement proceedings.

As regards the Decision of the first-instance court being challenged, the Court considered that the Applicant's Referral was premature because he had not exhausted the legal remedies provided by law. As regard the decision of the second-instance court being challenged, the Referral was declared inadmissible as manifestly ill-founded, because the Applicant had not submitted prima facie any item of evidence that would demonstrate that his rights guaranteed by the Constitution had been violated.

RESOLUTION ON INADMISSIBILITY

in

Cases No. KI127/16 and KI35/17

Applicant

Private-Trade Enterprise „Riar-Alfis“

Constitutional review of Decision IV. C. No. 408/15 of 7 July 2016 of the Basic Court in Prishtina, Decision GJA. No. 1214/2016 of 25 July 2016 of the Basic Court in Prishtina, and Decision Ac. No. 2685/17 of 31 January 2017 of the Court of Appeals of Kosovo

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 Applicant of both Referrals KI127/16 and KI35/17 is the Private-Trade Enterprise “Riar-Alfis” from Prishtina represented by its owner Rifat Sadiku (hereinafter: the Applicant).

Challenged decision

2. The Applicant in Referral KI127/16 challenges Decision IV. C. No. 408/15 of 7 July 2016 of the Basic Court in Prishtina – Department for Commercial Matters, and Decision GJA. No. 1214/2016 of 25 July 2016 of the Basic Court in Prishtina, which were served on him on 21 September 2016.

3. The Applicant in Referral KI35/17 challenges Decision Ac. No. 2685/17 of 31 January 2017 of the Court of Appeals of Kosovo (hereinafter: Court of Appeals).

Subject matter

4. The subject matter is the constitutional review of the challenged decisions. These decisions allegedly have violated the Applicant’s rights guaranteed by Articles 21 [General Principles], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Articles 6 [Right to a fair trial], 13 [Right to an effective remedy], 17 [Prohibition of abuse of rights], 18 [Limitation on use of restrictions on rights] and Article 1 of Protocol 1 [Protection of property] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on Articles 21.4 and 113.7 of 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 4 November 2016, the Applicant submitted Referral KI127/16 to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 5 December 2016, the Applicant submitted additional documents regarding the disciplinary proceeding against the trial judge, and requested that the additional documents be included into the Referral.

8. On 14 December 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Bekim Sejdiu.

9. On 22 December 2016, the Court notified the Applicant about the registration of Referral KI127/16, and sent a copy of it to the Basic Court in Prishtina-Department for Commercial Matters.

10. On 30 March 2017, the Applicant submitted another Referral to the Court, registered as Referral KI35/17.

11. On 25 April 2017, the Court notified the Applicant about the registration of Referral KI35/17, and sent a copy of it to the Court of Appeals.

12. On 28 April 2017, the President of the Court ordered the joinder of Referral KI35/17 with Referral KI127/16 in accordance with Rule 37 (1) of the Rules of Procedure. According to the order, the Judge Rapporteur and the composition of the Review Panel in both cases (KI127/16 and KI35/17) remain the same, as decided by her Decision No. KSH. KI127/16.

13. On 08 May 2017, the Court notified the Applicant, the Basic Court in Prishtina and the Court of Appeals about the joinder of Referrals KI127/16 and KI35/17.

14. On 05 September 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral

Summary of facts

15. The facts in relation to both Referrals concern the same series of judicial proceedings.

The contested proceedings

16. On 30 October 2008, the Applicant, entered into an agreement with the Limited Liability Company "Interpress R. Company" (hereinafter: the LLC "Interpress R. Company"), in the capacity of an investor, for the construction and renovation of the former supermarket "*Voćar*".

17. On 16 April 2009, the Applicant filed a claim with the District Commercial Court in Prishtina, requesting the fulfillment of the contractual obligations. LLC "Interpress R. Company" filed a counterclaim with the same court.

18. On 7 September 2011, the District Commercial Court in Prishtina by Judgment I.C. no. 269/2009 approved the Applicant's statement of claim and ordered LLC "Interpress R. Company", to pay for the work performed by the Applicant, to the amount of 41.250, 00 Euros plus an interest rate of 3.5% from the date of filing the claim, and the costs for the proceedings in the amount of 2,532.00 Euros.

19. The District Commercial Court in Prishtina by the same Judgment rejected the Applicant's statement of claim in respect of the lost profit in the amount of 87,986.25 Euros, and also rejected the counterclaim filed by LLC "Interpress R. Company" in the amount of 102.477.00 Euros.

20. Both litigating parties filed an appeal with the Court of Appeals against Judgment I. C. no. 269/2009 of the District Commercial Court in Prishtina.

21. On 9 October 2014, the Court of Appeals by Judgment Ae. No. 384/2012 partially approved the appeal of the LLC "Interpress R. Company" with respect to the costs of proceedings and reduced the costs of the proceedings to 844.00 Euros, while in other parts upheld Judgment IC no. 269/2009 of the District Commercial Court in Prishtina.

22. The LLC "Interpress R. Company" filed a request for revision with the Supreme Court of Kosovo against the Judgment of the Court of Appeals.

23. On 19 August 2015, the Supreme Court of Kosovo by Decision E Rev. No. 17/2015 approved as grounded the revision of the respondent LLC „Interpress R. Company", concluding that the earlier judgments were rendered with existence of essential violations of the contested procedures because the respondent was represented by an unauthorized person. The Supreme Court ordered that,

> *"... Judgment Ae.No.384/2012 of the Court of Appeals of Kosovo of 09.10.2014 and Judgment C. No. 269/2009 of the District Commercial Court in Prishtina of 07.09.2011, are annulled and the case is remanded for retrial to the first instance court."*

24. On 7 July 2016, in the retrial, the Basic Court in Prishtina-Department for Commercial Matters, in the preparatory hearing, rendered Decision IV. C. No. 408/15 by which it approved the request of the LLC „Interpress R. Company" to suspend the proceedings in the contested procedure pending the completion of proceedings against the enforcement according to Decision E. No. 1877/15 of 25 February 2016. The Basic Court reasoned that the proceedings against the enforcement are a preliminary issue which must be resolved before continuing with the contested proceedings.

The enforcement proceedings and counter-enforcement proceedings

25. On an unspecified date, the Applicant, based on Judgment Ae. No. 384/2012 of the Court of Appeals, initiated the enforcement proceedings before a private enforcement agent, as the request for revision submitted by the LLC "Interpress R. Company" as an extraordinary legal remedy does not stay the execution of the Judgment of the Court of Appeals.

26. The private enforcement agent by Writ of enforcement P. no. 19/15 approved the enforcement based on Judgment Ae. No. 384/2012 of the Court of Appeals.

27. On 20 November 2015, the LLC "Interpress R. Company" submitted a request for counter-enforcement as based on the request for revision, the Supreme Court by Decision E Rev. No. 17/2015 had annulled „*Judgment Ae. No. 384/2012 of the Court of Appeals of Kosovo of 09.10.2014, and of the District Commercial Court in Prishtina C. No. 269/2009 of 07.09.2011*."

28. On 9 December 2015, the Basic Court in Prishtina by Conclusion E No. 1877/15 requested the Applicant to comment on the request for counter-enforcement.

29. On 11 January 2016, the Applicant filed an objection to the proposal for counter-enforcement.

30. On 27 January 2016, the Basic Court in Prishtina held an oral hearing on the counter-enforcement procedure.

31. On 25 February 2016, the Basic Court in Prishtina by Decision E No. 1877/15 partially approved the proposal for counter-enforcement and obliged the Applicant, "*to return the amount of €51,999.54 which were taken from the creditor based on an enforcement procedure conducted before the private enforcement agent as an enforcement body, with 8% interest from 19.08.2015 until the means are returned, and to pay the amount of 260.00 € on behalf of the costs of the enforcement procedure within time limit of 7 days from the day of serving this decision.*"

32. On 25 February 2016, the Basic Court in Prishtina by another Decision E No. 1877/15 rejected the objection of the counter-enforcement debtor (the Applicant) and continued with the counter-enforcement procedure.

33. The Applicant filed an objection against both decisions of the Municipal Court in Prishtina.

34. On 09 June 2016, the Basic Court in Prishtina by Decision E. No. 1877/2015 rejected the objections of the Applicant.

35. The Applicant filed an appeal with the Court of Appeals against Decision E. No. 1877/2015 of 9 June 2016 of the Municipal Court in Prishtina.

36. On 31 January 2017, the Court of Appeals by Decision Ac. No. 2685/2016 rejected as ungrounded the Applicant's appeal and upheld Decision E. No. 1877/2015 of 09.06.2016 of the Basic Court in Prishtina.

The procedure for recusal of a judge and disciplinary proceedings

37. On 11 July 2016, the Applicant filed a request for recusal of Judge M.P. from the proceedings and adjudication in the retrial in the contested procedures before the Basic Court in Prishtina, with the reasoning that he rendered:

> *"... the decision on terminating the procedure in this contested matter of 07.07.2016 until the counter-enforcement procedure is completed, the latter is in contradiction with the provisions of Article 277 and 278 of LCP since by no condition foreseen in these provisions cannot be justified the legality of this decision."*

38. On 25 July 2016, the Basic Court in Prishtina by Decision GJA. No 1214/2016 rejected as ungrounded the Applicant's request for recusal of Judge M.P. from the proceedings.

39. On 29 August 2016, the Applicant filed a request for initiation of disciplinary proceedings with the Office of Disciplinary Counsel against Judge M.P.

40. On 7 November 2016, the Office of Disciplinary Counsel by letter ZPD/16/KB/892 informed the Applicant that it had initiated the disciplinary investigation (which is ongoing) against Judge M.P. regarding the manner of proceeding in the Applicant's case IV. C. No. 408/2015.

Applicant's allegations in both Referrals

41. The Applicant's allegations in relation to both Referrals are substantially identical. Fundamentally, he alleges that his rights to a fair trial and equality of treatment before the law have been violated because the regular courts have allowed the counter-enforcement proceedings to take precedence over the retrial on the merits of the contested proceedings on the fundamental dispute.

42. In Referral KI 127/16, the Applicant specifically alleges that this action by the regular courts constitutes a violation of Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution.

43. In Referral KI35/17, the Applicant repeats the same allegations in relation to the Constitution and also alleges violations of Articles 6 [Right to a fair trial], 13 [Right to an effective remedy], 17 [Prohibition of abuse of rights], 18 [Limitation on use of restrictions on rights] and Article 1 of Protocol 1 [Protection of property] of the ECHR.

44. In sum, the Applicant considers that the counter-enforcement proceedings are not a preliminary issue in relation to the contested proceedings, but that the contested proceedings are a preliminary issue in relation to the enforcement procedure. Therefore, the Applicant claims that the procedures applied by the regular courts are in violation of the law, and this places the Applicant in an unequal position vis-à-vis the respondent party.

45. Because the counter-enforcement proceedings are being decided first, the Applicant claims that this violates his right to a fair hearing on the merits of his contested proceedings.

46. Furthermore, because the judge had decided that the contested proceedings were secondary to the counter-enforcement proceedings, in violation of the law, the Applicant considers that this is evidence of bias against him on the part of that judge. The Applicant's request for recusal of this judge was refused, and therefore the Applicant alleges that he cannot receive a fair trial by this judge.

47. Regarding the constitutional review of Decision IV. C. No. 408/15 of the Basic Court in Prishtina of 7 July 2016, suspending the contested proceedings, the Applicant requests the Court:

> *"... 3) To **ANNUL** Decision of 7 July 2016 in the contested matter IV. C. No. 408/15, of the Basic Court in Prishtina – Department for Commercial Matters, which violates Article 24, item 1, Articles 31, 32 and 54 of the Constitution of the Republic of Kosovo and Article 6, item 1 and 13 of the ECHR.*

*4) To **ORDER** the Basic Court in Prishtina – Department for Commercial Matters to start the retrial in the contested matter IV. C. No. 408/15 according to Decision Rev. No. 17/2015, of 19 August 2015, of the Supreme Court of Kosovo, based on Rule 74.1 of Rules of Procedure.*
*5) To **ORDER** the Basic Court in Prishtina – Department for Commercial Matters –Civil Division to terminate the procedure of counter-enforcement according to Decision E. No. 1877/15, of 9 June 2016, until completion of contested procedures of the retrial by a final Decision according to Decision E. Rev. No. 17/2015, of 19 August 2015, of the Supreme Court of Kosovo because the contested procedure is a preliminarily matter of the contest and the Decision E. No. 1877/15, of 9 June 2016, violates Article 24, item 1, Article 31, 32 and 54 of the Constitution of the Republic of Kosovo and Article 6, item 1 and 13 of the ECHR."*

48. Regarding the constitutional review of Decision GJA. No. 1214/2016 of the Basic Court in Prishtina of 25 July 2016, rejecting the request for recusal of a judge, the Applicant requests the Court:

*"..3) To **ANNUL** Decision GJA. No. 1214/2016, of 25.07.2016 of the Basic Court in Prishtina – Department for Commercial Matters, which violates Article 24, item 1, Articles 31, 32 and 54 of the Constitution of the Republic of Kosovo and Article 6 and 13 of the ECHR.*
*4) To **APPROVE** the request of the Applicant for recusal of M.P. - Judge in the Basic Court in Prishtina-Department for Commercial Matters from proceeding and decision upon the contested legal matter IV. Ek. No. 408/2015, as grounded."*

49. Regarding the constitutional review of Decision Ac. No. 2685/17 of 31 January of the Court of Appeals, allowing the counter-execution proceedings, the Applicant requests the Court to:

"*TO ANNUL Decision Ac. No. 2685/17 which caused him irreparable damage.*
TO HOLD that the Applicant' rights and freedoms guaranteed by the Constitution of the Republic of Kosovo, defined under Article 21 item 1), 2), 3), Article 24, item 1), Articles 31, 46 and 54 and provisions of the ECHR defined under Article 6.1, 13, and Article 1 of Protocol 1 and Articles 14, 17 and 18, have been violated by the Decision.
[...]
"

Assessment of the admissibility

50. The Court will examine whether the Applicant has fulfilled the admissibility requirements established in the Constitution, in the Law and the Rules of Procedure.

51. Firstly, the Court refers to Article 113 [Jurisdiction and Authorized Parties], paragraphs 1 and 7, of the Constitution, which provides that,

"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."

52. Then the Court refers to Article 21 [General Principles], paragraph 4, of the Constitution which provides that,

"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

53. The Court also refers to Articles 47 [Individual Requests], paragraph 2, of the Law, which provides that:

"2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

54. The Court further refers to Article 48 [Accuracy of the Referral] of the Law, which provides that,

"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".

55. Furthermore, the Court takes into account Rule 36, paragraph 1 (b) and (d), and paragraph 2 (a) of the Rules of Procedure, which foresee that,

"(1) The Court may consider a referral if:
[...]
b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted, or
[...]
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:
(a) the referral is not prima facie justified, or [...]."

56. The Court first considers that, pursuant to Article 21.4 of the Constitution, which provides that *"fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable,"* the Applicant is entitled to submit a constitutional complaint, invoking constitutional rights, valid for individuals and applicable as well for legal persons such as the Applicant (see, (see Resolution on Inadmissibility, *AAB-RIINVEST University L.L.C. Prishtina v. the Government of the Republic of Kosovo,* case KI41/09, of 21 January 2010).

57. In the present case, the Court considers that the Applicant is an authorized party, and has filed the Referral within the prescribed deadline. However, the Court should further assess if the requirements provided by Articles 47 and 48 of the Law and foreseen by Rule 36 of the Rules of Procedure have been met.

58. The Court will assess the allegations against each of the three challenged decisions of the regular courts separately.

A. Regarding Decision IV. C. No. 408/15 of the Basic Court in Prishtina of 7 July 2016

59. The Court recalls that the Applicant challenges Decision IV. C. no. 408/15 of the Basic Court in Prishtina of 7 July 2016, suspending the contested proceedings, on the basis of the argument that this decision was in violation of the law, and thereby violated his rights to a fair trial on the merits of his contested proceedings.

60. The Court notes that the Basic Court suspended the contested proceedings pending a determination on the counter-enforcement proceedings.

61. As such, the Court notes that the contested proceedings will resume once the counter-enforcement proceedings have been concluded.

62. In this respect, the Court recalls that it may only accept Referrals once the Applicant has exhausted all legal remedies provided by the law.

63. The rationale for the exhaustion rule, as in the present case, is to afford the regular courts the opportunity to put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order shall provide an effective legal remedy for the violation of the constitutional rights (see Resolution on Inadmissibility, *AAB-RIINVEST University L.L.C. Prishtina v. the Government of the Republic of Kosovo,* case KI41/09, of 21 January 2010, and see *mutatis mutandis*, ECHR *Selmouni vs. France*, No. 25803/94, decision of 29 July 1999).

64. In the present case, the Court notes that the challenged decision is a preliminary determination, and that the contested proceedings will continue on the merits of the Applicants rights and obligations once the counter-enforcement proceedings have been concluded.

65. The Court recalls that on 31 January 2017, the Court of Appeals by Decision Ac. No. 2685/2016 rejected as ungrounded the Applicant's appeal and upheld Decision E. No. 1877/2015 of 09.06.2016 of the Basic Court in Prishtina on the counter-enforcement proceedings.

66. The Court notes that, therefore, the proceedings before the Basic Court on the substance of the Applicant's claims can now continue.

67. In these circumstances, the Court considers that the proceedings are ongoing and the Applicant's case has not yet reached a final decision by a court.

68. Therefore, the Court concludes that the Applicant's allegations in relation to the challenged Decision IV. C. No. 408/15 of the Basic Court in Prishtina of 7 July 2016, are premature, because the Applicant has not exhausted all legal remedies available under the law.

B. Regarding Decision GJA. No. 1214/2016 of the Basic Court in Prishtina of 25 July 2016

69. Regarding the constitutional review of Decision GJA. No. 1214/2016 of the Basic Court in Prishtina of 25 July 2016, rejecting the request for recusal of a judge, the Court recalls that the Applicant alleges that the judge who ordered the suspension of the contested proceedings was biased against the Applicant.

70. The Court recalls that where there are questions about the impartiality of a judge, the ECtHR has identified both a subjective test, where the judge is personally biased against the Applicant, and an objective test.

71. The Court recalls the ECtHR case law which states that, *"Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which*

the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. (see ECtHR Judgment of 24 May 1989, *Hauschildt v. Denmark*, No. 10486/83, paragraph 48)."

72. The Court notes that the Applicant had submitted a request for disciplinary proceedings against the challenged judge.

73. The Court further notes that regarding this disciplinary complaint, the Office of Disciplinary Counsel (letter ZPD/16/kb/892) informed the Applicant that it had initiated a disciplinary investigation against the challenged judge regarding the manner of handling the Applicant's case. The Court notes that this disciplinary investigation is still ongoing.

74. As such, the Court considers that the question of potential bias of the challenged judge has not yet been determined by the competent authority.

75. The Court notes that, once these disciplinary proceedings have been concluded, it will remain open to the Applicant to challenge the decisions of this judge for reasons of bias, because of how the contested proceedings were handled.

76. In these circumstances, the Court considers that the proceedings regarding the fundamental issue of the impartiality of the judge have not yet reached a final decision by a court.

77. Therefore, the Court concludes that the Applicant's allegations in relation to the challenged Decision GJA. No. 1214/2016 of the Basic Court in Prishtina of 25 July 2016 are premature, because the Applicant has not exhausted all legal remedies available under the law.

C. Regarding the constitutional review of Decision Ac. No. 2685/17 of 31 January 2017 of the Court of Appeals

78. Regarding the constitutional review of Decision Ac. No. 2685/17 of 31 January 2017 of the Court of Appeals, allowing the counter-execution proceedings, the Court recalls that the Applicant alleges that this is based upon an incorrect application of the law, and causes him irreparable damage.

79. The Court notes that the Applicant alleges that the Court of Appeals applied an "*erroneous linguistic and legal interpretation"* of Article 54, paragraph 1.1, of the Law on Enforcement Procedure.

80. The Court recalls that the Court of Appeals reasoned its decisions on this point, stating that,

> *"... The Court of the first instance correctly ascertained the fact that the conditions for imposing the counter-execution have been fulfilled, pursuant to Article 54, paragraph 1 and item 1.1 of the LEP, which defines that: "1. Debtor is entitled during same enforcement procedure, and after the end of enforcement procedure, to request the court the issuance of a decision ordering the enforcement creditor to return the items taken based on enforcement procedure, if: 1.1. enforcement document by a final decision is overruled, amended, annulled, dismissed or was concluded in another way that it is without legal effect; and in the present case by Decision Rev. nr. 17/2015, of the Supreme Court of Kosovo, of 19 August 2015, the*

execution document - Judgment C. nr. 269/2009, of 7 September 2011, and Judgment Ac. Nr. 384/2012, of 9 October 2014, based on which the execution was applied before the private enforcement agent, have been annulled by the Supreme Court."

81. 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). When alleging violation of the rights and freedoms guaranteed by the Constitution are done by a public authority, the Applicant must present reasoned and convincing arguments.

82. The Court considers that the Applicant had the opportunity to present his factual and legal arguments on the case before the regular courts. His arguments were duly heard and examined by the regular courts, and the proceedings as a whole were fair and the rendered decisions were well reasoned.

83. The Court considers that the mere fact that the Applicant does not agree with the decisions of the regular courts cannot of itself raise an arguable claim of a breach of the right to fair and impartial trial (see: *mutatis mutandis* case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005)

84. The Court recalls that the Applicant has made allegations that there has been a violation of his constitutional rights, but he did not present any *prima facie* evidence indicating how his constitutional rights were violated (see: ECtHR Judgment of 31 May 2005, V*anek v. Slovak Republic,* no. 53363/99).

85. The Court considers that the Applicant has not substantiated his allegations that the relevant proceedings were in any way unfair or arbitrary, and that the challenged decision has violated the Applicant's constitutional rights and freedoms guaranteed by the Constitution and the ECHR (see: *mutatis mutandis*, ECtHR, Decision of 30 June 2009, *Shub v. Lithuania*, No. 17064/06).

86. Therefore, the Court concludes that the Applicant's allegations against the Decision Ac. No. 2685/17 of 31 January 2017 of the Court of Appeals is inadmissible as manifestly ill-founded on a constitutional basis.

Conclusions

87. Regarding the Applicant's allegations against Decision IV. C. No. 408/15 of 7 July 2016 of the Basic Court in Prishtina and Decision GJA. No. 1214/2016 of 25 July 2016 of the Basic Court in Prishtina, the Court concludes that the proceedings before the regular courts have not been completed.

88. Therefore, the Applicant's allegations regarding these two Decisions are premature and are to be rejected as inadmissible in accordance with Article 47.2 of the Law and Rule 36 (1) (b) of the Rules of Procedure, because the Applicant has not exhausted all legal remedies provided by law in order to be able to submit a Referral to the Constitutional Court.

89. Regarding the Applicant's allegations against Decision Ac. No. 2685/17 of 31 January 2017 of the Court of Appeals of Kosovo, the Court concludes that the Applicant has not substantiated his allegations.

90. Therefore, the Applicant's allegations are to be rejected as inadmissible as manifestly ill-founded in accordance with Article 48 of the Law and Rule 36 (2) a) of the Rules of Procedure, because the Applicant did not provide any *prima facie* evidence which would indicate a violation of constitutional rights.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Articles 21 and 113. of the Constitution, Articles 47 and 48 of the Law, and Rules 36 (1) (b) and 36 (2) (a) of the Rules of Procedure, in the session held on 05 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Arta Rama-Hajrizi

KI49/17, Applicant: Imer Syla, Constitutional review of Judgment Pml. No. 227/2016 of the Supreme Court of Kosovo of 3 October 2016

KI49/17, Resolution on inadmissibility of 7 September 2017, published on 12 October 2017

Key words: *Individual referral, out of time*

By its Judgment, the Supreme Court of Kosovo rejected the Applicant's request for protection of legality filed against the Decision of the Court of Appeals of Kosovo as ungrounded.

The Applicant claimed before the Constitutional Court that his rights guaranteed by the Constitution, namely the right to fair and impartial trial, had been violated, alleging that he was found guilty of having committed the criminal offense due to the erroneous determination of factual situation by the regular courts.

The Court found that the Referral was inadmissible because the admissibility criteria, provided for in Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36 (1) (c) of the Rules of Procedure, had not been met. The Referral was declared inadmissible as being filed out of time.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI49/17

Applicant

Imer Syla

Constitutional review of Judgment Pml. No. 227/2016 of the Supreme Court of Kosovo of 3 October 2016

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 Imer Syla, residing in Ferizaj (hereinafter: the Applicant), who is represented by Labinota Qosa-Ilazi.

Challenged decision

2. The Applicant challenges Judgment [Pml. No. 227/2016] of the Supreme Court of Kosovo of 3 October 2016, which was served on the Applicant on 17 November 2016.

Challenged decision

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly has violated the Applicant's rights guaranteed by Article 30 [Rights of the Accused], Article 31 [Right to Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113 [Jurisdiction and Authorized Parties], paragraphs 1 and 7 of the Constitution, Article 47 [Individual Requests] of Law No. 03/L-121 on the 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

5. On 20 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 24 April 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 28 April 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 7 September 2017, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On 11 March 2013, the Basic Prosecution in Ferizaj filed an indictment [PP. II. no. 847-5/2010] against the Applicant for committing the criminal offense "*causing general danger"* under Article 291, of the Criminal Code of Kosovo (hereinafter: the CCK).

10. On 30 July 2014, the Basic Court in Ferizaj - General Department, following the guilty plea by the Applicant during the initial hearing, by Judgment [P. No. 635/13] found the Applicant guilty, and imposed on him a fine and imprisonment sentence of two (2) years, stating that the sentence will not be executed within a period of 2 (two) years, provided that the accused, respectively the Applicant, does not commit any other criminal offense during this period.

11. On 10 March 2016, the Applicant filed a request for reopening of the criminal proceedings with the Basic Court in Ferizaj, against Judgment [P. No. 635/13] of 29 July 2014, of the Basic Court in Ferizaj, alleging erroneous determination of factual situation, the existence of new evidence, and arguing that the Applicant "*plead guilty without understanding the nature of the criminal offense*", and that consequently, the legal requirements for guilty plea have not been met during the initial hearing.

12. On 14 April 2016, the Basic Court in Ferizaj, by Decision [PK. No. 42/16] rejected the Applicant's request as inadmissible, assessing that the facts and evidence presented do not provide legal basis to allow the reopening of the criminal proceedings.

13. On 18 April 2016, the Applicant filed an appeal against the Decision [PK. No. 42/16] of the Basic Court in Ferizaj, of 14 April 2016, claiming a violation of the fundamental right of the party provided for in the Criminal Procedure Code of Kosovo (hereinafter: the CPCK).

14. On 18 July 2016, the Court of Appeals of Kosovo, by Decision [PN. No. 485/2016], rejected as ungrounded the Applicant's appeal. The Court of Appeals in its Decision gave detailed responses to all the Applicant's allegations.

15. On 17 August 2016, the Applicant filed a request for protection of legality against Decision [PN. No. 485/2016] of the Court of Appeals of Kosovo, of 18 July 2016, with a proposal that the latter be annulled and the case be remanded for retrial.

16. On 3 October 2016, the Supreme Court of Kosovo by Judgment [Pml. No. 227/2016], rejected as ungrounded the request for protection of legality. The reasoning of the Judgment, *inter alia*, states: "*[...] both in the first and second instance decision, the legal*

reasons have been given for rendering the challenged decisions [...] it was rightly ascertained in the first instance decision that the evidence on which is based the request for reopening of the criminal proceedings [...] does not justify the allowing of the reopening of the criminal proceedings, and the court of second instance has also approved it."

Applicant's allegations

17. The Applicant alleges that by Judgment [Pml. No. 227/2016] of the Supreme Court of Kosovo of 3 October 2016, the rights guaranteed by Article 30 [Rights of the Accused], Article 31 [Right to Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights] of the Constitution have been violated.

18. The Applicant's arguments in relation to his allegations of constitutional violation are as follows: "*the right of Mr. Imer Syla to fair and impartial trial that constitutes a guaranteed right pursuant to Article 31 of the Constitution of the Republic of Kosovo has ultimately been violated, whereas if we are to analyse this case from its outset taking into consideration the educational background of Mr. Imer Syla [..] it follows that the aforementioned competent authorities in relation to Imer Syla during the legal proceedings in this criminal case against Imer Syla, have clearly violated par. 5 of Article 30, par. 1 and 6 of Article 31 as well as Article 54 of the Constitution of the Republic of Kosovo, since there is not a single piece of evidence proving that Imer Syla has been an owner of the immovable property in which the aforementioned criminal offence was committed [...]the first instance court was not entitled to obtain the guilty plea from the defendant Imer Syla without the presence of his defence counsel".*

19. The Applicant requests the Court to annul the decisions of the regular courts.

Admissibility of the Referral

20. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution and as further specified in the Law and the Rules of Procedure.

21. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties], paragraphs 1 and 7, 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".*

22. The Court also refers to Articles 49 [Deadlines] of the Law, which provides:

> *"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".*

23. In addition, the Court takes into account Rule 36 [Admissibility Criteria] of the Rules of Procedure, which emphasizes that:

"(1) The Court may consider a referral if:

[...] (c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant; or [...]".

24. In the present case, the Court notes that the challenged Judgment was served on the Applicant's representative on 17 November 2016, while the Referral was submitted to the Court on 20 April 2017. Accordingly, the Referral was submitted to the Court out of the 4 (four) month legal time limit.

25. The Court recalls that the purpose of the four-month legal time limit under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure is to promote legal certainty, to ensure that cases raising constitutional issues are dealt with within a reasonable time and that previously rendered decisions are not endlessly open to challenging. (see: case *O' Loughlin and Others v. the United Kingdom,* No. 23274/04, ECtHR Decision of 25 August 2005 and see also case No. KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 17 March 2014, paragraph 24).

26. In addition, the Court notes that the 4 (four) month legal limit is calculated from the date when the Applicant was served, after exhaustion of legal remedies, with the challenged decision. (See, for example, *Case Hatip Celik v. Turkey*, ECtHR, Application No. 52991/99, Judgment of 23 September 2004).

27. The Court notes that it is the duty of the applicants or of their representatives to act with *due diligence*, in order to ensure that their requests for protection of rights and fundamental freedoms are filed within the legal time limit of four (4) months provided for in Article 49 of the Law and further specified in Rule 36 (1) (c) of the Rules of Procedure (See Case *Mocanu and Others v. Romania* [GC], Application No. 10865/09, 45886/07 and 32431/08, Decision of 17 September 2014, paragraphs 263-267).

28. Therefore, the Referral is to be declared inadmissible because it was not submitted within the deadline established by Article 113.7 of the Constitution, as provided for in Article 49 of the Law and further specified in Rule 36 (1) (c) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36 (1) (c) of the Rules of Procedure, on 7 September 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 Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI78/16, Applicant: Driton Syla, Constitutional review of Judgment Rev. No. 7/2016 of the Supreme Court, of 18 January 2016

KI78/16, resolution on inadmissibility of 6 September 2016, published on 13 October 2017

Key words: *Individual referral, equality before the law, right to fair and impartial trial, manifestly ill-founded.*

By its Judgment, the Supreme Court of Kosovo had rejected the Applicant's revision filed against the Judgment of the Court of Appeals of Kosovo as ungrounded.

The Court found that the Applicant essentially alleged that his rights guaranteed by the Constitution, namely the right to equality before the law and right to fair and impartial trial had been violated by the challenged Decision.

The Applicant alleged, among others, that Decision no. 123/2008 of the Committee for Review of Appeals and Submissions had not been fully executed and that the partial compensation of salaries by the Courts is contradictory to the law.

The Court found that the Referral is inadmissible because the Applicant did not substantiate and sufficiently prove his allegation. The Referral was declared inadmissible as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI78/16

Applicant

Driton Syla

Constitutional review of Judgment Rev. No. 7/2016 of the Supreme Court, of 18 January 2016

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 Driton Syla, residing in Gjilan (hereinafter: the Applicant).

Challenged decision

2. The challenged decision is Judgment Rev. No. 7/2016 of the Supreme Court of Kosovo, of 18 January 2016, which was served on the Applicant on 10 February 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial], Article 13 [Right to an effective remedy] and Article 14 [Prohibition of discrimination] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113 [Jurisdiction and Authorized Parties], paragraphs 1 and 7 of the Constitution, Article 47 [Individual requests] of the Law No. 03/L-121 on the 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 19 May 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 June 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel, composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Selvete Gërxhaliu-Krasniqi.

7. On 29 June 2016, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Supreme Court as well as to the Municipal Directorate for Education in Gjilan (hereinafter: MDE)

8. On 13 January 2017, the President of the Court appointed Judge Altay Suroy, as Presiding Judge of the Review Panel, replacing Judge Robert Carolan, who on 9 September 2016 resigned from the position of the Judge of the Court.

9. On 6 September 2017, the Review Panel, after having considered the report of the Judge Rapporteur, unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts in the administrative proceedings

10. On 22 July 2011, the MDE in Gjilan, announced the vacancy for hiring a building caretaker at the Preschool Institution "Ardhmëria I" (hereinafter: IP "Ardhmëria I") in Gjilan.

11. On 12 October 2011, the MDE, by Decision 05. No.821/2011, announced the results on the basis of which in the post of caretaker of the facility in IP "Ardhmëria I" in Gjilan, was admitted the candidate who was third according to the assessment of the Interviewing Committee while the Applicant was ranked first.

12. On 18 October 2011, the Applicant filed a complaint with the Municipal Complaints Review Committee (hereinafter: the Complaints Committee) against Decision 05.No. 821/2011 of the MDE of 12 October 2011, claiming that "*the MDE decision is contradictory to the results from the interview procedure, because by the decision in question, the name – B. M., who has no adequate qualification for the position and who had less points was published*".

13. On an unspecified date, the Applicant addressed with a request the MDE director, requesting him "*to interrupt the further administrative actions under the announcement of 12 October 2011 until a final decision is rendered upon my complaint filed with the Complaints Committee and by the Court having jurisdiction*." The Applicant alleges that he has never received any response regarding this request.

14. On 25 November 2011, the Complaints Committee, by Decision No. 02-16-46560, approved the Applicant's complaint as grounded and decided to modify part II of Decision 05 No. 821/2011 of MDE of 12 October 2012, so that instead of the candidate B.M., decided to assign the Applicant in the working place. In this decision, among other things, is emphasized "*the Municipal Directorate for Education is obliged to systematize Driton Syla, within the time limit of 15 days, to the job position of Caretaker of the Building of PI Ardhmëria 1, based on the results of the interview*."

15. From the case file it results that on an unspecified date, the Applicant also filed a complaint with the Labor Inspectorate, against Decision 05. No. 821/2011 of the MDE, of 12 October 2011.

16. On 2 December 2011, the Labor Inspectorate (Notification No. 02-999/11) approved as grounded the complaint and ordered the MDE to admit within 8 (eight) days, the Applicant according to the ranking list of the Interviewing Committee.

Summary of facts in the enforcement proceedings

17. On an unspecified date, the Applicant submitted a proposal to the Municipal Court in Gjilan for enforcement of Decision No. 02-16-46560, of 25 November 2011, of the Complaints Committee.
18. On 16 December 2011, the Municipal Court in Gjilan, by Decision E. 2318/2011, authorized the enforcement upon the Applicant's proposal, against the Municipality of Gjilan, for compensation of personal income based on Decision No. 02-16-46560, of 25 November 2011, of the Complaints Committee.

19. On 23 January 2012, the Municipality of Gjilan filed an objection with the Municipal Court in Gjilan against Decision E. 2318/2011 of 16 December 2011, claiming that "*the proposal for execution does not mention the amount of money the creditor has to pay*".

20. On 5 March 2012, the Municipal Court in Gjilan, by Decision E. 2318/2011, approved the objection of the Municipality of Gjilan as grounded.

21. On an unspecified date, the Applicant filed an appeal with the District Court in Gjilan against Decision E. 2318/2011 of 5 March 2012 of the Municipal Court in Gjilan.

22. On 24 April 2012, the District Court in Gjilan, by Decision AC. No. 129/2012, rejected as ungrounded the Applicant's appeal and upheld the Decision of the Municipal Court in Gjilan, E. No. 2318/2011 of 5 March 2012. In the Decision, it is reasoned that "*the challenged decision contains sufficient, complete, and convincing reasons with which this Court agrees in entirety [...], Whereas, as regards the appealing allegation of the creditor according to which the court applies the rules under the substantive law based on its discretion, such appealing allegations is ungrounded because pursuant to Article 24, b) of the LEP, "Execution titles are execution decision given in administrative procedure and administrative settlement, if it has to do with monetary obligation and if by the law is not foreseen otherwise, in the case at hand, we do not have to do with monetary obligation and there is no executive title", therefore the first instance court fairly granted the objection of the Debtor!".*

23. On 7 October 2013, the Applicant filed a request for reopening of the proceedings with the Basic Court in Gjilan, on the grounds that "*he was informed that on 11 December 2012, the Supreme Court of Kosovo, by letter Agj. no. K. 584/2012, had changed its previous principled stance and concluded that a decision that is final in an administrative procedure is a decision which the court should execute, therefore, he proposed that the reopening of the procedure be allowed."*

24. On 8 October 2013, the Basic Court in Gjilan issued Notification E. 2318/2011, stating that "*in the present* case *the Basic Court in Gjilan, according to Decision No. 02-16-46560/2 of the Municipal Committee for Review of Complaints, of 25 November 2011, could not conduct an enforcement procedure because the enacting clause of the decision does not state the amount of money*".

25. On an unspecified date, the Applicant filed a request for repetition of the procedure with the Court of Appeals against Notification E. 2318/2011 of the Basic Court in Gjilan, of 8 October 2013.

26. On 24 November 2014, the Court of Appeals of Kosovo, by Decision No. 322/2013, rejected as inadmissible the Applicant's request for repetition of the procedure. In the reasoning of this decision, the Court of Appeal stated that "*the revision is not allowed, or the repetition of the procedure in the enforcement procedure*."

Summary of facts in contested procedure

27. On 21 December 2011, the Applicant filed a statement of claim against the MDE in Gjilan, requesting to enforce Decision No. 02-16-46560, of the Complaints Committee of 25 November 2011. The Applicant requested to be assigned in the working place and obliged the MDE to compensate all salaries from the date of issuance of Decision No. 02-16-46560, of the Complaints Committee, of 25 November 2011.

28. On 5 November 2012, the Municipal Court in Gjilan (Judgment C. No. 888/2011) approved the Applicant's statement of claim. The judgment further adds that "*the claimant's statement of claim is entirely grounded, because based on the examined items of evidence, it was confirmed that the respondent has not executed the decision of the Municipal Committee for Review of Complaints and the failure to execute it resulted in the failure to assign the claimant Driton Syla [...] although the respondent, pursuant to Article 16 of the Law on the Administrative Procedure, was obliged to execute the said decision [...] The Court obliged the respondent to pay to claimant-Driton Syla the unpaid salaries for the period from December 2011 until October 2012 .*"

29. On an unspecified date, the MDE filed an appeal with the Court of Appeals of Kosovo against the aforementioned decision of the Municipal Court in Gjilan claiming that there has been a substantial violation of the provisions of the contested procedure, erroneous determination of factual situation and erroneous application of the substantive law.

30. On 7 October 2013, the Court of Appeals of Kosovo (Decision Ac. No. 5020/2012), approved the appeal of the MDE and annulled the Judgment of the Municipal Court in Gjilan, C. No. 884/2011 of 5 November 2012 and remanded the case for consideration to the Basic Court in Gjilan. In the judgment, it is argued that "*the conclusion of the first instance court cannot be considered as fair and lawful because, according to the assessment of the present court, the challenged judgment was rendered by essential violation of the provisions of the contested procedure, under Article 182 paragraph 2, item n) of the LCP, whereof the second instance court is obliged to take care ex-officio, with this being the main reason why the challenged judgment is to be quashed [...].*"

31. On 17 December 2013, the Basic Court in Gjilan, deciding on a repeated proceeding (Judgment C. No. 783/2013) partially approved the Applicant's claim, concluding the following: "*The statement of claim of claimant Driton Syla from Gjilan is partially approved and the respondent is obliged [...], to assign claimant Driton Syla in the job position of Caretaker of the building of PI Ardhmëria 1 in Gjilan, and to pay the claimant the unpaid salaries from December 2011 until May 2012 [...] The part of the statement of claim of claimant Driton Syla, whereby he requested to oblige the respondent [...] to pay the claimant the unpaid salaries for the period of time covering June 2012 until 30 November 2013 is rejected as ungrounded.*" Regarding the rejection of the salary for the period in question, in the reasoning of the judgment is emphasized that "*during this time period, the claimant was not damaged in the form of the lost*

profit with the respondent's guilt because he worked on the GorenjeNikiTiki company […] higher personal incomes than he would have earned if he had worked for the respondent."

32. On an unspecified date, the Applicant and the Municipality of Gjilan filed an appeal with the Court of Appeals of Kosovo, claiming a violation of the provisions of the contested procedure, erroneous determination of factual situation and erroneous application of the substantive law.

33. On 17 November 2015, the Court of Appeals of Kosovo (Judgment Ac. No. 925/2014), rejected the appeal of the Applicant and the Municipality of Gjilan as ungrounded. In the reasoning of the decision, *inter alia*, it is noted that "*the Court of Appeals, as second instance court, approves the legal assessment of the first instance court as correct and lawful, because the challenged judgment does not contain essential violations of the provisions of contested procedure under Article 182.2 n) of the LCP, and, as alleged by the parties, there is no erroneous and incomplete determination of the factual situation and there is no erroneous application of the substantive law*".

34. On an unspecified date, the Applicant and the MDE in Gjilan filed the revision with the Supreme Court against Judgment Ac. No. 925/2014, of the Court of Appeals of Kosovo, of 17 November 2015, claiming essential violations of the contested procedure provisions and erroneous application of the substantive law.

35. On 18 January 2016, the Supreme Court of Kosovo, by Judgment Rev. No. 7/2016, decided as follows: "**I.** *The revision of claimant Driton Syla from Gjilan in the part which refers to part II of the Judgment of the first instance court concerning the compensation of personal income for the time period from June 2012 until 30.12.2013, is rejected as ungrounded;* ***II.*** *The revision of the respondent filed against Judgment Ac. No. 925/2004 of the Court of Appeals of Kosovo, dated 17.11.2015, in the part which refers to the obligation of the respondent to pay the claimant the unpaid salaries from December 2011 until May 2012, is rejected as inadmissible."*

Applicant's allegations

36. The Applicant alleges that the challenged decision violated his rights guaranteed by the Article 24 [Equality Before the Law] Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution, as well as Article 6 [Right to a fair trial], Article 13 [Right to an effective remedy] and Article 14 [Prohibition of discrimination] of the ECHR.

37. Specifically, the Applicant alleges that "*[…]The failure to execute Decision No. 123/2008 of the Committee for Review of Appeals and Submissions and the unreasonable delay for resolution of this legal matter by the authorities of the MA of Gjilan, constitutes a violation of Article 31 as read in conjunction with Article 32 of the Constitution, as well as Article 6 as read in conjunction with Article 13 of the Convention […]. This failure and the lack of effectiveness of proceedings as well as the failure to execute the decisions produce effects which make us face situations that are not compatible with the principle of rule of law, this being a principle which the authorities of Kosovo are obliged to respect*".

38. In addition, the Applicant alleges that *"There is no doubt that the rejection of the execution proposal by the Municipal Court in Gjilan and the District Court in Gjilan constitutes a violation of Article 24 of the Constitution, because in the same legal situations, the citizens have not been treated equally before the law and did not provide equal legal protection […] It is an indisputable fact that the damage was*

caused by the Employer [...] the court partially approved the statement of claim, thereby encouraging the Employer not to execute the enforceable decisions".

39. The Applicant further alleges that "*the partial compensation of salary by the courts is contradictory to the law, and that the Basic Court in Gjilan has exceeded the statement of claim, since it was requested the reinstatement to previous job position and compensation for the salary [...] and not the lost profit [...]".*

40. The Applicant requests the Court, as follows:

> *"to hold the violation of my rights in respect of partial compensation, to hold unreasonable delay of proceedings".*

41. Finally, the Applicant requests the Court to annul Judgment Rev. No.7/2016 of the Supreme Court of Kosovo, of 18 January 2016.

Admissibility of Referral

42. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, and as further specified in the Law and the Rules of Procedure.

43. In this respect, the Court refers to 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."*

44. 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."*

45. The Court further takes into account Rule 36 [Admissibility Criteria] (1) (d) and (2) (b) of the Rules of Procedure, which provides for:

> *"(1) The Court may consider a referral if:*
> *(...)*
> *(d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
> *(...)*
> *(d) the Applicant does not sufficiently substantiate his claim".*

46. In the present case, the Court considers that the Applicant is an authorized party, that he has exhausted all available legal remedies and he has submitted the Referral within the foreseen time limit.

47. However, the Court must also assess whether the requirements established in Article 48 of the Law and Rule 36 of the Rules of Procedure have been met.

48. In this regard, the Court recalls that the Applicant alleges that the Judgment of the Supreme Court, Rev. No. 7/2016 of 18 January 2016, violated his rights guaranteed by the Constitution, namely equality before the law, right to fair and impartial trial, right to legal remedies and judicial protection of rights in conjunction with the right to a fair trial, right to an effective remedy and prohibition of discrimination of the ECHR.

49. The Court recalls that in the present case there are several decisions rendered in various proceedings, namely in the administrative, enforcement and contested proceedings.

50. Based on the case file, the Court notes that the Applicant does not file allegations relating to his or her systematization or non- systematization in the working place, but only the issue of compensation of salary and only for a certain period of time.

51. However, the Court notes that the essence of the Referral relates to the decisions of the regular courts only in respect of the compensation of a part of unpaid personal income.

52. In this regard, the Court notes that the final decision, which the Applicant explicitly challenges, is the Judgment of the Supreme Court Rev. No. 7/2016 of 18 January 2016, by which Judgment the Applicant's request for revision against the judgment of the Court of Appeals was rejected as ungrounded.

53. As regards the Applicant's allegation that the regular courts, which rejected the Applicant's request for full compensation of salaries, violated his rights guaranteed by the Constitution, the Court notes that the Supreme Court in its aforementioned judgment concluded that the challenged judgment of the Court of Appeals was clear and comprehensible, and that it contained sufficient grounds and decisive facts for the adoption of a lawful decision.

54. The Court further notes that the Supreme Court found that "*in the present case the two courts have correctly assessed these circumstances and have correctly concluded that the claimant is not entitled to the right to compensation of personal income, since during this time period, the claimant was not damaged in the form of lost profit (Article 189 of the LCT), because he has realized higher personal income in the other job position than the incomes he would have realized in the job position of a caretaker*".

55. In this respect, the Court considers that the Judgment of the Supreme Court addressed and decided on the Applicant's allegations, which had already been brought before the lower instance courts.

56. Accordingly, the Court considers that the regular courts provided sufficient answers and justifications for their decisions as to why the Applicant's claim for compensation of salaries was not fully implemented.

57. In addition, the Court considers that the Applicants' allegations relate to the manner in which the regular courts have made the relevant qualifications and interpretations of the facts and applicable laws in the present case.

58. The Court emphasizes that findings and qualifications of the facts as well as legal interpretations are the prerogative of the regular courts.

59. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact 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). The constitutional control over the court decisions, exercised by the Constitutional Court, is limited to the functioning of the protection of the constitutional rights of the individual and respective constitutional standards. Accordingly, the Constitutional Court cannot act as a "fourth instance court" in relation to the decisions of the regular courts (see *Akdivar v. Turkey*, ECtHR, Application No. 21893/93, Judgment of 16 September 1996, para. 65, also *mutatis mutandis*, see Case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

60. Regarding the Applicant's allegation of violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, due to the excessive length of the proceedings, the Court notes that the Applicant has not submitted arguments and facts supporting this claim. In addition, based on the case file and in the light of the circumstances of the case, the Court notes that the regular courts were active in the adjudication of the case from the moment of initiation, and, accordingly, did not cause unreasonable delays of the proceedings.

61. Regarding the Applicant's allegation that "*in the same legal situation, the citizens were not treated the same before the law and did have not been provided equal legal protection*", the Court considers that the Applicant has not filed any facts and has not sufficiently substantiated his allegation of unequal treatment. When alleging such constitutional violation, the Applicant must submit a reasoned allegation and a convincing argument (See: Case No. KI32/16, Applicant: *Ibrahim Svarça*, Constitutional Court, Resolution on Inadmissibility of 15 September 2016).

62. The Court emphasizes the fact that the Applicant does not agree with the outcome of the case, is not sufficient in itself to argue an alleged constitutional violation (see case *Mezotur - Tiszazugi Tarsulat v. Hungary*, No. 5503/02, ECtHR, Judgment of 26 July 2005)

63. In conclusion, the Court considers that the Applicant has not substantiated his allegations of violation of the human rights and fundamental freedoms guaranteed by the Constitution, because the facts presented by him do not in any way indicate that the regular courts have denied him the rights guaranteed by the Constitution, as alleged by the Applicant.

64. Therefore, the Referral is manifestly ill-founded on constitutional basis, in accordance with Rules 36 (1) (d) and 36 (2) (b) of the Rules of Procedure.

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) of the Rules of Procedure, on 6 September 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 Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI70/16, Applicant: Fazli Krasniqi, Constitutional review of Judgment Rev. No. 185/2015, of the Supreme Court of the Republic of Kosovo, of 28 December 2015

KI70/16, Resolution on inadmissibility of 4 September 2017, published on 13 October 2017

Key words: *Individual referral, right to fair and impartial trial, protection of property, right to work and exercise profession, manifestly ill-founded*

The Supreme Court of Kosovo had rejected the Applicant's revision filed against the Judgment of the Court of Appeals as ungrounded.

The Applicant claimed before the Constitutional Court that his rights guaranteed by the Constitution, namely his right to fair and impartial trial, right to property, right to work and exercise profession, had been violated, alleging that the Judgment of the Supreme Court was contradictory, namely that the factual situation had been incorrectly determined in the challenged judgment.

The Court found that the Applicant had failed to reason and substantiate on constitutional basis that the proceedings before the regular courts, including the Supreme Court, were unfair or arbitrary or that his rights and freedoms have been violated. The Referral was declared inadmissible as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI70/16

Applicant

Fazli Krasniqi

Constitutional review of Judgment Rev. No. 185/2015, of the Supreme Court of the Republic of Kosovo, of 28 December 2015

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 Mr. Fazli Krasniqi from Junik (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment Rev. No. 185/2015, of the Supreme Court, of 28 December 2015, in conjunction with Judgment Ac. No. 3202/12, of the Court of Appeals of Kosovo, of 6 March 2015 and Judgment C. No. 63/09, of the Municipal Court in Deçan, of 8 February 2012.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment Rev. No. 185/2015, of the Supreme Court, of 28 December 2015, which has allegedly violated the Applicant's rights and freedoms guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], Article 49 [Right to Work and Exercise Profession] and Article 53 [Interpretation of the Human Rights Provisions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] and Article 1 [Protection of Property] of Protocol No. 1 of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution (hereinafter: the Constitution), Articles 22 and 47 of Law No. 03/L-121 on the 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

5. On 25 April 2016, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 11 May 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.

7. On 22 June 2016, the Court notified the Applicant about the registration of the Referral and requested the Applicant to submit to the Court the Referral form as well as to complete his Referral with relevant documents, namely by regular court decisions.

8. On 6 July 2016, the Applicant submitted to the Court the Referral form.

9. On 20 July 2016, the Applicant submitted to the Court the decisions of the regular courts.

10. On 27 July 2017, the Court notified the Supreme Court about the registration of the Referral.

11. On 4 September 2017, the Review Panel, after having considered the report of the Judge Rapporteur, unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

12. On 21 April 2009, the Applicant filed a statement of claim with the Basic Court in Deçan, requesting the confirmation of the ownership right based on inheritance over ½ of the ideal part of the immovable properties in the different cadastral plots, all registered under the possession list 391. From the case file it transcribes that this inheritance mass is a part of the inheritance of the daughter of the Applicant's uncle SH.K., which she inherited from her predecessor R.K., and who, on her own will, left the inheritance to other litigants (family members of the Applicant, in the capacity of the respondents in this court proceeding). In the statement of claim, the Applicant alleged that he is in the same inheritance rank with other litigating parties.

13. On 8 February 2012, the Municipal Court in Deçan (Judgment C. No. 63/09) rejected the statement of claim as ungrounded. its Judgment reads: "*the court concluded and determined without any doubt that the claimant had the opportunity while his predecessors were alive to clarify these relations, that an agreement on the division of the predecessors of litigants was not challenged within one year and one day according to the legal rules of civil law, but also under Article 117 of the LOR where it is provided that the right to claim nullity of a rescindable contract shall be terminated one year after becoming aware of the ground for making a contract rescindable.*"

14. On an unspecified date, the the Applicant filed an appeal with the Court of Appeals, against Judgment C. No. 63/09, of 8 February 2012, of the Municipal Court in Decan, claiming essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.

15. On 6 March 2015, the Court of Appeals (Judgment Ac. No. 3202/12) rejected the Applicant's appeal as ungrounded. In this Judgment, it is emphasized that: "*the first instance court by presenting the necessary evidence and in the presence of the indisputable facts correctly and completely determined the factual situation and by fair assessment of the evidence, has correctly applied the substantive law when it found that the statement of claim is ungrounded. ...in the reasoning of the judgment of the first instance court are given sufficient legal and factual reasons based on law which are approved by this court too.*"

16. Against this Judgment, the Applicant submitted a revision to the Supreme Court, alleging the existence of essential violations of the provisions of the contested procedure and erroneous application of substantive law.

17. On 28 December 2015, the Supreme Court (Judgment Rev. No. 185/2015) rejected the Applicant's revision as ungrounded. The Supreme Court concluded that *"The first instance court has completely determined the fact that the respondents have been in possession and use of the immovable property in questioned for more than 30 years, who are in possession even after the death of Sh. K., in 1985, who lived until the moment of death in the family union with the respondents, which fact was not challenged either by the claimants until the day of filing the claim [...] For these reasons the allegations presented in the revision were found as ungrounded."*

Applicant's allegations

18. The Applicant alleges that the challenged decision violated his rights guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], Article 49 [Right to Work and Exercise Profession] and Article 53 [Interpretation of Human Rights Provisions] of the Constitution, in conjunction with Article 6 [Right to a Fair Trial] and Article 1 [Protection of Property] of Protocol No. 1, of the ECHR.

19. The Applicant further alleges that: "*the Judgment of the Municipal Court contains serious violations of the provisions of the contested procedure [...] because the challenged Judgment has flaws due to which it cannot be reviewed, and especially because the enacting clause of the challenged Judgment is in contradiction with the reasons, namely the challenged Judgment does not have any reasons for the decisive facts."* The Applicant also alleges that the Court of Appeals by its Judgment has erroneously applied the substantive law.

20. The Applicant requests the Court to annul Judgment Rev. No. 185/2015, of the Supreme Court of 28 December 2015, Judgment Ac. no. 3202/12 of 6 March 2015 and Judgment C. No. 63/09 of the Municipal Court in Deçan, of 8 February 2012.

Admissibility of Referral

21. The Court must first examine whether the Applicant has fulfilled the admissibility requirements established in the Constitution and as further specified in the Law and the Rules of Procedure.

22. In this respect, the Court refers to 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."

23. 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".

24. The Court further refers to Rule 36 [Admissibility Criteria] (1) (d) and (2) (b) of the Rules of Procedure, which foresees:

"(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".

25. In this case, the Court considers that the Applicant is an authorized party, that he has exhausted all available legal remedies and has submitted the Referral within the foreseen time limit. However, the Court must further assess whether the requirements established in Article 48 of the Law and provided for in Rule 36 of the Rules of Procedure have been met.

26. The Court recalls that the Applicant alleges that, by rejecting the claim for the confirmation of ownership as ungrounded, the decisions of the regular courts violated his rights guaranteed by the Constitution due to erroneous determination of the facts and erroneous legal interpretations.

27. In this regard, the Court notes that Judgment Rev. No. 185/2015 of the Supreme Court, of 28 December 2015, addressed and decided on the aforementioned allegations, which had already been brought before the first and second instance courts

28. In this regard, the Court refers to this Judgment of the Supreme Court, which concluded that the challenged Judgment of the Court of Appeals does not contain essential violations of the legal provisions, stating that *"[...] the courts of the lower instance, by correctly and completely determining the factual situation, correctly applied the provisions of the contested procedure and the substantive law when they found that the claimant's statement of claim is ungrounded."*

29. The Supreme Court further reasoned that: "*the enacting clause of the judgments of both courts is clear when decided upon the statement of claim of the claimant, respectively the appeal, that in the reasoning are given sufficient and convincing reasons for the decisive facts for fair adjudication of this legal matter, which is not in contradiction with the content of evidence from case file."*

30. The Court notes that the Applicant does not agree with the outcome of the proceedings before the regular courts, challenging the assessment of evidence and determination of facts by these courts.

31. The Court recalls that it is not a fact-finding court and that correct and complete determination of the factual situation, as well as the relevant legal interpretations, fall within the function of the regular courts. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, therefore, it cannot act as a „*fourth instance*" court (see: ECtHR case, *Akdivar v. Turkey*, No. 21893/93, of 16 September 1996, para. 65, see also: case of the Constitutional Court KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

32. The Court emphasizes that it is its task to determine whether the proceedings, viewed in their entirety, were fair, including the way the evidence was taken (See case *Edwards v. United Kingdom*, No 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991).

33. In the present case, the Court considers that the Applicant was able to adduce arguments and evidence he considered relevant to his case and to challenge the arguments and evidence adduced against him; that all the arguments and evidence which were relevant to the resolution of the case were duly heard and examined by the courts. Accordingly, it follows that the proceedings taken as a whole were fair. (See: case *Garcia Ruiz v. Spain*, [GC], application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

34. Accordingly, the Court considers that the Applicant has not substantiated his allegations of violation of human rights and fundamental freedoms guaranteed by the Constitution, because the facts presented by him do not in any way indicate that the regular courts have denied him the right guaranteed by the Constitution, as alleged by the Applicant.

35. In this regard, the Court notes that the mere mentioning of relevant articles of the Constitution alleging that they have been violated without further explanations how these violations occurred, is not sufficient for the Applicant to build an allegation on a constitutional violation When alleging such violations of the Constitution, the Applicant must provide a reasoned allegation and a compelling argument (See Case of Constitutional Court, KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33).

36. In conclusion, the Court finds that the Applicant failed to substantiate and prove on constitutional basis that the proceedings before the regular courts, including the Supreme Court, were unfair or arbitrary or that his rights and freedoms have been violated.

37. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Rules 36 (1) (d) and 36 (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution, Article 48 of the Law, and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, on 4 September 2017, unanimously

DECIDES

V. TO DECLARE the Referral inadmissible;

VI. TO NOTIFY this Decision to the Parties;

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

VIII. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI44/17, Applicant: T. P. E. "Theranda - Projekt", Constitutional review of Decision A. no. 503/2006 TAK of the Independent Review Board, of 17 September 2013

KI44/17, Resolution on inadmissibility, approved on 07 September 2017, published on 13 October 2017

Key words: *individual referral, administrative procedure, premature referral, inadmissible referral*

The Applicant alleged that a large number of articles of Law no. 03/L-202 on Administrative Conflicts, Law no. 02/L-28 on Administrative Procedure and Regulation no. 2002/3 on Profit Tax in Kosovo, had been violated. Nevertheless, the Applicant did not make reference to any concrete constitutional provision. The Applicant requests the Court to annul the decision of Independent Review Board, and oblige TAK to render a decision to reimburse excess taxes paid.

The Court found that the Applicant had not exhausted all the legal remedies and noted that the proceedings before the Court of Appeals are still pending and that the Applicant's Referral is premature because the legal remedies available at regular courts had yet to be exhausted. For these reasons, the Court found that the referral is inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI44/17

Applicant

T. P. E. „Theranda – Projekt“

Constitutional review of Decision A. No. 503/2006 TAK of the Independent Review Board of 17 September 2013

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 Trade-Production Enterprise „Theranda – Projekt“ from Prizren (hereinafter, the Applicant) which is represented by a lawyer, Ymer Kubati, based on the power of attorney issued by the Director of the Applicant.

Challenged decision

2. The Applicant challenges the decision of the Independent Review Board in the repeated proceedings A. No. 503/2006 TAK of 17 September 2013, which rejected as ungrounded the Applicant’s appeal and upheld the Decision of the Appeals Department No.292/2006 dated 04 August 2006.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated a number of legal norms not connected with constitutional violations.

Legal basis

4. The Referral is based on Articles 21 (4) and 113 (7) of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 13 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

6. On 18 April 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel, composed of Judges: Ivan Čukalović (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

7. On 26 April 2017, the Court notified the Applicant about the registration of the Referral and requested it to fill in the referral form and submit a power of attorney.

8. On 20 June 2017, the Applicant submitted to the Court a power of attorney and a completed referral form.

9. On 07 September 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 28 March 2006, the Tax Administration of Kosovo (hereinafter, TAK) carried out the tax control operations of the Applicant and issued a notice of the audit and subsequent assessment, according to which the Applicant was responsible of the tax burden in a certain amount.

11. The Applicant filed an appeal with the TAK Appeal Department against the notice of the audit and subsequent evaluation.
12. On 04 August 2006, the TAK Appeal Department (Decision No. 292/2006) rejected the appeal as ungrounded.

13. The Applicant filed an appeal with the Independent Review Board (hereinafter, IRB) against the Decision of the TAK Appeal Department.

14. On 16 October 2006, the IRB (Decision 503/2006) rejected the Applicant's appeal and upheld the decision of the TAK Appeal Department.

15. On 20 November 2006, the Applicant filed with the Supreme Court a claim against the decision of IRB.

16. On 13 November 2008, the Supreme Court (Judgment A. No. 3284/2006) approved the Applicant's claim and remanded the case to the IRB for reconsideration.

17. On 17 September 2013, acting in accordance with the recommendations of the Supreme Court, the IRB (Decision A. No. 503/2006 TAK) decided to reject as ungrounded the Applicant’s appeal and to uphold the Decision of the TAK Appeals Department.

18. That Decision of IRB stated, in the legal remedy guidance, that the Applicant *“has the right to file an appeal against this Decision, with the Kosovo Court of Appeals within a term of 60 days from the day of receipt of decision”*.

19. On 8 May 2014, the Applicant filed with the Basic Court in Prizren a proposal for enforcement of the Judgment No. 3284/2006 of the Supreme Court of Kosovo.

20. On 19 February 2015, the Basic Court (Decision CP No. 1070/14) rejected as ungrounded the proposal for enforcement, stating that the judgment to which the Applicant refers "does *not constitute enforcement document*".

21. On an unspecified date, the Applicant filed with the Basic Court a second proposal for enforcement of the Judgment (No. 3284/2006) of the Supreme Court.

22. On 14 June 2016, the Basic Court (Decision No. 2664/09) rejected the proposal for enforcement as ungrounded, reasoning that "*this judgment does not constitute an executive title in this enforcement proceedings because in this judgment it is ordered that the case be remanded in the repeated proceedings for deciding.*"

23. On 5 April 2017, the Applicant filed with the Basic Court in Prishtina an administrative claim against the TAK for annulment of the Decision A. No. 503/2006-TAK of 17.09.2013 of the IRB.

24. On 11 April 2017, the Basic Court in Prishtina (Decision No. 627/17) declared itself without subject matter jurisdiction to deal with that legal matter and decided to forward the case to the Administrative Matters Department of the Court of Appeals as a competent court for resolving the matter.

Applicant's allegations

25. The Applicant claims a violation of a large number of Articles of the Law No. 03/L-202 on Administrative Conflicts, Law No. 02/L-28 on the Administrative Procedure and Regulation No. 2002/3 on Profit Tax in Kosovo.

26. However, the Applicant makes no reference to any violation of its constitutional rights and related constitutional provisions.

27. Furthermore, the Applicant claims that IRB *(*Decision No. 503/2006 of 17 September 2013) did not enforce the Judgment (A. No. 3284/2006) of the Supreme Court.

28. Finally, the Applicant requests the Court that "*the Decision of the Independent Review Board –Prishtina A. no. 503/2006 dated 17.09.2006 is annulled"* and the TAK be *"obliged to take a decision for reimbursement of excess taxes paid".*

Admissibility of the Referral

29. The Court examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

30. In that connection, the Court also refers to §§ 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.*

31. In addition, the Court also refers to § 4 of Article 21 [General Principles] of the Constitution, which provides:

4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

32. The Court further refers to § 2 of Article 47 [Individual Requests] of the Law, which foresees:

The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.

33. The Court takes into account § (1) (b) of Rule 36 [Admissibility] of the Rules of Procedure, which foresees:

"The Court may consider a referral if all effective remedies that are available under the law against the judgment or decision challenged have been exhausted."

34. The Court considers that the Applicant has not fulfilled the admissibility requirements established in the Constitution, and as further provided by the Law and foreseen by the Rules of Procedure.

35. In fact, the Court recalls that the IRB Decision (A. No. 503/2006) stated that the Applicant "*has the right to file an appeal against this Decision, with the Kosovo Court of Appeals within a term of 60 days from the day of receipt of decision".*

36. The Court notes that the Applicant has not proved that it filed appeal with the Court of Appeal against the IRB Decision, even though that Decision could have been appealed according to the law in force and the guidance on the right to appeal given by the Decision itself.

37. The Court further recalls that the Applicant submitted the appeal to the Basic Court in Prishtina which declared (Decision No. 627/17) itself incompetent and forwarded the case to the Court of Appeals as the competent court.

38. Finally, the Court concludes that the appeal proceedings before the Court of Appeals are still pending and that the Applicant has not provided evidence that the Court of Appeal has rendered a decision on the Applicant's appeal.

39. The Court considers that the Applicant has not exhausted all legal remedies afforded to him by the applicable law in Kosovo. In fact, the principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular administrative or judicial proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such a violation. (See Constitutional Court Case No. KI07/09, *Demë and Besnik Kurbogaj,* Resolution on Inadmissibility of 19 May 2010, §§ 18, 28 and 29).

40. The rationale for the exhaustion rule is to afford the regular courts the opportunity to put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order provides an effective legal remedy for the violation of the constitutional rights. (See Constitutional Court case KI41/09 *AAB-RIINVEST University L.L.C. Prishtina v. the Government of the Republic of Kosovo,* Resolution on Inadmissibility of 21 January 2010; see also, *mutatis mutandis*, ECtHR case *Selmouni vs. France*, No. 25803/94, 29 July 1999)

41. In that respect, the Court recalls that the rule of exhaustion of legal remedies under Article 113 (7) of the Constitution, Article 47 of the Law and Rule 36 (1) (b) of the Rules of Procedure obliges those who want to bring their case before the Court to first use the effective legal remedies available under the law against public authorities' decisions which allegedly have violated their constitutional rights.

42. The Court emphasizes that the rule is based on the assumption, reflected in Article 32 of the Constitution and Article 13 of ECHR that under the domestic legislation there are available remedies to be used before the regular courts in respect of an alleged breach regardless whether or not the provisions of the ECHR are incorporated in national law. (See, *inter alia,* ECtHR case *Aksoy v. Turkey,* Judgment of 18 December 1996, § 51).

43. The Court reiterates that the protection mechanism established by the constitutional system is subsidiary to the regular system of judiciary safeguarding human rights. (See ECtHR case *Handyside v. United Kingdom,* Judgement of 7 December 1976, § 48).

44. In these circumstances, the Court notes that the proceedings are pending before the Court of Appeals and that a final decision has not yet been rendered in the case of the Applicant.

45. Thus, the Court considers that the Applicant's Referral is premature as the legal remedies before the regular courts have not been exhausted yet.

46. Therefore, the Court finds that the Referral is inadmissible according to Articles 113 (1) and (7) of the Constitution, Article 47 (2) of the Law and Rule 36 (1) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 (1) and (7) of the Constitution, Article 47 of the Law Rules 36 (1) (b) and 56 of the Rules of Procedure, in the session held on 07 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Arta Rama-Hajrizi

KI29/17, Applicant: Adem Zhegrova, Constitutional review of Judgment Rev. no. 343/2016 of the Supreme Court of 16 January 2017

KI29/17, Resolution on inadmissibility, of 5 September 2017, published on 13 October 2017

Key words: *Individual referral, civil procedure, manifestly ill-founded*

The Applicant submitted a request to the Constitutional Court whereby he requested the constitutional review of the Judgment of the Supreme Court. The Applicant had been a worker of the Kosovo Energy Corporation and after his employment contract was terminated, he had filed a claim with the regular courts.

Following the decision of the Supreme Court, the Applicant submitted a referral to the Constitutional Court alleging that Articles 31, 49, 53, and 55 of the Constitution, among others, had been violated, stating that the case law of the Supreme Court contained great differences, because the Supreme Court had decided differently in similar cases. According to the Applicant, the contradictory decisions rendered by the Supreme Court create legal uncertainty.

The Court considered that neither the number of allegedly contradictory judgments nor the period within which these judgments were rendered, or the manner in which the Supreme Court had reviewed and reasoned the Applicant's case create sufficient grounds to justify the allegation for violation of the Applicant's right to fair and impartial trial. Accordingly, the Court declared the Applicant's referral inadmissible as manifestly ill-founded on constitutional grounds, because the facts he submitted did not substantiate his allegations that his constitutional rights had been violated.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI29/17

Applicant

Adem Zhegrova

Constitutional review of Judgment Rev. No. 343/2016 of the Supreme Court of 16 January 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 Applicant is Adem Zhegrova from the Municipality of Vushtrri (hereinafter: the Applicant), represented by the "Judex" Law Firm in Prishtina.

Challenged decision

2. The challenged decision is Judgment Rev. No. 343/2016 of the Supreme Court of Kosovo of 16 January 2017, which rejected as ungrounded the Applicant's revision against the Judgment of the Court of Appeals (Ac No. 2042/2014) of 20 September 2016.

3. The Applicant claims that the challenged Judgment was served on him on 8 February 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged judgment, which has allegedly violated the Applicant's right to fair and impartial trial, guaranteed by Article 31 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR), as well as his right guaranteed by Article 49 [Right to Work and Exercise Profession], Article 53 [Interpretation of Human Rights Provisions] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the 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 8 March 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 7 April 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

8. On 14 April 2017, the Court notified the Applicant of the registration of the Referral. On the same date, the Court sent a copy of the Referral to the Supreme Court.

9. On 5 September 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 18 October 2010, the Applicant was informed about the Decision of the Kosovo Energy Corporation, Distribution in Mitrovica (hereinafter: the Employer), for termination of the employment relationship. The Applicant was notified about the employer's decision during the meeting with the District Manager.

11. The Employer's decision to terminate the employment relationship (hereinafter: the Employer's decision) was justified by the commission of serious breach of duties by the Applicant, namely manipulation of the meter and unauthorized use of electricity, which was ascertained in the internal audit report.

12. On 22 October 2010, against the Employer's decision, the Applicant filed an objection with the Employer's Executive Director.

13. On 2 November 2010, the Employer's Executive Director (Decision No. 396) rejected the Applicant's objection.

14. On 15 November 2010, the Applicant filed a claim with the Municipal Court of Vushtrri (hereinafter: the Municipal Court) requesting the annulment of the Employer's decision and reinstatement to the previous job position or to a position, which corresponds to his professional skills and qualifications.

15. On 13 April 2012, the Municipal Court (Judgment C. No. 462/2010) approved the Applicant's statement of claim and obliged the Employer to reinstate him to his previous working place or to another working place with duties corresponding to Applicant's professional qualifications and skills.

16. The Municipal Court in its judgment held that the Employer's decision was in contradiction with the provisions of the Basic Labor Law and Regulation No. 3 of the Employer, because *"[...] the employment relationship was terminated to the Applicant, before the decision on commission of the offense of theft became final, whereas [the Employer] failed to present to the court a final judgment rendered by the court of competent jurisdiction, which would prove that the latter was found guilty for commission of the criminal offense of theft."*

17. On 13 November 2012, the Employer filed an appeal with the Court of Appeals against the Judgment of the Municipal Court, claiming essential violations of the provisions of the Law on Contested Procedure, incomplete and erroneous determination of factual situation and erroneous application of the substantive law.

18. On 30 December 2013, the Court of Appeals (Judgment Ac. No. 4926/2012) quashed the Judgment of the Municipal Court (C. No. 462/2010 of 13 April 2012) and remanded the case for reconsideration and retrial. The Court of Appeals found that the Judgment of the Municipal Court contains essential violations of the provisions of the Law on Contested Procedure and incomplete determination of the factual situation.

19. The Court of Appeals, *inter alia*, reasoned that: *"[...] the disciplinary procedure is separate procedure from criminal proceedings and that the contesting court, which assesses legality of the disciplinary measure is not related to acquittal criminal judgment, namely the criminal procedure."*

20. On 23 April 2014, the Basic Court in Mitrovica-Branch in Vushtrri (hereinafter: the Basic Court) by Judgment C. No. 16/14: I. Approved the Applicant's statement of claim; II. Annulled the Employer's decision to terminate the employment relationship; III. Obliged the Employer to reinstate the Applicant to his previous working place or to a work corresponding to his qualification; IV. Ordered the Employer to compensate the Applicant for all salaries and other benefits from the date of his dismissal from work until the date of his reinstatement to work; and V. Obliged the Employer to pay a certain amount on behalf of the costs of the procedure to the Applicant.

21. The Basic Court found in its judgment that the termination of the employment relationship by the Employer is unlawful because the Employer did not conduct disciplinary proceedings against the Applicant.

22. In this regard, the Basic Court reasoned: *"[...] in relation to the Basic Labour Law in Kosovo, which in Article 11 explicitly provided the reasons for contract termination, whereas Article 26 of the same law has provided that for purposes of implementation of this law, the Special Representative of the Secretary General shall issue administrative directions. SRSG issued Administrative Direction 2003/2, to implement labour law, whereas Articles 31, 32 and Article 33 substantially regulate the disciplinary procedure."*

23. Against the Judgment of the Basic Court, the Employer filed an appeal with the Court of Appeals. In his appeal, the Employer alleged essential violations of the provisions of the contested procedure, erroneous determination of factual situation and erroneous application of the substantive law.

24. On 20 September 2016, the Court of Appeals (Judgment Ac No. 2043/14): I. Approved the Employer's appeal as grounded; II. Modified the Judgment of the Basic Court (C. No. 16/14 of 23 April 2014); and III. Rejected the Applicant's statement of claim as ungrounded.

25. In its judgment, the Court of Appeals found that by the Judgment of the Basic Court the substantive law was erroneously applied.

26. The Court of Appeals reasoned that: "*The first instance court erroneously referred to Administrative Direction No.2003/2, for the implementation of UNMIK Regulation No.2001/36 on the Kosovo Civil Service, with reference to Article 26 of Regulation No. 2001/27, on the Basic Labour Law in Kosovo, as the cited administrative direction does not refer, at all, to implementation of Regulation*

No.2001/27, on the Basic Labour Law in Kosovo, but refers to UNMIK Regulation No.2001/36 on Kosovo Civil Service. The court should have a clear assessment that in the present case the establishment of the working relationship between the respondent and the claimant and consequently the termination of the employment relationship is not based on UNMIK Regulation No.2001/36 on Civil Service in Kosovo, but is based on the Regulation No.2001/27, on the Basic Labour Law in Kosovo, since these two Regulations define the rules for two different categories of subjects of the working relationship. […]"

27. The Court of Appeals further referred to the abovementioned Basic Labor Law, and emphasized that: *"By provisions of Article 11, paragraph 1, item c) of UNMIK Regulation No. 2001/27 on Labour Basic Law, it is defined the termination of contract in serious cases of misconduct of by an employee, whereas Article 11, paragraph 5, item a) provides that: "The Employer shall notify in writing the employee about the intention to terminate the employment contract. Such notice shall include the reasons for termination of the employment contract" and in paragraph b) of the same article stipulates that: "The Employer shall hold a meeting with the employee, in which case the Employer explains orally to the employee the causes for the termination of the contract […]"*

28. On 28 October 2016, the Applicant submitted a revision to the Supreme Court against the Judgment of the Court of Appeals alleging erroneous application of the substantive law.

29. The Applicant in his revision referred to the Law on Employment Relationships in Kosovo, No. 12/1989, which according to him was also in force and has foreseen the initiation of disciplinary proceedings in case of violations of duties or other disciplinary violations. The Applicant further refers to the Employer's internal regulations, stating that the provisions of these regulations stipulate that the disciplinary liability of the employee is proven in disciplinary proceedings.

30. On 16 January 2017, the Supreme Court (Rev. No. 343/2016) rejected the Applicant's revision as ungrounded.

31. The Supreme Court found that *"[…] the challenged judgment does not contain defects that would challenge the legality of the judgment, regarding the application of substantive law, due to the fact that the findings of the second instance court are fair, when established that the respondent respected the legal procedures laid down, during the termination of employment with the claimant, defined by UNMIK Regulation No.2001/27 on the Basic Labour Law in Kosovo, since according to Article 11.2 paragraph (a) the claimant is notified through the notification no.406 dated 18.10.2010, about its intention to terminate the claimant's employment contract pursuant to paragraph (b) the respondent has held a meeting with the claimant, in which case, orally explained the reasons for termination of the employment contract."*

32. The Supreme Court further found that: *"[…] by the provisions of Article 38.1 of this regulation it is foreseen a short disciplinary procedure, in case of a violation of labour duties stipulated by the provisions of Article 38.3 (c and f) for which the claimant was declared liable. While Article 39.1 and 2 provides that the short disciplinary procedure can be initiated on the basis of the information received from other employees, or a direct surveillance ordered by the supervisor and the employer. The Managing Director after hearing the employee may impose a disciplinary measure-termination of the contract."*

Applicant's allegations

33. The Applicant alleges that the Supreme Court by challenged Judgment *"initially acted in contradiction of its own case law, ruling differently for the same cases*". In this regard, the Applicant considers that the Supreme Court *"has not provided him fair and impartial trial*" guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

34. The Applicant further claims that: *"having such major differences expressed in its judicial decisions by the revision court [...] the Supreme Court with these situations is creating legal uncertainty and is undermining citizens' confidence to fair and legal trial by the court"*

35. Regarding the allegation of violation of Article 49 [Right to Work and Exercise Profession] of the Constitution, the Applicant, *inter alia*, claims that *"the denial of a constitutional right, such as the right to work and right to exercise profession, consists on unilateral termination of employment and with no prior notice by the employer"*

36. The Applicant further alleges the existence of a violation of Article 55 [Limitations on Human Rights and Freedoms] of the Constitution, reasoning that: *"[...] the Applicant never had the opportunity to declare in advance, before the decision on contract termination. This is because the employer never established a disciplinary committee, which would enable issuance of a final decision, based on the arguments provided by both parties."*

37. Finally, the Applicant proposes to the Court to:

> *"To declare the Referral admissible;*
>
> *To find that there has been a violation of Article 49 (Right to Work and Exercise Profession) of the Constitution, Article 55 (Limitations on Fundamental Rights and Freedoms), Article 53 (Interpretation of Human Rights Provisions) of the Constitution of Kosovo.*
> *To find that there has been a violation of Article 6.1 (Right to a Fair Trial) of the European Convention on Human Rights.*
> *To declare Judgment Rev. No. 151/2013, of the Supreme Court of Kosovo, of 15 June 2013 and Judgment of the Court of Appeals Ac. No..2042/2014 of 20 September 2016, invalid."*

Admissibility of the Referral

38. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution and as further specified in the Law and foreseen in the Rules of Procedure.

39. 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".

40. The Court notes that the Applicant is authorized party in accordance with the Constitution, has exhausted all necessary legal remedies and has submitted his Referral within a period of 4 (four) months after the receipt of the Judgment.

41. However, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides that:

"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".

42. The Court also recalls Rule 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, which establishes:

"(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."

43. The Court recalls that the Applicant alleges that the challenged Judgment of the Supreme Court violated his right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, as well as the rights guaranteed by Articles 49 [Right to Work], 53 [Interpretation of Human Rights Provisions] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution.

44. However, the Court considers that the allegations raised by the Applicant in essence refer to the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

45. The Court notes that, in support of his allegation that the Supreme Court "*by deciding differently in identical cases is creating legal uncertainty for the citizens, and a lack of confidence to fair and lawful judicial decisions*," the Applicant refers to Judgment Rev. No. 62/2014 (of 20 March 2014). In this regard, the Applicant also refers to the case law of the Constitutional Court, in particular Case KI89/13, *Arbresha Januzi*, Judgment of 22 April 2014.

46. The Court first recalls 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".*

47. The Court recalls the case law of the European Court of Human Rights (hereinafter: the ECtHR), which *inter alia* emphasizes: *"[...] save in the event of evident arbitrariness, it*

is not the Court's role to question the interpretation of the domestic law by the national courts (see, for example, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008). Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts [...]" (Judgment of the ECtHR of 20 October 2011, *Nejdet Şahin and Perihan Şahin v. Turkey*, No. 13279/05, paragraph 50).

48. The Court notes that the Applicant specifically refers to the Judgment of the Supreme Court (Rev. No. 62/2014 of 20 March 2014) submitted to the Court, by which the Supreme Court had approved as grounded the revision of a former employee of the Employer. According to the Applicant, this Judgment relates to a factual situation similar to that of the Applicant.

49. The Court notes that the Supreme Court, by aforementioned Judgment (Rev. No. 62/2014 of 20 March 2014), referring to the Law on Labor Relations in Kosovo 12/1989, annulled the Judgment of the Court of Appeals, finding that the Employer had to initiate disciplinary proceedings. Consequently, the Supreme Court upheld the first instance judgment (Municipal Court in Vushtrri), by which the statement of claim of former Employer's employee for reinstatement to his previous working place or to a working place corresponding to his qualifications was approved as grounded.

50. With regard to the Applicant's claim, the Court again refers to the ECtHR case law, which has admitted that*: "A certain degree of distinction in legal interpretations [by the courts] can be accepted as an inherent feature of any judicial system [...] However, when the higher court finds no solution to contradictory decisions without any valid reason, it becomes a source of legal uncertainty. (*See ECtHR cases, *Beian v. Romania*, application No. 30658/05, Judgment of 6 March 2008, paragraph 39 and *Tomić and Others v. Montenegro*, applications no. 18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09 and 7316/10, Judgment of 17 April 2012, paragraph 53).

51. However, the ECtHR has established in its case law the criteria for assessing the conditions in which contradictory decisions of the last instance courts are in contradiction with the right to a fair trial, namely it must be established whether there are any profound differences in the case law, whether the domestic law provides for a mechanism to overcome those inconsistencies, whether this mechanism has been implemented and if so, to what extent (See *mutatis mutandis* the case of ECtHR *Iordan Iordanov and Others v. Bulgaria*, Application no. 23530/02, Judgment of 2 October 2009, para. 49-52).

52. In the present case, the Court finds that the Applicant referred and submitted only one Judgment of the Supreme Court (Rev. No. 62/2014 of 20 March 2014), which in similar factual circumstances interpreted differently the substantive law.

53. Accordingly, and in the light of the ECHR case law, the Court considers that it is not possible to ascertain the existence of profound and long-lasting differences in the case law of the Supreme Court which endangers the principle of legal certainty by invoking only one Judgment of the Supreme Court, rendered 3 (three) years earlier.

54. The Court further recalls that the Applicant alleges that in his case the termination of the employment relationship by the Employer is unlawful because the Employer did not initiate disciplinary proceedings.

55. In this regard, the Court recalls that the Applicant, referring to the Law on Labor Relations in Kosovo 12/1989, also raised this allegation in his request for revision with the Supreme Court.

56. The Supreme Court in its judgment found that the Judgment of the Court of Appeals did not contain flaws which would have challenged the legality of the challenged judgment. In this respect, the Supreme Court found that the Court of Appeals has correctly found that when terminating the employment relationship to the Applicant, the Employer respected the established legal procedures provided by UNMIK Regulation No. 2001/27 on the Essential Labor Law in Kosovo, as well as the Employer's Internal Regulation on Disciplinary and Material Liability.

57. The Court further considers that the Judgment of the Supreme Court is reasoned and that the interpretation of the Supreme Court with regard to the facts presented for assessment by the Applicant cannot be said to be arbitrary, not reasoned or that it could have influence on a fair trial, but was merely a matter of the law enforcement (see *mutatis mutandis*, ECtHR case, *Nejdet Şahin and Perihan Şahin v. Turkey*, No. 13279/05, paragraph 93).

58. Therefore, the Court considers that neither the number of judgments allegedly contradictory nor the period within which these judgments were rendered, nor the manner in which the Supreme Court has reviewed and reasoned the Applicant's case create sufficient grounds to justify the allegation for violation of the Applicant's right to fair and impartial trial.

59. Accordingly, the Court finds that the Applicant has not substantiated his allegations of a violation of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR (see case *Vanek v. Republic of Slovakia*, No. 53363/99, ECtHR, Decision of 31 May 2005).

60. The Court further recalls that the Applicant alleges violation of Articles 49, 53 and 55 of the Constitution. In this regard, the Court notes that the mere fact that the Applicant does not agree with the outcome of the Judgment of the Supreme Court and only the mentioning of relevant Articles of the Constitution without elaborating their alleged violation, is not sufficient that the Applicant builds a claim based on constitutional violation. When such violations of the Constitution are alleged, the Applicant must provide a reasoned claim and a convincing argument. (See the Constitutional Court case, KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33).

61. In addition, as to the Applicant's allegation of violation of the right to work and exercise profession, the Court considers that the challenged Judgment of the Supreme Court does not in any way prevent the Applicant from working or exercising a profession. Consequently, there is nothing in the Applicant's claim that would justify a conclusion that his constitutional right to work and exercise profession has been violated (see case of the Constitutional Court, KI136/14, *Abdullah Bajqinca,* Resolution on Inadmissibility of 10 February 2015, paragraph 34).

62. For the aforementioned reasons, the Court concludes that the facts presented by the Applicant do not in any way justify his allegation of a violation of Articles 31, 49, 53 and 55 of the Constitution, and the Applicant has not sufficiently substantiated his allegations.

63. Therefore, pursuant to Rule 36 (1) (d) and (2) (b) and (d), the Referral is manifestly ill-founded on constitutional basis and, accordingly, inadmissible.

FOR THESE REASONS

In accordance with Article 113 (7) of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, in the session held on 5 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI11/17, Applicant: Aleksandar Đekić, Ljiljana Tomić, Radunka Tomić and Slavoljub Tomić, Constitutional review of Judgment AC-I-12-0050-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 6 October 2016

KI11/17, Resolution on inadmissibility, approved on 6 September 2017, published on 13 October 2017

Key words: *individual referral, civil procedure, right to fair and impartial trial, protection of property, manifestly ill-founded referral, inadmissible referral*

The Applicants alleged that Decision no. 35/63 of the Commission for Land Consolidation of the Municipality of Prishtina (of 1963) was not entirely executed and that the challenged decision was unlawful right from the moment it was rendered, because it did not include the fourth inheritors but only Aleksandar Tomić. In addition, the Applicants emphasized that the disputed property had always been possessed and used by them without any obstruction by anyone. Therefore, the Applicants reasoned that Article 46 [Protection of Property] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo had been violated.

The Court considered that the Applicants had, nevertheless, the opportunity to submit to regular courts the substantive and legal reasons for resolving the contest, whereby their reasons would have been heard and properly reviewed by the Specialized Panel and Appellate Panel, the proceedings before which were, viewed in their entirety, fair, and the decisions they rendered were well-reasoned.

In sum, the Court concluded that the Applicants had not substantiated their allegations that the relevant proceedings had been, in any way, unfair or arbitrary, and that the challenged decision had led to their constitutional rights being violated. The Court considered that the admissibility criteria, foreseen by the Constitution, further specified by the Law and stipulated by the Rules of Procedure, had not been met.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI11/17

Applicants

Aleksandar Đekić, Ljiljana Tomić, Radunka Tomić and Slavoljub Tomić

Constitutional review of Decision AC-I-12-0050-A0001 of 06 October 2016 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters

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 Aleksandar Đekić, Ljiljana Tomić, Radunka Tomić and Slavoljub Tomić (hereinafter: the Applicants), who are represented by the lawyer Halil Palaj.

Challenged decision

2. The Applicants challenge Decision AC-I-12-0050-A0001 of 06 October 2016 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel), which was served on the Applicants on 21 October 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged decisions, which according to the Applicants' allegations have violated their rights, as guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereafter: the Constitution).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 09 February 2017, the Applicants submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

6. On 20 March 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Almiro Rodrigues and Selvete Gërxhaliu-Krasniqi.

7. On 31 March 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Appellate Panel.

8. On 06 September 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 24 January 1964, by Decision No. 35/63 of the Commission for Land Consolidation of the Municipality of Prishtina, it was ordered to conduct the land consolidation of the immovable property, by which was taken the immovable property of Aleksandar Tomić, namely the cadastral parcel No. 1467/2 in the surface area of 0.47,33 ha, and as a replacement for the abovementioned parcel he was given a part of the cadastral parcel No. 273 in the surface area of 0.54,59 ha.

10. On 22 December 2008, the Applicant Aleksandar Đekić filed a claim with the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel).

11. In the statement of claim, the Applicant Aleksandar Đekić requested the restitution of property from the cadastral parcel No. 1467/2, registered in the name of the Socially Owned Enterprise-Kosovo Export (Hereinafter: SEO Kosovo Export), arguing that the property that was the subject of replacement (a part of cadastral parcel No. 273) was never delivered to the Applicant Aleksandar Đekić nor registered on his behalf. The Applicant Aleksandar Đekić claimed that without any obstacles he continued to use parcel No. 1467/2.

12. On 19 January 2010, the Privatization Agency of Kosovo (PAK) as an administrator of the respondent SOE Kosovo Export filed a response to the claim, alleging that the claim should be rejected as inadmissible or unfounded, arguing that the decision of the Commission for Land Consolidation of the Municipality of Prishtina as a legally binding administrative decision cannot be annulled by a new contested proceeding.

13. On 20 January 2011, the Specialized Panel (Decision SCC-08-0304) rejected the claim as unfounded reasoning that "*the 1964 land consolidation decision had not been challenged in accordance with the 1986 Law on Administrative Procedure and that the ownership of the exchanged property would be a matter of execution of the decision and not of its validity. The ownership claim on the basis of adverse possession would be ungrounded pursuant to Section 20 of the Law on Basic Property Relation (no. 6/1980).*"

14. On 12 April 2011, the Applicant Aleksandar Đekić filed an appeal with the Appellate Panel against the Decision (SCC-08-0304) of the Specialized Panel.

15. On 2 December 2011, the Appellate Panel (Decision ASC-11-0045) approved the appeal as grounded, annulled the Decision of the Specialized Panel and remanded the case for retrial. The Appellate Panel considered that: "*the Specialized Panel has erroneously applied the law that was not in force at the time of the challenged decision (1986 Law on Administrative Procedure) [...].*

16. On 30 March 2012, the Specialized Panel ordered the Applicant Aleksandar Đekić to submit an inheritance decision proving that he is a heir of Aleksander Tomić (who was his father) under whose name is Decision No. 35/63 of the Commission for the Land Consolidation of the Municipality of Prishtina.

17. On 17 April 2012, the Applicant Aleksandar Đekić submitted to the Specialized Panel the decision on inheritance of 21 January 1960 (of his grandmother, Jorgacije Tomić (Đekić)). According to this decision on inheritance the heirs of Jorgacije Tomić (Đekić) are: Aleksandar Tomić, Slavoljub Tomić, Radunka Tomić and Ljiljana Tomić.

18. At the same time, the Applicant Aleksandar Đekić filed a supplemented claim to the Specialized Panel, requesting that the Applicants Ljiljana Tomić, Radunka Tomić and Slavoljub Tomić, are included in the proceedings as claimants.
19. The Applicants did not submit the decision on inheritance proving that they are the heirs of Aleksander Tomić (for whom was issued Decision No. 35/63 of the Commission for the Land Consolidation of the Municipality of Prishtina).

20. On 11 May 2012, the Specialized Panel (Judgment SCC-08-0304) rejected the Applicant's claim as ungrounded.

21. The Specialized Panel noted that only the Applicant Aleksandar Đekić is considered as a claimant to the dispute, and not the applicants Slavoljub Tomić, Radunka Tomić and Ljiljana Tomić. The Specialized Panel did not accept the new claimants "*because the respondent (SOE-KPA) was against it and also it would require the delay of the decision.*"

22. On 10 July 2012, the Applicant Aleksandar Đekić appealed to the Appellate Panel claiming: "*the erroneous determination of factual situation due to the fact that successors to the contested property are also brother and two sisters of claimant, violation of Art. 182 of contested procedure and contradiction of the reasoning with evidence, as well as the provision from decision of 24 January 1964 are not implemented in accordance with the cadastral book. "*

23. On 10 June 2016, the Appellate Panel ordered the Applicant Aleksandar Đekić to submit a copy of his birth certificate and inheritance decision confirming his inheritance right after the death of his father Aleksandar Tomić. The Appellate Panel notified the Applicant Aleksandar Đekić that failure to provide the decision will result in dismissal of the claim.

24. On 6 October 2016, the Appellate Panel by (Decision AC-II-12-0050-A0001) rejected the appeal as ungrounded, modified (Judgment SCC-08-0304) of the Specialized Panel concluding that the claim should be rejected as inadmissible due to the failure of the claimant to submit relevant evidence on his legal interests, reasoning that:

"... evidence on the inheritance right is a requirement for admissibility of the claim, when claimants submit claim regarding the rights acquired by inheritance. The Court should check ex officio the admissibility requirements. In line with this official duty the court sent to the appellant who is also a claimant, the order dating 10 June 2016, requesting the inheritance decision but claimant failed to submit it. Therefore and

regardless of the grounds of the appeal, the first instance decision is modified and the claim dismissed as inadmissible "

Applicant's allegations

25. The Applicants initially stated that Decision No. 35/63 of the Commission for Land Consolidation of the Municipality of Prishtina (of the year 1963) was not fully executed, reasoning that *"...The Municipality of Prishtina [...], though being legally obliged to implement the aforementioned Decision in its entirety, it did so only partially, to the detriment of the claiming parties – the Applicants of this Referral. "*

26. Furthermore, the Applicants state that the challenged decision was unlawful at the moment of its adoption, because it did not include all four successors, but only Aleksandar Tomić. The Applicants also emphasize that the disputed parcel "*...was always possessed and used by them without obstruction by anyone, and due to this fact, the co-owners were never aware of the formal modifications made, since the respondent – KBI never had this immovable property in its possession."*

27. Based on the above, the Applicants reason that "*in the present case Article 46 of the Constitution of the Republic of Kosovo has been violated, thus, the guaranteed right to property has been violated; the right to property is a sacred and inviolable right, and no one, be it a state authority, has the right to violate it, as is the present case, unless otherwise provided by law. In the present case, there has been a violation of Article 31 of the Constitution – the Right to Fair and Impartial Trial. "*

28. Finally, the Applicants request the Court :

"... To declare Decision AC-I-12-0050-A0001 of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 06 October 2016, inadmissible, and order to review the case based on merits."

.

Assessment of admissibility of the Referral

29. The Court first examines whether the Applicants have met the admissibility requirements established in the Constitution and as further specified in the Law and foreseen in the Rules of Procedure.

30. 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."

31. The Court also refers to Article 48 [Accuracy of Referral] 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".

32. In addition, the Court recalls Rule 36 (1) (d) and (2) (a) of the Rules of Procedure, which stipulates:

(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:
[...]
(a) the referral is not prima facie justified.

33. In the present case, the Court notes that the Applicants are authorized party to submit a Referral to the Constitutional Court and that they have exhausted the effective legal remedies; therefore, they met the procedural requirements provided for in Articles 113.7 of the Constitution. However, to determine the admissibility of the Referral, the Court still has to assess whether the Applicants have met the requirements of Article 48 of the Law and the admissibility criteria stipulated in Rule 36 of the Rules of Procedure.

34. First, the Court notes that the Referral is submitted by the four Applicants before the Constitutional Court, although the Appellate Panel Decision AC-II-12–0050-A0001 applies only to the Applicant Aleksandar Đekić.

35. The Court considers that the Applicants have built their case on legal grounds, namely on erroneously determined factual situation in relation to the right of inheritance and the validity of the challenged decision No. 35/63 of the Commission for Land Consolidation of the Municipality of Prishtina, as well as on erroneous assessment of evidence by the regular courts.

36. The Court first observes that the Applicants were twice ordered to submit the decision on inheritance proving that they are the heirs of Tomić Aleksandar under whose name reads Decision No. 35/63 of the Commission for Land Consolidation of the Municipality of Prishtina.

37. The Court further notes that the Specialized Panel and the Appellate Panel explained why the other applicants cannot be included in the statement of claim of the Applicant Aleksandar Đekić, and that the Applicant Aleksandar Đekić was notified by the Appellate Panel that "*the failure to submit the decision will result in the rejection of the claim.*"

38. Finally, the Court notes that the Appellate Panel by Decision AC-II-12–0050-A0001 explained in detail the reasons for rejecting the claim as inadmissible emphasizing that "*...the evidence on inheritance right is a requirement for admissibility of the claim, when the claimants submit the claim for the right acquired by inheritance...*"

39. Based on the foregoing, the Court will not further review the Applicant's allegations regarding the factual situation, because it is not the role of the Constitutional Court to determine whether the certain types of evidence is allowed, what evidence should be taken, nor to specify what evidence is acceptable and what is not. That is the role of the regular courts. The role of the Constitutional Court is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way the evidence was taken (see: Case *Dukmedjian v. France*, Application no. 60495/00, paragraph 71, ECtHR Judgment of 31 January 2006)

40. 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). When alleging violation of the rights and

freedoms guaranteed by the Constitution by the public authority, the Applicant must present a reasoned and a convincing argument.

41. The Court notes that the Applicants had the opportunity to present before the regular courts the factual and legal reasons for the resolution of dispute; their arguments were duly heard and examined by the Specialized Panel and the Appellate Panel; the proceedings taken as a whole were fair and the rendered decisions were reasoned in detail.

42. The Court further considers that the Applicants do not agree with the outcome of the proceedings before the regular courts. However, this fact cannot of itself raise an arguable claim of the violation of the right to fair and impartial trial (see: *mutatis mutandis* case *Mezotur - Tiszazugi Tarsulat v. Hungary*, paragraph 21 no. 5503/02, ECtHR Judgment of 26 July 2005).

43. The Court considers that the Applicants did not substantiate allegation for the violation of their rights and did not explain how and why the decision of the Appellate Panel may have violated their constitutional rights; they only emphasized the there has been a violation of their constitutional rights. They did not provide any *prima facie* evidence which would indicate a violation of their constitutional rights (see *Trofimchuk v. Ukraine*, ECtHR, paragraph 50-55, Judgment no. 4241/03, of 28 October 2010).

44. In conclusion, the Court considers that the Applicants have not substantiated their allegations that the relevant proceedings have been in any way unfair or arbitrary and that the challenged decision violated their constitutional rights and freedoms guaranteed by the Constitution and the ECHR (see: *mutatis mutandis: Shub vs. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).

45. Therefore, the Court considers that the admissibility requirements, as established in the Constitution, foreseen by the Law and as further specified in the Rule of Procedure have not been met.

46. Accordingly, the Court finds that the Applicants' Referral is inadmissible, as manifestly ill-founded on constitutional basis.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 (1) and (7) of the Constitution, Article 48 of the Law Rules 36 (2) (a) and 56 of the Rules of Procedure, in the session held on 06 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI 57/17 Applicant „KLENAK – DOO“, constitutional review of Judgment AC-I-16-0075-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 5 January 2017

KI57/17 Resolution on Inadmissibility approved on 6 September 2017, published on 20 October 2017

Key words*: Individual referral, violation of various rights and freedoms guaranteed by the Constitution and ECHR, referral manifestly ill-founded*

The subject matter was the constitutional review of the challenged Judgment which has allegedly violated the Applicant's rights and freedoms guaranteed by Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], Article 53 [Interpretation of Human Rights Provisions], Article 54 [Judicial Protection of Rights], Article 55 [Limitations on Fundamental Rights and Freedoms], Article 56 [Fundamental Rights and Freedoms During a State of Emergency], Article 57 [General Principles] and Article 58 [Responsibilities of the State] in conjunction with Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo.

Court noted that the Applicant in the Referral submitted to the Court raised the same questions related to procedural flaws allegedly committed by the Specialized Panel when its statement of claim was rejected due to statutory limitation, relying on current legal rules, more specifically on Article 374 paragraph 1 of the Law on Obligational Relationships

Bearing in mind the circumstances of the case, the Court did not find any arbitrariness in the application of the substantive law in the reasoning of the challenged decisions of the regular courts.

Court concluded that the Referral is manifestly ill-founded and is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI57/17

Applicant

„KLENAK – DOO“

Constitutional review of Judgment AC-I-16-0075-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 5 January 2017

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 the company „Klenak-DOO“ from Krusevac, Republic of Serbia (hereinafter: the Applicant), represented by Abit Asllani, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Judgment AC-I-16-0075-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel) of 5 January 2017.

3. The challenged Judgment of the Appellate Panel was served on the Applicant on 17 January 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment which has allegedly violated the Applicant's rights and freedoms guaranteed by Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], Article 53 [Interpretation of Human Rights Provisions], Article 54 [Judicial Protection of Rights], Article 55 [Limitations on Fundamental Rights and Freedoms], Article 56 [Fundamental Rights and Freedoms During a State of Emergency], Article 57 [General Principles] and Article 58 [Responsibilities of the State] in conjunction with Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

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

Proceedings before the Constitutional Court

6. On 16 May 2017, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 17 May 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

8. On 26 May 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Appellate Panel.

9. On 06 September 2017, the Review Panel considered the report of the Judge Rapporteur, and recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. The Applicant is the company, which until 2 December 1997, provided its services to „Social Enterprise LUX"(hereinafter: SOE LUX :) from Mitrovica.

11. On 27 September 2013, the Applicant filed a request with the Privatization Agency of Kosovo (hereinafter: PAK), requesting payment of debt which „SOE LUX" did not pay for the period from 4 February 1997 until 2 December 1997.

12. On 23 October 2013, the PAK Liquidation Authority „SOE LUX" rendered decision [MIT 039-0011] rejecting the Applicant's request for payment of debt as ungrounded due to statute of limitation.

13. On 25 November 2013, the Applicant filed a complaint with the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters (hereinafter: the Special Chamber) against the decision of PAK of 23 October 2013.

14. On 14 May 2014, PAK filed a response to the Applicant's complaint with the Special Chamber, stating that the Applicant's complaint is statute barred.

15. On 23 March 2016, the Specialized Panel of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel) rendered Judgment [C-IV-13-3274], rejecting the applicant's Appeal as ungrounded. The reasoning of the judgment reads:

„The challenged decision is fair, grounded, well-reasoned, it is clear and comprehensible to the parties, it does not contain procedural violations and it contains all crucial reasons on which is based.

[...]

„Pursuant to Article 374, paragraph 1 of the Law on Contracts and Torts (OG of SFRJ No.29/78) it is stipulates that: "the mutual contractual claims of legal persons

(corporate bodies) in the sphere of sales of goods and services, as well as claims relating to reimbursement of expenses made in connection to such contracts, shall expire due to the statutory limitations after a three year period "

16. The Applicant filed a complaint with the Appellate Panel against the Judgment [C-IV-13-3274] of the Specialized Panel.

17. At the same time, PAK sent a response to the Appellate Panel.

18. On 5 January 2017, the Appellate Panel rendered Judgment [AC-I-16-0075-A0001], which rejected the Applicant's appeal as ungrounded. The reasoning of the judgment reads:

"The complainant, either in its complaint or in its response to the defence, failed to submit any evidence to the court that it filed with the respondent any claim before for the payment of this debt and that it addressed to the competent court, from December 1997, when the SOE terminated the regular payment of the debt; by this action there would have been interrupted the statutory limitation…".

Applicant's allegations

19. The Applicant alleges: "*Judgments of both instances of this court, the factual situation – namely the existing debt owed by the Privatisation Agency of Kosovo towards the claimant in this case has not been contested, since all allegations have been rejected with justification that "the legally prescribed period of the claim in relation to this debt has elapsed"... and such a situation occurred because the courts have erroneously determined the factual situation and erroneously applied the substantive law".*

20. The Applicant requests the Court *„to declare invalid Judgment of the Specialized Panel of the SCSC and Judgment of the Appellate Panel and to remand the subject matter for reconsideration and retrial".*

Admissibility of Referral

21. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and foreseen in the Rules of Procedure.

22. The Court notes that, in accordance with Article 21.4 of the Constitution, which provides that "*Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable"*, the Applicant has the right to file a constitutional complaint referring to the fundamental rights applicable to individuals as well as to legal entities (see: *mutatis mutandis*, Resolution of 27 January 2010, case KI41/09, *AAB-RIINVEST University LLC, Prishtina v. Government of the Republic of Kosovo*).

23. 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."

24. The Court notes that the Applicant is an authorized party; the Referral was filed in accordance with the deadlines prescribed in Article 49 of the Law and the Applicant has exhausted all legal remedies.

25. However, the Court further refers to Article 48 of the Law [Accuracy of the Referral], 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."

26. The Court further refers to Rule 36 (1) d) and (2) b) of the Rules of Procedure, which foresees:

"(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".

27. In the present case, the Applicant considers that the regular courts, deciding on his statement of claim, have erroneously determined the factual situation and have erroneously applied the substantive law, and consequently the courts dealt solely with the procedural issue concerning the statute of limitations of his statement of claim, rather than the substance itself that was related to the payment of debt. This allegedly violated his constitutional rights and freedoms.

28. In this regard, the Court reiterates that the European Court on Human Rights (hereinafter: the ECtHR) has established that *„it is the role of the regular courts to interpret and apply the rules of procedural and substantive law"* (see, *mutatis mutandis*, *García Ruiz v. Spain* [GC], No. 30544/96, paragraph 28, European Court of Human Rights [ECtHR] 1999-I).

29. In this regard, the Court reiterates that the complete determination of factual situation is within the full jurisdiction of the regular courts, while the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, therefore, it cannot act as a „*fourth instance*" court (see: ECtHR case, *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65, see also: *mutatis mutandis* Constitutional Court KI86/11, Applicant *Milaim Berisha*, of 5 April 2012).

30. Based on this, the Court finds that the Applicant's allegations of erroneous application and inconsistent interpretation of the relevant legal provisions, as well as allegations of

erroneous determination of factual situation allegedly committed by the Specialized Panel and the Appellate Panel, raise issues that fall within the scope of the regular courts (legality) and this is not in the domain of the Constitutional Court (constitutionality).

31. This Court will, therefore, particularly deal with examination of the manner in which the competent courts have established facts and applied the positive legal rules to such established facts, when it is clear that there has been an arbitrary treatment by the regular court in the particular proceeding, both in the procedure of establishing facts, as well as in the procedure of application of relevant positive legal rules.

32. However, the Court notes that the Applicant in the Referral submitted to the Court raised the same questions related to procedural flaws allegedly committed by the Specialized Panel when its statement of claim was rejected due to statutory limitation, relying on current legal rules, more specifically on Article 374 paragraph 1 of the Law on Obligational Relationships.

33. In this regard, the Court notes that the Applicant filed identical objections before the Appellate Panel, which in Judgment [AC-I-16-0075-A0001] exhaustively dealt with it, and assessed these allegations as ungrounded, with the reasoning which does not seem arbitrary to the Court.

34. Furthermore, the Court does not either find arbitrary Judgment [AC-I-16-0075-A0001] of the Appellate Panel because it gave clear reasons for its decision which are legally grounded on the relevant legal provisions concerning the issue of the statutory limitation of the statement of claim.

35. Bearing in mind the above, as well as the circumstances of the present case, the Court does not see any arbitrariness in the application of the substantive law in the reasoning of the challenged decisions of the regular courts. It also cannot find elements that would indicate irregularity or arbitrariness in rendering the challenged decisions to the detriment of the Applicant.

36. Therefore, the Court considers that nothing in the case presented by the Applicant indicates that the proceedings before the regular courts were unfair or arbitrary in order for the Constitutional Court to be satisfied that the Applicant was deprived of any rights or obligations guaranteed by the Constitution.

37. The Court considers that it is the Applicant's obligation to substantiate its constitutional allegations and to submit *prima facie* evidence indicating a violation of its rights guaranteed by the Constitution and the ECHR. That assessment is in compliance with the jurisdiction of the Court (see: case of the Constitutional Court No. KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

38. However, the Court finds that the Applicant did not substantiate its allegation, nor did it indicate that its rights have been violated.

39. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 paragraph 7 of the Constitution, Article 47 of the Law, and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, in the session held on 06 September 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; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI28/17, Applicants: Azem and Arbenita Gashi, Constitutional review of Judgment Rev. No. 262/2016, of the Supreme Court of Kosovo, of 3 November 2016

KI28/17, Resolution on inadmissibility of 6 September 2017, published on 20 October 2017

Key words: *Individual referral, right to fair and impartial trial, manifestly ill-founded*

By its Judgment, the Supreme Court of Kosovo rejected the Applicants' revision filed against the Judgment of the Court of Appeals as ungrounded.

In essence, the Applicants complained before the Constitutional Court that their rights guaranteed by the Constitution, namely his right to fair and impartial trial, had been violated, alleging that the Supreme Court had not provided satisfactory reasoning in its Judgment as to why they modified the Judgment of the Municipal Court on the compensation for the damage they suffered in a road accident.

The Court found that the Applicants had failed to substantiate and prove on constitutional basis that the proceedings conducted before regular courts, including the Supreme Court, were unfair or arbitrary. The Referral was declared inadmissible as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI28/17

Applicant

Azem Gashi and Arbenita Gashi

Constitutional review of
Judgment Rev. No. 262/2016, of the Supreme Court of Kosovo,
of 3 November 2016

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 Azem Gashi and Arbenita Gashi, residing in Prishtina, (hereinafter: the Applicants), who are represented by Zaim Istrefi, a lawyer from Prishtina.

Challenged decision

2. The Applicants challenge Judgment Rev. No. 262/2016, of the Supreme Court of Kosovo, of 3 November 2016, which was served on them on 16 November 2016.

Subject matter

3. The subject matter of the Referral is the constitutional review of Judgment Rev. No. 262/2016 of the Supreme Court of Kosovo, of 3 November 2016, which allegedly violated the Applicants' rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. On 7 March 2017, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 7 April 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.

7. On 13 April 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.

8. On 17 July 2017, the Applicants' representative submitted to the Court Judgment P. No. 2850/08 of the Municipal Court in Prishtina, of 10 February 2012.

9. On 6 September 2017, the Review Panel, after having considered the report of the Judge Rapporteur, unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. On 7 August 2008, the Applicants sustained serious bodily injury in a traffic accident caused by the user of the "Sigal Uniqa Group Austria" Insurance Company in Prishtina (hereinafter: Sigal Company).

11. On 10 February 2012, the Municipal Court in Prishtina [Judgment P. No. 2950/08] found guilty G.B, the vehicle security user of Sigal Company, for the criminal offense "*Endangering Public Traffic*" under Article 297 par. 5 in conjunction with paragraphs 3 and 1 of the Criminal Procedure Code.

12. On 15 October 2012, the Applicants filed a lawsuit for compensation of non-material damage with the Basic Court against Sigal Company by specifying the compensation (the amount) for all forms of damage caused by the accident.

13. On an unspecified date, Sigal Company filed a response to the lawsuit, challenging the amount of compensation, and giving the Applicants an offer for judicial reconciliation. The Applicants did not accept the offer for judicial reconciliation.

14. On 14 December 2012, the Municipal Court in Prishtina (Judgment C. No. 1793/08) partially approved the statement of claim and obliged Sigal Company to compensate the non-material damage to the Applicants caused by the user of the security of the Sigal Company.

15. On 25 April 2013, Sigal Company filed an appeal with the Court of Appeals of Kosovo against Judgment C. No. 1793/08 of the Municipal Court in Prishtina of 14 December 2012, on the grounds of essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.

16. On 10 March 2016, the Court of Appeals of Kosovo (Judgment CA. No. 3287/13), partially modified Judgment C. No. 1793/08 of the Municipal Court in Prishtina, of 14 December 2012, obliging Sigal Company that on behalf of the damage sustained as a result of the traffic accident, pay the Applicants less than the amount determined by the Municipal Court. In the Judgment it is reasoned that:

"[...] when rendering the judgment, it erroneously applied the substantive law when determining amounts to be compensated for non-material damage as in the enacting clause of the appealed judgment considering them being disproportionate with criteria and living standard in Kosovo, i.e. exceeding the amounts that would be adequate for satisfaction and in compliance with provisions of Article 200 of LOR of 1978 as well as with the case law created by dealing with similar cases in Kosovo including the stances of the Supreme Court [...]."

17. On 6 May 2016, the Applicants submitted a revision to the Supreme Court against Judgment CA. No. 3287/13 of the Court of Appeals of 10 March 2016, on the grounds of erroneous application of the substantive law.

18. On an unspecified date, Sigal Company submitted a revision to the Supreme Court, due to "*exceeding the statement of claim with the proposal to modify the challenged judgment and to partially approve the statement of claim of the claimants.*"

19. On 3 November 2016, the Supreme Court of Kosovo (Judgment Rev. No. 262/2016) rejected the revision of Applicants and of the Sigal Company as inadmissible, reasoning that the second instance court had correctly applied the provisions of the substantive law and by fully upholding Judgment CA. No. 3287/13of the Court of Appeals, of 10 March 2016.

Applicant's allegations

20. The Applicants allege that the decisions of the regular courts violated their constitutional rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights] of the Constitution, as well as Article 6 [Right to a fair trial] of the ECHR.

21. The Applicants allege that *"the Court of Appeals of Kosovo and the Supreme Court of Kosovo in their judgments stated above, did not provide satisfactory reasoning as to why they modified the decision rendered by the Municipal Court of Kosovo, having in mind that in Article 200 of LOR is determined the purpose of compensation; whereas in this specific case, the applicants were subject to uprooting of their material goods; therefore, the decision of the Municipal Court would have served them as a fair redress [...]."*

22. The Applicants further allege that *"the Court of Appeals and the Supreme Court in their judgments did not refer to any factual and legal reasoning on how and why they have modified the Judgment of the first instance court."*

23. The Applicants request the Court to annul Judgment CA. No. 3287/13 of the Court of Appeals of Kosovo of 10 March 2016 and Judgment Rev. No. 262/2016 of the Supreme Court of 3 November 2016, and to uphold Judgment C. No. 1783/08 of the Municipal Court in Prishtina, of 14 December 2012.

Admissibility of the Referral

24. The Court first examines whether the admissibility requirements established in the Constitution and as further specified in the Law and the Rules of Procedure have been met.

25. In this respect, the Court refers to 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."

26. However, Court 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. In this regard, the Court further refers to Rule 36 of the Rules of Procedure, which provides:

(1) The Court may consider a referral if

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

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

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

28. In the present case, the Court notes that the Applicants are authorized parties, that they have exhausted all available legal remedies and filed the Referral within a prescribed legal period. However, the Court should further examine whether the requirements laid down in Article 48 of the Law and provided for in Rule 36 of the Rules of Procedure have been met.

29. The Applicants allege that Judgment CA. No. 3287/13, of the Court of Appeals of Kosovo, of 10 March 2016 and Judgment Rev. No. 262/2016 of the Supreme Court of 3 November 2016, violated their rights guaranteed by the Constitution, namely the right to fair and impartial trial and to judicial protection, due to the reduction of the value for compensation for the non-material damage as a result of injury sustained in the traffic accident.

30. In this regard, the Court refers to Article 31 of the Constitution, which establishes:

"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 [...] within a reasonable time by an independent and impartial tribunal established by law."

31. In addition, the Court takes into account Article 6.1 of the ECHR, which stipulates:

"*In the determination of his civil rights and obligations, everyone is entitled to a fair hearing by a tribunal.*"

32. The Court recalls that the Applicants allege that the Court of Appeals and the Supreme Court did not sufficiently reasoned their decisions in the parts in which Judgment C. No. 1793/08 of the Municipal Court in Prishtina of 14 December 2012 was annulled and that they did not correctly determine the factual situation.

33. The Court notes that the Applicants alleged in the Supreme Court the violation of the substantive law. The Court considers that the Judgment of the Supreme Court addressed and decided on the grounds of the aforementioned appeal. For these reasons, the Judgment of the Supreme Court is now final decision on this contested matter.

34. In this regard, the Court refers to Judgment Rev. No. 262/2016 of the Supreme Court of 3 November 2016, which concluded that the Court of Appeals, by Judgment Ac. No. 3287/2013, of 10 March 2016 has correctly applied the provisions of the substantive law.

35. The Supreme Court in Judgment Rev. No. 262/2016 of 3 November 2016 held that *"the second instance court has correctly applied the substantive law provisions when it partially approved the respondent's appeal ad modified the first instance judgment [...] the challenged judgment does not contain substantial violations of provisions of the contested procedure which this Court shall ex officio take care of. Regarding the adjudicated amounts by the second instance court (amended part) and in relation to abovementioned forms of non-material damages, the provision of Article 200 of LOR, in conjunction with Article 323 of LCP was correctly applied when taken into consideration conclusions and recommendations of respective medical experts [...] Assessment of the redress for non-material damage (as a satisfaction that does not have profit - lucrative purposes) shall present application of the substantive law."*

36. The Court considers that the Supreme Court not only confirmed the reasons given in the Judgment CA. No. 3287/13 of the Court of Appeals of Kosovo of 10 March 2016, but also addressed the essential issues related to the allegation of "*a violation of the substantive law*."

37. In this regard, the Court considers that the Supreme Court assessed the evidence in its entirety by analyzing the facts and considering that "*when* determining *the amounts for redress on certain forms of non-material damage and on the fear as a freestanding non-material damage, the Court shall take care on significance of the damaged wealth and on the purpose such a redress serves under Article 200 of LOR; furthermore it shall take care to not give favors to purposes that are not in compliance with nature of such redress of non-material damage [...]. The determined amount by the second instance court, regarding the forms of non-material damage stated above and according to assessment of this court, are realistic and in compliance with legally envisaged criteria and in harmony with the case law*."

38. Regarding the Applicants' allegation that the Court of Appeals and the Supreme Court did not sufficiently reason their decisions, the Court reiterates that, in accordance with the ECHR case law, the right to a reasoned decision includes a complex of obligations of the Court's decisions, respectively, to provide the reasons on which the decision is based, to demonstrate to the parties that they have been heard, provide them with the opportunity to appeal against the decision and provide sufficient clarity of the reasons based on which the decision is made.

39. Although a regular court has a certain margin of appreciation when choosing arguments and admitting evidence, Article 6 (1) of the ECHR does not require a detailed answer to each and every argument provided to the court during the conduct of the proceedings (See *Suominen v. Finland*, No. 37801/97, ECtHR, Judgment of 24 July 2003, para 36;

Van de Hurk v. the Netherlands, No. 16034/90, ECtHR, Judgment of 19 April 1994, para 61; *Jahnke and Lenoble v. France* (déc.); *Perez v. France* [GC] No. 47287/99, ECtHR, Judgment of 12 April 2004, para 81; *Ruiz Torija v. Spain*, No 18390/91, ECtHR, Judgment of 09 December 1994, para 29; *Hiro Balani v. Spain*, No. 18064/91. ECtHR, Judgment of 9 December 1994 para 27).

40. The Court considers that the Supreme Court addressed all the grounds of the appeal raised in the request for revision of the Applicants. Therefore, the Applicants had sufficient access to regular courts and sufficient opportunity to present evidence and arguments regarding their disputed question.

41. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See ECHR case*, Garcia Ruiz v. Spain,* Application No. 30544/96, 21 January 1999, para. 28).

42. The Court notes that the Applicants submitted to the Constitutional Court essentially the same grounds of appeal as they have filed at the last instance.

43. The Constitutional Court recalls that it is not a fact finding court and that the correct and complete determination of factual situation is a full jurisdiction of the regular courts. The role of the Constitutional Court is only to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Court cannot act as a "fourth instance court" (see case *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65; see also: case KI86/11, Applicant: *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012.

44. Moreover, the Applicants failed to prove and substantiate on constitutional basis that the proceedings before the regular courts, including the Supreme Court, were unfair or arbitrary or that their rights and freedoms were violated. The facts of the case do not show that the regular courts acted in contravention of the procedural safeguards established by the Constitution.

45. From the foregoing, the Court finds that the right of the Applicants to fair and impartial trial during the proceedings was generally respected and, more specifically, they had free access to the courts, reasoned judgments were given at various stages of the procedure. The Court further finds that, in accordance with this, the judicial protection was guaranteed.

46. Therefore, the Applicants' allegations of a violation of the right to fair and impartial trial and to judicial protection are manifestly ill-founded on constitutional basis.

47. In the light of the foregoing, the Court considers that the Applicants' Referral does not meet the admissibility requirements established in the Constitution, as further specified in the Law and provided by the Rules of Procedure.

48. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible pursuant to Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, on 6 September 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 Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI 25/17 Applicant Bukurije Gashi, constitutional review of Judgment GSK- KPA-A- 221/14 of the Kosovo Property Agency Appeals Panel of the Supreme Court of Kosovo of 3 August 2016

KI25/17 Resolution on Inadmissibility approved on 6 September 2017, published on 20 October 2017

Key words: *Individual referral, Property rights*, *referral manifestly ill-founded*

The subject matter was the constitutional review of the Judgment of the KPA Appeals Panel, which allegedly has violated the Applicant' rights under Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo.

The Court concluded that even assuming that the challenged judgment of the KPA Appeals Panel was served on the Applicant sometime between 4 August 2016 and 2 November 2016, the Referral is out of time limit of four (4) months, because it was submitted on 3 March 2017. Therefore referral was declared inadmissible for review because it is filed out of time, as it is established by Article 113.7 of the Constitution, provided for in Article 49 of the Law, and as further specified in Rule 36 (1) (c) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI25/17

Applicant

Bukurije Gashi

Constitutional review of Judgment GSK- KPA- A- 221/14 of the Kosovo Property Agency Appeals Panel of the Supreme Court of Kosovo of 3 August 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 Bukurije Gashi from Suhareka (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [GSK-KPA-A-221/14] of the Kosovo Property Agency Appeals Panel of the Supreme Court of Kosovo (hereinafter: the KPA Appeals Panel) of 3 August 2016, served on her on unspecified date.

Subject matter

3. The subject matter is the constitutional review of the Judgment of the KPA Appeals Panel, which allegedly has violated the Applicant' rights under Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113.7 of 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

5. On 3 March 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 7 April 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani

7. On 19 April 2017, the Court notified the Applicant and the KPA Appeals Panel about the registration of the Referral.

8. The Court also requested from the Applicant to submit the acknowledgment on receipt within a specified period as evidence when the challenged judgment was served on her.

9. The Applicant did not respond to the request of the Court within a specified period.

10. On 17 May 2017, the Applicant sent a letter to the Court with comments which did not contain the evidence of the date of service of the challenged judgment.

11. On 17 May 2017, the Court sent a letter to the KPA Appeals Panel, requesting to submit the evidence when the challenged judgment was served on the Applicant.

12. The KPA Appeals Panel did not respond to the request of the Court.

13. On 21 June 2017, the Court submitted again the request to the KPA Appeals Panel, in which it requested to submit the acknowledgment on receipt as evidence when the challenged judgment was served on the Applicant.

14. The KPA Appeals Panel did not respond to this request of the Court either.

15. On 6 September 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on inadmissibility of the Referral.

Summary of facts

16. Based on the case file in the Referral, the Court can notice that on 19 January 2007, the Housing and Property Claims Commission (hereinafter: the HPCC) rendered a decision HPCC/REC/89/2007, which recognized the right of possession over the apartment located in the neighbourhood Rasadnik in Suhareka to the third party Z.S.

17. On 10 October 2007, the Applicant filed an appeal with the Kosovo Property Agency (hereinafter: the KPA), requesting the possession over the aforementioned apartment.

18. On 13 March 2014, the Kosovo Property Claims Commission (hereinafter: the KPCC) rendered Judgment No. KPCC / D / R / 231/2014, which rejected the Applicant' appeal as ungrounded, with the reasoning: "*The Applicant, in this case the appellant, did not lose the possession as a result of the conflict 1998/99. "*

19. On 23 May 2014, the Applicant filed an appeal with the KPA Appeals Panel against the KPCC Decision No. KPCC/ D/ R/ 231/2014.

20. On 3 August 2016, the KPA Appeals Panel rendered Judgment [GSK-KPA-A-221/14] which rejected the Applicant's appeal as ungrounded, while it upheld the KPCC decision of 13 March 2014, in entirety. The reasoning of the Judgment reads: *"There are sufficient elements in the case file that show that the apartment was not in*

possession of the appellant (the Applicant) at the moment when the conflict happened. "

Applicant's allegations

21. The Applicant alleges in the Referral: *"that the HPD, namely the Kosovo Property Agency, violated the law and her right to property."*

22. The Applicant requests the Court to *„annul the decision of the KPA Appeals Panel and to approve her request for the use of the apartment. "*

Assessment of the admissibility of Referral

23. 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.

24. 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."*

25. The Court, also refers to Article 49 of the Law, which foresees:

> *"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..."*

26. The Court further takes into account Rule 36 (1) (c) of the Rules of Procedure, which provides:

> *"1) The Court may consider a referral if:*
>
> (...)
>
> *(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant."*

27. Having reviewed the Applicant's Referral, the Court notes that she challenges Judgment [GSK-KPA-A-221/14] of the KPA Appeals Panel, of 3 August 2016. In this regard, on 19 April 2017, the Court sent a letter to the Applicant requesting her to indicate when the challenged Judgment [GSK-KPA-A-221/14] of the KPA Appeals Panel was served on her, as well as to submit evidence to justify her allegations about the date of service of the judgment.

28. The Court further notes that the Applicant did not submit any reply to the Court within specified period.

29. On 17 May 2017, the Applicant sent a letter to the Court with comments based on which the Court could not conclude when the challenged judgment was served on her.

30. In addition, in order to determine when the challenged judgment was served on the Applicant, the Court sent two requests for additional documentation (on 17 May 2017 and on 21 June 2017), to the KPA Appeals Panel.

31. However, the Court wishes to reiterate that the KPA Appeals Panel did not send replies to any of the Court's requests.

32. The Court adds that even assuming that the challenged judgment of the KPA Appeals Panel was served on the Applicant sometime between 4 August 2016 and 2 November 2016, the Referral is out of time limit of four (4) months, because it was submitted on 3 March 2017.

33. The Court recalls that the purpose of the 4 (four) months legal deadline under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedures is to promote legal certainty by ensuring that cases raising issues under the Constitution are dealt within a reasonable time and that past decisions are not continually open to constitutional review (See case *O'Loughlin and Others v. United Kingdom*, Application No. 23274/04, ECHR, Decision of 25 August 2005, and see also: Case no. KI140/13, *Ramadan Cakiqi,* Decision on Inadmissibility of 17 March 2014, paragraph 24).

34. Therefore, the Referral is to be declared inadmissible for review because it is filed out of time, as it is established by Article 113.7 of the Constitution, provided for in Article 49 of the Law, and as further specified in Rule 36 (1) (c) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49 of the Law and Rule 36 (1) c) of the Rules of Procedure, on its session held on 6 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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**
Altay Suroy	Arta Rama-Hajrizi

KI53/17, Applicant: X, Constitutional review of Judgment Pml. No. 50/2017 of the Supreme Court of Kosovo, of 20 March 2017

KI53/17, Resolution on inadmissibility of 5 September 2017, published on 24 October 2017

Key words: *Individual referral, criminal procedure, right to fair and impartial trial, manifestly ill-founded, proceedings against a minor, non-disclosure of identity*

The Applicant submitted a Referral to the Constitutional Court whereby he requested the constitutional review of the Judgment of the Supreme Court. The Applicant was found guilty by the Municipal Court in Prizren of having committed 3 (three) criminal offences.

In his request for protection of legality filed with the Supreme Court, the Applicant had alleged that Article 390, paragraph 1, of the Criminal Procedure Code of Kosovo (CPCK) had been violated because the hearing of the panel for minors at the Court of Appeals had been conducted in his absence despite the Applicant's request to be notified on such hearing. The Supreme Court had rejected the Applicant's request for protection of legality as ungrounded.

In his Referral, the Applicant alleged that Articles 31 and 50 of the Constitution, Article 6 of the ECHR, and Articles 3 and12 of the Convention on the Rights of the Child had been violated.

The Constitutional Court found that the Applicant's referral was inadmissible as manifestly ill-founded on constitutional grounds, because the facts submitted by the Applicant did not substantiate the allegation that Articles 31 and 50 of the Constitution, Article 6 of the ECHR, and Articles 3 and 12 of the Convention on the Rights of the Child had been violated, and that the Applicant did not sufficiently substantiate his claim. Because the Applicant is a minor, the Court granted his request for non-disclosure of identity.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI53/17

Applicant

X

Constitutional review of Judgment Pml. No. 50/2017 of the Supreme Court of Kosovo, of 20 March 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 minor X (hereinafter: the Applicant), represented by Fitim Shporta, a lawyer from Prizren.

Challenged decision

2. The challenged decision is Judgment Pml. No. 50/2017 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 20 March 2017 which rejected the Applicant's request for protection of legality against Decision No. 73/1626 of the Court of Appeals (Decision PAM. No. 73/2016, of 22 December 2016) as ungrounded.

3. The challenged Judgment of the Supreme Court was served on the Applicant on 5 April 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged judgment, which allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 50 [Rights of Children], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR), as well as Articles 3 and 12 of the Convention on the Rights of the Child.

5. The Applicant filed a request for non-disclosure of his identity, due to his minor age.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the 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

7. On 26 April 2017, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 27 April 2017, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

9. On 4 May 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.

10. On 5 September 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of Referral.

Summary of facts

11. On 29 August 2016, the Basic Court in Prizren, Department for Minors (hereinafter: the Basic Court), Decision PM. No. 105/2015, after holding the hearing in a non-public session, and in the presence of the Applicant, other minors, the legal representatives, the Probation Service and the State Prosecutor imposed an educational measure against the Applicant, namely committed him to an Educational-Correctional Institution for a period of one (1) year.

12. The Basic Court in Prizren found that the Applicant had committed three criminal offenses of aggravated theft in co-perpetration under Article 327, paragraph 1, subparagraph 1.1. in conjunction with Article 31 of the Criminal Code of Kosovo (hereinafter: CCK), one criminal offense of aggravated theft in co-perpetration under Article 327, paragraph 2, subparagraph 2.3 in conjunction with Article 31 of the CCK, and one criminal offense of attempted aggravated theft in co-perpetration under Article 327, paragraph 1, sub-paragraph 1.1 in conjunction with Articles 28 and 31 of the CCK.

13. On 21 October 2016, the Applicant filed an appeal with the Court of Appeals against the aforementioned Decision of the Basic Court. In his appeal, the Applicant mainly alleged a violation of the criminal law, because the Basic Court did not correctly and completely assess the mitigating circumstances, and as a result, a more lenient educational measure or a suspended sentence was not imposed on the Applicant. In addition, the Applicant requested the Court of Appeals to notify him about the panel session of the Court of Appeals.

14. On 22 December 2016, the Court of Appeals (Decision No. 73/2016) rejected the Applicant's appeal as ungrounded and upheld the Decision of the Basic Court of 29 August 2016.

15. In its decision, the Court of Appeals found that: *"[...] the allegations of defense counsels of the juveniles that the educational institutional measures imposed to the juveniles are too harsh and they should be replaced with more lenient measures, are ungrounded*

since in the appeals in defense counsels of the juveniles there are no concrete mitigating circumstances which would be a subject of review by the first instance court and which would affect in modifying the imposed measure, making it more lenient; therefore, the Court of Appeals considers that the Court of the first instance assessed fairly all the circumstances which had influence on imposing the educational measures, including here the report of the Probation Service; therefore, the period of the educational measure imposed to the juveniles is in accordance with the ascertained and assessed circumstances and it is to their best interest. […]"

16. On 2 February 2017, the Applicant submitted a request for protection of legality to the Supreme Court against the aforementioned decision of the Court of Appeals.

17. In his request for protection of legality, the Applicant alleged violation of Article 390, paragraph 1 of the Criminal Procedure Code of Kosovo (hereinafter: the CPCK), because the panel session for minors at the Court of Appeals was held without his presence, despite the Applicant's request to be notified about this hearing. In this regard, the Applicant also alleged violation of Article 31 of the Constitution, Article 6 of the ECHR, and Articles 3 and 12 of the Convention on the Rights of the Child.

18. On 20 March 2017, the Supreme Court (Judgment PML. No. 50/2017) rejected the Applicant's request for protection of legality as ungrounded.

19. Regarding the Applicant's allegation about notification of a session of the panel, the Supreme Court held that:

> *"[…] the above mentioned claims do not stand, based on the fact that provisions of Article 390, paragraph 1, of the CPCK emphasizes that when the accused person was sentenced to imprisonment, the notification for the session of the Appellate Panel shall be sent to the competent State Prosecutor, the injured person, the accused person and his defense counsel*
>
> *The fact that the educational institutional measure - sending the juvenile to Educational Correctional Institution for a period of 1 year was imposed on the juvenile [the Applicant], stands but this measure is not punishment of imprisonment as stipulated under provision of Article 390, paragraph 1, of the CPCK. Further on, the provision of Article 5 of Juvenile Justice Code stipulates that the provisions of the Criminal Code of Kosovo, the Criminal Procedure Code of Kosovo, the Law on Execution of Penal Sanctions and any other relevant legislation shall apply to juveniles, unless otherwise regulated by the present Code. Therefore, in the present case, the Court of Appeals of Kosovo rightfully applied the provisions of Article 390, paragraph 1, of the CPCK, where it did not inform about the session of the Panel neither the juvenile, nor his defense counsel."*

Applicant's allegations

20. The Applicant alleges that the Court of Appeals and the Supreme Court violated the provisions of the criminal procedure and his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 50 [Rights of Children] of the Constitution, in conjunction with Article 6 [Right to a Fair Trial] of the ECHR, as well as Articles 3 and 12 of the Convention on the Rights of the Child.

21. In this regard, the Applicant claims that *"by ignoring the best interests of the child, the court did not give the opportunity to the child and his legal representative to be heard in the session before the appellate panel, although in all court proceeding the child and*

his legal representative should have been given the opportunity to be heard with regard to their matter."

Relevant provisions of the Constitution, the European Convention on Human Rights and the Convention on the Rights of the Child, the Criminal Procedural Code and the Juvenile Justice Code

Constitution

Article 31 [Right to Fair and Impartial Trial]

"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.

[...]

Article 50 [Rights of Children]

[...]

4. All actions undertaken by public or private authorities concerning children shall be in the best interest of the children.

[...]

European Convention on Human Rights

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Convention on the Rights of the Child

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 8

"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 12

[...]

"2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

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.

Criminal Procedure Code

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."*
[...]

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."

Assessment of the admissibility of Referral

22. The Court first examines whether the Applicant has met the admissibility requirements established in the Constitution and as further foreseen in the Law and specified in the Rules of Procedure.

23. In this respect, the Court refers to 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".*

24. The Court notes that the Applicant is an authorized party in accordance with the Constitution, challenges an act of public authority, in this case the Judgment of the Supreme Court, has exhausted all the necessary legal remedies and has submitted his referral within a period of 4 (four) months from the receipt of the judgment.

25. However, the Court also refers to Article 48 [Accuracy of Referral] 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".*

26. The Court also recalls Rule 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, which establishes:

> *"(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."*

27. The Court recalls that the Applicant essentially alleges that the Court of Appeals has violated his right to be summoned and attend the panel session of the Court of Appeals, as provided by Article 390 (1) of the CPCK. In this regard, he alleges violation of Articles 31 and 50 of the Constitution, Article 6 of the ECHR and Articles 3 and 12 of the Convention on the Rights of the Child.

28. The Court notes 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."*

29. The Court referring to the case law of the European Court of Human Rights (hereinafter: the ECtHR) states that *"the entitlement to a "public hearing" as guaranteed by Article 31.2 of the Constitution and Article 6.1 of the ECHR necessarily implies a right to an "oral hearing" (*See case of the Constitutional Court KI74/16, X, Resolution on Inadmissibility of 10 November 2016, paragraph 30; see also, *mutatis mutandis* ECtHR

case *Döry v. Sweeden*, Application No. 28394/95, Judgment of 12 November 2002, paragraph 37).

30. Accordingly, the principle of an oral and public hearing is particularly important in the criminal context, where the accused person of a criminal offence in general, must be provided an opportunity to be physically present in the session of a first instance court, which fully meets the requirements of Article 31 of the Constitution and Article 6 of the ECHR (See case of the Constitutional Court, KI68/16, *Fadil Rashiti*, Resolution on Inadmissibility of 2 June 2017, paragraph 41, see also ECtHR case *Jussila v. Finland,* Application No. 73053/01, [GC], Judgment of 23 November 2006, paragraph 40).

31. However, referring to its case law and the ECtHR case, the Court considers that the personal presence of the accused is of no critical importance in the appeal hearing as in the hearing. "*The manner in which Article 31 of the Constitution and Article 6 of the Convention apply to proceedings before the appellate courts depends on the particular features of the proceedings in progress and that the proceedings as a whole, the legal order and the role of the Court of Appeal in the legal system"* (see Constitutional Court cases, KI68 / 16, Fadil Rashiti, Resolution on Inadmissibility of 2 June 2017, paragraph 42 and KI74 / 16, X Resolution on Inadmissibility of 10 November 2016, paragraph 32, see also , *mutatis mutandis,* case of ECtHR, *Hermi v. Italy,* Application No. 18114/02, Judgment of 18 October 2006, para. 60).

32. In the present case, the Court notes that the first instance court met the requirement for holding a public and oral hearing because the court hearings were conducted in the personal attendance of the Applicant and his defense counsel, as well as of the prosecutor. The Court also recalls that the Basic Court, after having determined that the Applicant had committed the aforementioned criminal offenses, imposed on him the educational measure.

33. Consequently, the Court considers that the first instance court, namely the Basic Court met the requirement for holding an "oral hearing" in accordance with Article 31.2 of the Constitution and Article 6.1 of the ECHR.

34. The Court further recalls that the Applicant in his appeal filed with the Court of Appeals had essentially alleged a violation of the criminal law and requested that he be notified and summoned to the appellate panel session.

35. The Court notes that in the appeals procedure, the Court of Appeals only upheld the Judgment of the Basic Court based on the facts established by the Basic Court.

36. Thus, the Court finds that the Applicant in the proceedings before the Court of Appeals was not deprived of his rights and guarantees foreseen by Article 31.2 of the Constitution and Article 6.1 of the ECHR with regard to an "*oral and public hearing*".

37. Further the Court notes that the Supreme Court rejected as ungrounded the Applicant's request for protection of legality based on Article 390.1 of the CPCK and Article 5 of the Juvenile Code.

38. The Supreme Court in it interpretation of these provisions assessed that: "*The fact that the educational institutional measure - sending the juvenile to Educational Correctional Institution for a period of 1 year was imposed on the juvenile [the Applicant], stands but this measure is not punishment of imprisonment as stipulated under provision of Article 390, paragraph 1, of the CPCK. Further on, the provision of Article 5 of Juvenile Justice Code stipulates that the provisions of the Criminal Code of Kosovo, the Criminal Procedure Code of Kosovo, the Law on Execution of Penal*

Sanctions and any other relevant legislation shall apply to juveniles, unless otherwise regulated by the present Code."

39. Therefore, the Court finds that the reasoning given by the Supreme Court with respect to the Applicant's allegations of violation of the Criminal Procedure Code, is clear and, after reviewing all the proceedings, the Court also found that the proceedings before the regular courts were not unfair or arbitrary (See case *Shub v. Lithuania,* No. 17064/06, ECtHR, Decision of 30 June 2009).

40. As regards the Applicant's allegations of violation of Article 50 [Rights of Children] of the Constitution, and Articles 3 and 12 of the Convention on the Rights of the Child, the Court notes that the Applicant has not presented *prima facie* evidence nor has he substantiated his claim as to how the Court of Appeals and the Supreme Court have violated his rights.

41. The mere fact that the Applicant does not agree with the outcome of his case cannot raise of itself an arguable claim of the violation of his rights as protected by the Constitution, ECHR and the European Convention on Rights of the Child (see case of Constitutional Court KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 May 2012, paragraph 28).

42. In the present case, the Court considers that the facts presented by the Applicant do not in any way justify the alleged violation of Articles 31 and 50 of the Constitution, Article 6 of the ECHR and Articles 3 and 12 of the Convention on the Rights of the Child and that the Applicant has not sufficiently substantiated his claim.

43. Therefore, the Referral is manifestly ill-founded on constitutional basis and must be declared inadmissible.

Applicant's request for non-disclosure of identity

44. The Court recalls that the Applicant in his Referral filed a request for non-disclosure of identity due to his minor age.

45. In this regard, the Court refers to Rule 29 (6) of the Rules of Procedure, which provides that:

"The party filing the referral may request that his or her identity not be publicly disclosed and shall state the reasons for the request. The Court may grant the request if it finds that the reasons are well-founded."

46. The Court, based on the minor age of the Applicant and in accordance with the Articles 8 and 40 of the Convention on the Rights of the Child, which, according to Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, "are 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", grants his request for non-disclosure of identity.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rules 29 (6) and 36 (2) (b) and (d) of the Rules of Procedure, on 5 September 2017, 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	**President of the Constitutional Court**
Ivan Čukalović	Arta Rama-Hajrizi

KI64/17, Applicant: Selatin Ahmeti, Constitutional review of Conclusion no. 011-952-1/4261/16 of the Directorate of Cadaster in the Municipality of Prishtina, of 27 February 2017

KI64/17, Resolution on inadmissibility of 5 September 2017, published on 24 October 2017

Key words: *Individual referral, civil proceedings, effective legal remedies, principle of subsidiarity, premature referral*

The Applicant submitted a referral to the Constitutional Court whereby he requested the constitutional review of the Conclusion no. 011-952-1/4261/16 of the Directorate of Cadaster in the Municipality of Prishtina, whereby the transfer of immovable property in the name of the Applicant had been temporarily suspended.

In his Referral, the Applicant stated that he was aware that he had not exhausted the legal remedies; however, according to him, such remedies would be ineffective because they may result in proceedings being excessively lengthy.

The Court found that it could not assess the alleged constitutional violations without affording an opportunity to the competent authorities to complete the proceedings regarding the Applicant's appeal, which are still are pending. Therefore, the Court declared the Applicant's referral inadmissible as being filed prematurely.

RESOLUTION ON INADMISSIBILITY

in

Case KI64/17

Applicant

Selatin Ahmeti

Constitutional review of Conclusion No. 011-952-1/4261/16 of the Directorate of Cadastre in the Municipality of Prishtina, of 27 February 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 Selatin Ahmeti, residing in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The challenged decision is Conclusion No. 011-952-1/4261/16 of the Directorate of Cadastre in the Municipality of Prishtina (hereinafter: the Directorate of Cadastre) of 27 February 2017, which temporarily suspended the transfer of immovable property in the name of the Applicant.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's rights guaranteed by Article 21 [General Principles], Article 46 [Protection of Property] and Article 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the 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 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 Altay Suroy as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.

7. On 6 June 2017, the Court notified the Applicant about the registration of the Referral. On 19 June 2017, a copy of the Referral was sent to the Directorate of Cadastre.

8. On 5 September 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 27 December 2008, the Applicant purchased an apartment in Prishtina and certified the sale-purchase contract with the Municipal Court in Prishtina (Decision 86/2009 of 8 January 2009).

10. On an unspecified date, the apartment which the Applicant had leased as a business premise, was closed by the Municipal Inspectorate in Prishtina, for the reason that the transfer of property was not carried out in the name of the Applicant.

11. On 16 December 2016, the Applicant submitted a request for transfer of the immovable property to the Directorate of Cadastre.

12. On 27 February 2017, the Directorate of Cadastre (Conclusion No. 011-952-1/4261/16) decided that until the submission of additional evidence by the Applicant, it would temporarily suspend the transfer of the immovable property.

13. The Directorate of Cadastre requested the following: *"[...] within the legal time limit of 15 working days from the date of receipt hereof, with the following documents: [...] based on Article 32, paragraph 1 and 2 of Law No. 05/L-096 on the Prevention of Money Laundering and Combating Terrorist Financing, the completed bank transfer shall be presented as it is required based on this Law [...] between the seller and the buyer [...]."*

14. The Conclusion of the Directorate of Cadastre also determined that the Applicant *"is allowed to file appeal against this conclusion within a time limit of 15 days from the date of receipt. The appeal shall be addressed and submitted to the DOC [Directorate of Cadastre] for review."*

15. On 13 March 2017, against the abovementioned conclusion, the Applicant filed a complaint with the Directorate of Cadastre.

16. Until this date, the Applicant did not submit the notification or decision regarding his complaint in the administrative procedure.

Applicant's allegations

17. The Applicant alleges that his rights guaranteed by Article 21 [General Principles], Article 46 [Protection of Property] and Article 53 [Interpretation of Human Rights Provisions] of the Constitution in conjunction with Article 6 [Right to a fair trial] of the ECHR have been violated.

18. Regarding the exhaustion of legal remedies, the Applicant alleges that *"[...] the failure to use or possess freely the property; the failure to administer the justice correctly, the extraordinary complexity of the administrative procedure for reaching a fair decision, the excessive delay of the process, namely not deciding upon the contest within a reasonable time even though it is known that the courts in the excessively extended process will decide in my favor, while the excessive extension of the legal process has unforeseen consequences."*

19. Finally, the Applicant requests the Court: *"[...] to render a decision holding the violations of the rights of the Applicant guaranteed by the Constitution, that are related to Article 6 of the European Convention on Human Rights [...]".*

Assessment of the admissibility of Referral

20. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, and as further specified in the Law and foreseen in the Rules of Procedure.

21. In this respect, the Court refers to 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."*

22. The Court also refers to paragraph 2 of Article 47 [Individual Requests] of the Law, which establishes:

> *"2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law".*

23. The Court further refers to paragraph (1) (b) of Rule 36 of the Rules of Procedure, which provides:

> *"(1) The Court may consider a referral if:*
> *[...]*
>
> *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.*
>
> *[...]"*

24. The Court based on the case file, notes that the Applicant's complaint is still under the review with the Directorate of Cadastre.

25. Taking into account the fact that the Applicant's case is still under consideration in a regular administrative procedure with the Cadastral Directorate, the Court considers that the Applicant's Referral is premature.

26. In the present case, the Court recalls that the Applicant does not deny the fact that all available remedies have not been exhausted, but according to him, the exhaustion of effective legal remedies before the competent authorities, including the regular courts, is ineffective because it may result in the excessive length of the proceedings.

27. However, referring to its case law and the case law of the Court of Human Rights (hereinafter: the ECtHR), reiterates that that the length of proceedings, by itself, does not make legal remedy ineffective (See case of the Constitutional Court, KI145/15, *Florent Muçaj*, Resolution on Inadmissibility of 16 May 2016, paragraph 34).

28. Regarding the Applicant's allegation that in his case the legal remedies are ineffective, the Court notes that he does not provide concrete evidence substantiating his assumption.

29. Only the mere allegation of possible extensions of the proceedings in advance cannot serve as an argument to assess the effectiveness of legal remedies (see: case of the Constitutional Court, KI145/15, *Florent Muçaj*, Resolution on Inadmissibility of 16 May 2016, paragraph 35).

30. The principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular proceedings, administrative or judicial proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right (see: case of the Constitutional Court, KI07/09, Applicants: *Demë Kurbogaj and Besnik Kurbogaj*, Constitutional Court, Resolution on of 19 May 2010).

31. Accordingly, the Court cannot assess the alleged constitutional violations without affording an opportunity to the competent authorities, namely the Directorate of Cadastre, to complete the proceedings regarding the Applicant's appeal that still are pending.

32. Finally, the Court finds that the Applicant’s Referral is premature, because the Applicant has not exhausted all legal remedies as provided by Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 36 (1) (b) of the Rules of Procedure.

FOR THESE REASONS

In accordance with Article 113.7 of the Constitution, Article 47.2 of the Law Rule 36 (1) (b) of the Rules of Procedure, in the session held on 5 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI09/17, Applicant Fatmir Hoti, constitutional review of Judgment Pml. no. 281/2016 of the Supreme Court of Kosovo, of 5 December 2016

KI09/17, resolution on inadmissibility of 5 September 2017, published on 27 October 2017

Key words: *individual referral, constitutional review of the Judgment of the Supreme Court of Kosovo, manifestly ill-founded*

The Applicant submitted his referral based on Article 113.7 of the Constitution, Article 47 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Criminal proceedings were conducted against the Applicant before ordinary courts on the grounds of the criminal offence of "Disproportionate Profit from Property".

The aforementioned criminal proceedings instituted against the Applicant ended upon the Judgment of the Supreme Court which rejected his request for protection of legality, filed against the judgments of the first- and second-instance courts whereby the Applicant was found guilty, as ungrounded.

The Basic Court rejected the Applicant's statement of claim as ungrounded reasoning that the Applicant had not submitted any evidence whereby he could substantiate his allegation concerning the ownership over the disputed land plot.

The Applicant alleges in his referral that the Basic Court had unlawfully rendered its decision because it was not correctly composed; that the regular courts did not clearly and completely determine the factual situation, hence the decisions of the regular courts were not adequately reasoned and examined, leading to the violation of the Applicant's rights guaranteed by Articles 24, 31, 32, 46 and 54 of the Constitution of the Republic of Kosovo in conjunction with Articles 6 and 13 and Article 1 of Protocol 1 to the European Convention on Human Rights.

The Court further considers that the Applicant has not presented facts showing that the proceedings before the regular courts were in any way a constitutional violation of his constitutionally guaranteed rights to equality before the law, to fair and impartial trial and to protection of property.

In sum, the Court concludes that the Applicant has not substantiated his allegations, nor has submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR.

Therefore the Court considers that the Referral is manifestly ill-founded on constitutional basis and should be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI09/17

Applicant

Fatmir Hoti

Constitutional review of Judgment Pml. No. 281/2016 of the Supreme Court of Kosovo, of 5 December 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 Fatmir Hoti, residing in Gjakova (hereinafter: the Applicant), represented by Teki Bokshi, a lawyer from Gjakova.

Challenged decision

2. The challenged decision is Judgment Pml. No. 281/2016 of the Supreme Court of Kosovo of 5 December 2016 (hereinafter: the Supreme Court), which rejected the Applicant's request for protection of legality against Judgment of the Court of Appeals PAKR. No. 421/2016 of 9 September 2016 in conjunction with the Judgment of the Basic Court in Gjakova (Judgment PKR. No. 23/2014 of 16 May 2016).

3. The challenged Judgment of the Supreme Court was served on the Applicant on 23 December 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly, has violated the Applicant's rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution

of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) and Article 13 (Right to an effective remedy), as well as Article 1 of Protocol No. 1 (Protection of Property) of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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 8 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 20 March 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

8. On 27 April 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 8 May 2017, the Applicant submitted additional documents to the Court.

10. On 5 September 2017, after having considered the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court the Referral to be declared inadmissible.

Summary of facts

11. On 16 May 2016, the Basic Court in Gjakova (by Judgment PKR No. 23/14) found the Applicant guilty for the criminal offense of Contracting for Disproportionate Profit from Property and sentenced him to imprisonment.

12. The Applicant filed an appeal against the Judgment of the Basic Court with the Court of Appeals. The Basic Prosecutor's Office in Gjakova- Serious Crimes Department also filed an appeal.

13. On 09 September 2016, the Court of Appeals (by Judgment PAKR No. 42/16) rejected the Applicant's appeal as ungrounded and upheld the Judgment of the Basic Court.

14. The Applicant submitted a request for protection of legality to the Supreme Court against the Judgments of the Court of Appeals and of the Basic Court.

15. On 5 December 2016, the Supreme Court of Kosovo (by Judgment PML No. 281/2016) rejected as ungrounded the request for protection of legality against the Judgments of the Basic Court and of the Court of Appeals.

Applicant’s allegations

16. The Applicant alleged a violation of the rights to equality before the law, effective legal remedy, fair and impartial trial, protection of property and judicial protection of rights.

17. The Applicant considered that: "*The violation has to do with composition of the first instance panel which was not in compliance with the law, and which presents violation of Article 384, paragraph 1, item 1.1 of CPCRK. In the composition of the first instance trial panel took part also the Judge**s** […], who work as Judges of the Minor Offence Court who don't meet the legal requirements to adjudicate in the matters that are under the Department of Serious Crimes.*"

18. The Applicant stated that: "*Although the first instance judgment and the judgment on the appeal resulted in numerous essential violations […], the Court of Appeals did not analyze those substantive violations of the criminal procedure provisions at all and, without any justification, rejected our appeals and upheld the first instance judgment.*"

19. The Applicant further alleged that: "*regarding the abovementioned violations, the court did not clearly and completely presented the facts due to which it considered that it was established beyond a reasonable doubt that the accused Fatmir Hoti committed the criminal offense for which he was convicted; the court did not establish contradictory evidence and why it had given trust to certain evidence, and not to others, and the Supreme Court did not give sufficient reasons because the Judgment of the Supreme Court is mainly negative regarding the course of the proceedings because the reasons given by the court are insufficient.*"

20. The Applicant requested the Court to:

I. *TO DECLARE the referral admissible;*
II. *TO HOLD that there has been a violation of Article 24 [Equality before the Law]; Article 31 [Right to Fair and Impartial Trial]; Article 31 of the Constitution of the Republic of Kosovo; Article 6.1 of the European Convention on Human Rights (hereinafter as the ECHR); Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property], of the Constitution of the Republic of Kosovo, Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo in conjunction with Article 5 and 6 [Right to a fair trial], Article 12, 13 [The right to an effective remedy] of the ECHR, Article 46 of the Constitution of the Republic of Kosovo in conjunction with Article 1 of Protocol 1 of ECHR as well as Article 54 of the Constitution of the Republic of Kosovo – [Judicial Protection of Rights].*
III. *TO DECLARE INVALID Judgment PML. No. 281/2016 of the Supreme Court of Kosovo of 05 December 2016;*
IV. TO REMAND the Judgment of the Supreme Court of Kosovo for reconsideration in compliance with the Judgment of the Constitutional Court.
V. *TO ORDER that this Judgment is notified to the parties, in accordance with Article 20.4 of the Law, to publish in the Official Gazette;*
VI. *This Judgment is effective immediately.*

Admissibility of the Referral

21. The Court first will examine whether the Referral has fulfilled the admissibility requirements established in the Constitution and as further specified in the Law and foreseen in the Rules of Procedure.

22. 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."

23. However, the Court refers as well to Article 48 [Accuracy of the Referral] of the Law, which provides that:

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.

24. The Court also refers to Article 49 of the Law which provides:

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.

25. The Court further refers to Rule 36 (1) (d) and (2) (b) of the Rules of Procedure, which foresees:

"(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."

26. In the present case, the Court notes that the Applicant is an authorized party to submit the Referral, has exhausted all legal remedies in accordance with Article 113.7 of the Constitution and the Referral is submitted within the deadline of 4 (four) months as established in Article 49 of the Law.

27. The Court shall also determine whether the Applicant has accurately clarified and specified the allegations in accordance with Article 48 of the Law.

28. The Court notes that the Applicant has accurately clarified the rights he claims to have been violated, as well the concrete act of the public authority.

29. As far as the applicability of Rule 36 (1) (d) and (2) (b) is concerend, the Court considers that the gist of the Applicant's complaint is the following:

(i) the Basic Court has unlawfully decided because it was incorrectly composed;

(ii) the regular courts did not clearly and completely determine factual situation and, accordingly, the decisions of the regular courts were not adequately analyzed and reasoned.

30. As regards to the allegation (i), the Court notes that the Supreme Court (Judgment No. 281/2016) rejected the request for protection of legality against the Judgments of the Basic Court and the Court of Appeals with respective reasoning.

31. The Supreme Court in its Judgment concluded: *"from the minutes from the main trial, that neither the parties nor the convict's defense counsels had any objection related to the composition of the trial panel; whereas by the minutes from the main trial of 14 March 2016 in which were assigned aforementioned judges, they have decisively stated that they had no objection to the composition of the trial panel.*
According to the assessment of the Supreme Court, the substantial violation of provisions of the criminal procedure as provided by Article 384, paragraph 1 of CPCK is committed when the court was not properly constituted or the participants in the rendering of the judgment included a judge who did not attend the main trial or was excluded from adjudication under a final decision. This did not happen in this specific case. Pursuant to the provisions of Article 12, paragraph 4 of the Law on Courts, the Presiding Judge of the Basic Court shall also assign judges to departments to ensure the efficient adjudication of cases, and may temporarily reassign judges among branches and departments as needed to address conflicts, resolve backlogs, or ensure the timely disposition of cases. Therefore, this allegation of the request for protection of legality was ungrounded."

32. The Court considers that the challenged Judgment of the Supreme Court took into consideration all the allegations stated in the request for the protection of legality within the limits prescribed by the law. It responded in detail to all the allegations and it reasoned why the request was rejected as ungrounded. The presented explanations and reasons were not a result of unjustified findings of facts or of arbitrary application of the procedural and substantive law.

33. About the allegation (ii), the Court notes that the Judgment of the Basic Court shows a comprehensive and a detailed analysis of all the facts and law related to the commission of criminal offenses and imposing of the sentence.

34. The Court is of the opinion that the Court of Appeals explained in detail and responded to the Applicant's appeal, providing reasoned answers to his allegations for essential violation of the provisions of the Criminal Code, erroneous and incomplete determination of factual situation and the decision on the punishment.

35. Moreover, the Court of Appeals *„accepted the entire factual findings and the legal stance* of the *[Basic Court], considering that it correctly determined the factual situation and correctly applied the substantive law when it found that the [Applicant's] appeal is ungrounded and upheld the judgment [of the Basic Court]. "*

36. The Court notes that the regular courts assessed the facts and interpreted and applied the provisions of the procedural and substantive law regarding the Applicant's request. Their conclusions were based on a detailed examination of all the arguments presented by the Applicant and the injured party.

37. The Court further notes that the Applicant repeated before it the same arguments he had filed in the proceedings before the regular courts, in particular, regarding the determination of the factual situation and the legality of the regular courts' decisions.

38. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, the role of the

regular courts is to interpret and apply the pertinent rules of both procedural and substantive law (See: *mutatis mutandis*, the European Court of Human Rights (hereinafter: ECtHR) case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, para. 28).

39. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as "fourth instance court" (See: ECtHR, case *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65; see also: *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

40. In other words, the complete determination of the factual situation and the correct application of the law is within the jurisdiction of the regular courts (matter of legality).

41. The mere fact that the Applicant does not agree with the outcome of the proceedings in his case do not give rise to an arguable claim of a violation of his rights as protected by the Constitution.

42. The Constitutional Court can only consider whether the evidence has been presented in a correct manner and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (See: *inter alia,* case *Edwards v. United Kingdom*, No 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991).

43. In that respect, the Court concludes that the Applicant did not substantiate the allegations that the relevant proceedings were in any way unfair or arbitrary and that the challenged decision violated the Applicant's fundamental rights and freedoms guaranteed by the Constitution and the ECHR (See: *mutatis mutandis*: ECtHR, decision of 30 June 2009, *Shub v. Lithuania*, No. 17064/06).

44. With regard to the Applicants' alleged violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of ECHR, the Court recalls that the right to property applies only to a person's existing possessions and does not guarantee the right to acquire property (See, *mutatis mutandis*, ECtHR case *Marckx v. Belgium,* No. 6633/74, Judgment of 13 June 1879, paragraph 50).

45. In certain circumstances, a "*legitimate expectation*" of obtaining an asset may also enjoy the protection of Article 46 of the Constitution and Article 1 of Protocol No. 1 to the ECHR (See, *mutatis mutandis*, ECtHR case *Béláné Nagy v. Hungary*, no. 53080/13, Judgment of 13 December 2016, para. 74).

46. However, the Court recalls that no "*legitimate expectation*" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the Applicant's submissions are subsequently rejected by the national courts (See *Béláné Nagy v. Hungary*, Ibidem, para. 75).

47. The Court considers that the circumstances of the case do not confer on the Applicant a title to a substantive interest protected by Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR.

48. The Court further considers that the Applicant has not presented facts showing that the proceedings before the regular courts were in any way a constitutional violation of his constitutionally guaranteed rights to equality before the law, to fair and impartial trial and to protection of property.

49. In sum, the Court concludes that the Applicant has not substantiated his allegations, nor has submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR.

50. Therefore, the Referral is manifestly ill-founded on constitutional basis and it should be declared inadmissible pursuant to Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.1 and 7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (b) of the Rules of Procedure, in its session held on 5 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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**
Snezhana Botusharova	Arta Rama-Hajrizi

KI135/16, Applicants Tomislav Janković et alii, Constitutional Review of Decision AC-I-0095, of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency Related Matters of 6 October 2016

KI135/16, Decision on Inadmissibility of 2 June 2017, published on 27 October 2017

Key words: Individual Referral, civil procedure, out of time Referral

The Applicants submitted a request with the Court, requesting the constitutional review of the Decision of Appellate Panel of the SCSC. They alleged violation of Articles 21, 22 and 31 of the Constitution, inter alia, claiming that the decisions of the SCSC were followed by the constitutional violations because they were denied the right to property, to immovable property, for which they claimed that it belongs to them on the basis of inheritance. However, the Municipal Court in Prizren recognized them this right with Judgment C. no. 811/16, which afterwards was annulled by the SCSC with the conducted procedures pursuant to the appeals of KPA.

The Court found that the Applicants' Referral was submitted out of the time limit of 4 (four) months, defined by Article 49 of the Law on the Constitutional Court. The Court did not take into account the remedy exercised by the complainants in the form of appeal to the Appellate Panel of the SCSC against the prior decision of that Court, because such a remedy was certainly inadmissible. In such circumstances of the case, the Court found that the last contested decision would normally be the final court decision, which in this case was the Judgment DHPGJS, AC-II-12-0192 of the Appellate Panel of 17 March 2016, which the Applicants received within a time limit of more than 4 (four) months prior the Referral was submitted to the Constitutional Court. Subsequently, the Referral was declared inadmissible as being submitted out of time.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI135/16

Applicant

Tomislav Janković and others

Constitutional review of Decision AC-I-0095 of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency of Kosovo Related Matters, of 6 October 2016

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 Tomislav Janković, Živomirka Cvetković, Drenka Popović, Verica Djurdjević, Stojka Janković, Ljiljana Garić and Jovica Janković, all from Prizren, now residing outside the Republic of Kosovo and are represented by a lawyer Mas-har Pirana from Prizren (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge Decision AC-I-0095 of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency of Kosovo Related Matters, of 6 October 2016, (hereinafter: Appellate Panel of the SCSC) which rejected as inadmissible the Applicants' appeal against Decision AC-II-12-0192 of the APSCSC of 17 March 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which has allegedly violated the Applicants' rights and freedoms guaranteed by Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and

Instruments] and Article 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 Article 113.7 of 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

5. On 24 November 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 4 December 2016, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.

7. On 13 December 2016, the Court notified the Applicants about the registration of the Referral and sent a copy of the Referral to the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency of Kosovo Related Matters.

8. On 2 June 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility.

Summary of facts

9. On 9 June 1961 B. J. signed a contract on gift by which she donated an immovable property to the agricultural cooperative in Prizren, which was later transferred to the ownership of AIC "Progres" from Prizren.

10. On 26 October 2006, the Applicants, as heirs of B. J., filed a claim with the Municipal Court in Prizren for annulment of the contract on gift of the immovable property and for return of possession.

11. From the moment of filing the claim until 2016, court proceedings in the regular courts have been conducted and resulted in many court decisions.

12. On 17 March 2016, the Appellate Panel of SCSC (Judgment AC-II-12-0192) approved the appeal of PAK and annulled Judgment No. C. 811/06 of the Municipal Court in Prizren, which recognized the right of the Applicants regarding their property claims.

13. On 6 May 2016, the Applicants filed with the Appellate Panel of the SCSC an appeal against Judgment AC-II-12-0192.

14. On 6 October 2016, the Appellate Panel of the SCSC by Decision AC-I-16-0095 rejected the Applicants' appeal as inadmissible on the grounds that the decisions of the Appellate Panel of the SCSC cannot be subject to appeal.

Applicant's allegations

15. The Applicants allege that *"By Decision AC-I-16-0095 of the Appellate Panel of the Special Chamber of 06.10.2016 were violated the claimants' fundamental rights of*

citizens guaranteed by the Constitution under Article 31 item 1 and 2 of the Constitution of the Republic of Kosovo, because by the appealed Judgment AC-II-12-0192 of the Special Chamber of 17.03.2016 it was decided to not hold the oral hearings in accordance with Article 64.1 of the Annex to the Law on Special Chamber, by which the claimants were deprived the fundamental rights to declare directly and to reason their statement of claim before the Appellate Panel."

16. The Applicants also allege that *"In the reasoning of the challenged Judgment AC-II-0192 of 17 March 2016, in page 2 and 3, it is stated that the imaginary allegations in the PAK appeal of 05.05.2010 that the Judgment of the first instance court allegedly contains essential violations of the provisions of Article 181, para. 1 a, b, and c, as well as of Article 183 and Article 184 of the Law on Contested Procedure, which is not true."*

17. Finally, the Applicants propose to the Constitutional Court to declare Decision AC-I-16-0095 and Judgment AC-II-12-0912 unconstitutional and to remand the case for retrial.

Admissibility of Referral

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

19. In this respect, the Court refers to Article 113, paragraph 7 of the Constitution, which establishes that:

> *"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."*

20. In addition, the Court assesses whether the Applicants filed the Referral within the prescribed time limit, and in this case, it refers to Article 49 of the Law, which provides that *"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. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."*

21. In order to verify whether the Applicants have submitted the Referral within the prescribed four (4) month deadline, the Court refers to the date of receipt of the final decision by the Applicants and the date when the Referral was submitted to the Constitutional Court.

22. The "final decision" for the purposes of Article 49 of the Law will normally be the final decision rejecting the Applicant's claim (See *Paul and Audrey Edwards v. UK*, No. 46477/99, ECtHR, Decision of 14 March 2002).

23. The time limit starts to run from the final decision resulting from the exhaustion of remedies which are adequate and effective to provide redress in respect of the matter complained of (See *Norkin v. Russia*, App. 21056/ 11, ECtHR, Decision of 5 February 2013 and see also *Moya Alvarez v. Spain*, No. 44677/98, ECtHR, Decision of 23 November 1999).

24. Regarding the appeal filed against Judgment AC-II-12-0192 of 17 March 2016, the Court notes that in accordance with Article 10, paragraph 14 of Law No. 04/L-033 on the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related

Matters "*All Judgments and Decisions of the appellate panel are final and not subject to any further appeal.*"

25. In the circumstances of the present case, it is clear that the appeal against Judgment AC-II-12-0192, of 17 March 2016, was not an effective legal remedy and that there could be no legitimate expectation to the success of that remedy, because it was explicitly provided by the law that such legal remedy was not allowed to be filed.

26. For the foregoing reasons, the Court considers that the final decision in the present case is Judgment AC-II-12-0192 of the Appellate Panel of the SCSC and the time-limit begins to run from the date of receipt of the aforementioned decision by the Applicants' representative (See *mutatis mutandis Bayram and Yildirim v. Turkey*, App. No. 38587/97, ECtHR, Decision of 29 January 2002).

27. Thus, from the examination of the case file it results that the Applicants were served with Judgment AC-II-12-0192 on 18 April 2016, whereas they submitted the Referral to the Court on 24 November 2016 (see, *inter alia*, Resolution on Inadmissibility of the Constitutional Court KI105/15, Applicants *Mehmet Bajraktari and others*, of 19 December 2016).

28. In the circumstances when the referral is manifestly out of time, the Court cannot consider the allegations raised regarding the alleged violations of the right to fair trial in all its elements.

29. Based on the foregoing, it results that the Referral has not been submitted within the legal deadline stipulated by Article 49 of the Law, and it is to be declared inadmissible, because it is out of time.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 49 of the Law and Rules 36 (1) (c) and 55 (4) of the Rules of Procedure, in the session held on 2 June 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 Court**
Selvete Gerxhaliu -Krasniqi	Arta Rama-Hajrizi

KI77/16, Applicants: Burim Ramadani and Arsim Ramadani, who request the constitutional review of Judgment Rev. no. 296/2015 of the Supreme Court of Kosovo, of 10 February 2016

KI77/16, Resolution on inadmissibility of 6 September 2017, published on 27 October 2017

Key words: Individual referral, constitutional review of the Judgment of the Supreme Court of Kosovo, ratione materiae

The Applicants submitted their Referral based on Article 113.7 of the Constitution, Article 47 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Criminal proceedings concerning the criminal offece of murder were conducted against the Applicants before the regular courts, and they were found guilty by the last instance court and sentenced to imprisonment.

The Applicant had reviously submitted referral KI81/11 to the Court, whereby they had requested the constitutional review of the Judgment of the District Court in Gjilan.

Having reviewed the applicants' allegations, the Court had concluded that the Referral was manifestly ill-founded thereby rejecting it as inadmissible.

After submitting their request for reopening the criminal proceedings and administering new evidence, the Basic Court in Gjilan rejected the Applicants' request as inadmissible. Furthermore, the Court of Appeals rejected the Applicants' appeal as entirely ungrounded, and the Supreme Court rejected the Applicants' request for protection of legality as ungrounded, stating that they had not not provided evidence that would have been considered as new.

The Court noted that this request is related to the proceedings concerning a request for reopening the criminal proceedings, initiated by the Applicants.

The Court considered that the proceedings related to the Applicants' request for reopening the proceedings are not related to the determination of the criminal charge within the meaning of Article 31.2 of the Constitution and Article 6.1 of the ECHR.

Based on the foregoing, the Court concluded that the Applicants' allegations are incompatible *ratione materiae* with the Constitution, thereby declaring the Referral inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI77/16

Applicants

Burim Ramadani and Arsim Ramadani

Constitutional review of Judgment Pml. No. 296/2015 of the Supreme Court of Kosovo of 10 February 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 Burim Ramadani and Arsim Ramadani (hereinafter: the Applicants). They are represented by Vahide Braha, a lawyer from Prishtina.

Challenged decision

2. The Applicants challenge Judgment Pml. No. 296/2015 of the Supreme Court of Kosovo of 10 February 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly has violated the Applicants' rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) as well as Article 6 [Right to a fair trial] of the European Convention for the Protection of Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 of 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

5. On 18 May 2016, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court)

6. On 14 June 2016, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

7. On 23 June 2017, the Court notified the Applicants about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.

8. On 06 September 2017, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the referral.

Summary of facts

Initial procedure

9. In 2011, The Applicants were found guilty in final instance and sentenced to imprisonment for the criminal offence of murder of five members of the H family.

10. On 13 June 2011, the Applicants submitted Referral KI81/11 for constitutional review of Judgment P. No. 162/2003 of the District Court in Gjilan of 7 April 2005 and the Judgments of the Supreme Court (Ap. No. 393/2006 of 20 May 2008), (Ap. No. 04/2009 of 16 September 2009) and (PKL. No. 30/2010 of 1 February 2011).

11. In Referral KI81/11, the Applicants alleged that the challenged judgments violated their rights guaranteed under Articles 30 [Rights of the Accused], 31 [Right to Fair and Impartial Trial] and 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution and Article 5 (1), Article 6 (1) and (2), and Article 14 of the ECHR.

12. On 15 May 2012, the Constitutional Court of Kosovo, by Decision KI81/11, after considering the allegations of the Applicants, concluded that the Referral is manifestly ill-founded and REJECTED the Referral as inadmissible.

Reopening of proceedings

13. On an unspecified date, the Applicants filed a request through their lawyer for reopening of criminal proceedings, in which they requested to present new evidence and to have a new expertise performed on the data taken from the Applicants' mobile phones.

14. On 4 September 2015, the Basic Court in Gjilan (by Decision No. 162/03) rejected as inadmissible the request for a new expertise on the data taken from the Applicants' mobile phones. At the same time, the Panel rejected the request for the presentation of new evidence, reasoning that:

> *"After the assessment of the request of the defense counsel of the convicts Burim and Arsim Ramadani, the response of the state prosecution and its investigations, the Panel of this Court found that the request should be dismissed as inadmissible*

because the facts and evidence do not provide reasons for allowing the reopening of the proceeding because they are repeated requests of the defense counsel and they were consumed in the previous requests."

15. The Applicants filed an appeal against the decision of the Basic Court in Gjilan on the grounds of erroneous and incomplete determination of factual situation and erroneous application of the substantive law, with a proposal that the Court of Appeals approves the appeal as grounded, so that the case be remanded for retrial or that the first instance decision is modified and the Court of Appeals decides on the merits of the request.

16. On 26 October 2015, the Appellate Prosecutor's Office in Prishtina (by submission PPN/I. No. 167/15) proposed that the Applicants' appeal be rejected as ungrounded and that the challenged decision be upheld.

17. On 30 December 2015, the Court of Appeals rejected the appeal (Decision PN/No. 582/15). The Court of Appeals reasoned that the appeal *"is rejected as ungrounded [...] filed against Decision of the Basic Court [...] whereas according to the official duty, the appealed Decision is modified so that the request [...] for reopening of the criminal proceedings completed by final Judgment [...] is rejected in entirety as ungrounded."*

18. The Applicants filed a request for protection of legality with the Supreme Court in which they pointed out that the courts "*ignored the matter of alibi of the convicts, for which matter were presented also the concrete evidence which should have been examined in the reopened proceedings. The decisions of the two courts are arbitrary because the presented evidence, which in the request are emphasized as new, were not assessed."*

19. On 10 February 2016, the Supreme Court of Kosovo (Judgment Pml. No. 296/2015) rejected as ungrounded the request for protection of legality. The Supreme Court reasoned that,

"In this present case no new evidence was presented which within the meaning of the above mentioned provision would be considered as new, in order to allow the reopening of the criminal proceedings, whereas the fact that now new witnesses have been found with the old statements which were used during the criminal proceedings in all instances, is irrelevant because in this present case, the provided evidence regarding the alibi of the accused persons in any variant cannot affect the application of a more lenient provision or paragraph from the one based on which the convicts were found guilty, due to the fact that the matter of alibi is assessed in the judgments of the first instance, second instance and third instance courts, therefore, the claims of the defense counsel are clearly found as ungrounded."

Applicant's allegations

20. The Applicants first repeat the same allegations that were raised in the request for protection of legality before the Supreme Court, which are: (a) that the regular courts did not allow the new expertise of the data taken from the Applicants' mobile phones; (b) that the courts did not accept as new evidence the witness testimonies given under oath before a notary; (c) that the courts have not considered evidence regarding the alibi of the Applicants; (d) that the courts did not take into account the more favorable law when pronouncing the judgments; and (e) that the courts have applied the wrong law when imposing the sentence.

21. Furthermore, the Applicants state that the regular courts decided and assessed the evidence under the "*discretionary right*" which they had no right to do, by rendering

decisions "*according to their free conviction"* without holding a hearing where the evidence is presented, thereby violating a large number of Articles of the Criminal Procedure Code and the Criminal Code of Kosovo.

22. The Applicants further claim that the decisions of the regular courts were "*arbitrary and unlawful,*" because they imposed punishments foreseen for adults, although the Applicants were minors at the time of the commission of the offence.

23. Finally, the Applicants consider that *"their right was violated, according to Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), and Article 31 of the Constitution of Kosovo, the right to fair and impartial trial, and by special emphasis paragraph 7 of this Article where the special procedures for minors are determined, in this present case the adult juveniles according to JJC. Since in this case all the three instances including also the extraordinary remedy, decided contrary to the applicable law, as mentioned above, under Article 34, paragraph 2 of JJC (applicable law in Kosovo from 22 March 1989 until 12 December 1999, when UNMIK Regulation 1999/24 entered into force), and Article 385.1.3 of the CPCK "an inapplicable law was applied to the criminal offence which is the subject-matter of the charge."*

24. For all the foregoing reasons, the Applicants conclude that "*the right to reopen the proceeding completed by a final judgment was not allowed to them"* and that the Court should annul the decisions of the regular courts as unconstitutional and "*to allow reopening of the proceedings (by the force of law) for the foregoing reasons."*

25. The Applicants propose that *"The Court holds that the regular courts [...] have violated the Applicants' rights to regular legal process according to the principle of justice as it is determined by Article 6 of the ECHR and Article 31 of the Constitution of the Republic of Kosovo, and after consideration [we] ask this panel to conclude that the described decisions of the two regular courts including here also the request for protection of legality as an extraordinary remedy by the Supreme Court of Kosovo, are unlawful."*

Assessment of the admissibility of Referral

26. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the 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 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.*

28. The Court also refers to Article 49 [Deadlines] of the Law, which provides that,

> *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.*

29. The Court considers that the Applicants are authorized parties, have exhausted the available legal remedies and submitted the Referral in due time.

30. However, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides that,

> *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.*

31. In addition, the Court refers to paragraph (3)(e) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresees that,

> *(3) A Referral may also be deemed inadmissible in any of the following cases:*
>
> *[...]*
>
> *(e) the Referral is incompatible ratione materiae with the Constitution;*

32. In that respect, the Court recalls that the Applicants allege that they have been denied the right to a fair and impartial trial in the proceedings before the Court of Appeals and the Supreme Court regarding their request for the reopening of their case.

33. The Court recalls Article 31 [Right to Fair and Impartial Trial] of the Constitution, which provides that,

> *(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.*

34. The Court also recalls Article 6 of the ECHR, which provides that,

> *(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.*

35. Furthermore, the Court recalls the consistent case law of the European Court of Human Rights (hereinafter: ECtHR), which establishes that,

> *"The [ECtHR] reiterates that according to the established case-law, Article 6 does not apply to proceedings for the re-opening of criminal proceedings, given that someone who applies for her case to be re-opened and whose sentence has become final is not "charged with a criminal offence" within the meaning of Article 6."* (see ECtHR Decision on Inadmissibility of 5 February 2004, Erdemli v. Turkey, no. 33412/03; and ECtHR Decision on Inadmissibility of 6 May 2003, Fischer v. Austria, no.27569/02).

36. The Court recalls that the Applicants have been convicted and sentenced in final instance on criminal charges, and their request for protection of legality in relation to those proceedings was rejected by the Supreme Court on 1 February 2011.
37. The Court also recalls that the Applicants submitted a Referral, registered under number KI 81/11, alleging that the regular courts had violated their right to a fair and impartial trial in the determination of the criminal charges against them, and that the Court had

rejected that Referral on 15 May 2012 as inadmissible because manifestly ill-founded on a constitutional basis.

38. The Court notes that the present referral pertains to proceedings regarding a request to reopen criminal proceedings, which were initiated by the Applicants at some point before 4 September 2015.

39. The Court considers that the proceedings regarding the Applicants' request for the reopening of proceedings do not concern the determination of a criminal charge within the meaning of either article 31(2) of the Constitution or Article 6(1) of the ECHR.

40. As such, the challenged proceedings do not come within the scope of Article 31 of the Constitution and Article 6 of the ECHR.

41. Therefore, the Court concludes that the Applicants' allegations are incompatible *ratione materiae* with the Constitution.

42. Consequently, the Referral is to be declared inadmissible pursuant to Rule 36, paragraph (3)(e) of the Rules of Procedure

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113, paragraphs 1 and 7, of the Constitution, Article 46 of the Law, and Rule 36 (3)(e) of the Rules of Procedure, at its session held on 06 September 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Arta Rama-Hajrizi

KI149/16 Applicant: Municipality of Klina, constitutional review of Decision CML. No. 13/2016, of the Supreme Court of Kosovo, of 13 September 2016

KI149/16, Resolution on Inadmissibility of 6 September 2017, published on 30 October 2017

Keywords*: individual referral, constitutional review of the judgment of the Supreme Court of Kosovo, private execution, manifestly ill-founded*

The Referral was submitted based on Article 21.4 and 113.7 of the Constitution, Article 47 and 48 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo. In this case, it is a civil legal dispute between the Municipality of Klina, as the Applicant and a private company under a contract for the provision of spider's motor vehicle services. After filing a request for execution by a private company against the Municipality of Klina due to unsettled financial obligations, the Private Enforcement Agent decides to initiate the execution procedure.

The Municipality of Klina, as the Applicant, initiates the proceedings before the regular courts, which ends with the decision of the Supreme Court that the request for protection of legality against the decisions of the Basic Court and the Court of Appeals are ungrounded. The Applicant claims that as a debtor in this case he received a decision of the Supreme Court of Kosovo, which finally resolved the case to the detriment of the Applicant, and, therefore, consider that they were affected by such an unlawful court decision. The Court notes that the Applicant does not invoke a specific constitutional provision, but in general describes and initiates legal issues without specifying his claims at the constitutional level as prescribed in Article 48 of the Law.

Finally, the Applicant failed to *prima facie* justify his Referral and, therefore the Court considers that the Referral is manifestly ill-founded and, it is declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI149/16

Applicant

Municipality of Klina

Constitutional review of Decision CML. No. 13/2016, of the Supreme Court of the Republic of Kosovo, of 13 September 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 the Municipality of Klina (hereinafter: the Applicant), represented by Ali Shala, the legal representative - state advocate of the Municipality of Klina.

Challenged decision

2. The Applicant challenges Decision CML. No. 13/2016 of the Supreme Court of Kosovo, of 13 September 2016. The challenged decision was served on the Applicant on 31 October 2016.

Subject matter

3. The subject matter of the Referral is the constitutional review of the aforementioned decision of the Supreme Court. The Applicant does not refer to the violation of any constitutional provision in particular.

Legal basis

4. The Referral is based on Article 21.4 and 113.7 of the Constitution, Article 47 and 48 of Law No. 03/L-121 on the 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

5. On 20 December 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 16 January 2017, the President of the Court appointed Judge Selvete Gërxhaliu Krasniqi as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.

7. On 27 February 2017, the Court notified the Applicant about the registration of the Referral and requested him to complete the Referral within a period of 7 (seven) days.

8. On the same date, the Court sent a copy of the Referral to the Supreme Court of the Republic of Kosovo.

9. On 3 March 2017, the Applicant submitted the required documents.

10. On 06 September 2017, the Review Panel considered the report of the Judge Rapporteur, and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 12 May 2010, the Applicant and N. P. "Morina Automobile" (hereinafter: the creditor) signed a contract for tow transport services.

12. On 29 September 2011 and 25 May 2012, the parties signed two more contracts for the purpose of extending cooperation between them.

13. Meanwhile, disagreements arose between the Applicant and the creditor for the fulfillment of the financial obligations to the latter for the services provided.

14. On 10 March 2015, the creditor submitted to the Office of Private Enforcement Agent the execution proposal, due to the failure of the Applicant to meet the financial obligations. The proposal was submitted on the basis of an "authentic document", invoice no. 267 of 25 February 2015.

15. On 11 March 2015, the Office of Private Enforcement Agent allowed the creditor's proposal for execution of invoice no. 267 of 25 February 2015.

16. On 23 March 2015, the Applicant in the Basic Court in Peja filed an objection against the execution order of the Office of Private Enforcement Agent.

17. On 6 August 2015, the Basic Court in Peja by Decision C.P. No. 7/15 partially approved the Applicant's objection, and partially upheld the execution order of the Office of the Private Enforcement Agent.

18. On 23 September 2015, the Applicant filed an appeal with the Court of Appeals against the aforementioned decision of the Basic Court.

19. On 28 January 2016, the Court of Appeals by the Decision AC. No. 3906/20 rejected the appeal of the Applicant as ungrounded and upheld the Decision of the Basic Court.

20. On 2 March 2016, the Office of the Private Enforcement Agent ordered the Ministry of Finance (Treasury Department) to execute payments in accordance with the court decisions.

21. On 14 March 2016, the Applicant submitted a request for revision to the Supreme Court against the abovementioned decisions of the Court of Appeals and of the Basic Court. The Applicant submitted a revision alleging essential violation of the provisions of the enforcement and contested procedure, erroneous application of the substantive law by proposing that the creditor's request for execution be declared as out of time; or that decisions of the lower instance courts be annulled and the case be remanded for retrial.

22. On 25 March 2016, the Ministry of Finance issued a payment order for execution of the court decisions.

23. On 25 April 2016, the Applicant requested the Office of the Chief State Prosecutor to file a request for protection of legality against the Decision of the Court of Appeals and of the Basic Court

24. On 12 May 2016, the Office of the Chief State Prosecutor informed the Applicant that he had approved its initiative and submitted to the Supreme Court a request for protection of legality against the abovementioned decisions of the lower instance courts. The State Prosecutor filed a request for protection of legality by claiming an essential violation of the provisions of the contested procedure, erroneous application of the substantive law, with the proposal that the challenged decisions be quashed and the case be remanded to the first instance court for retrial.

25. On 13 September 2016, the Supreme Court by Decision Cml. No. 13/2016, rejected as ungrounded the request for protection of legality of the State Prosecutor filed against the decisions of the Court of Appeals and of the Basic Court.

Applicant's allegations

26. The Applicant alleges that *"We consider that in the present case we are dealing with the submission of the Referral based on provisions of Article 113, paragraph 4, of the Constitution of the Republic of Kosovo because we assess that: the Municipality is authorized to challenge the constitutionality of laws or acts of the Government which violate the municipal responsibilities or decrease the incomes of the Municipality, if the respective Municipality was affected by that law or that act."*

27. The Applicant further alleges that *"In the present case, on 31 October 2016 the Municipality of Klina, as debtor, received Decision Cml. No. 13/2016, of the Supreme Court of Kosovo, of 13 September 2016, by which the case was finally decided upon to our disfavor, therefore, we considered that we have been harmed by that unlawful Decision and also by the actions and the act of the Ministry of Finance – Department of Treasury in Prishtina which on 25 March 2016 directly transferred the money from the bank account of the Municipality of Klina to the bank account of LE "Morina Automobile" in Klina, allegedly according to order P. No. 2019/15, of the private enforcement agent Gj. R. headquartered in Gjakova, of 2 March 2016, on allowing the*

execution, and this was done according to our registry that we have from the Free Balance Report of 25 March 2016, in the amount of 88.798.76."

28. Finally, the Applicant requests the Court to declare the Referral admissible and to annul all court decisions and the order of the Ministry of Finance.

Admissibility of the referral

29. 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.

30. In this respect, the Court refers to paragraphs 1, 4 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish that,

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties,*
>
> *[...]*
> *4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.*
>
> *[...]*
> *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."*

31. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

> *"[...]*
> *4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

32. The Court refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide:

Article 48

> *"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

> *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...".*

33. The Court also takes into account Rule 36 (2) (a) and (c) of the Rules of Procedure, which specifies:

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

a) the referral is not prima facie justified, or;
c) the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution;"

34. In the present case, the Court notes that the Applicant has exhausted all legal remedies in accordance with paragraph 7 of Article 113 of the Constitution and submitted the Referral within 4 (four) month legal deadline as defined in Article 49 of the Law.

35. The Court must also ascertain whether the Applicant has presented and substantiated its allegations filed in accordance with Article 48 of the Law.

36. The Court is also mindful of the legal status of the Municipality as a legal person under Article 5 of the Law No. 03/L-040 on Local Self-Government

37. In this regard, the Court as a preliminary matter notes that, despite the allegations of the Applicant, the Referral under review will be assessed within Articles 21.4 and 113.7 of the Constitution, because the challenged decisions are court decisions, while the execution act of the Ministry of Finance was rendered as a consequence and in the function of the implementation of the court decisions (See, Constitutional Court of the Republic of Kosovo: Case No. KI48/14 and KI49/14, Applicant, *Municipality of Vushtrri, Constitutional review of Decisions of the Basic Court in Mitrovica - Branch in Vushtrri,* Resolution on Inadmissibility of 17 May 2016, paragraph 49).

38. The Court notes that the essence of the Referral is the Applicant's allegation that the legal decisions and the payment order of the Ministry of Finance were issued without any legal or constitutional basis.

39. In this regard, the Court also notes that the Applicant does not refer to the violation of any of the constitutional provisions that provide guarantees for the protection of human rights and fundamental freedoms, to the extent they are applicable to public-legal persons.

40. Regarding the Applicant's allegations of *"the court decisions rendered without any legal basis",* the reasoning of the Supreme Court can be summarized as follows: "*the Court of Appeals has found that the first instance court, by correctly and completely determining the factual situation, has correctly applied the substantive law provisions, when the first instance court partially upholds the execution order of the private enforcement agent. According to the assessment of this court, the creditor has conducted the services for the debtor, on the basis of the contracts established within the time period between 12 May 2010 and 24 May 2015, by conducting services of transportation and parking of seized vehicles by the Kosovo Police... Setting from such a situation of the case, the Supreme Court of Kosovo has found that the lower instance courts, on the basis of the determined factual situation, has correctly applied the substantive law, when they found that the statement of claim of the Creditor is partially grounded."*

41. From the content of the Referral, it results that the courts have assessed all central issues such as: (i) the assessment of contracts and the legal-obligational relationship between the Applicant and the creditor; (ii) the assessment of "authentic document" for allowing execution; (iii) assessing the exact debt that the Applicant owed to the creditor for the services rendered; and (iv) assessing the statute of limitation of a part of the debt that the Applicant owed to the creditor.

42. The Constitution does not guarantee favorable outcome to the Applicants' case nor does it allow the Court to question the substantive fairness of the outcome of a civil dispute,

where more often than not one of the parties wins and the other loses (Constitutional Court of the Republic of Kosovo: Case no. KI142/15 Applicant: *Habib Makiqi*, Constitutional review of Judgment Rev. No. 231/2015, of the Supreme Court of Kosovo, of 1 September 2015, Resolution on Inadmissibility of 1 November 2016, paragraph 43).

43. In the light of the foregoing considerations, the Court notes that the Applicant had the benefit of adversarial proceedings; that it was able, at various stages of those proceedings, to adduce the arguments and evidence it considered relevant to its case; that it had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; that all its arguments which, viewed objectively, were relevant to the resolution of the case were duly heard and examined by the courts; that the factual and legal reasons for the impugned decisions were set out at length; and that, accordingly, the proceedings taken as a whole were fair. (See, for example the Case *Garcia Ruiz v. Spain*, [GC], application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

44. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact 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).

45. In fact, it is the role of the regular courts to interpret and apply the rules of procedural and substantive law (See, *mutatis mutandis*, *García Ruiz v. Spain* [GC], No. 30544/96, paragraph 28, European Court of Human Rights [ECtHR] 1999-I)."

46. The Constitutional Court recalls that it is not a fact-finding court and that the complete determination of factual situation is within the full jurisdiction of the regular courts, while the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, therefore, it cannot act as a „*fourth instance court*" (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, see also: *mutatis mutandis* in case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

47. Finally, the Court considers that the Applicant does not refer to any of the constitutional provisions and generally describes and raises legal issues without accurately stating and without raising his allegations at the constitutional level as foreseen by Article 48 of the Law.

48. In these circumstances, the Court considers that the Applicant has not substantiated the allegations of violation of fundamental human rights and freedoms guaranteed by the Constitution. The facts of the case do not show that the Court has acted contrary to the procedural guarantees established in the Constitution.

49. The Applicant failed to *prima facie* justify his Referral and, therefore, cannot claim to be subject of a violation of any right guaranteed by the Constitution.

50. Based on the aforementioned considerations, the Referral, on constitutional basis is manifestly ill-founded and is to be declared inadmissible as established by Article 113.7 of the Constitution, foreseen by Article 48 of the Law and as further specified in Rule 36 (2) (a)) and (c) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (1) and (7) of the Constitution, Article 48 of the Law, and Rule 36 (2) (a) and (c) of the Rules of Procedure, 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; and

IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI08/17, Applicant: N.S., Constitutional review of Decision CN. No. 89/2015 of the Basic Court in Mitrovica, of 14 August 2015

KI08/17, resolution on inadmissibility of 5 September 2017, published on 1 November 2017

Key words: *Individual referral, equality before the law, right to legal remedies, nondisclosure of identity, principle of subsidiarity*

The Basic Court in Mitrovica had rendered a decision whereby it had granted the motion of Applicant's former spouse to uphold the Decision of the First-Instance Court in Tirana.

In essence, the Applicant claimed before the Constitutional Court that his rights guaranteed by the Constitution, namely the right to equality and the right to legal remedies, had been violated, alleging that he had never received the decision of the Basic Court in Mitrovica. The Applicant requested the Constitutional Court not to disclose his identity.

The Court found that the Applicant had at his disposal legal remedies before the regular courts which were effective and could put right the alleged violations, but the Applicant had not done so. The Court found that the Applicant had not exhausted all the legal remedies afforded to him by the applicable law.

The Constitutional Court approved the Applicant's request not to disclose his identity to the public.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI08/17

Applicant

NS

Constitutional review of
Decision CN. No. 89/2015 of the Basic Court in Mitrovica,
of 14 August 2015

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 NS from Mitrovica (hereinafter, the Applicant).

Challenged decision

2. The Applicant challenges Decision CN. No. 89/2015 of the Basic Court in Mitrovica, which recognized a Decision of a foreign country.

3. The Applicant states that he was informed indirectly of the content of that Decision on 20 January 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged Decision, which allegedly has violated the Applicant's rights guaranteed by Article 24 [Equality Before the Law] and Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

5. The Applicant also requests for his identity not to be disclosed to the public.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

7. On 1 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

8. On 20 March 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu.

9. On 11 April 2017, the Court notified the Applicant about the registration of the Referral and, on 19 April 2017, sent a copy of it to the Basic Court in Mitrovica.

10. On 4 September 2017, the Applicant submitted additional documents to the Court, namely Decision no. 5799 of the Court of Judicial District in Tirana and the same Decision as verified by the notary in Prishtina.

11. On 5 September 2017, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

12. On 3 December 2012, the District Court in Tirana (Decision 5799) dissolved the marriage between the Applicant and his former spouse.

13. On an unspecified date, the Applicant's former spouse, who is a citizen of Albania, filed with the Basic Court in Mitrovica a proposal to recognize the decision of the Albanian court.

14. On 14 August 2015, the Basic Court in Mitrovica (Decision No. 89/2015) "*found that the proposal is grounded"* and recognized the Decision of the District Court in Tirana, "*in accordance with Article 86-101 of the Law on Resolving Conflicts of Local Laws with Foreign Laws, and on the grounds of reciprocity"*.

Applicant's allegations

15. The Applicant claims that the challenged decision violated his constitutional rights guaranteed by Article 24 [Equality Before the Law] and Article 32 [Right to Legal Remedies] of the Constitution.

16. The Applicant alleges that his right to equality before the law was violated, *"since the fact that I am a citizen of Kosovo was ignored, whereas the Court has considered the party that is not a citizen of Kosovo as being a citizen of Kosovo"*.

17. The Applicant further alleges a violation of his right to legal remedies, because he had no right to appeal *"a Decision which can produce legal consequences for me, as a citizen of Kosovo"*.

18. The Applicant states that "a *final Decision* [was] *rendered 2 years ago by the Basic Court in Mitrovica"* and *"I never received it. I came to know about it on 20 January 2017"*.

19. The Applicant requests for his identity not to be disclosed to the public, "*due to the reason that my name is irrelevant in reviewing the case, and publicity may indirectly affect my children*".

20. The Applicant concludes by requesting the Court "*to declare the recognition of the Decision of the foreign Court invalid (...), due to the approval made in violation of the procedure and the provision of the law in force"*.

Admissibility of the Referral

21. The Court refers to Article 46 [Admissibility], which provides:

> *The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that all legal requirements have been met.*

22. Thus the Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

23. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

> *1. The Constitutional Court decides only on matters referred to the court in 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.*

24. The Court also refers to Article 47 (2) of the Law, which provides:

> *"[...] The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

25. Furthermore, the Court takes into account Rule 36 (1) (b) of the Rules of Procedure, which stipulates:

> *"(1) The Court may consider a referral if:*
>
> > *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted".*

26. The Court recalls that the Applicant claims that the Basic Court did not notify him about Decision CN. No. 89/2015 of 14 August 2015; he became indirectly aware of its content only after two years and, as a result, the Applicant did not have a right to appeal.

27. In addition, the Applicant states that "a *final Decision rendered 2 years ago (...) cannot be considered at the same instance, nor by the Court of Appeals, thus, the only Court having merits is the Constitutional Court".*

28. However, the Court notes that the Applicant, after becoming aware of the content of Decision CN. No. 89/2015 of the Basic Court in Mitrovica of 14 August 2015, could, at least, have requested the Basic Court to officially notify him of the Decision or have filed an appeal before the Court of Appeals.

29. Thus, the Court considers that the Applicant had available legal remedies before the regular courts which were effective and could have corrected the alleged violations; but the Applicant has not done so.

30. Moreover, the Court reiterates that a remedy available under applicable law cannot be considered as ineffective without the Applicant even trying to exhaust it and see whether it produces any results.

31. Therefore, the Court further considers that the Applicant has not exhausted all legal remedies afforded to him by the applicable law in Kosovo. See Constitutional Court Case No. KI07/09, *Demë and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, §§ 28-29).

32. In this respect, the Court reiterates that the principle of subsidiarity and the exhaustion rule of legal remedies under Article 113 (7) of the Constitution, Article 47 of the Law and Rule 36 (1) (b) of the Rules of Procedure obliges those who want to bring their case to the Court, to previously use all effective remedies provided by law.

33. In fact, the principle and the rule are based on the assumption that there is an effective remedy available in respect of the alleged breach in the regular courts. In fact, the machinery of protection established by the Convention is subsidiary to the regular court system safeguarding human rights. See, *mutatis mutandis*, ECtHR cases *Akdivar and others v. Turkey*, 16 September 1996, § 51 and *Handyside v. the United Kingdom*, 7 December 1976, § 48; see also Constitutional Court case KI42/15, of 4 July 2016, §§ 34 and 35.

34. The considerations above are in conformity with the jurisprudence of the ECtHR, which upheld that "*the applicant has never raised this complaint (...). Thus this complaint needs to be rejected for non exhaustion of domestic legal remedies (...)".* See ECtHR case *Erzebet PAP v. Serbia*, Application No. 44694, 21 June 2011, § 3.

35. Moreover, the Court considers that the additional documents filed on 4 September 2017 do not impact on the analysis made so far.

36. Thus, the Court considers that the Applicant has not exhausted all legal remedies provided by law and determines that he has not fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

37. Therefore, pursuant to Article 113 (7) of the Constitution, Article 47 (2) of the Law and Rule 36 (1) (b) of the Rules of Procedure, the Court finds that the Referral is inadmissible.

Request to not disclose identity

38. The Court recalls that the Applicant requested for his identity not to be disclosed to the public, "*due to the reason that my name is irrelevant in reviewing the case, and publicity may indirectly affect my children*".

39. In this connection, the Court refers to Rule 29 (6) of the Rules of Procedure, which provides:

> "*The party filing the referral may request that his or her identity not be publicly disclosed and shall state the reasons for the request. The Court may grant the request if it finds that the reasons are well-founded".*

40. The Court also refers to Article 8 (1) of the Convention on the Rights of the Child, which establishes;

> *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.*

41. The Court considers that in a family case the publicity may, even indirectly, affect the identity, name and family relations of the children.

42. Therefore, pursuant to Article 8 (1) of the Convention on the Rights of the Child and Rule 29 (6) of the Rules of Procedure, the Court grants as well-founded the Applicant's request for not disclosing his identity to the public.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 47 of the Law and Rules 36 (1) (b) and 56 (b) of the Rules of Procedure, on 5 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Arta Rama-Hajrizi

KI37/17 and KI52/17 Applicants: Tihomir Mikarić, Olga Janićijević and Shemsije Sheholli, constitutional Review of Judgment Pml.Kzz 236/2016 of the Supreme Court of 11 January 2017

KI37/17 and KI52/17, Resolution on Inadmissibility of 7 September 2017, published on 1 November 2017

Keywords: *individual referral, constitutional review of judgment of the Supreme Court of Kosovo, criminal proceedings, manifestly ill-founded*

The Referrals are based on Article 113.7 of the Constitution, Article 47 and 48 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo. Against the Applicants of this joined referral, the criminal proceedings was conducted before the regular courts regarding the criminal offense of issuing unlawful judicial decisions, which ended with the decision of the Supreme Court of Kosovo that the request of the Applicants for the protection of legality was ungrounded and by the confirmation of the judgments on conviction. The Applicants claim that this decision violated Articles 3, 24.2, 31.1 and 4 as well as Articles 33 and 54 of the Constitution and Article 6 of the ECtHR.

The Court notes that the Supreme Court thoroughly analyzed the allegations and arguments contained in the Applicants' request for protection of legality and gave justified answers. The Supreme Court specifically analyzed and decided on the arguments of establishment of intent, "selective justice" and correctly established that they were not substantiated. Finally, the Court finds that the Referral are manifestly ill-founded on constitutional basis and as such they should be declared inadmissible.

RESOLUTION ON INADMISIBILITY

in

Cases Nos. KI37/17 and KI52/17

Applicants

Tihomir Mikarić
Olga Janičijević
Shemsije Sheholli

Constitutional Review of
Judgment Pml.Kzz 236/2016 of the Supreme Court
of 11 January 2017

THE CONSTITUONAL 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.

Applicants

1. The Referral KI37/17 was submitted by Tihomir Mikarić, with residence in Laplje Selo, municipality of Gračanica and Olga Janičijević, with residence in Prishtina; the Referral KI52/17 was submitted Shemsije Sheholli, with residence in Prishtina (hereinafter, the Applicants).

Challenged decision

2. The Applicants challenge Judgment Pml. Kzz 236/16 of the Supreme Court of 11 January 2017, in connection with Judgment PAKR 158/15 of the Court of Appeals of 5 April 2016 and Judgment K.no. 272/13 of the Basic Court in Prizren of 9 September 2014.

Subject matter

3. The subject matter of the Referrals is the constitutional review of the challenged Judgment, which allegedly violated the Applicants' rights as guaranteed by Article 3

[Equality Before the Law], Article 24 [Equality Before the Law], Article 31 (2) [Right to Fair and Impartial Trial], Article 33 (1) (4) [The Principle of Legality and Proportionality in Criminal Cases], Article 54 [Judicial Protection of Rights], Article 107 [Immunity] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), in connection with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention of Human Rights (hereinafter, the ECHR).

4. The Applicant Shemsije Sheholli requested the Court to hold a hearing

Legal basis

5. The Referrals are based on Article 113 (7) of the Constitution, Article 47 and 48 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 3 April 2017, the Applicants Tihomir Mikarić and Olga Janičijević submitted their Referral KI 37/17 to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 7 April 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel composed of Judges Bekim (presiding), Selvete Gërxhaliu-Krasnqi and Gresa Caka-Nimani.

8. On 21 April 2017, the Applicant Shemsije Sheholli submitted her Referral KI 52/17 to the Court.

9. On 24 April 2017, the President of the Court ordered the joinder of the Referrals under Rule 37 (1) of the Rules of Procedure.

10. On 25 May 2017, the Court notified the Applicants about the registration and joinder of their referrals and sent a copy of the referrals to the Supreme Court.

11. On 12 June 2017, the Applicant Shemsije Sheholli submitted additional documents and requested the Court to hold a hearing and to enable her to participate in that hearing.

12. On 7 September 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. On 27 July 2012, the Special Prosecution of the Republic of Kosovo filed indictment PPS 253/09 against the Applicants.

14. On 9 September 2014, the Basic Court in Prizren (Judgment P. No. 272/13) found guilty:

    (i) the Applicant Tihomir Mikaric because in between 2006 and 2007, as a judge in the then Municipal Court in Prishtina, rendered illegal decisions in cases nos. 1908/03; 342/06; and 1918/06;

(ii) (ii) the Applicant Olga Janičijević because in between 2006 and 2007, as a judge in the then Municipal Court in Prishtina, rendered illegal decisions in cases nos. 1314/07; 53/06; 3/06; 1849/06; 1147/06; 3521/04; 1415/05; 1738/07; and,

(iii) (iii) the Applicant Shemsije Sheholli because in between 2006 and 2007, as a judge in the then Municipal Court in Prishtina, rendered illegal decision in case no. 2333/05.

15. The Basic Court found the Applicants guilty due to having committed the criminal offence of "Issuing Unlawful Judicial Decisions" as provided for by Article 346 of the Provisional Criminal Code of Kosovo UNMIK/REG/2003/25 (hereinafter, PCCK) of 6 July 2003. The Basic Court reasoned that the Applicants have rendered decisions pertinent to property claims against Socially Owned Enterprises in contravention with the applicable law which provided that the Special Chamber of the Supreme Court has primary jurisdiction to resolve such claims. The Basic Court further added that the applicants have rendered those decisions for the purposes of personal material gain and for the material gain of third persons.

16. The Applicant Tihomir Mikarić was sentenced to 1 (one) year of conditional imprisonment which shall not be executed under the condition not to commit another criminal offence within a period of 2 (two) years. The Applicant Olga Janičijević was sentenced to 18 (eighteen) months of conditional imprisonment which shall not be executed under the condition not to commit another criminal offence within a period of 2 (two) years. The Applicant Shemsije Sheholli was sentenced to 8 (eight) months of conditional imprisonment which shall not be executed under the condition not to commit another criminal offence within a period of 2 (two) years.

17. The Basic Court, under Article 54 [Accessory Punishments] and Article 57 [Prohibition on Exercising a Profession, Activity or Duty] of the PCCK, sentenced the Applicants with the accessory punishment of prohibition of profession, activity or duty for a period of 2 (two) years.

18. The Applicants filed with the Court of Appeals an appeal alleging essential violation of the provisions of the criminal procedure, erroneous and incomplete determination of the factual situation, violation of the criminal law and decision on criminal sanction.

19. On 5 April 2016, the Court of Appeals (Judgment PAKR 158/15) partially granted the Applicants' appeal, insofar as their intent to obtain unlawful material benefit could not be proven beyond a reasonable doubt and the imposed accessory punishment was too vague; rejected as ungrounded the remainder of the appeal; and upheld their conviction.

20. The Applicants filed with the Supreme Court a request for protection of legality, claiming violations of their fundamental human rights and freedoms, namely consisting of allegations about selective justice, form and content of judgments, disproportionality in criminal cases, establishment of criminal intent, establishment of fact, forged evidence, immunity of judges and wrongful imposition of accessory punishment.

21. On 11 January 2017, the Supreme Court (Judgment Pml.Kzz 236/2016) rejected as ungrounded the Applicants' request for protection of legality, because it concluded that *"all allegations against the form and content of the judgment of the Court of Appeals to be unfounded (...)"*.

Applicants' allegations

22. The Applicants claim violations of Article 3 [Equality Before the Law]; Article 24 [Equality Before the Law]; § 2 of Article 31 [Right to Fair and Impartial Trial]; §§ (1) and (4) of Article 33 [The Principle of Legality and Proportionality in Criminal Cases]; Article 54 [Judicial Protection of Rights]; Article 107 [Immunity] of the Constitution, in connection with § 1 of Article 6 (Right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the ECHR).

23. The Applicants Tihomir Mikarić and Olga Janičijević claim that the proceedings were arbitrary. In fact, they allege that *"first instance Judgment (...) is arbitrary, hypothetical or incomprehensible. In paragraph 267 of the judgment is provided an explanation "the panel has reviewed UNMIK Regulation 2002/13, in particular Article 4 and found that provisions of the same are clear. However, the panel did not read the regulation"*.

24. The Applicants Tihomir Mikarić and Olga Janičijević also claim that the judgments of the courts show a deficient reasoning. In fact, they allege that "*first Instance Basic Court in Prizren has not provided sufficient reasons for its judgment. It did not explain clearly and unequivocally my guilt, neither my intent, as an essential element of the offense "Rendering unlawful judicial decisions", foreseen by Article 346 PCCK"*.

25. Moreover, the Applicants Tihomir Mikarić and Olga Janičijević claim a violation of Article 31 (2) of the Constitution. In fact, they allege that "*first instance Judgment was rendered beyond the reasonable timeframe of 180 days, which is the time required for rendering of a court decision. SPRK on 27.07.2012 filed the indictment PPS 253 of 19.07.2012, and the judgment was rendered on 09.09.2014"*.

26. The Applicants Tihomir Mikarić and Olga Janičijević further claim about the reasons set out in the Judgment of the Court of Appeals. In fact, they allege that "*the second instance (...) did not provide valid reasons as determined that I allegedly rendered disputed judgments with the intention to damage the DP PIK "Kosovo-Export" (...). The second instance Judgment also cannot meet the standards of a well reasoned decision, by which would be respected my right to a reasoned decision, as it is guaranteed by the Constitution of the Republic of Kosovo and the European Convention on Human Rights"*.

27. In addition, the Applicants Tihomir Mikarić and Olga Janičijević claim a violation of Article 33 (1) and (4) of the Constitution. In fact, they allege that "*the Supreme Court (...) justified the unlawful and unjust judgments of lower courts by inventing "specific intent", which is different from the basic forms of the intentions laid down in Article 15 of the PCCK, by doing so directly violated Article 33 paragraph 1 and paragraph 4 of the Constitution of the Republic of Kosovo (...)"*.

28. Finally, the Applicants Tihomir Mikarić and Olga Janičijević request the Court: (i) to confirm violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the ECHR; (ii) to confirm violation Article 33 (1) and (4) of the Constitution; and (iii) to declare null and void all the Judgments of the regular courts.

29. The Applicant Shemsije Sheholli claims as to the forgery of the Judgment of the Basic Court in Prizren. In fact, she alleges that "*(...) the first instance Court has concealed documents – material proofs, to my detriment, which are now found in the case files P. No. 272/13. This material proof was intentionally concealed to my detriment by the Presiding Judge of the Trial Panel (...)"*.

30. The Applicant Shemsije Sheholli also claims as to the consistency of the Judgment of the Court of Appeals. In fact, she alleges that "*(...) I, as judge of the first instance, am declared guilty – whereas the Trial Panel of the District Court, which has upheld this*

Judgment which I have issued as Presiding Judge in the first instance, is acquitted of all charges".

31. The Applicant Shemsije Sheholli further complains against the Judgment of Supreme Court "*(...) by which my Request for protection of legality (...) is rejected as ungrounded – without any legal grounds".*

32. In addition, the Applicant Shemsije Sheholli claims a violation of Article 107 of the Constitution. In fact, she alleges that she "*(...) was found guilty of the criminal offense (...) and punished by a suspended sentence (...), the Court of Appeals in Prishtina has rejected my Appeal, and in relation to me, it has upheld the Judgment of the Basic Court in Prizren. Both Judgments have been rendered with a series of violations of formal and material provisions. By these Judgments, the Constitution of the Republic of Kosovo has been violated as well (...)".*

33. Moreover, the Applicant Shemsije Sheholli alleges that she is a victim of discrimination by the courts because: (i) in the proceedings before the trial court, evidence was "manipulated" and documents were "concealed" to her detriment; (ii) her intent to commit a criminal offence and her purpose for material gain were never established, and hence, in absence of such elements, there is no criminal offence; and that (iii) the accessory punishment, namely prohibition to exercise her profession as a judge is "unlawful", "unfair" and "denigrating" to her as a judge and that that punishment "seriously" violates Article 107 of the Constitution.

34. Finally, the Applicant Shemsije Sheholli requests the Court to declare null and void all the Judgments of the regular courts.

Admissibility of the Referral

35. The Court first examines whether the Applicants have fulfilled the admissibility requirements established by the Constitution, provided by the Law and further specified by the Rules of Procedure.

36. In that respect, the Court refers to §§ 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.*

37. The Court also refers to Articles 49 [Deadlines] of the Law, which provides:

> *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.*

38. In this respect, the Court notes that the Applicants are individuals who allege violations by the regular courts of their rights guaranteed by the Constitution; they have submitted their Referrals within the prescribed deadline and they have exhausted all legal remedies available to them.

39. However, the Court further refers to Article 48 [Accuracy of the Referral] 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.*

40. The Court takes into account Rule 36 (1) (d) and (2) (d), which foresees:

> *"(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 manifestly ill-founded when it is satisfied that:*
> *(...)*
>
> *(d) the Applicant does not sufficiently substantiate his claim".*

41. Thus the Court determines that the Applicants are authorized parties, they filed their Referrals in due time and they have exhausted all legal remedies. However, the Applicants have not sufficiently substantiated their claims as it will be further explained.

42. The Court recalls that the Applicants claim violations of Article 3, 24, 31 (2), Article 33 (1) and (4), 54, and 107 of the Constitution, in connection Article 6 (1) of the ECHR.

43. The Court is mindful of Article 24 [Equality Before the Law] of the Constitution, which establishes:

> *1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*
> *2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.*
> (...)

44. Article 31 [Right to Fair and Impartial Trial] of the Constitution establishes:

> *1. Everyone shall be guaranteed equal protection of rights in the proceedings before the 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.*

45. In addition, Article 6 [Right to a fair trial] of the ECHR establishes:

> *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.*

46. Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution, which establishes that:

1. No one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law."
[...]
4. Punishments shall be administered in accordance with the law in force at the time a criminal act was committed.

47. Articles 54 [Judicial Protection of Rights] of the Constitution establishes:

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

48. Article 107 [Immunity] of the Constitution establishes:

1. Judges, including lay judges, shall be immune from prosecution, civil lawsuit and dismissal for actions taken, decisions made or options expressed that are within the scope of their responsibilities as judges."

49. The Court notes at the outset that the Applicants challenge the same Judgment of the Supreme Court; however, several of the allegations are raised by more than one of the Applicants. Thus the Court will examine them together or one by one in as much as they are interrelated or separated.

50. In this respect, the Court recalls that the Applicants allege violations of their fundamental human rights and freedoms, namely arguing about selective justice, form and content of judgments, disproportionality in criminal cases, establishment of criminal intent, establishment of facts, forged evidence, deprivation of immunity of judges and wrongful imposition of accessory punishment.

51. The Court considers that these allegations and arguments were already the grounds on which the Applicants requested the protection of legality.

52. In fact, the Court notes that the Applicant Tihomir Mikaric requested protection of legality arguing that *"the judgments are in violation of Article 346 [Issuing Unlawful Judicial Decisions] of the PCCK and in substantial violation of the provisions of criminal procedure according to Article 384 (1.3) of the CPC"*.

53. The Court also notes that the Applicant Olga Janicijevic requested protection of legality arguing that *"the judgment of the Court of Appeals is in violation of Article 346 of the PCCK because the reasoning does not mention any evidence that proves that she intended to cause damage*".

54. The Court further notes that the Applicant Shemsije Sheholli requested protection of legality, arguing that *"the judgments are in violation of the provisions of criminal procedure, criminal law and the Constitution*". In relation with that alleged violation of the Constitution, the Applicant Shemsije Sheholli argued that "*the judgments violate the constitutionally protected principle of immunity for judges pursuant to Article 107 of the Constitution as they deprive a judge from the right to independently render judgments based on applicable law"*.

55. The Court considers that the allegations and arguments brought before the Court are related with errors of facts and law allegedly committed not only by the Supreme Court

but also by the Court of Appeals, District Court and Municipal Court. The allegations and arguments taken by the Applicants are the same in substance as the ones presented before the Supreme Court. It appears that the Applicants are coming before the Constitutional Court as it would be a "fourth instance" court.

56. However, the Court reiterates that it is not its task to deal with errors of law allegedly committed by a regular court (legality), unless and in so far as such errors may have infringed rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which have 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 European Court on Human Rights [ECtHR] case *García Ruiz v. Spain*, Application No. 30544/96, 21 January 1999, § 28; and see *mutatis mutandis* Constitutional Court case No. KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility, of 17 August 2016, § 40).

57. The Court further emphasizes that, as a general rule, the establishment of the facts and the interpretation and application of law is a matter solely for the regular instances whose findings and conclusions in this regard are binding on the Constitutional Court. However, where a decision of a regular court is clearly arbitrary, the Court can and must call it into question. (See Constitutional Court case No. KI63/16, Ibidem, § 45).

58. Moreover, the Court notes that the Supreme Court thoroughly analyzed the allegations and arguments contained in the Applicants' request for protection of legality and gave justified answers. The Supreme Court specifically analyzed and decided on the arguments of establishment of intent, "selective justice", the session held on 3 September 2014, forged evidence, immunity, form and content of the judgments and imposition of accessory punishments.

59. In fact, as to the Applicants' allegation on selective justice, the Supreme Court noted that "*the arguments in this regard are extremely vague as they are not substantiated by any legal ground"*. Furthermore, the Supreme Court considered that *"it is not a violation of either criminal procedure or criminal material law to acquit only some of the defendants based on a different assessment of the established facts"*. Finally, the Supreme Court *"has not found that (...) the law intentionally was applied selectively. Because of this, the allegations are unfounded"*.

60. As to the allegation of the Applicants about the form and content of judgments of the courts of lower instance, the Supreme Court noted that *"the Court of Appeals affirmed the conclusions already exhaustively elaborated by the District Court"*. The Supreme Court considered that*, "in situations where the Court of Appeals concur with reasons already given in the first instance, the standard for its reasoning is set lower. The Panel does not agree that the reasoning is insufficient or that the enacting clause is unclear or incomprehensible"*. Finally, the Supreme Court found *"all allegations against the form and content of the judgment of the Court of Appeals to be unfounded in these parts"*.

61. As to the allegation of the Applicants on the exercise of proportionality by the courts of lower instance, the Supreme Court noted that "*the criminal offence of Issuing Unlawful Judicial Decisions is pursuant to Article 346 of the PCCK punishable by imprisonment of six months to five years"*. The Supreme Court considered that *"all terms of imprisonment were decided within this scale"*. Finally, the Supreme Court found that *"the allegation that the courts exceeded their authority is therefore unfounded"*.

62. As to the allegation of the Applicants that the courts of lower instance never established their criminal intent, the Supreme Court noted that *the intent prescribed in Article 346 of the PCCK is one of the specific elements of the criminal offence of Issuing Unlawful Judicial Decision. It is a specific intent and as such it differs from the basic forms of intents prescribed in Article 15 of the PCCK. Article 15 of the PCCK defines the two types of basic intent – direct and eventual – that applies to each criminal offence within the PCCK"*. The Supreme Court considered that *"the factual determination in relation to the specific subjective element as defined in Article 346 of the PCCK does not differ from the factual determination in relation to other elements"*. Finally, the Supreme Court found that *"the specific intent can therefore be proved in many ways, including through logical inferences that can be drawn from other pieces of evidence, including circumstantial evidence"*.

63. As to the request of the Applicants Tihomir Mikarić that the Supreme Court must examine the video and audio recordings, the Supreme Court reminded that the procedure of the request for protection of legality "*is governed by Articles 418 and 432—441 of the CPC"*. The Supreme Court considered that *"none of these articles include a procedural possibility for the Supreme Court to take new evidence or examine video and audio recordings from the District Court´s sessions"*. Finally, the Supreme Court found that *"Tihomir Mikaric´s request is therefore rejected"*.

64. As to the allegation of the Applicants Tihomir Mikarić and Olga Janičijević that the first instance judgment was rendered beyond the reasonable deadline of one hundred and eighty (180) days, and thus, resulting in violation of paragraph 2 of Article 31 of the Constitution, the Constitutional Court notes that there is nothing in their Referral suggesting that this allegation was raised by the Applicants during the course of regular proceedings. This allegation is being raised for the first time before this Court. However, the Court, in accordance with the principle of subsidiarity, cannot assess this question without it having been raised and assessed in the regular proceedings beforehand. (See Constitutional Court case KI89/15, Applicant *Fatmir Koci*, Resolution on Inadmissibility, of 22 March 2016, § 35).

65. As to the allegation of the Applicant Shemsije Sheholli on forged evidence, the Supreme Court considered that "*the allegation in this regard is vague as it is not substantiated by any legal ground or example"*. In addition, the Supreme Court noted that it *"cannot assess the District Court´s establishment of facts as Article 432 (2) of the CPC prohibits arguments that – directly or indirectly – challenge the factual determination"*. Finally, the Supreme Court concluded that it *"did not find any indication of that the courts forged evidence, these allegations are unfounded"*.

66. As to the allegation of the Applicant Shemsije Sheholli about the breach of her immunity as a judge, the Supreme Court reminded that "*Article 107 (2) of the Constitution prescribes that judges shall not enjoy immunity and may be removed from office if they have committed an intentional violation of the law"*. The Supreme Court noted that, *"in this case, the defendants have been found guilty of intentionally violating the law"*. Finally, the Supreme Court concluded that *"for that reason, the Constitution does not exclude criminal responsibility. The allegation that the Constitution was violated is therefore unfounded*".

67. As to the allegation of the Applicant Shemsije Sheholli about wrongful imposition of accessory punishment, the Supreme Court reminded that the accessory punishment *"can according to Article 57 of the PCCK be imposed on a perpetrator if he/she has abused his/her position, activity or duty in order to commit a criminal offence or if there is reason to expect that the exercise of such profession, activity or duty can be misused to commit a criminal offence"*. The Supreme Court noted that *"the provision does not make*

a difference between defendants who are judges and other defendants". The Supreme Court considered that, *"in this case, the defendants have clearly abused their positions in order to commit the criminal offences at hand"*. Finally, the Supreme Court concluded that "*the allegation that the imposition of accessory punishments is unlawful is therefore unfounded"*.

68. Before the foregoing considerations, the Court notes that the Applicants had the benefit of the conduct of the proceedings based on adversarial principle; they were able to submit the arguments they considered relevant to their case at the various stages of those proceedings; they were given the opportunity to challenge effectively the arguments and evidence presented by the prosecutor; all the arguments relevant for the resolution of their case were heard and reviewed by the regular courts; the factual and legal reasons against the challenged judgments were presented in detail; and, in accordance with the circumstances of the case, viewed in their entirety, the proceedings were fair. (See, for example, ECtHR case *Garcia Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, § 29; and see, *mutatis mutandis,* Constitutional Court case No. KI42/16, Applicant *Valdet Sutaj*, Resolution on Inadmissibility, of 7 November 2016, § 40).

69. In this respect, the Court reiterates that requirement of "fairness" as guaranteed by Article 31 of the Constitution in connection with Article 6 of the Convention covers proceedings as a whole, and the question whether a person has had a "fair" trial is looked at by cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage. (See, for example, ECtHR case *Monnell and Morris v. the United Kingdom*, Application No. 9562/81; 9818/82, Judgment 2 March 1987, §§55-70).

70. The Court considers that the Applicants do not agree with the Judgment of the Supreme Court, namely with the way the law was interpreted and applied by the courts. In this respect, the Court refers to the case-law of the ECtHR which held that, "*in consequence of the principle that laws must be of general application, the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorizations as opposed to exhaustive lists. That means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application depend on practice. Consequently, in any system of law, however clearly drafted a legal provision may be, including a criminal law provision, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain.* (See *mutatis mutandis* ECtHR case *Scoppola v. Italy*, Application No. 10249/03, Judgment of 17 December 2009, §§ 100-101).

71. Furthermore, it is not up to the Court to speculate as to the establishment of the facts, the interpretation and application of the criminal and criminal procedural law by the Supreme Court and by the other courts during the course of the criminal proceedings.

72. The Court reiterates that it is the master of characterization to be given in law to the facts of the case, it does not consider itself bound by the characterization given by the Applicants or other parties in the proceedings. (See ECtHR case *Guerra and Others v. Italy,* Application No. 116/1996/735/932, Judgment of 19 February 1998, § 44).

73. Moreover, the Applicants have not showed and substantiated any violation which might lead the Court to conclude that the Supreme Court or the regular courts acted in an arbitrary or unreasonable manner in establishing the facts or interpreting the law. (See, for example, ECtHR case *Alimuçaj v. Albania,* Application No. 20134/05, Judgment of 7 February 2012, § 176).

74. In addition, the Court considers that the Applicants' disagreement with the outcome of their cases cannot of itself raise an arguable claim of a breach of their constitutional rights. (See, *mutatis mutandis*, Constitutional Court Case No. KI63/16, Ibidem, § 46).

75. Based on the foregoing considerations, the Court concludes that the Applicants have not presented any facts to justify their allegations for a breach of their fundamental rights and freedoms as guaranteed by the Constitution; nor have they substantiated those allegations as required by Article 48 of the Law.

76. The Court finds that the referrals are manifestly ill-founded on a constitutional basis and must thus be declared inadmissible, as established by Article 113 (7) of the Constitution, provided for by Article 48 of the Law and foreseen by Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

The Applicant's Shemsije Sheholli request to hold an oral hearing

77. The Court recalls that the Applicant Shemsije Sheholli requested to hold a hearing and to enable her to participate in that hearing.

78. In that respect, the Court refers to Article 20 of the Law, which provides:

> *1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
>
> *2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files.*

79. The Court notes that no reasons were invoked by the Applicant supporting her request.

80. Thus the Court considers that the documents contained in the Referral are sufficient to decide this case as per wording of Article 20 paragraph 2 of the Law. (See, *mutatis mutandis,* Constitutional Court case No. KI34/17 Applicant *Valdete Daka*, Judgment of 12 June 2017, §§ 108-110).

81. Therefore, the Applicant's request to hold a hearing is rejected as ungrounded.

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) (d), and 56 (b) of the Rules of Procedure, on 7 September 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Arta Rama-Hajrizi

KI98/16, Applicant Fazile Morina, Referral for Constitutional Review of Decision ARJ-UZVP, no. 7/2016, of the Supreme Court, of 31 March 2016

KI98/16, Decision on Inadmissibility of 4 July 2017, published on 2 November 2017

Key words: *Individual Referral, civil proceedings, fair and impartial trial, manifestly ill-founded*

The Applicant requested from the Court the constitutional review of the Decision of the Supreme Court, by which the request for extraordinary review of Judgment AA nr. 128/2015, of the Court of Appeal of 9 October 2015, was dismissed as inadmissible.

She alleged a violation of Article 31 of the Constitution, respectively the right to a fair and impartial trial, because of the erroneous and incomplete determination of the factual situation by the regular courts, inter alia, alleging that the Supreme Court had not correctly calculated the time limit for submitting the request for extraordinary review of the Decision of the Court of Appeal.

The Court found that the Applicants' Referral was inadmissible on constitutional grounds, clarifying that it is not a court of fourth instance and does not deal with evaluation of facts or possible legal errors unless they as such are indicators of the constitutional violations. In the case circumstances, where the Applicant did not sufficiently support the allegations of constitutional violation, the Court declared the Referral inadmissible as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI98/16

Applicant

Fazile Morina

Request for constitutional review of Decision ARJ-UZVP No. 7/2016 of the Supreme Court, of 31 March 2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Cukalović, 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 Ms. Fazile Morina from village Hade (hereinafter: the Applicant), represented by lawyer Selatin Ahmeti from Prishtina.

Challenged decision

2. The Applicant challenges Decision ARJ-UZVP No. 7/2016 of the Supreme Court of 31 March 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly has violated the Applicant's right to fair and impartial trial in accordance with Article 31 of the Constitution.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of Law No. 03/L-121 on the 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

5. On 27 June 2016, the Applicant submitted the Referral through mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 12 July 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (Presiding), Gresa Caka-Nimani and Selvete Gërxhaliu-Krasniqi.

7. On 19 July 2016, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Supreme Court.

8. On 31 October 2016, the President of the Court appointed Judge Ivan Čukalović as Presiding Judge of the Review Panel, replacing Judge Robert Carolan, who resigned from the position of the Judge on 9 September 2016

9. On 4 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 29 June 2006, the Ministry of Environment and Spatial Planning (MESP) by Decision No. 05/313/2 rejected the Applicant's request for compensation of rent and food expenses as a result of the relocation from her home in Hade village, due to the risk of landslide.

11. On 9 October 2008, by Judgment A. No. 1739/2006, the Supreme Court of Kosovo in administrative conflict proceedings approved the Applicant's claim as grounded, annulled the decision of MESP and remanded the case for reconsideration to MESP.

12. On 27 August 2010, by Decision KRJA 7/2008, the Supreme Court of Kosovo rejected as inadmissible the request for the extraordinary review of the Judgment of the Supreme Court filed by MESP.

13. On 13 May 2011, by Decision No. 313-4/08, in the reconsideration procedure, MESP rejected again the Applicant's request for compensation of rent and food expenses as ungrounded.

14. On an unspecified date, the Applicant challenged the decision of MESP and filed a claim with the Basic Court in Prishtina- Department for Administrative Conflicts (DAC).

15. On 9 October 2014, by Judgment A. No. 444/11, the Basic Court in Prishtina -DAC, rejected the Applicant's claim as ungrounded.

16. On 17 November 2014, the Applicant filed an appeal with the Court of Appeal of Kosovo, on the grounds of erroneous and incomplete determination of factual situation, erroneous application of substantive law and violation of the contested procedure provisions.

17. On 9 October 2015, the Court of Appeal of Kosovo, by Judgment AA. No. 128/2015, rejected the Applicant's appeal as ungrounded and upheld the Judgment DKA A. No. 444/11 of the Basic Court.

18. On 21 November 2015, the Applicant filed a request for revision with the Supreme Court of Kosovo, on the grounds of the erroneous application of substantive law and essential violations of LCP procedure.

19. The Supreme Court of Kosovo, by Decision Rev. A (U) No. 13/2015 (the decision is missing in the case file), rejected as inadmissible the revision of the claimant filed against Judgment AA. No. 128/2015 of the Court of Appeal in Prishtina, of 9 October 2015, emphasizing that the revision against the final decisions for the administrative matters of the second instance cannot be filed.

20. On 25 January 2016, the Applicant filed a request for extraordinary review of the Judgment of the Court of Appeal, stating that the request for revision was erroneously oriented instead of the request for extraordinary review.

21. On 31 March 2016, the Supreme Court, by Decision RJ-UZVP. No. 7/2016, rejected as inadmissible the request for extraordinary review, filed against Judgment AA. No. 114/2014 of the Court of Appeal in Prishtina, of 6 May 2015.

Applicant's allegations

22. The Applicant alleges that the regular courts have violated his right to fair and impartial trial because they did not correctly determine the facts of the case and erroneously applied the substantive law.

Admissibility of the Referral

23. The Court first examines whether the admissibility requirements laid down in the Constitution, and as further specified in the Law and the Rules of Procedure, have been met.

24. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties], paragraph 7 of the Constitution, which establishes:

> *"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".*

25. The Court also takes into account Article 48 of the Law, which stipulates:

> *"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".*

26. Finally, the Court also refers to Rule 36 of the Rules of Procedure, which provides:

> *"(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
>
> *b) the referral is not prima facie justified, or;*

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or".

27. The Court finds that the Applicant's Referral meets the requirements of Article 113.7 with respect to the authorized party and the exhaustion of legal remedies, it was submitted within the legal deadline under Article 49 of the Law, as well as the requirements for review by the Court.

28. The Court notes that the Applicant specifically claimed that the Decision ARJ-UZVP No.7/2016 of the Supreme Court violated her constitutional right to a fair and impartial trial (Article 31 of the Constitution), which has the following content:

Article 31 [Right to Fair and Impartial Trial]

"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."

29. When reviewing the allegations of a violation of the right to fair and impartial trial, the Court assesses whether the proceedings in their entirety were fair and impartial, as required by Article 31 of the Constitution (see, *inter alia*, *mutatis mutandis, Edwards v. United Kingdom*, 16 December 1992, p 34, Series A No. 247, and *B. Vidal v. Belgium*, 22 April 1992, p. 33, Series A no 235).

30. The Court notes that the Applicant's arguments regarding the violation of the right to fair and impartial trial consist in the erroneous and incomplete determination of factual situation, because the regular courts have erroneously found that the Applicant was not displaced from her home during the process managed by "The Office for Implementation of Hade Project, in the period from 18 November 2004 to 14 February 2005". The Applicant also emphasized that the Supreme Court incorrectly calculated the legal deadline when it rejected as out of time the request for extraordinary review of the Judgment of the Court of Appeal.

31. The Court finds that the Basic Court in Prishtina deciding on the Applicant's claim against the MESP Decision, *inter alia*, reasoned that "*The court also notes that during the inspection of the families in their provisional residences relocated from the area with a high risk coefficient in Hade village, in minutes of 18 May 2006, it was concluded that Fazile Morina, now claimant, lives as head of household at the family of Fazile Morina in rent in the apartment of her brother in Ulpiana, however she does not have a contract on rent; moreover, it is concluded in the minutes that the same is not found in the list of persons resettled from Hade village."*

32. The Basic Court further stated that "*Based on this situation of the facts, the Court notes that the respondent, by rendering the challenged Decision, has correctly determined the factual situation, due to the reason that on the basis of the evidence that are found in the case files, it results that the claimant did not fulfill the requirements for benefitting financial aid for rent and food, due to the reason that the latter did not resettle along with other persons from Hade village, risk area, a resettlement which the respondent has completed, as well as due to the fact that the latter, in the case of inspection, did not possess a contract on rent for provisional residence, conditions which are needed for acquiring the right to financial aid for rent and food.".*

33. The Court notes that by rejecting the Applicant's appeal, this factual situation was also determined by the Court of Appeal when upholding the Judgment of the Basic Court in Prishtina-DAC.

34. The Court further finds that the decisions of the Supreme Court regarding the request for revision and the extraordinary review of the final decision were dismissed by that court for failure to comply with the procedural legal criteria and did not deal with the merits of the case.

35. In this regard, the Court reiterates that it is not the duty of the Constitutional Court to deal with the errors of fact or law (legality), allegedly committed by the Supreme Court, the Court of Appeal and the Basic Court, unless and insofar as they may have resulted in a violation of the rights and freedoms of the Applicant protected by the Constitution (constitutionality).

36. The Court further reiterates that it is not its task under the Constitution to act as a fourth-instance court in respect of decisions rendered by the regular courts. It is the duty of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see *Garcia Ruiz v. Spain*, ECtHR, Judgment of 21 January 1999, see also Case KI70/11 of the Applicants *Faik Hima, Magbule Hima And Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).

37. In fact, the Court reiterates that the task of the Court is to assess whether the relevant proceedings of the regular courts were fair in their entirety, including the way how the evidence was taken, or whether they were in any way unfair or arbitrary (see, *mutatis mutandis*, *Shub v. Lithuania*, paragraph 16, ECtHR Decision on Admissibility of Application of 30 June 2009,; *Edwards v. United Kingdom*, paragraph 34, ECtHR Judgment of 16 December 1992,; *Barbera, and Messeque Jabardo v. Spain*, paragraph 68, ECtHR Judgment of 6 December 1988).

38. The Court notes that the Applicant had numerous opportunities to present her case before the Basic Court in Prishtina, the Court of Appeal and the Supreme Court, using the appeal remedies she has actively participated in all stages of the court proceedings, therefore, the process in its entirety cannot be deemed arbitrary or unfair.

39. In the circumstances of the case, the Court cannot find that the decisions of the regular courts are arbitrary or indicative of a violation of the right to fair and impartial trial, all the more when all the Applicant's allegations relate to violations of laws and not of the Constitution, whereby the Applicant did not in any way present evidence as to how and under which circumstances the alleged constitutional right was violated.

40. In sum, the Court concludes that the Referral is not *prima facie* justified on a constitutional basis and that the facts presented in the Referral by the Applicant do not in any way justify the allegation of a violation of a constitutional right, therefore, pursuant to Rule 36 (2) (a) and (b), the Referral is to be declared inadmissible as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rule 36 (2) (a) and (b) of the Rules of Procedure, in its session held on 4 July 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI140/16, Applicant: Raiffeisen Bank Kosovo JSC, constitutional review of Judgment CN. No. 6/2016 of the Supreme Court of Kosovo, of 23 August 2016

KI140/16, Decision on inadmissibility of 6 September 2017 published on 3 November 2017

Key words: *individual referral, constitutional review of the Decision of the Supreme Court of Kosovo, manifestly ill-founded*

The Applicant submitted his referral based on Articles 113.7 and 21.4 of the Constitution, Article 47 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

A former employee initiated court proceedings against the Applicant regarding the dismissal. The proceedings were conducted before all the instances of the regular judiciary. The Supreme Court rejected the Employee's request for review as being filed out of time.

In 2014, the Applicant submitted for the first time a referral with the Court claiming that the Supreme Court had decided on the request for return to the previous situation, without notifying the Applicant. This referral was registered under number KI10/14.

In Judgment KI10/14, the Court had found that the Supreme Court had violated the Applicant's rights to fair trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. The Court declared Supreme Court Judgment C. no. 7/2013 of 19 October 2013 as invalid and remanded the case for reconsideration to the Supreme Court in accordance with the judgment of the Court.

The Supreme Court repeated the proceedings upon the Employee's request, allowed the Employees' request for return to the previous situation, and quashed the Decision of the Supreme Court of Kosovo, of 21 January 2013.

Afterwards, the Applicant submitted a request to the Supreme Court for return to the previous situation The Supreme Court rejected the Applicant's request as out of time.

The Applicant claims that the Supreme Court denied his right to the legal effect of the decision hence the right to fair and impartial trial, and for these reasons, the Applicant's rights guaranteed by Articles 31 and 116 of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights, had been violated.

The Court considers that based on the facts of the case stemming from the presented documents and appealing allegations of the Applicant, the Supreme Court gave detailed and clear reasoning of its decision, including the grounds based on which it rejected the Applicant's request to return to previous situation, as being out of time.

Bearing the foregoing in mind, and the consistent practice of the ECtHR and the Court, as well as the stances expressed herein, the Court considers that there is nothing to indicate that the allegations of the Applicant in the present Referral raise constitutional questions whereto the Applicant refers.

Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI140/16

Applicant

Raiffeisen Bank Kosovo JSC

Constitutional review of Judgment CN. No. 6/2016 of the Supreme Court of Kosovo, of 23 August 2016

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 Applicant is Raiffeisen Bank Kosovo JSC (hereinafter: the Applicant) based in Prishtina, represented by Ilir Tahiri, its legal representative.

Challenged decision

2. The Applicant challenges Decision CN. No. 6/2016 of the Supreme Court of Kosovo of 23 August 2016, which was served on the Applicant on 20 September 2016**.**

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which has allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 116 [Legal Effect of Decisions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 [Right to a fair trial] of the European Convention of Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 and 21.4 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 1 December 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 6 January 2017, the President of the Court by Decision No. GJR. KI140/16, appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur. On the same date, the President of the Court by Decision No. KSH. KI140/16 appointed the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Bekim Sejdiu.

7. On 31 January 2017, the Court notified the Applicant about the registration of the Referral.

8. On 27 March 2017, the Court notified the Supreme Court about the registration of the Referral. By this notification the Court requested the Supreme Court to provide a copy of the acknowledgment of receipt, by which the Applicant was notified about the request of the opposing party for return to previous situation.

9. On 07 April 2017, the Supreme Court submitted complete case file, including acknowledgment of receipt which informed the Applicant of the claim of the opposite side, with the date of 14 January 2016.

10. On 06 September 2017, the Review Panel considered the report of the Judge Rapporteur, and recommended to the Court the inadmissibility of the Referral.

Summary of facts regarding the Judgment of the Constitutional Court Ki10/14 of 26 June 2014

11. In 2002, the Applicant had dismissed an employee. That employee initiated judicial proceedings against the Applicant regarding the dismissal, the procedure was conducted through all instances of the regular judiciary.

12. On 21 January 2013, the Supreme Court rejected the employee's request for revision as being 'out of time'.

13. Thereafter, the employee filed a request with the Supreme Court for return to the previous situation deciding upon the request on the revision.

14. On 19 October 2013, by Judgment C. No. 7/2013, the Supreme Court approved the request of the employee for return to the previous situation.

15. On 28 January 2014, the Applicant submitted a referral to the Court claiming that the Supreme Court had decided on the request for return to the previous situation, without notifying the Applicant. The Applicant alleged a violation of the right to a fair hearing as protected by Article 31 of the Constitution and Article 6 of the ECHR, because the Applicant had not been able to present its legal arguments on the request for return to the previous situation. This referral was registered under number KI 10/14.

16. On 20 May 2014, the Court issued its Judgment, finding that the Supreme Court had violated the Applicant's rights to a fair tria as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. The Court declared Invalid the Supreme Court Judgment C.No.7/2013 of 19 October 2013, and remanded the case back to the Supreme Court for reconsideration in accordance with the Judgment of the Court.

Summary of facts after Judgment of the Constitutional Court KI10/14

17. On 22 March 2016, the Supreme Court by Judgment Rev. No. 85/2016 repeated the proceedings on the employee's request, allowed employee's request for return to the

previous situation and quashed Decision [Rev. No. 333/2011] of the Supreme Court of Kosovo, of 21 January 2013.

18. On 27 April 2016, the Applicant submitted a request to the Supreme Court for return to the previous situation. On 23 August 2016, by Decision C.no.6/2016, the Supreme Court rejected the Applicant's request as out of time.

Applicant's allegations

19. The Applicant alleges that:

(i) The Supreme Court by Judgment [Rev. No. 85/2016] did not comply with Judgment KI10/14 of the Constitutional Court of the Republic of Kosovo, of 26 June 2014, because when rendering this judgment it did not previously submit a request to return to the previous situation to the Applicant and did not invite the Applicant to present its arguments which seriously violated Article 116 [Legal Effect of Decisions] and

(ii) The Supreme Court by Decision [C. No. 6/2016] also violated the right to fair and impartial trial, rejecting as out of time his proposal to return to the previous situation filed against Judgment Rev. No. 85/2016, of the Supreme Court of Kosovo, because according to the Applicant, he was not notified of the request to return to previous situation, and therefore, it was not given the opportunity to present its case, which seriously violated Article 31 of the Constitution and Article 6 of the ECHR.

20. The Applicant requests the Court:

"
I. To declare the Referral submitted by the Applicant admissible;
II. To hold that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6 (1) [Right to a Fair Trial] of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
III. To hold that there has been a violation of Article 116.1 [Legal Effects of Decisions] of the Constitution of the Republic of Kosovo;
IV. To declare invalid Judgment REV. No. 85/2016 of the Supreme Court of Kosovo of 22 March 2016 and Decision CN. No. 6/2016 of 23 August 2016, and to remand the case for retrial in accordance with the Judgment of the Constitutional Court.
V. The Judgment is effective immediately."

Admissibility of the Referral

21. The Court first examines whether the Applicant has met the admissibility requirements established in the Constitution and as further specified in the Law and the Rules of Procedure.

22. 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."*

23. In addition, the Court also refers to Article 21.4 of the Constitution which stipulates:

"[...]
4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

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

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."

25. In addition, the Court takes into account Rule 36 [Admissibility Criteria] (2) (b) and (d) which foresees:

"(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".

26. In this case, the Court assesses that the Applicant has met the procedural requirements provided by Article 113.7 of the Constitution. However, in order to verify the admissibility of the Referral, the Court has to assess further whether the Applicant has met the requirements prescribed by Article 48 of the Law and the admissibility criteria provided by Rule 36 of the Rules of Procedure.

27. The Court recalls that the Applicant claims that the Supreme Court denied (i) the right to the legal effect of the decision and, consequently, (ii) the right to fair and impartial trial.

(i) Alleged violations of Article 116 of the Constitution

28. The Court refers to Article 116.1 of the Constitution, which establishes:

"1. Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo."

29. Regarding the first claim of the Applicant, the Court notes that the appealing allegations about violation of the rights are related to the manner the Supreme Court implemented the decision of the Constitutional Court no. KI10/14 of 20 May 2014.

30. On 18 April 2016, the Supreme Court notified the Constitutional Court that it acted in accordance with the constitutional judgment (see: Judgment Rev. no. 85/2016 of 22 March 2016).

31. The Court noted that the Supreme Court by Judgment Rev. No. 85/2016 of 22 March 2016 corrected violations of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR, which the Court found in Decision CN. No. 7/13 of the Supreme Court of 19 October 2013, when it considered the Referral no. KI10/14 of 20 May 2014.

32. The Court further added that the Supreme Court submitted on 07 April 2017 to the Court a copy of the acknowledgment of receipt, which states that on 14 January 2016 it submitted to the Applicant Judgment KI10/14 of the Constitutional Court, as well as the request of the opposing party to return to previous situation.

33. With regard to the Applicant's allegation of violation of Article 116 of the Constitution, the Court notes that according to the documents included in the Referral, the Supreme Court submitted to the Applicant a copy of the request for return to the previous situation filed by the opposing party, as required by the relevant provisions of the procedural law; however, the Applicant did not give any response to the request submitted by the opposing party.

34. Accordingly, the Court notes that the Supreme Court by Judgment [Rev. no. 85/2016] corrected the aforementioned procedural violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR, and therefore complied with Judgment KI10/14 of the Constitutional Court of the Republic of Kosovo.

(ii) Alleged violation of Article 31 of the Constitution and Article 6 of the ECHR

35. The Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

> *"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 [...] within a reasonable time by an independent and impartial tribunal established by law."*

36. The Court refers to Article 6.1 of ECHR, which provides:

> "*In the determination of his civil rights and obligations, everyone is entitled to a fair hearing by a [...] tribunal."*

37. As to the second claim of the Applicant, the Court notes that the appealing allegations about violation of the right to fair and impartial trial pertain to the way in which the Supreme Court rejected his request to return to previous situation. The Court points out that these claims of the Applicant were thoroughly reviewed by the Supreme Court.

38. In Decision C. No. 6/2016 of 23 August 2016, which rejected the Applicant's request to return to previous situation as out of time, the Supreme Court reasoned:

> *„[...] The Supreme Court of Kosovo submitted to the respondent the judgment of the Constitutional Court and request (proposal) to return to previous situation, which was served on the respondent on 14.01.2016 [...]*
> *From the moment the proposer found out of the latter, a subjective time limit of 7 days began to run in which the respondent had to file a proposal to return to previous situation, while it filed it on 27.04.2016.*
>
> *The provision of Article 130 para. 3 of LCP regulates the objective time limit - the running of a period of 60 days from the date of failure, in this case, the running of the time limit for submission of the request to return to previous situation. In this case, the respondent failed to take procedural action within the time limit*

prescribed by Article 130, para. 2 and 3 of LCP, and for this reason the Supreme Court decided as in the enacting clause of this decision [...]".

39. The Court considers that based on the facts of the case stemming from the presented documents and appealing allegations of the Applicant, the Supreme Court gave detailed and clear reasoning of its decision, including the grounds based on which it rejected the request to return to previous situation of the Applicant as being out of time.

40. In addition, the Court reiterates that it is not a fact finding court and correct and complete determination of factual situation is a full jurisdiction of the regular courts, while the role of the l Court is only to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Court cannot act as a fourth instance court (see case *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65; see also: case KI86/11, Applicant: *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012.

41. In this regard, the Court considers that the Applicant failed to prove that the regular courts acted in an arbitrary or unfair manner. It is not the role of the Court to substitute its own assessment of the facts with that of the regular courts and, as a general rule, it is the duty of these courts to assess the evidence made available to them. The Court can only consider whether the proceedings before the regular courts, in general, have been conducted in such a way that the Applicant had a fair trial. (see: case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991).

42. The Court recalls in particular the fact that the Applicant in his Referral did not provide relevant arguments to justify its claims that there has been in any way a violation of the constitutional rights which he referred to, in addition to being dissatisfied with the outcome of the proceedings in which its request to return to previous situation was rejected (see: case *Mezotur - Tiszazugi Tarsulat v. Hungary*, no. 5503/02, ECHR Judgment of 26 July 2005).

43. The fact that the Applicant is not satisfied with the outcome of the proceedings cannot of itself raise an arguable claim of a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (1) [Right to Fair Trial] of the ECHR (see: case *Mezotur - Tiszazugi Tarsulat v. Hungary*, no. 5503/02, ECHR Judgment of 26 July 2005).

Conclusion

44. Bearing in mind the foregoing, as well as the consistent case law of the ECtHR and of the Court and also the points made in this decision, the Court considers that there is nothing to indicate that the allegations of the Applicant in the present Referral raise constitutional questions referred to by the Applicant.

45. In these circumstances, the Court considers that the Applicant has not substantiated by evidence nor has it sufficiently substantiated it claim of violation of human rights and fundamental freedoms guaranteed by the Constitution and the ECHR, because the presented facts do not in any way show that the regular courts had denied it those rights.

46. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, as established in Article 113 (7) of the Constitution, provided for in Article 48 of the Law, and further specified in the admissibility criteria of Rule 36 (2) (b) and (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 and 7 of the Constitution, Article 48 of the Law, and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, in the session held on 06 September 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 Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI100/16, Applicant: Živorad Dutina, Constitutional review of Judgment GSK-KPA-A-97/2014 of the Appellate Panel of the Supreme Court of Kosovo on Property Agency of Kosovo, of 19 February 2016

KI100/16, Resolution on inadmissibility, approved on 4 September 2017, published on 3 November 2017

Key words: *individual referral, civil procedure, right to fair and impartial trial, right to legal remedies, protection of property, judicial protection of rights, right to effective remedy, manifestly ill-founded referral, inadmissible referral*

The Applicant contested before the Court the Judgment of the Appellate Panel of the Supreme Court on Property Agency of Kosovo, alleging that his rights and freedoms guaranteed by Articles 31, 32, 46, and 54 of the Constitution and Articles 6 and 13 of ECHR had been violated, and that the Appellate Panel made an erroneous decision when finding that his case did not fall under the jurisdiction of PAK, and that the Appellate Panel did not entirely and legitimately verify the evidence submitted by the Applicant.

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. Therefore, the Referral was declared inadmissible as manifestly ill-founded on constitutional basis.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI100/16

Applicant

Živorad Dutina

Constitutional review of Judgment No. GSK-KPA-A-97/2014 of the Appellate Panel of the Supreme Court of Kosovo on Kosovo Property Agency, of 19 February 2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Cukalovic, 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 Živorad Dutina (hereinafter: the Applicant) from Obiliq.

Challenged decision

2. The Applicants challenges Judgment GSK-KPA-A-97/2014 of the Appellate Panel of the Supreme Court of Kosovo on Kosovo Property Agency (hereinafter: the Appellate Panel), of 19 February 2016.

3. That Judgment was served on the Applicant on 29 March 2016.

Subject Matter

4. The subject matter is the constitutional review of the abovementioned Judgment of the Appellate Panel whereby the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] and Article 54[Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 [Right to a fair trial] and Article 13 [Right to an effective remedy] of the European Convention on Human Rights (hereinafter: ECHR) have allegedly been violated.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 47 and 48 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 15 July 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 16 August 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (Presiding), Altay Suroy and Gresa Caka-Nimani.

8. On 5 September 2016, the Court informed the Applicant about the registration of the Referral and sent a copy of the Referral to the Appellate Panel.

9. On 27 January 2017, the President of the Court appointed Judge Ivan Cukalovic as a member of the Review Panel replacing Judge Robert Carolan, who had resigned from the position of the Judge of the Court on 9 September 2016. Judge Altay Suroy was appointed as presiding judge of the Review Panel.

10. On 4 September 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 22 May 2007, the Applicant filed a property claim to the Kosovo Property Agency (KPA), whereby he requested the re-possession over parcels number 474 and 475, measuring a total surface area of 00.43.44 sqm, and located in Millosheva Village, Obiliq, Vise Sela, registered in Possession List no. 75.

12. On 11 June 2013, the Kosovo Property Claims Commission (hereinafter: KPCC), by its Decision KPCC/D/A/204/2013 rejected the property claim due to having no jurisdiction.

13. On 20 February 2014, the Applicant filed an appeal against the decision in question to the Appellate Panel.

14. On 19 February 2016, the Appellate Panel by Judgment GSK-KPA-A97/2014 rejected as unfounded the Applicant's appeal and upheld Decision of KPCC, of 11 June 2013.

15. The relevant part of the Judgment of the Appellate Panel reads:

> *"...Pursuant to Article 3.1 of Law no. 03/L-079, the KPA has jurisdiction to solve the property claims "involving circumstances directly related to or resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999". This means that the KPA assessment framework includes the confirmation of the following elements: who possessed the claimed property before 27 February 1998; who currently possessed the property; when and why was the possession lost between the period covering 27 February 1998 and 20 June 1999. If the Commission concludes that the loss of property had happened before or during the aforementioned dates, or if the loss of possession is not related to the armed conflict, then it rejects the property claim pursuant to Article 11.4 (b) of Law no. 03/L-079.*
>
> *"...Since we have reached the conclusion that neither the Appellant nor his siblings have used the claimed property after 1995, the Supreme Court considers that the*

property claim falls out of the KPCC jurisdiction. The question whether a sale contract was concluded with the Appellant's brother in 1995 might have a legal effect or not, is largely insignificant for the results of the proceedings conducted before the present Court, because the allegations submitted by the parties themselves fall into the category of disputes that are to be resolved by a civil court having jurisdiction. The consideration of other elements related to the purchase of property rights fall out of the KPCC jurisdiction.

"...Hence, given that the Appellant has not demonstrated that he had been in the possession of the claimed property for the period between 27 February 1998 and 20 June 1999, that he had lost his possession during the conflict, the Supreme Court considers that the appeal should be rejected as ungrounded.

Applicant's allegations

16. The Applicant alleges that his rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32[Right to Legal Remedies], 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution, as well as Articles 6 [Right to a fair trial], and 13 [Right to an effective remedy] of the ECHR have been violated.

17. The applicant complains about *"the lack of a mechanism, or lack of their implementation, on the occasion of loss of the property since June 1999, which led to the violation of his rights guaranteed by the Constitution as stated in this submission. The Applicant also complains because he considers that the authorities having jurisdiction did not fairly and lawfully act in case of his request."*

18. He particularly alleges that the Appellate Panel made an erroneous determination when it found that his case does not fall under the jurisdiction of KPA. What is more, the Applicant also alleges that the Appellate Panel has not verified the adduced evidence completely and in a legally valid manner.

19. He declares that "*First of all, his request was rejected alleging that it does not fall under the jurisdiction of the KPA, because the property had, since the pre-war period, not been under his possession. During the proceedings before the court, the Applicant has testified that he has freely been enjoying this property, with the other co-owners until June 1999. No contract has been concluded on the alienation of the property. The evidence presented by the responding party are contradictory to the common sense and evidently falsified. The Court has not reviewed the Applicant's allegations in a legally valid manner and completely nor the Court during the evidentiary procedure verified the signatures and other circumstances pertaining to the contract attached as main item of evidence."*

20. The applicant alleges that his rights to a reasoned decision was violated because the *"the Judgements do not contain reasoned stances concerning the reasons owing to which the Courts did not review the evidence presented by the Applicant, and which were important in terms of the precondition of the guarantee for a fair decision. On the other hand, they show arbitrariness in confirming the stance concerning the lack of the opportunity to verify the documentation and the insufficient grounds of such stances and decisions; therefore, by doing so, they show arbitrariness.*

21. He further considers that, "*... there was a violation of the right to access the court, because during the proceedings conducted, there was no review of the essence of the violation of the right with the alleged impossibility to verify the documentation attached, but also the factual and legal nature of the use of the disputed property until June 1999."*

22. The Applicant also contests *"the interpretation of the Commission and Court that the disputed immovable property has been transferred in a large part, namely lost the possession before the 1998/99 conflict. The mere reasoning of the appealed decision is ambiguous and vague. First of all, it contains no relevant reasons, criteria and evidence which were decisive and valid so that the alleged contract could have been considered as credible and that the applicant had lost his property in 1995. By doing so, the Committee had acted contrary to its legal obligations and the principle of justice, in the sense that it has not clearly and intelligibly explained the legal nature of the alleged contract and the Appellant's allegations that he had enjoyed his property until June 1999."*

Assessment of admissibility of the Referral

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

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

> *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."*

25. The Court refers to Article 49 [Deadlines], which provides that *"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".*

26. The Court considers that the Applicant is an authorized party. Besides that the Referral was submitted in accordance with the provided deadline and the Applicant has exhausted all legal remedies.

27. The Court further refers to Article 48 of the Law [Accuracy of the Referral], which foresees:

> *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.*

28. The Court notes, that the Applicant has clarified what act of a public authority is subject to challenge and what rights allegedly have been violated as provided for by Article 48 of the Law. In this respect, the Court must also determine whether the Applicant has substantiated his allegations as required by Article 48 of the Law and as further specified by rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure.

29. Thus, the Court further refers to Rule 36 [Admissibility Criteria] (1) (d) and (2) (b) and (d) of the Rules of Procedure, which specify 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

30. Based on the above considerations with respect to the admissibility criteria, the Court must now determine whether the Applicant's referral is prima facie justified; and whether, he has substantiated his allegations in compliance with Article 48 of the Law and rule 36 (2) (b) and (d) of the Rules of Procedure.

31. In this connection, the Court notes that the gist of the referral is that the Applicant disagrees with the findings of the courts as to the time when he lost the factual possession of his real property.

32. The Court recalls 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"*.

33. In this regard, the Court reiterates that the European Court of Human Rights (hereinafter, the ECtHR) found that *"the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law". See: mutatis mutandis,* ECtHR case *García Ruiz v. Spain*, no. 30544/96, 21 January 1999, paragraph 28.

34. In that respect, the Court notes that the Appellate Panel thoroughly reviewed the evidence and the analysis made by the KPCC.

35. The Court notes that the Appellate Panel took it into account and analyzed all the allegations made by the Applicant in his appeal. The Panel explained the question of the jurisdiction of the KPCC and the burden of proof placed on the Applicant in order to substantiate his allegations.

36. In addition, 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).

37. 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).

38. The Applicant's Referral does not indicate that the regular courts acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to substitute its own assessment of the facts with that of the regular courts and, as a general rule, it is the duty of these courts to assess the evidence made available to them. The Constitutional Court can only consider whether the regular courts' proceedings in general have been

conducted in such a way that the Applicant had a fair trial (see: case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991).

39. The fact that the Applicant disagrees with the outcome of the proceedings cannot of itself raise an arguable claim for breach of Articles 31 [Right to a Fair and Impartial Trial], 32 [Right to Legal Remedies], 46 [Protection of Property], 54 [Judicial Protection of Rights] of the Constitution in connection with Articles 6 [Right to fair trial] and 13 [Right to an effective remedy] of the ECHR (see: case *Mezotur-Tiszazugi Tarsulat vs. Hungary*, No.5503/02, ECtHR, Judgment of 26 July 2005)

40. In these circumstances, the Court considers that the Applicant has not substantiated, nor has he sufficiently justified his claim of violation of human rights and fundamental freedoms guaranteed by the Constitution, in particular, violation of Articles 31 [Right to Fair and Impartial Trial], 32]Right to Legal Remedies], 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution, as well as Articles 6 [Right to a fair trial], and 13 [Right to an effective remedy] of the ECHR, because the facts presented by him do not show in any way that the regular courts denied him the rights guaranteed by the Constitution.

41. Therefore, the Referral is manifestly ill-founded, on constitutional basis, and is to be declared inadmissible, as established by Article 113.7 of the Constitution, provided for by the Article 48 of the Law and as further specified by the admissibility criteria, Rule 36 (2) (b) and (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 1 and 7 of the Constitution, Article 48 of the Law and Rule 36 (2) (b) and (d) of the Rules of Procedure, in the session held on 4 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20-4 of the Law; and

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur **President of the Constitutional Court**

Snezhana Botusharova Arta Rama-Hajrizi

KI13/17, Applicants Bedri Prishtina **and Fahri Bekteshi, Referral for the Constitutional Review of Judgment CA. nr. 3442/2016 of the Court of Appeals of Kosovo of 10 October 2016**

KI13/17, Decision on Inadmissibility of 4 July 2017, published on 3 November 2017

Key words: *Individual Referral, civil proceedings, fair and impartial trial, manifestly ill-founded*

The Applicants requested from the Court the constitutional review of the Judgment of the Court of Appeals, by which the imposition of a security measure was rejected to them in a court dispute, in which they were party who claimed the right to ownership over the property which was the subject of dispute before the regular courts.

They alleged a violation of Article 31 of the Constitution, respectively the right to a fair and impartial trial, due to the erroneous and incomplete determination of the factual situation by the regular courts and the violation of the principle of equality of arms in the proceedings, as one of the guarantees of Article 31 of the Constitution.

The Court found that the decisions of the regular courts were sufficiently reasoned and were not indicators of any emphasized arbitrariness that would result in a constitutional violation. The Court further stated in its Decision, that it is not a court of fourth instances and does not deal with evaluation of facts or possible legal errors unless they as such are indicators of the constitutional violations. In the case circumstances, where the Applicants did not sufficiently support the allegations of constitutional violation, the Court declared the Referral inadmissible as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI13/17

Applicant

Bedri Prishtina and Fahri Bekteshi

Constitutional review of Judgment CA. No. 3442/2016 of the Court of Appeals of Kosovo, of 10 October 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-Krasnqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Applicants are: Bedri Prishtina and Fahri Bekteshi from Prishtina (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge Judgment CA. No. 3442/2016, of the Court of Appeals of Kosovo, of 10 October 2016, which was served on the Applicants on 20 October 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly has violated the Applicants' rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 24 [Equality before the Law], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 1 of Protocol 1 [Protection of Property] and Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 13 February 2017, the Applicants submitted the Referral through mail service to the Constitutional Court (hereinafter: the Court).

6. On 20 March 2017, the President of the Court by Decision appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka- Nimani.

7. On 12 April 2017, the Court notified the Applicants about the registration of the Referral, and sent a copy of the Referral to the Court of Appeals.

8. On 4 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 8 July 2016, the Basic Court in Prishtina by Decision C. No. 3216/2014 rejected the Applicants' proposal for imposition of the security measure as ungrounded by which they requested to prohibit the respondent - the opponent of the security M. Zh to enter into any contract with other persons, to impose on a mortgage or any other real encumbrance or obligation or to take action that would change the immovable property structure which is the subject of the ownership dispute on the surface and cadastral parcels mentioned as in the proposal, until the decision on merits according to the request of the claimants is rendered.

10. On an unspecified date, against the decision of the first instance court, the Applicant's representative filed an appeal with the Court of Appeals of Kosovo on the grounds of essential violations of the provisions of the contested procedure, incomplete and erroneous determination of factual situation and erroneous application of the substantive law.

11. On 10 October 2016, the Court of Appeals in Prishtina, by Decision CA. No. 3442/2016, rejected the Applicants' appeal as ungrounded, and upheld the decision of the Basic Court in Prishtina.

12. On 28 October 2016, the Applicants, through their authorized representative, filed with the Office of the Chief State Prosecutor a request for protection of legality against Judgment CA. No. 3442/16 of the Court of Appeals in Prishtina, of 10 October 2016.

13. On 7 November 2016, the Office of the Chief State Prosecutor by Notification KMLC. No. 73/16 informed the legal representative of the Applicants that the request for protection of legality was not approved.

Applicant's allegations

14. The Applicants allege that the right to fair and impartial trial guaranteed by the Constitution (Article 31) and the right to a fair trial guaranteed by the ECHR (Article 6) have been violated because of the violation of the principle of equality of the parties to the procedure (equality of arms) and because the evidence presented by the parties was not treated equally by the regular courts and, moreover, the court decisions were not sufficiently reasoned.

15. The Applicants have also claimed that the property right was violated as a result of this impartial trial, stating that the factual situation was determined incompletely and incorrectly as well as the applicable law was incorrectly applied.

Admissibility of the Referral

16. In order to adjudicate the Applicant's Referral, the Court first examines whether the Applicants have met the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.

17. In this regard, 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."*

18. In addition, the Court takes into account Article 48 of the Law, which stipulates:
> *"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."*

19. The Court refers to Rule 36 of the Rules of Procedure, which provides:

> *"The Court may consider a referral if:*
>
> *(1) (d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *and*
>
> *(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;*

20. Based on the foregoing, the Court finds that the Referral was filed in accordance with Article 113 of the Constitution within the time limit provided for in Article 49 of the Law and after exhausting legal remedies in this stage of the court proceedings. However, must assess whether the requirements set out in Article 48 of the Law and Rule 36 of the Rules of Procedure have been met.

21. The Court recalls that the Applicants allege violation of paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution, because by the challenged decisions the regular courts rejected the request for security measure and, consequently, there has been a violation of Article 46 (Protection of Property) of the Constitution.

22. The Court 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 (ECtHR)."*

Relevant constitutional provisions and of ECHR regarding the case as presented by the Applicants

Article 31 [Right to Fair and Impartial Trial]

"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.

[...]

Article 6 of ECHR [Right to a fair trial]

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

[...]

Article 46 [Protection of Property]

1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.

23. When reviewing the allegations of a violation of the right to fair and impartial trial, the Court assesses whether the proceedings in its entirety were fair and impartial, as required by Article 31 of the Constitution (see, *inter alia*, *mutatis mutandis, Edwards v. United Kingdom*, 16 December 1992, p 34, Series A No. 247, and *B. Vidal v. Belgium*, 22 April 1992, p. 33, Series A no 235).

24. In relation to the foregoing, the Court finds that the Applicants have requested to assess whether Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated by Decision CA. No. 3442/2016 of the Court of Appeals, which rejected as ungrounded the appeal of the Applicants regarding the application of a security measure for a property which is otherwise subject to a property dispute between the Applicants and the opposing parties in that process and for which there is still no final decision regarding the main dispute.

25. Regarding the foregoing, the Court recalls that the Basic Court in Prishtina, by Decision C. No. 3216/17 of 8 July 2016, rejected the Applicant's proposal for the application of the security measure against the counter proposers, whereas in item II of this Decision, the

Basic Court had annulled the earlier decision of that court to impose the interim measure against the proposer SHKP "Viva" imposed on 12 December 2014.

26. Reasoning the abovementioned decision, the Basic Court emphasized, *inter alia,* that "*Article 297 of the Law on Contested Procedure clearly stipulates the following: "Measures for insurance can be determined: if the propose of the insurance makes it believable the existence of the request or of his subjective, and, in case there is a danger that without determining a measure of the kind the opposing party will make it impossible or make it difficult the implementation of the request, especially with alienating of its estate, hiding it, or other way through which it will change the existing situation of goods, or in another way will negatively impact on the rights of the insurance party that proposed."*

27. The Basic Court further reasoned that "*The evidence presented by the party proposing the respective security measure in support of his claim are rather contradictory and they cannot substantiate in any way the existence of his claim or of his subjective right."*

28. The Court of Appeals, after considering the appeal, reasoned "*Having assessed the appealing allegations and the conducted proceeding with respect to ordering of the security measure, the court found that the first instance court through correct application of the LCP with which requirements for ordering the security measure had been fulfilled, has rendered the decision highlighted in the enacting clause of the decision. This is due to the fact that ordering of the security measure shall imply essential determination of factual situation to the extent of such degree of credibility andif there is a danger that without ordering such a measure the opposing party might render the enforcement of the statement of claim impossible or substantially difficult."*

29. The decision further reiterates that "*This implies that the evidence shall be administered only when ordering a measure before exhausting all the evidence, since that would imply that the factual situation has been reviewed in its entirety, namely the procedure has reached such maturity that all conditions have been fulfilled for rendering a merit – based decision. Therefore, the court has not justified in a separate manner the appealing allegations with reference to the subject of the statement of the claim, since this shall be resolved as per the main matter.*

30. The Court further finds that although the Applicants attached to the Referral the Notification of the Office of the Chief State Prosecutor, KMLC 73/16, they have neither challenged nor alleged any constitutional violation by this legal act, therefore, the Court will not assess the compatibility of this act with the Constitution.

31. The Court recalls that the Court of Appeals rejected the Applicants' appeal against the Decision of the Basic Court and, accordingly, rejected the request for the imposition of the security measure requested by the Applicants.

32. In this regard, the Court reiterates that it is not the role of the Constitutional Court 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). 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*, Judgment of the European Court of Human Rights (hereinafter: ECHR) of 21 January 1999, *García Ruiz v. Spain*, no. 30544/96, par. 28).

33. Regarding the foregoing, the Court notes that the Basic Court and the Court of Appeals have assessed the factual situation of the case and fully addressed the Applicants'

allegations in relation to their request and provided a sufficient reasoning based on law and in relation to the allegations raised.

34. The Court also notes that the Applicants were given the opportunity to be active in all stages of the proceedings, and they have also exercised the legal remedy of the appeal, therefore from the aspect of constitutionality the Court did not find that the court decisions are arbitrary or indicate to violation of any right guaranteed by the Constitution.

35. In the circumstances of the case, the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and. Therefore, the Constitutional Court cannot act as a "fourth instance court" (See ECtHR Judgment of 16 September 1996, *Akdivar v. Turkey*, No. 21893/93, para. 65, see: also *mutatis mutandis* case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

36. Taking into account the fact that the court proceedings regarding the issue of determination of the title of ownership have not yet been concluded, but it was decided only with respect to the required security measure, the Court at this stage cannot assess the allegation of a possible violation of the right to property, under Article 46 of the Constitution.

37. In sum, the Court considers that nothing prevents the Applicants from submitting a new Referral to the Constitutional Court after the completion of the court proceedings in entirety, but at this stage of the procedure, regarding the subject matter of the Referral, they did not present any evidence, facts and arguments that show that the proceedings before the Court of Appeals have in any way constituted a constitutional violation of their rights guaranteed by the Constitution, namely the right to fair and impartial trial and the right to protection of property, and accordingly, have not sufficiently substantiated their allegations.

38. Accordingly, based on the foregoing assessments, the Court finds that the Referral in respect of allegations of violation of Article 31 of the Constitution, Article 6 of the ECHR and Article 46 of the Constitution in the form submitted by the Applicants, is manifestly ill-founded on constitutional basis, and therefore, in accordance with Articles 113. 7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, is declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law, and Rules 36 (1 and 2) (d) and 56 (b) of the Rules of Procedure, on 4 July 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI121/16, Applicant: Vera Otešević, Constitutional review of Judgment Rev. no. 123/16 of the Supreme Court of Kosovo, of 6 June 2016

KI121/16, Decision to reject the referral, approved on 4 April 2017, published on 9 November 2017

Key words: *individual referral, civil procedure, right to fair and impartial trial, responsibilities of the state, protection of property, property rights*

The Applicant alleged that her representative by power of attorney had acted contrary to her interests in relation to respondent R.M., and against her will and without her knowledge. The Applicant has merely mentioned the challenged decisions which she alleges led to the violation of her rights guaranteed by the Constitution and international covenants.

The Court considered that the Applicant's referral did not meet the procedural requirements for further review, because the referral was not complete with supporting documentation as required by Article 22.4 of the Law and rules 29 (2) (h) and 32 (5) of the Rules of Procedure. Therefore, the Court concluded that the referral is to be summarily rejected.

DECISION TO REJECT THE REFERRAL

in

Case no. KI121/16

Applicant

Vera Otešević

Constitutional review of Judgment Rev. no. 123/16 of the Supreme Court of the Republic of Kosovo of 6 June 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 Vera Otešević (hereinafter: the Applicant), currently residing in Danilovgrad, Republic of Montenegro.

Challenged decision

2. The Applicant challenges decision Rev. No. 123/16, of the Supreme Court of Kosovo, of 6 June 2016, Decision Ca. no. 1251/2015 of the Court of Appeal of the Republic of Kosovo, of 20 April 2015, and Judgment P. no. 26/13 of the Basic Court in Gjakova, of 5 September 2013.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decisions, which allegedly violated the rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of the Human Rights Provisions] and 58 [Responsibilities of the State] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 1 of Protocol 1 of the European Convention of Human Rights.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 and 47 of the Law no. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Constitution), and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter: Rules of Procedure).

Proceedings before the Constitutional Court

5. On 20 October 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 November 2016, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (presiding), Ivan Čukalović and Arta Rama-Hajrizi.

7. On 23 December 2016, the Court notified the Applicant of the registration of the Referral and requested to complete the Referral with relevant documentation.

8. On 3 February 2017, the Applicant submitted to the Court additional documentations. However, the hard copies of the challenged decisions have not been attached to the additional documentation.

9. On 4 April 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court to summarily reject the Referral.

Summary of facts

10. The Applicant only mentions the challenged decisions, by which she alleges that her rights guaranteed by the Constitution and international conventions have been violated. However, the above decisions which are mentioned by the Applicant have not been attached to the Referral.

Applicant's allegations

11. The Applicant alleges that her representative by power of attorney, against her will and without her knowledge, has acted contrary to her interests in relation to the defendant R.M. As a result of this action she alleges that "*the first instance court rendered an unlawful judgment, which is challenged by this appeal*".

12. Moreover, the Applicant alleges:

> *"The first instance court should serve on me in a formal and lawful manner the challenged judgment, and allow me the right of appeal.*
> *(...)*
> *The first instance judgment was unlawful, which action my authorized representative should have not taken, and the first instance court should have not have allowed such an UNAUTHORIZED AVAILABILITY OF MY REPRESENTATIVE, who misused me. When the court notes that an authorized representative works at the expense of the authorizer, it is obliged to meet the authorizer. By this, my constitutional rights have also been violated, violation of the right to property, ownership, because my authorized representative acted contrary to my interest. The Court of Appeal has neither dealt with these allegations.*
> *(...)*
> *The Decision of the Court of Appeal of Kosovo is unlawful and completely absurd. In all procedural laws and in the Law on Contested Procedure of Kosovo there are provisions which provide the manner how the judgments and other decisions in writing are served, which are related to deadlines.*
> (...)
> *Written decisions were not served on me in my language. I am the main subject of the proceedings. It is not my authorized representative, and that violation renders*

the proceeding and the trial unconstitutional, violates my right to fair and impartial trial, i.e. Right to a fair trial. I request the Court to recognize this constitutional complaint as grounded".

Admissibility of the Referral

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

14. Thus, the Court refers to the following provisions of Law:

Article 22.4 [Processing Referral]

"4. If the referral ... is not ... complete, the Judge Rapporteur informs the relevant parties or participants and sets a deadline of not more than fifteen (15) days for supplementing the respective referral(...)".

15. In addition, the Court refers to Rule 29 (2) [Filing of Referrals and Replies] and Rule 32 (5) [Withdrawal, Dismissal and Rejection of the Referrals] of the Rules of Procedure, which provides:

29 (2) "the referral shall also include:
[...]
(h) the supporting documentation and information.
[...]"

32 (5) "the Court may summarily reject a referral if the referral is incomplete or not clearly stated despite requests by the Court to the party to supplement or clarify the referral (...)".

16. The Court recalls that the Applicant alleges that regular courts violated her rights guaranteed by the Constitution and international conventions, for the reasons mentioned above.

17. Based on Article 22.4 of the Law, the Court requested the Applicant to submit the challenged decision and other decisions of the regular courts.

18. However, after the provided deadline, the Court received only some documents but not the hard copies of the challenged decisions of the regular courts, whose constitutionality the Court would be able to assess only after meeting the requirements laid down by the Constitution, Law and Rules of Procedure.

19. The Court considers that it cannot take into account the Applicant's allegations without supporting documentation and material evidence, pursuant to Article 22.4 of the Law and Rules 29 (2) (h) and 32 (5) of the Rules of Procedure (see Decision of the Constitutional Court in case KI03/15, Applicant *Hasan Beqiri*, of 13 May 2015, paragraphs 14, 15, 17, 19, 20 and 21).

20. The Court further considers that the Applicant has not shown a prima facie case in order for the Court to assess the fulfillment of all procedural admissibility requirements.

21. In addition, the Court notes that it is not a fact finding court and the burden of responsibility falls on the Applicant who failed to meet the procedural requirements laid down by the Constitution, the Law and the Rules of Procedure.

22. In sum, the Court considers that the Applicant's Referral does not meet the procedural requirements for further review, because the referral has not been completed with relevant documentation, as required by Article 22.4 of the Law and regulated 29 (2) (h), 32 (5) of the Rules of Procedure.

23. Therefore, the Court concludes that the Referral is to be summarily rejected.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113 (7) of the Constitution, Article 20 of the Law, and Rule 32 (5) of the Rules of Procedure, on 4 April 2017, unanimously

DECIDES

I. TO SUMMARILY REJECT the Referral;

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 Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI29/16, Applicant Afërdita Gashi-Sinanaj, Constitutional Review of Judgment Rev. no. 236/2015, of the Supreme Court of Kosovo of 5 October 2015

KI29/16, Decision on Inadmissibility of 6 November 2017, published on 15 November 2017

Key words: Individual Referral, civil procedure, unauthorized party, manifestly ill-founded

The Applicant submitted a Referral to the Court, requesting the constitutional review of Judgment Rev. no. 236/2015 of the Supreme Court of Kosovo of 5 October 2015. She alleges violation of Articles 31 and 46 of the Constitution, inter alia, alleging that the contested decision and the other court decisions violated her right to a fair and impartial trial, as well as deprived her from the property which, according to her, she had acquired by virtue of valid legal work, namely, by an entirely regular sale-purchase contract, certified as such at the Basic Court in Prishtina, as well with the cadastral department she has made a transfer of the purchased property on her name.

The Court found that the Applicant's allegations of violation of the right to a fair and impartial trial were not sufficiently substantiated so that the Court could conclude that court decisions were indicators of the violations of the Applicant's rights protected by the Constitution. On the other hand, the Court found that the Judgment of the Supreme Court as well as the court decisions of the courts of lower instances responded to all the issues raised by the Applicant, by examining the previous contract matter in between the third parties where the subject matter was the same property that afterwards served as legal ground for the court decisions that subsequently were contested by the Applicant. In such circumstances of the case, the Court ascertained that there was no violation of Article 31 of the Constitution and subsequently of Article 46 (Protection of Property) and based on its consolidated legal practice in such cases the Referral was declared inadmissible as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI29/16

Applicant

Afërdita Gashi-Sinanaj

Constitutional review of Judgment Rev. No. 236/2015 of the Supreme Court of Kosovo, of 5 October 2015

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 Applicant is Afërdita Gashi - Sinanaj, from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment Rev. No. 236/2015 of the Supreme Court of Kosovo of 5 October 2015, which was served on the Applicant on 18 November 2015.

Subject matter

3. The Applicant requests the constitutional review of the challenged Judgment, which allegedly has violated her right to fair and impartial trial and the right to property [Article 31, namely Article 46 of the Constitution].

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 11 February 2016, the Applicant submitted the Referral through mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 March 2016, the President of the Court by Decision appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel, composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka- Nimani.

7. On 11 October 2016, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Supreme Court.

8. On 30 May 2017, the Review Panel considered the report of the Judge Rapporteur, and recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On 17 November 2011, the Municipal Court in Prishtina rendered Judgment C. No. 610/2010, which approved the statement of claim of claimant SH.H. as grounded and confirmed that he is entitled to the right of using the property-land in Prishtina based on the sale-purchase contract VR. No. 2712/2000, of 10 October 2000 concluded between him as a buyer and a lawyer H.S., who with the power of attorney represented SH.A. (now deceased) the owner of the immovable property.

10. By the Judgment as above in item III, the Court found that the contract for sale-purchase concluded and certified in the Municipal Court in Prishtina, on 25 April 2001 between the spouse of the owner SH.A., now deceased, in the capacity of a seller, who claimed to be the owner of the same land on the basis of inheritance according to Decision T. No. 69/2001 of 23 March 2001, and here, the Applicant in the capacity of a buyer.
11. On 9 December 2013, the Applicant and SH.A. filed appeal with the District Court in Prishtina on the grounds of: a) violation of the contested procedure provisions, and b) erroneous application of the substantive law.

12. On 3 March 2015, the Court of Appeal of Kosovo, by Judgment AC. No. 3055/12 rejected the Applicant's appeal as ungrounded and upheld the Judgment of the first instance court.

13. On 24 April 2015, the Applicant submitted to the Supreme Court of Kosovo a request for revision on the grounds of the substantial violation of the contested procedure provisions and the erroneous application of the substantive law.

14. On 5 October 2015, the Supreme Court of Kosovo by Judgment Rev. No. 236/2015, rejected the Applicant's request for revision as ungrounded.

Applicant's allegations

15. The Applicant alleged that she had no knowledge of a lawsuit filed against her, she did not attend at all the first instance trial, and further emphasized that the Court of Appeal and the Supreme Court failed to properly assess the key fact to this process, which is the legal action of the authorized representative (lawyer) to enter into a sale-purchase contract on behalf of the grantor of authorization almost a year after the authorization provider (the landowner for whom the dispute was conducted) had died.

16. The Applicant further alleges that in a completely legitimate manner she has become the owner of the disputed immovable property and registered it without any obstacles in the cadastral books and had taken the possession of it. According to her, the court decisions clearly violated Articles 31 and 46 of the Constitution.

Admissibility of Referral

17. In order to adjudicate the Applicant's Referral, the Court first examines whether the Applicant has met the admissibility requirements established in the Constitution and the Law on the Constitutional Court and further specified in the Rules of Procedure of the Court.

18. In this regard, 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.*"

19. In addition, the Court takes into account Article 48 of the Law on the Constitutional Court regarding the accuracy of the Referral, which stipulates that:

> *"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."*

20. The Court also takes into account Rule 36 of the Rules of Procedure, where it is determined:

> *(1) "The Court may consider a referral if:*
>
> *(...)*
>
> *(d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights."*

21. Based on the foregoing, the Court finds that the Applicant filed an individual referral after exhausting all available legal remedies within the time limit provided for in Article 49 of the Law, and, therefore, the Court will examine the merits of the case in relation to the allegations raised for constitutional violations.

.

22. The Court recalls that Article 53 of the Constitution obliges the Constitutional Court 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,"* therefore, in the course of the case review, this practice will be taken into consideration.

23. In light of the allegations raised in the Referral, the Court finds that the Applicant challenged Judgment Rev. No. 236/2015 of the Supreme Court of Kosovo of 5 October 2015 which was a final decision, emphasizing that the right to fair and impartial trial and the right to property, guaranteed by the Constitution of Kosovo have been violated, which in the relevant part for the case, have this content.

> **Article 31 [Right to Fair and Impartial Trial]**
>
> *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.

[.....]

Article 46 [Protection of Property]

1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.

[.....]

24. When reviewing the allegations of a violation of the right to fair and impartial trial, the Court assesses whether the proceedings in its entirety were fair and impartial, as required by Article 31 of the Constitution (see, *inter alia*, *mutatis mutandis, Edwards v. United Kingdom*, 16 December 1992, p 34, Series A No. 247, and *B. Vidal v. Belgium*, 22 April 1992, p. 33, Series A no 235).

25. Although in the judgments of the regular courts the Court noticed some repeated errors such as the date of certification of the sale-purchase contract concluded between the Applicant and SH.A., somewhere is stated as 25 April 2014 and somewhere as 25 January 2014, or in the court decisions of various instances the names of the parties to the proceedings are mixed. However, the Court notes that in principle it is not its task to deal with errors of fact or law, committed by the regular courts, unless and insofar as that such errors may have infringed the rights and freedoms protected by the Constitution (See case *Garcia Ruiz v. Spain*, Application no. 30544/96 [GC], Judgment of 21 January 1999, para. 28). Therefore, in this respect, the constitutional control over the court decisions is limited only for the purpose of protecting the constitutional rights of an individual.

26. Regarding the foregoing, the Court notes that the Applicant claimed that the Judgment of the Supreme Court regarding the revision, but also other judgments of the regular courts, did not respect the guarantees of Article 31 of the Constitution, because of not notifying her of the proceedings initiated against her, and, consequently, her non-participation in the first instance trial and also because of insufficient reasoning of the court decisions on the key facts, because the regular courts have failed to clearly explain the key element of the process of certification of the sale-purchase contract in the Municipal Court in Prishtina by an authorized lawyer who used the power of attorney almost a year after the death of the grantor of the authorization.

27. In this regard, the Court finds that the Municipal Court in Prishtina in its Judgment C. No. 610/2010 in the reasoning part emphasized: "*The deceased person – Sh.A. has granted authorization to the Attorney-at-Law H.S. from Prishtina, for the sale of the contested immovable property, an authorization which was registered under the number 5/99, of 10 February 1999 at the Municipal Court in Prishtina, where after this, the deceased Sh.A. has passed away on 14 December 1999 in Prishtina. Following*

the death of Sh.A., the claimant concludes a contract on the purchase of the contested immovable property and the representative of Sh.A., a contract which was certified at the court under the number VR. No. 2712/2000, of 10 February 2000."

28. The Municipal Court further reasoned: "*The respondent (the spouse of the deceased SH.A.), following the death of Sh.A., reviewed the inheritance and on the basis of Decision T. No. 69/2001 of 23 March 2001, she is declared as inheritor and she sells this immovable property to Afërdita Gashi from Prishtina by Contract VR. No. 2172/2001, of 15 January 2001 and delivers this immovable property in her possession and use."*

29. Regarding the issue of the validity of the power of attorney and its use by the lawyer after the death of the grantor of the authorization, the court reasoned: "*After the deceased Sh.A. passed away on 14 December 1999, whereas on the basis of the authorization granted on 10 February 1999, the claimant has confirmed the signatures in the contract at the Municipal Court in Prishtina by number VR. No. 2712/2000 of 10 February 2000, therefore when Sh.A. was not alive any more, and in terms of the provision of Article 94, paragraph 3 of LCT, this authorization is valid in cases when a transaction already commenced cannot be interrupted without causing damages to the legal successors or by taking into account the character of the transaction and the intention of the grantor of authorization."*

30. The Court of Appeal, by rejecting the Applicant's appeal, by Judgment AC. No. 3055/12, fully accepted the assessment of the first instance court and in the judgment *inter alia* stated: *"In this situation of the legal – civil matter, this court assessed the conclusion of the first instance court and found that it is fair and grounded, that it has a basis on the conducted pieces of evidence and in the case files, and that justifiable reasons have been provided which are accepted by this court as well."*

31. This court reasoned that *"Moreover, this court considers that the first instance court has not committed a violation of the provisions of the contested procedure, for which this court takes care ex officio and that it has determined the factual situation correctly and completely as it has also applied the substantive law in a correct manner".*

32. The Court further notes that the Supreme Court deciding upon the Applicant's request for revision has concluded: *"The Supreme Court of Kosovo assessed that the lower instance courts, on the basis of the correct and complete determination of factual situation, have correctly applied the provisions of the contested procedure and the substantive law; that the challenged Judgment and the judgment of the first instance court do not contain essential violations of the provisions of the contested procedure, for which this court acts ex officio; that the lower instance courts in their Judgments have provided sufficient reasons for the decisive facts, for a fair adjudication of this legal matter, which are accepted by this Court as well."*

33. The Court finds that the Supreme Court in the Judgment related to the revision referred to the issue of authorization specifically challenged by the Applicant ascertaining that: "*now the deceased Sh.A. has authorized the Attorney-at-Law Halim Sylejmani from Prishtina, to take all necessary procedural actions for a confirmation of the purchase contract before the court and transfer all the ownership rights to the claimant, an authorization which was confirmed at the court by number Vr. No. 5/99, of 10 February 1999, where afterwards, on 14 December 1999, Shaip Hamidi passes away, as grantor of authorization."*

34. In the present case, the Court notes that the Supreme Court by the challenged Judgment decided to reject the request for revision by supporting the determination of the factual

situation and the law applied by the lower instance courts and also extensively elaborated the Applicant's allegations regarding all matters raised, by giving answer to the challenged authorization as well as the validity of the sale-purchase contract on immovable property that was the object of the dispute.

35. The Court also finds that the allegation of non-participation in the court hearing as another ground raised for violation of the right to fair and impartial trial, was answered by the Municipal Court in Prishtina concluding that the Applicant was regularly summoned in the court hearings and she did not justify her absence in any way *"so the court within the meaning of Article 423.4 of the LCP held the main hearing in her absence."*

36. In these circumstances of the case, when the key issues raised by the Applicant were extensively reviewed by the regular courts, when three judicial instances provided legal assessment and legal solution to the dispute between the parties, the Court could not find that there was a violation of Article 31 of the Constitution regarding the right to fair and impartial trial.

37. As it is assumed that the violation of Article 46 (Protection of Property) was committed as a result of unfair and impartial trial, accordingly, the Court does not find violation of Article 46 of the Constitution.

38. Based on the principle of subsidiarity, the Court cannot take the role of the fourth instance court and it does not adjudicate on the final outcome of the court decisions (see: *Fc Metrebi v. Georgia*, par. 31, Judgment of ECHR, of 31 July 2007), while judging by the circumstances of this case, the Applicants' primary goal seems to have been precisely the challenging of the outcome of the court proceedings.

39. Based on the aforementioned, the Court finds that the facts presented by the Applicant do not in any way justify the allegation of violation of the right to fair and impartial trial and the right to property, therefore, pursuant to Rule 36 paragraph (2), item (b) and (d), finds that the Referral is to be declared inadmissible as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 47 of the Law, and Rules 36 (2) (b), (d) and 55 (4) of the Rules of Procedure, in the session held on 30 May 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 Court**

Ivan Čukalović Arta Rama-Hajrizi

KI 93/16 Applicants Maliq Maliqi and Skender Maliqi, constitutional review of Judgment Rev. no. 321/2012 of the Supreme Court of Kosovo, of 13 November 2013

KI93/16 Judgment approved on 31 March 2017, published on 24 November 2017

Key words: *Individual referral, Property rights*, *violation*

The subject matter was the constitutional review of the challenged decision, which allegedly violated the Applicants' rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo, as well as Article 6 and Article 1 of Protocol 1 of the European Convention on Human Rights.

The Court also considered that the interpretation and application of the law given in the Supreme Court's Judgment in Revision is manifestly erroneous and, as such, has resulted in an arbitrary decision.

However, the Court found that the challenged decision of the Supreme Court was not in compliance with the right to a fair and impartial trial as guaranteed by Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.

JUDGMENT

in

Case no. KI93/16

Applicant

Maliq Maliqi and Skender Maliqi

Constitutional review of
Judgment Rev. no. 321/2012 of the Supreme Court of Kosovo,
of 13 November 2013

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 Maliq Maliqi and Skender Maliqi, from Prishtina (hereinafter, the Applicants).

Challenged decision

2. The Applicants challenge Judgment Rev. no. 321/2012 of the Supreme Court of Kosovo of 13 November 2013, which approved as grounded the Revision of the Counter proposer, quashed Decision Ac. No. 398/2009 of the District Court, of 17 July 2012, and Decision No. 224/2007 of the Municipal Court in Prishtina, of 28 October 2008, and remanded the case to the first instance court for retrial.

3. The challenged Judgment was served on the Applicants on 19 February 2016

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicants' rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), as well as Article 6 and Article 1 of Protocol 1 of the European Convention on Human Rights (hereinafter, the ECHR).

Legal basis

5. The Referral is based on Article 113 (7) of 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 16 June 2016, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 12 July 2016, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

8. On 18 July 2016, the Court notified the Applicants about the registration of the Referral and sent a copy of it to the Supreme Court.

9. On 01 November 2016, the Basic Court in Prishtina submitted a copy of the certificate of service of the challenged Judgment.

10. On 31 March 2017, the Review Panel considered the Report of the Judge Rapporteur and recommended to the court the admissibility of the Referral.

11. On the same day, the Court deliberated on the Case. The President of the Court, pursuant to Rules 60 (1) and 44 (4) of the Rules of Procedure, replaced Judge Ivan Čukalović as Judge Rapporteur with Judge Almiro Rodrigues and appointed Judge Snezhana Botusharova as member of the Review Panel.

12. On 19 April 2017, the Court requested the Applicants to clarify which was the decision being challenged in their Referral, and to provide additional documents.

13. On 28 April 2017, the Applicants submitted additional information and documents to the Court.

14. On 04 September 2017, the Court deliberated and voted the draft Judgment proposed by the Judge Rapporteur.

Summary of facts

15. On 1 June 2004, the Department for Urbanism, Geodesy, Cadaster and Property of the Municipality of Fushë-Kosovë (Decision no. 58) expropriated cadastral parcel no. 991/1 from the predecessor of the Applicants, in order to provide land to Prishtina International Airport.

16. On an unspecified date in 2006, the Applicants, as legal heirs of their predecessor, filed with the Municipal Court of Prishtina a suit against Prishtina International Airport, JSC Sllatina (hereinafter, JSC Sllatina), requesting monetary compensation for the expropriated immovable property.

17. On 16 October 2006, the Municipal Court [N. No. 44/2005] ordered compensation to be paid by JSC Sllatina to the Applicants on behalf of the expropriation. The Municipal Court established the amount to be paid.

18. JSC Sllatina filed an appeal with the District Court in Prishtina, complaining that the amount to be paid in compensation for expropriation had not been determined in accordance with law.

19. On 21 May 2007, the District Court [Ac.No.154/07] accepted as grounded the appeal of JSC Sllatina and remanded the case to the Municipal Court for retrial. The District Court considered that the Municipal Court had not accurately determined the factual situation and ordered what follows.

> *"During the retrial, the court of the first instance should be seeking from experts of the agriculture field to consider the sale and purchase contracts that have been confirmed at the court, then what was the price per 'are' of the land sold in the vicinity of the expropriated land as well as the amount of compensation given for the expropriated lands nearby this immovable property that has been also expropriated.*
> *[…]*
> *During the retrial procedure, the court of the first instance may also order another super expert analysis, if they deem it necessary, considering the principle of fairness and awareness when deciding about the evaluation of this expropriation".*

20. On 28 October 2008, the Municipal Court [Decision N. no. 224/07] awarded a sum of money to Applicants in compensation for their expropriated immovable property.

21. JSC Sllatina again filed an appeal with the District Court, alleging "*erroneous […] determination of the value of the parcel*".

22. On 17 July 2012, the District Court [Decision Ac. no. 398/2009] rejected as ungrounded the appeal and upheld in its entirety the Decision of the Municipal Court.

23. The Decision of the District Court emphasized that *"the factual situation was based on the super expertise of the group of experts from the Faculty of Agriculture, which at this moment represents the most credible institution in Kosovo for the provision of such assessments".*

24. JSC Sllatina then submitted to the Supreme Court a request for revision, claiming "*violations of the basic provisions of the contested procedure and erroneous application of the substantive law".*

25. In the meantime, the Applicants initiated execution proceedings at the Municipal Court in Lipjan.

26. On 04 October 2012, the Municipal Court in Lipjan [E. No. 717/2012] authorized the execution of the Decision of the Municipal Court of Prishtina [N. no. 224/07] of 28 October 2008, and ordered JSC Sllatina to pay the amount specified in that decision to the Applicants in compensation for the expropriation.

27. JSC Sllatina submitted an objection to this execution decision, requesting suspension of the execution pending the decision of the Supreme Court on the request for revision.

28. On 30 November 2012, the Municipal Court in Lipjan rejected this objection as ungrounded.

29. JSC Sllatina then submitted an appeal against the execution decision.

30. On 14 June 2013, the Court of Appeals [CA.No.77/2012] rejected the appeal as ungrounded, because *"pursuant to Article 213 of the LCP the filed revision shall not stop execution".*

31. Subsequently, on 13 November 2013, the Supreme Court [Judgment Rev. no. 321/2012] approved as grounded the revision of JSC Sllatina, annulled Decision [Ac. no. 398/2009] of the District Court of Prishtina, of 17 July 2012, and Decision [N. no.224/2007] of the Municipal Court of Prishtina, of 28 October 2008, and remanded the case to the first instance court for retrial.

32. The Judgment of the Supreme Court reads that "*the first instance court […] has erroneously applied the provision of Article 28 of the Law on Expropriation […]*" instead of applying *"Article 13 of the Law on Amending and Supplementing the Law on Expropriation […]"*.

33. On 19 February 2016, the Basic Court of Prishtina held a hearing in the retrial. Then the Applicants, having become aware of the existence of the challenged Judgment, claimed that they had never received a copy of the Judgment of the Supreme Court. The Basic Court delivered a copy of that Judgment to the Applicants.

34. Moreover, the Basic Court suspended *sine die* the examination of the case, pending additional information from JSC Sllatina. In fact, the Basic Court stated that JSC Sllatina "*is obliged, after defining the competence for representation between the Government of the Republic of Kosovo and the Air Navigation Services Agency, to inform the Court by a special submission so that the Court can proceed further*".

Applicants' allegations

35. The Applicants claim that the challenged Decision *"falls in contradiction with Article 6, paragraph 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and its Protocols"*.

36. They allege that *"after 12 years they are still obstructed from receiving 'immediate and adequate' compensation for the expropriated land",* even though *"the procedure for imposing compensation for the expropriated immovable property is urgent"*.

37. Furthermore, the Applicants allege that the Supreme Court could not make a decision on the request for revision, because *"the revision is in contradiction with Article 2(b) of the Law Amending and Supplementing the Law on Expropriation (…), which explicitly determines that 'no revision is hereby permissible against a final ruling on determination of the compensation'"*.

38. In addition, the Applicants allege that the Supreme Court of Kosovo "*directly contradicts and violates Article 46 of the Constitution of the Republic of Kosovo, by depriving* [them] *of their right to property",* mainly because the land's expropriation, pursuant to the same Article 46 of the Constitution, must be *"followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated"*.

39. In fact, the Applicants allege that the challenged Decision *"has erroneously applied the provision of Article 28 of the Law on Expropriation […]*", which implies the intervention of *"the social income service"*. They state that "*the existence and functions of this organ were not determined by any laws, regulations or legal acts*."

40. Moreover, they reiterate that the challenged Decision was taken in the Revision procedure which is a *"not-legally-permitted tool"* and affects the retrial proceedings. They state that, *"if the first instance court would act in the manner that the Supreme Court has ordered it […]",* the Applicants would never realize the immediate and

adequate compensation, "*because 'the social income service' does not exist in Kosovo and there is no subsequent authority which has undertaken this role*".

41. The Applicants consider that the failure to determine in final instance the compensation to which they are immediately and adequately entitled for the expropriated property constitutes a violation of Article 46 of the Constitution.

42. The Applicants conclude their allegations requesting the Court to hold that the challenged Judgment *"violated Article 46, paragraph 1 of the Constitution of the Republic of Kosovo, Article 6, paragraph 1 of the European Convention, and Article 1 of Protocol No. 1 of the European Convention"*.

Relevant law

43. Law on Expropriation (Official Gazette of SAPK, No. 21/78, as amended by the Law on Amendments and Supplements of Law on Expropriation, Official Gazette SAPK, no. 46/86).

> *"Article 2b.*
> *[...]*
> *The procedure for determination of compensation for expropriated real estate is an urgent procedure.*
> *Against a final decision on the determination of compensation is not permitted revision".*
>
> *Article 28 (as amended by Article 13 of the Law on Amendments and Supplements of the Law on Expropriation).*
> *[...]*
> *(2) "The market price for the expropriated agrarian land shall be determined on the basis of the data on turnover value which are provided by the social income service and the data on the amount from agreements concluded for determination of the just compensation for the expropriated land in that area".*

Admissibility of the Referral

44. In relation to the admissibility of the Referral, the Court refers to Article 46 [Admissibility] of the Law, which provides:

> *The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that all legal requirements have been met.*

45. Thus, the Court first examines whether the Applicants have met the admissibility requirements established by the Constitution and further provided by the Law and foreseen by the Rules of Procedure.

46. In this respect, the Court refers to 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.*

47. The Court also refers to Articles 47, 48 and 49 of the Law, which provide:

> *Article 47 [Individual Requests]*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.*
>
> *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.*

48. The Court further refers to Rule 36 (1) of the Rules of Procedure which foresees:

> *(1) The Court may consider a referral if:*
>
> *(a) the referral is filed by an authorized party, or*
>
> *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted, or*
>
> *(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or*
>
> *(d) the referral is prima facie justified or not manifestly ill-founded.*

49. In that connection, the Court notes that the Applicants claim that the Judgment of the Supreme Court violated their rights to fair and impartial trial and to protection of property guaranteed by the Constitution.

50. The Court notes that the Applicants filed the Referral on 16 June 2016, challenging the Judgment of the Supreme Court, dated 13 November 2013. However, they claim to have been served with that Judgment only on 19 February 2016. That fact was confirmed by the Basic Court of Prishtina.

51. In this regard, the Court notes that the challenged Judgment of the Supreme Court annulled the decisions of the lower instance courts, which had approved to the Applicants the compensation for the expropriated land and had ordered the execution. In addition, the challenged Judgment remanded the case to the first instance court for retrial.

52. The Applicants state that the proceedings were remanded for retrial, *"because as a result of the erroneous application of the substantive law [these courts] failed to determine correctly and completely the factual situation, and for this reason, the decisions had to be annulled"*. Therefore, the Supreme Court could not *"accept the legal position of the lower instance courts"*.

53. The Court reiterates that the principle of subsidiarity requires that, before addressing the Constitutional Court, the Applicants must exhaust all procedural possibilities in the regular proceedings, in order to prevent violations of human rights and freedoms guaranteed by the Constitution or, if any, to remedy such a violation of rights guaranteed by the Constitution.

54. The rationale for the exhaustion rule is to afford the competent authorities, including the regular courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order shall provide an effective legal remedy for the violation of the constitutional rights. This is an important aspect of the subsidiary character of the Constitution. See Constitutional Court case KI41/09, *AAB-RIINVEST University L.L.C. Prishtina v. the Government of the Republic of Kosovo,* Resolution on Inadmissibility, of 3 February 2010, § 16; see also European Court of Human Rights (hereinafter, ECtHR) case *Selmouni vs. France*, Application No. 25803/94, Judgment of 29 July 1999.

55. In that respect, the Court observes that the proceedings in the case concern exclusively the compensation to the Applicants for the expropriated property.

56. The Court reiterates that the revision filed by JSC Sllatina could not interfere in the execution ordered by the Municipal Court in Lipjan either because, *"pursuant to Article 213 of the LCP, the filed revision shall not stop execution"* (Decision CA.No.77/2012 of the Court of Appeals of 14 June 2013) or because *"no revision is hereby permissible against a final ruling on determination of the compensation"* (Article 2 (b) of the Law Amending and Supplementing the Law on Expropriation).

57. However, the Court also notes that, at the present time, the case is suspended by the Basic Court of Prishtina, without any specified deadline for it to resume.

58. In these circumstances, the Court considers that, although the case has not allegedly reached a final determination by the regular courts, the Applicants cannot reasonably be required to continue to pursue their claim for "immediate" compensation through the courts before they can submit their claim for a violation of their constitutional right to protection of property.

59. Therefore, the Court finds that such a continuation of the retrial does not constitute an effective legal remedy to be exhausted within the meaning of Article 113 (7) of the Constitution, Article 47 of the Law and Rule 36 (1) (b) of the Rules of Procedure.

60. In addition, the Court notes that the Applicants precisely clarify what rights have been allegedly violated by the challenged Judgment of the Supreme Court. Thus the Court considers that the Referral is justified.

61. In sum, the Court considers that the Applicants are authorized parties, have exhausted all effective legal remedies provided by law, have submitted the Referral in due time, and have accurately clarified the alleged violation of their constitutional rights.

62. The Court considers that the Applicants have met the admissibility requirements established by the Constitution and further provided by the Law and foreseen by the Rules of Procedure.

63. Therefore, pursuant to Article 46 of the Law, the Court determines that the Referral is admissible for review of its substantive legal aspects.

The substantive legal aspects of the Referral

64. The Court recalls that the Applicants claim a violation of (i) their rights to a fair and impartial trial as guaranteed by Article 31 (2) of the Constitution and Article 6 (1) of the ECHR; and (ii) their right to immediate and adequate compensation for the expropriation of their property as guaranteed by Article 46 (3) of the Constitution and Article 1 of Protocol 1 to the ECHR.

(i) Alleged violation of the right to a fair and impartial trial

65. The Court recalls Article 31 (2) of the Constitution, which establishes:

> *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.*

66. The Court also recalls Article 6 (1) of the ECHR, which in its relevant parts, establishes:

> *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. [...].*

67. The Court notes that the Applicants mainly allege that the challenged Judgment violated their right to a fair and impartial trial, because the Supreme Court ordered the Basic Court to apply provisions of the law which allegedly cannot possibly be applied as the *'the social income service'* referred to does not exist.

68. Moreover, the Applicants claim that the challenged decision was taken in the Revision procedure which is a *"not-legally-permitted tool"* and affects the retrial proceedings. As such, that allegation concerns the assessment of the applicable law given by the Supreme Court in its Revision.

69. In fact, Article 2 (b) of the Law on Amending and Supplementing of Law on Expropriation provides:

> *The procedure for determination of compensation for expropriated real estate is an urgent procedure.*
> *Against a final decision on the determination of compensation is not permitted revision.*

70. The Court is mindful of Article 53 [Interpretation of Human Rights Provisions] of the Constitution which establishes 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"*.

71. In that connection, the Court reiterates the jurisprudence of the ECtHR which held, *mutatis mutandis,* that *"its jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable"*. See ECtHR case *Anheuser-Busch Inc. v. Portugal,* Application No. 73049/01, Judgment of 11 January 2007, § 83.

72. The ECtHR reiterated that standing view holding that *"while it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of*

domestic legislation, the role of the Court is to verify whether the effects of such interpretation are compatible with the Convention (see, mutatis mutandis, Miragall Escolano and Others v. Spain, no. 38366/97, §§ 33-39, ECHR 2000-I). Therefore, even though it has only limited power to review compliance with domestic law, the Court may draw appropriate conclusions under the Convention where it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions (see the above cited Anheuser-Busch Inc. judgment, § 83; Kuznetsov and Others v. Russia, no. 184/02, §§ 70-74 and 84, 11 January 2007; Păduraru v. Romania, no. 63252/00, § 98, ECHR 2005-... (extracts); Sovtransavto Holding v. Ukraine, no. 48553/99, §§ 79, 97 and 98, ECHR 2002-VII, Beyeler v. Italy [GC], no. 33202/96, § 108, ECHR 2000-I; and, mutatis mutandis, Tsirlis and Kouloumpas v. Greece, judgment of 29 May 1997, Reports of Judgments and Decisions 1997-III, §§ 59-63)". See ECtHR case *Koshoglu v. Bulgaria*, Application No. 48191/99, Judgment of 10 May 2007, § 50.

73. The Court also recalls that *"[...] the Court* [ECtHR] *will not question the interpretation* of *domestic law by the national courts, save in the event of evident arbitrariness (see, mutatis mutandis, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008), in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or a denial of justice (see, mutatis mutandis, Farbers and Harlanova v. Latvia (dec.), no 57313/00 6 September 2001, and, albeit in the context of Article 1 of Protocol No. 1, Beyeler v. Italy [GC], no. 33202/96, § 108, ECHR 2000-I*)". See ECtHR case *Andjelković v. Serbia*, Application No. 1401/08, Judgment of 9 April 2013, § 24)

74. In light of the above, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of 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). 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, ECtHR case *García Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, § 28.

75. However, the Court notes that the challenged Judgment of the Supreme Court not only did not take into account that *"the procedure for determination of compensation for expropriated real estate is an urgent procedure";* but mainly did not pay attention to the fact that *"against a final decision on the determination of compensation is not permitted revision."*

76. The Court recalls that the Applicants explicitly allege that the Revision procedure is a *"not-legally-permitted tool"* and is preventing them to obtain their compensation.

77. The Court considers that the Law on Expropriation is neither vague nor ambiguous regarding revision; on the contrary, the Law on Expropriation specifically, clearly and directly states that the legal remedy of revision is not permitted against final decisions on the determination of compensation for expropriated real estate. Thus the Supreme Court cannot at all admit and consider such a revision.

78. The Court notes that the Supreme Court was aware of the provisions of the Law on Amendments and Supplements to the Law on Expropriation (Official Gazette SAPK no. 46/86) when pointing out to the "social income service" in cases of the determination of compensation for the expropriation of agricultural land.

79. However, the Supreme Court has neither provided any explanation as to why it applied one article of that Law, while disregarding another article of this law which excluded its

jurisdiction; nor it has explained why it accepted a revision which *is not permitted* by the same law.

80. Furthermore, the Court considers that the Supreme Court entirely disregarded the urgency of the procedure for determining compensation for expropriated real estate, which is also required by the Law on Expropriation, as well as by Article 46 of the Constitution.

81. The Court also considers that the interpretation and application of the law given in the Supreme Court's Judgment in Revision is manifestly erroneous and, as such, has resulted in an arbitrary decision.

82. The Court further considers that, in these circumstances, the Applicants have been deprived of their right to fair and impartial trial under Article 31 of the Constitution and article 6 of the ECHR, and to have the compensation for the expropriation of their land finally decided by a court.

83. Therefore, the Court finds that there has been a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the ECHR.

(ii) Alleged violation of the right to property

84. The Court recalls that the Applicants also allege a violation of their right to protection of property under Article 46 (3) of the Constitution and Article 1 of Protocol 1 to the ECHR, because they have still not received any immediate and adequate compensation for the expropriation of their land.

85. The Court also recalls that paragraph 3 of Article 46 [Protection of Property] of the Constitution establishes:

> *No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of a public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*

86. In addition, the Court refers to Article 1 of Protocol 1 to the ECHR which establishes:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

87. The Court reiterates that Article 1 of Protocol 1 comprises three distinct and connected rules: the first rule enunciates the principle of peaceful enjoyment of property; the second rule covers deprivation of possessions and subjects it to certain conditions; and the third rule recognizes that the State is entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for that purpose. See ECtHR cases *James, Wells and Lee v. The United*

Kingdom, Applications Nos. 25119/09, 57715/09 and 57877/09, 18 September 2012; *Sargsyan v. Azerbaijan*, Application No. 40167/06, 16 June 2015; and *Belane Nagy v. Hungary*, Application No. 53080/13, 13 December 2016, § 72.

88. In that respect, the Court recalls that the ECtHR found a violation of Article 1 of Protocol No. 1, because *"the court proceedings for compensation have lasted five years so far (...), have already exceeded a reasonable time (...) and are continuing (...)*". See ECtHR case *Guillemin v. France*, Application No. 19632/92, Judgment of 21 February 1997, § 55.

89. The ECtHR reiterated that standing view while finding violations of Article 1 of Protocol No. 1 *"in numerous cases against Bulgaria (...) on the ground of lengthy delays in the procedures, which affected the applicants' right to (...) compensation (see, for example, Lyubomir Popov v. Bulgaria, no. 69855/01, 7 January 2010; Naydenov v. Bulgaria, no. 17353/03, 26 November 2009; Vasilev and Doycheva v. Bulgaria, no. 14966/04, 31 May 2012; and Nedelcheva and Others v. Bulgaria, no. 5516/05, 28 May 2013)"*. See ECtHR case *Popov and Chonin v. Bulgaria*, Application No. 36094/08, Judgment of 17 February 2015, § 41.

90. The ECtHR further considered that *"the national authorities were responsible for* lengthy *unjustified delays"* and that *"these delays must have placed the applicants in a situation of prolonged uncertainty (see Lyubomir Popov, § 123, and Nedelcheva and Others, § 82, both cited above)"*. See *Popov and Chonin v. Bulgaria*, Ibidem, § 52.

91. The Court recalls that the Municipal Court awarded a sum of money to the Applicants in compensation for their expropriated immovable property on 28 October 2008. The District Court rejected as ungrounded the appeal of JSC Sllatina and upheld in its entirety the Decision of the Municipal Court on 17 July 2012. In accordance with Article 2 (b) of the Law on Amending and Supplementing of Law on Expropriation, allegedly a revision is not allowed against that final decision on imposing compensation

92. The Court observes that the challenged Decision of the Supreme Court approved as grounded the revision of JSC Sllatina, annulled the Decision of the District Court of 17 July 2012, and remanded the case to the first instance court for retrial.

93. However, the Court has just found that the challenged decision of the Supreme Court was not in compliance with the right to a fair and impartial trial as guaranteed by Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.

94. Thus, the Court considers that the previous decision of the District Court [Decision Ac. no. 398/2009] of 17 July 2012, on the determination of the amount to be paid in compensation for the expropriation of their property had become final and binding and is, as such, *res judicata*, since no remedy was legally permitted to challenge that decision.

95. Consequently, the Court also considers that the execution proceedings on the basis of this District Court decision, which concluded with the Ruling of the Court of Appeals [CA. No. 77/2012] of 14 June 2013, have also become final and binding.

96. The Court notes that so far no compensation was paid for the expropriation of the Applicants' property already decided on 1 June 2004. In 2006, the Applicants initiated judicial proceedings in order to be compensated; however, no compensation has been paid to them yet. Moreover, as a consequence of the challenged decision of the Supreme Court, the examination of the case is suspended *sine die*. Notwithstanding, "t*he procedure for imposing compensation for the expropriated immovable property is*

urgent" and the Constitution establishes *"the provision of immediate and adequate compensation"*.

97. Thus, the Court considers that such a delay, without payment of the compensation for the expropriation, cannot be considered to comply with the requirement of "*immediate and adequate*" within the meaning of Article 46 (3) of the Constitution.

98. Therefore, the Court finds that the Applicants are unjustly deprived of their property due to the delay in providing the immediate and adequate compensation for the expropriation of their property. Thus, the Applicants' right to the peaceful enjoyment of their property, as guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 to the ECHR, has been violated.

Conclusion

99. The Court considers that the Revision No. 321/2012 of the Supreme Court of 13 November 2013 is based upon an erroneous application of the law and has consequently resulted in an arbitrary decision.

100. The Court considers that the Applicants have been denied the right to a fair and impartial trial on the determination of the compensation for the expropriation of their property, which was finally determined by the District Court [Decision Ac. no. 398/2009] of 17 July 2012.

101. Therefore, the Court finds that there has been a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the ECHR.

102. Furthermore, the Court considers that the Applicants have been deprived of their right to immediate and adequate compensation for the expropriation of their property.

103. Therefore, the Court also finds that there has been a violation of Article 46 (3) of the Constitution, in conjunction with Article 1 of Protocol 1 to the ECHR.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 20 of the Law, and Rule 56 (1) of the Rules of Procedure, in the session held on 31 March 2017,

DECIDES

I. TO DECLARE by majority the Referral admissible;

II. TO HOLD by majority that there has been a violation of Article 31 of the Constitution of the Republic of Kosovo, in conjunction with Article 6 (1) of the European Convention on Human Rights;

III. TO HOLD by majority that there has been a violation of Article 46 of the Constitution, in conjunction with Article 1 of Protocol 1 to the European Convention on Human Rights;

IV. TO DECLARE invalid the Judgment Rev. No. 321/2012 of the Supreme Court of Kosovo of 13 November 2013;

V. TO DECLARE that the Decision of the District Court [Decision Ac. no. 398/2009] of 17 July 2012, on the determination of the amount to be paid in compensation for the expropriated real estate is final and binding and, as such, is *res judicata;*

VI. TO DECLARE that the Ruling of the Court of Appeals [CA. No. 77/2012], of 14 June 2013, on execution is final and binding and, as such, is *res judicata* and executable;

VII. TO ORDER the Supreme Court of the Republic of Kosovo, the Court of Appeals and the Basic Court of Prishtina, pursuant to Article 116 (1) of the Constitution and in accordance with Rule 63 of the Rules of Procedure of the Court, to notify the Court as soon as possible, but not later than within six (6) months, regarding the measures taken to implement the Judgment of this Court;

VIII. TO REMAIN seized of the matter pending compliance with that Order;

IX. TO NOTIFY this Decision to the Applicants, the Supreme Court of the Republic of Kosovo, the Court of Appeals and the Basic Court of Prishtina;

X. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

XI. TO DECLARE this Decision effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Almiro Rodrigues Arta Rama-Hajrizi

KI92/17, Applicant: Shemsi Peshku, Constitutional review of Decision AC-I-16-0221 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 26 October 2016

KI92/17, Resolution on inadmissibility of 24 October 2017, published on 30 November 2017

Key words: *Individual referral, out of time*

By its Decision, the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on PAK-Related Matters rejected the Applicant's complaint filed against the Decision of the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on PAK-Related Matters as ungrounded.

The Applicant complained before the Constitutional Court that his rights guaranteed by the Constitution, namely the judicial protection of rights, had been violated, alleging that the regular courts had not considered the reasons that the Applicant had mentioned regarding him missing the deadline for the complaint. In essence, his Referral concerned his request to be granted the right to a share of 20% of proceeds generated by the privatization of the SOE.

The Court found that the Referral was inadmissible because the admissibility criteria, provided for in Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36 (1) (c) of the Rules of Procedure, had not been met. The Referral was declared inadmissible as being filed out of time.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI92/17

Applicant

Shemsi Peshku

Constitutional review of Decision AC-I-16-0221 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 26 October 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 Shemsi Peshku, residing in Barileva (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision AC-I-16-0221 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 26 October 2016, which was served on the Applicant on 13 November 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which, allegedly, has violated the Applicant's rights guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter Constitution).

Legal basis

4. The Referral is based on Article 113 [Jurisdiction and Authorized Parties], paragraphs 1 and 7 of the Constitution, Article 47 [Individual Requests] of the Law No. 03/L-121 on the 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

5. On 14 August 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 15 August 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.

7. On 16 August 2017, the Court notified the Applicant about the registration of the Referral, requesting him to attach the acknowledgment of receipt indicating the date when he was served with Decision AC-I-16-0221 of the Appellate Panel of 26 October 2016. On the same date, the Court notified the Appellate Panel about the registration of the Referral.

8. On 28 August 2017, the Applicant notified the Court that he does not know when he was served with the above-mentioned Decision.

9. On 30 August 2017, the Court requested the Appellate Panel of the Special Chamber of the Supreme Court (hereinafter: the Appellate Panel) to inform the Court when the Applicant was served with Decision AC-I- 16-0221 of the Appellate Panel of 26 October 2016.

10. On 5 September 2017, the Appellate Panel submitted to the Court the acknowledgment of receipt indicating that the Applicant received the aforementioned decision on 13 November 2016.

11. On 24 October 2017, after having considered the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of Referral.

Summary of facts

12. From the case file it results that the Applicant was an employee of the Socially-Owned Enterprise "Kosova Export-Bujqësia" (hereinafter: SOE) which was privatized on an unspecified date.

13. On 12 April 2010, the Privatization Agency of Kosovo (hereinafter: the PAK) published the final list of employees who acquired the legitimate right to a share of the proceeds generated by the privatization of the SOE. The deadline for filing a complaint against the final list with the SCSC was 3 May 2010.

14. On 18 January 2016, the Applicant filed appeal with the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel) against the final list of the PAK, requesting to be included in this list.

15. On 10 February 2016, the PAK responded to the Applicant's complaint stating that the Applicant submitted his complaint after the legal deadline.

16. On 13 September 2016, the Specialized Panel [Decision C-II-16-0011-C0001], rejected the Applicant's appeal as out of time.

17. On 10 October 2016, the Applicant filed an appeal with the Appellate Panel of the Specialized Panel against Decision C-II-16-0011-C0001 of 13 September 2016, claiming that he missed the legal deadline because he is old and he has not been in good health.

18. On 26 October 2016, the Appellate Panel (Decision AC-I-16-0221) rejected the Applicant's appeal as ungrounded and upheld Decision C-II-16-0011 of the Specialized Panel of 13 September 2016. The Appellate Panel in its Decision gave a detailed answer to all Applicant's allegations.

Applicant's allegations

19. The Applicant alleges that Decision AC-I-16-0221 of the Appellate Panel of 26 October 2016 violated the rights guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution.

20. The Applicant alleges that the violation of the rights protected by the Constitution has resulted from the rejection of the request because he missed the deadline, and the Applicant claims that he was old, in poor health and not informed.

21. The Applicant requests the Court to annul the decisions of the Special Chamber of the Supreme Court and to be recognized the right to participate in 20% of the Privatization of the SOE.

Admissibility of the Referral

22. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution and as further specified in the Law and the Rules of Procedure.

23. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties], paragraphs 1 and 7, 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".*

24. The Court also refers to Articles 49 [Deadlines] of the Law, which provides:

> *"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".*

25. In addition, the Court takes into account Rule 36 [Admissibility Criteria] of the Rules of Procedure, which emphasizes that:

> *"(1) The Court may consider a referral if:*
>
> > *[...] (c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant; or [...]".*

26. In the present case, the Court notes that the challenged Judgment was served on the Applicant on 13 November 2016, while the Referral was submitted to the Court on 14

August 2017. Accordingly, the Referral was submitted to the Court out of the legal 4 (four) month time limit.

27. The Court recalls that the purpose of the four-month legal time limit under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure is to promote legal certainty, to ensure that cases raising constitutional issues are dealt with within a reasonable time and that previously rendered decisions are not endlessly open to challenging. (see: case *O' Loughlin and Others v. the United Kingdom,* No. 23274/04, ECtHR Decision of 25 August 2005 and see also case No. KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 17 March 2014, paragraph 24).

28. In addition, the Court notes that the 4 (four) month legal limit is calculated from the date when the Applicant was served, after exhaustion of legal remedies, with the challenged decision (See, for example, *Case Hatip Celik v. Turkey*, ECtHR, Application No. 52991/99, Judgment of 23 September 2004).

29. The Court notes that it is the duty of the applicants or of their representatives to act with *due diligence*, in order to ensure that their requests for protection of rights and fundamental freedoms are filed within the legal time limit of four (4) months provided for in Article 49 of the Law and further specified in Rule 36 (1) (c) of the Rules of Procedure (See Case *Mocanu and Others v. Romania* [GC], Application No. 10865/09, 45886/07 and 32431/08, Decision of 17 September 2014, paragraphs 263-267).

30. Therefore, the Referral is declared inadmissible because it is out of time, as it is established by Article 113.7 of the Constitution, as provided for in Article 49 of the Law and further specified in Rule 36 (1) (c) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure, on 24 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**
Altay Suroy	Arta Rama-Hajrizi

KI73/17, KI78/17 and KI85/17, Applicants Istref Rexhepi and 28 others, Constitutional review of 29 Decisions of the Supreme Court of Kosovo issued between 7 February and 20 March 2017

KI73/17, KI78/17 and KI85/17, Resolution on Inadmissibility of 23 October 2017, published on 30 November 2017

Key words: *Individual referral, claim for compensation, territorial jurisdiction, referral manifestly ill-founded, referral out of time*

The applicants individually, filed claims with the Basic Court of Skenderaj against the Government of the Republic of Serbia for compensation for material and non-material damages caused to them between 1998 and 1999. Basic Court, by individual decisions, dismissed the claims of the applicants and declared itself incompetent to decide on the matter. The applicants, individually, filed appeals with the Court of Appeals against the judgments of the Basic Court, which were rejected by the Court of Appeals as ungrounded. In addition, the applicants filed revisions with the Supreme Court of Kosovo against the Judgments of the Court of Appeals. The Supreme Court rejected the revisions of the applicants' as ungrounded.

The applicants alleged, before the Constitutional Court that the Supreme Court by rejecting as ungrounded their revisions against the judgments of the Court of Appeals, violated their rights guaranteed by Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions], and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo, Article 6 (Right to a Fair Trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 15 of the Universal Declaration of Human Rights. The Court noted regarding all 28 applicants of the referrals (KI73/17 and KI78/17) that they have not presented facts showing that the proceedings before the regular courts were in any way in violation of their constitutional rights, while with regard to the applicant Sokol Goxhuli (KI85/17), his referral was submitted out of the legal time limit. Thus, the Court declared the applicants' referrals inadmissible pursuant to Article 113 (1) and (7) of the Constitution, Articles 48, 49 and 50 of the Law and Rules 36 (1) (c) 36 (1) (d), 36 (2) (d) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Cases No. KI73/17, KI78/17 and KI85/17

Applicants

Istref Rexhepi and 28 others

Constitutional review of 29 Decisions of the Supreme Court of Kosovo issued between 7 February and 20 March 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.

The Applicants

1. Referral KI73/17 has been submitted by 27 Applicants, namely: Istref Rexhepi, Lulferet Hoxha, Aziz Balaj, Azem Veliu, Adem Veliu, Mehmet Buzhala, Latif Shaqiri, Elfije Gashi, Ilaz Ahmeti, Enver Hamza, Bajram Salihu, Bahtir Geci, Shaqir Bejta, Halil Sejdiu, Florim Haliti, Sherife Halili, Lah Sahiti, Naser Rama, Halim Meha, Asllan Bajra, Zymer Halilaj, Sadik Ahmeti, Abaz Avdiu, Ahmet Hoti, Muhamet Gashi, Januz Gashi, and Enver Mëziu, represented by Jahir Bejta, Director of NGO "Ngritja e Zërit", with residence in Skenderaj.

2. Referral KI78/17 has been submitted by Behram Kajtazi.

3. Referral KI85/17 has been submitted by Sokol Goxhuli. All the above (hereinafter: the Applicants) are with residence in Skenderaj.

Challenged decisions

4. The Applicants challenge 29 decisions of the Supreme Court of the Republic of Kosovo (hereinafter, the Supreme Court) as follows:

    1. Istref Rexhepi - Decision No. Rev 430/2016 of 16 February 2017, served on him on 16 March 2017;
    2. Lulferet Hoxha - Decision No. Rev 387/2016 of 08 February 2017, served on her on 11 April 2017;
    3. Aziz Balaj - Decision No. Rev 414/2016 of 13 February 2017, served on him on 15 March 2017;
    4. Azem Veliu - Decision No. Rev 432/2016 of 8 February 2017, served on him on 15 March 2017;

5. Adem Veliu - Decision No. Rev 420/2016 of 16 February 2017, served on him on 15 March 2017;
6. Mehmet Buzhala - Decision No. Rev 421/2016 of 7 February 2017, served on him on 25 February 2017;
7. Latif Shaqiri - Decision No. Rev 386/2016 of 7 February 2017, served on him on 28 February 2017;
8. Elfije Gashi - Decision No. Rev 390/2016 of 16 March 2017, served on her on 16 March 2017;
9. Ilaz Ahmeti - Decision No. Rev 391/2016 of 7 February 2017, served on him on 28 February 2017;
10. Enver Hamza - Decision No. Rev 392/2016 of 8 February 2017, served on him on 15 March 2017;
11. Bajram Salihu - Decision No. Rev 396/2016 of 7 February 2017, served on him on 3 March 2017;
12. Bahtir Geci - Decision No. Rev 427/2016 of 9 February 2017, served on him on 15 March 2017;
13. Shaqir Bejta - Decision No. Rev 407/2016 of 8 February 2017, served on him on 15 March 2017;
14. Halil Sejdiu - Decision No. Rev 411/2016 of 7 February 2017, served on him on 2 March 2017;
15. Florim Haliti - Decision No. Rev 397/2016 of 8 February 2017, served on him on 25 March 2017;
16. Sherife Halili - Decision No. Rev 419/2016 of 16 March 2017, served on her on unspecified date;
17. Lah Sahiti - Decision No. Rev 429/2016 of 16 March 2017, served on him on unspecified date;
18. Naser Rama - Decision No. Rev 424/2016 of 16 March 2017; served on him on unspecified date;
19. Halim Meha - Decision No. Rev 401/2016 of 7 February 2017, served on him on 28 February 2017;
20. Asllan Bajra - Decision No. Rev 406/2016 of 7 February 2017, served on him on 28 February 2017;
21. Zymer Halilaj - Decision No. Rev 422/2016 of 8 February 2017, served on him on 24 March 2017;
22. Sadik Ahmeti - Decision No. Rev 409/2016 of 13 February 2017, served on him on 11 April 2017;
23. Abaz Avdiu - Decision No. Rev 394/2016 of 7 February 2017, served on him on 28 February 2017;
24. Ahmet Hoti - Decision No. Rev 433/2016 of 16 February 2017, served on him on 16 March 2017;
25. Muhamet Gashi - Decision No. Rev 410/2016 of 16 February 2017, served on him on 16 March 2017;
26. Januz Gashi - Decision No. Rev 412/2016 of 8 February 2017, served on him on 16 Mars 2017;
27. Enver Mëziu - Decision No. Rev 425/2016 of 16 February 2017, served on him on 15 Mars 2017;
28. Behram Kajtazi - Decision No. Rev 398/2016 of 20 March 2017 served on her on unspecified date; and,
29. Sokol Goxhuli - Decision No. Rev 416/2016 of 7 February 2017, served on him on 10 February 2017.

Subject matter

5. The subject matter of the Referrals is the constitutional review of the challenged decisions which allegedly violated the rights of the Applicants guaranteed by Articles 21

[General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions], and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 6 (Right to a Fair Trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the ECHR) and Article 15 of the Universal Declaration of Human Rights (hereinafter, UDHR).

Legal basis

6. The Referrals are based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 [Filling of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Court

7. On 23 June 2017, 27 Applicants submitted Referral KI73/17 to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

8. On 28 June 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

9. On 5 July 2017, the Applicant Behram Kajtazi submitted Referral KI78/17 to the Court.

10. On 7 July 2017, in accordance with the Rule 37.1 of the Rules of Procedure, the President of the Court ordered joinder of Referral KI78/17 with Referral KI73/17. By this order, it was decided that the Judge Rapporteur and the composition of the Review Panel would be the same as it was decided by the President on appointment of the Judge Rapporteur and the Review Panel on 28 June 2017.

11. On 17 July 2017, the Court notified the Applicants of the registration and joinder of the Referrals and requested additional documents to be provided to the Court.

12. On the same day, the Court sent a copy of the Referrals to the Supreme Court and sent a request to the Basic Court in Mitrovica-Branch in Skenderaj (hereinafter, the Basic Court) to submit evidence on the date of receipt by twenty-two (22) Applicants of their challenged decisions of the Supreme Court.

13. On 21 July 2017, the Court received from the Applicants some of the documents requested by it on 17 July 2017.

14. On the same day, the Court sent a copy of the additional documents to the Supreme Court and sent a request to the Basic Court to submit the receipts of the date on which the two (2) Applicants received the challenged decisions of the Supreme Court that were not attached to the Referral.

15. On 24 July and 11 August 2017, the Basic Court delivered to the Court the receipts showing the dates when twenty-two (22) Applicants received the challenged decisions as requested by the Court on 17 July 2017.

16. On 27 July 2017, Applicant Sokol Goxhuli submitted Referral KI85/17 to the Court.

17. On 28 July 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of the judges Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

18. On 4 August 2017, the Court received from the Applicants the additional documents requested by it on 17 July 2017.

19. On 7 August 2017, the Basic Court delivered to the Court the receipts showing the date the two (2) Applicants received the challenged decisions as requested by the Court on 21 July 2017.

20. On the same day, in accordance with the Rule 37.1 of the Rules of Procedure, the President of the Court ordered joinder of Referral KI 85/17 with Referrals KI73/17 and KI78/17. By this order, it was decided that the Judge Rapporteur and the composition of the Review Panel would be the same as it was decided by the President on appointment of the Judge Rapporteur and the Review Panel on 28 June 2017.

21. On 15 August 2017, the Court notified the respective Applicants of the registration of Referral KI85/17 and its joinder with Referrals KI73/17 and KI78/17.

22. On the same day, the Court sent a copy of Referral KI85/17 to the Supreme Court and notified the Supreme Court of the joinder of the Referrals.

23. On 23 October 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referrals.

Summary of facts

24. Between 17 May 2010 and 23 October 2014, the Applicants, individually, filed claims with the Basic Court against the Government of the Republic of Serbia for compensation for material and non-material damages caused to them between 1998 and 1999.

25. Between 12 July 2013 and 2 March 2015 the Basic Court, by individual decisions, dismissed the claims of the Applicants and declared itself incompetent to decide.

26. The Applicants appealed the decisions of the Basic Court with the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) due to essential violations of the provisions of the contested procedure. The Applicants requested that the decisions of the Basic Court be amended and the claims of the Applicants be declared admissible.

27. Between 12 May 2015 and 14 June 2016, the Court of Appeals issued separate decisions rejecting as ungrounded each of the appeals of the Applicants and confirmed the decisions of the Basic Court.

28. Each of the Applicants filed separate requests for revision with the Supreme Court due to essential violation of the provisions of the contested procedure. They requested the revisions to be approved, the decisions of the Court of Appeals and Basic Court be annulled and the matter be referred for re-consideration by the Basic Court.

29. Between 7 February 2017 and 20 March 2017, the Supreme Court issued separate decisions rejecting the revisions of each of the Applicants as ungrounded. The Supreme Court in each of its decisions argued along the following lines:

> "*Taking into consideration [provisions of the Law on Contested Procedure] LCP and the fact that as respondent by the claim for damage compensation appears*

the Republic of Serbia – the Government of the RS in Belgrade, […] in this specific case it is about a property dispute with a foreign country and provisions of the international law shall apply, and the local courts have no jurisdiction over these contests, the Supreme Court of Kosovo considers that the [Basic Court and the Court of Appeals] have correctly applied provisions of Article 18.3 and Article 39, paragraph 1 and 2 of LCP when they have declared to have no jurisdiction over this legal matter and have dismissed the [Applicants'] claims because, the general territorial jurisdiction is with the court in whose territory is the seat of the Assembly of the Republic of Serbia, [and] the seat of the Assembly of the Republic of Serbia as respondent, is not located in the territory of the courts of Kosovo.
[…]
provisions of Article 28 of LCP, which the [Applicants] referred to, by which is determined jurisdiction of [Kosovo] courts in contests with international (foreign) elements, cannot apply in this specific case because here we are not dealing either with foreign natural persons or with foreign legal persons but with a foreign country with whom, until this date, the state of Kosovo in whose territory was caused the damage, did not conclude any international (mutual) agreement on jurisdiction of local courts related to this kind of contests.
Also, in this specific case, the allegations of the [Applicants'] revision concerning territorial jurisdiction [provided in Articles 47, 51 and 61] of LCP, are ungrounded as, according to assessment of [Supreme Court], these provisions have nothing to do with this specific concrete case […], the first instance court has correctly applied provisions of Article 18.3 of LCP also taking into consideration other reasons stated above."

Applicants' allegations

30. The Applicants claim that the Supreme Court decisions violated their rights guaranteed by Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions], and 54 [Judicial Protection of Rights] of the Constitution, Article 6 (Right to a Fair Trial) of the ECHR and Article 15 of the UDHR.

31. The Applicants allege that the regular courts "*have erroneously interpreted the applicable law when referring to the territorial jurisdiction of the Basic Court […], because the court in the territory of which was committed the crime, moral namely material damage, is always the territorially competent court for adjudicating legal matters! This definition and valid legal stance also coincides with the interest of injured party and the principle of economy in judicial and administrative proceedings and international principle - per loci.*"

32. The Applicants further state that they were not *"given the possibility to have their cases decided in legal proceedings based on the applicable laws of Kosovo, the Constitution […] and best judicial practices from the region."*

33. The Applicants, referring to Article 21 paragraph 1 of the Constitution, claim that the regular courts *"have not applied the advanced international standards for human rights. One of those standards is the possibility the injured party to initiate a procedure for moral and material compensation as a result of direct actions of Serbian authorities"*.

34. The Applicants, referring to Article 54 of the Constitution, also state that *"they were denied the right for judicial protection of rights, rights for access to justice at national level as well as institutional guarantees for protection of human rights"*.

35. The Applicants refer to examples that have allowed the victims of World War II "to submit *individual claims before national courts for compensation of damages caused by Germany"*. In this regard they specify that in the cases of Greece, Italy and United States of America, individuals where given a possibility to claim compensation for *"damages caused by Germany during World War II in accordance with international principle "per loci"."*

36. In addition to all other Applicants, Applicant Sokol Goxhuli (KI85/17), with regard to the deadline of four (4) months for submitting the Referral before the Court, requests to return the deadline to the previous situation, in accordance with Article 50 [Return to the Previous Situation] of the Law, stating that *"from 10.02.2017 he has been accompanying his wife […] who was taking medical care for cancer disease in France*" and thus, could not submit the Referral within the foreseen deadline of four (4) months.

Admissibility of the Referrals

37. The Court first will examine whether the Referrals fulfil the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

38. 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.*

39. The Court also refers to Articles 49 [Deadlines] and 50 [Return to the Previous Situation] of the Law, which provides:

> *"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.*
>
> *[…]*
>
> *If a claimant without his/her fault has not been able to submit the referral within the set deadline, the Constitutional Court, based on such a request, is obliged to return it to previous situation. The claimant should submit the request for returning to previous situation within 15 days from the removal of obstacle and should justify such a request. The return to the previous situation is not permitted if one year or more have passed from the day the deadline set in this Law has expired."*

With regard to 28 Applicants

40. The Court considers that the 28 Applicants, not including Sokol Goxhuli whose case will be dealt separately, are authorized parties, they have exhausted the available legal remedies and they have submitted the Referrals in due time.

41. However, the Court also refers to Article 48 [Accuracy of the Referral] 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.

42. In addition, the Court also refers to paragraphs (1)(d) and (2)(d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresee:

(1) The Court may consider a referral if:
[...]
(d) the referral is prima facie justified or not manifestly ill-founded.

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:
[...]
d) the Applicant does not sufficiently substantiate his claim.

43. In that respect, the Court recalls that the Applicants claim that the regular courts violated numerous rights protected by the Constitution, the ECHR and UDHR, mainly pertaining to right to a fair and impartial trial and judicial protection of rights.

44. In this respect, the Court notes that the Applicants allege that the regular courts have erroneously interpreted the applicable law when referring to the territorial jurisdiction of the Basic Court claiming that the court in the territory of which damage was caused is the competent court for adjudicating their legal matters.

45. The Court considers that the Applicants' allegations essentially pertain to interpretation by regular courts of procedural provisions regarding their territorial jurisdiction and competence to deal with the claims of the Applicants.

46. The Court emphasizes that it is not its task to deal with errors of fact or law allegedly committed by the regular courts when establishing facts or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). 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*, the ECtHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, para. 28).

47. The complete determination of factual situation and the correct application of the law is in the jurisdiction of the regular courts (matter of legality). Therefore, the Constitutional Court cannot act as a "fourth instance court" (see: ECtHR Judgment of 16 September 1996, *Akdivar v. Turkey*, No. 21893/93, para. 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

48. The Court notes that the Supreme Court assessed the interpretation of the Court of Appeals and the Basic Court of procedural provisions regarding their competence to deal with the claims of the Applicants.

49. The Supreme Court when dealing with the allegations of the Applicants reasoned that the Basic Court and the Court of Appeals have correctly applied provisions of Article 18, paragraph 3 and Article 39, paragraph 1 and 2 of the Law on Contested Procedure when they have declared to have no jurisdiction over these legal matters. Accordingly, the Supreme Court dismissed the Applicants' claims because the general territorial

jurisdiction is with the court on whose territory is the seat of the Assembly of the Republic of Serbia and that is not located on the territory of the courts of Kosovo.

50. The Supreme Court further specified that in the case of the Applicants, "*we are dealing with foreign country with whom, until this date, Kosovo, in whose territory was caused the damage, did not conclude any international (mutual) agreement on jurisdiction of local courts related to this kind of contests.*"

51. The Court considers that the conclusions of the Basic Court, Court of Appeals and the Supreme Court were reached after a detailed examination of all arguments submitted by the Applicants. In this way, the Applicants were given the opportunity to present at all stages of the proceedings the arguments and evidence which they consider relevant to their cases.

52. All the arguments of the Applicants, which were relevant to the resolution of the dispute, were heard and properly reviewed by the courts. All material and legal reasons related to the challenged decisions were presented by the Applicants in detail and the Court concludes that the proceedings before the regular courts, viewed in their entirety were fair (See, *mutatis mutandis*, ECHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, para. 29 and 30).

53. The mere fact that the Applicants are not satisfied with the outcome of the decisions of the Supreme Court or the mentioning of articles of the Constitution is not sufficient to build an allegation for a constitutional violation. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and compelling arguments. (See, *mutatis mutandis*, Resolution on Inadmissibility of 10 February 2015, *Abdullah Bajqinca*, KI 136/14, paragraph 33).

54. In sum, the Court considers that the Applicants have not presented evidence, facts and arguments showing that the proceedings before the regular courts presented in any way a constitutional violation of their guaranteed rights under the Constitution namely, Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions], and 54 [Judicial Protection of Rights] of the Constitution, Article 6 of the ECHR or Article 15 of the UDHR.

With regard to the Applicant Sokol Goxhuli

55. The Court considers that Applicant Sokol Goxhuli (KI85/17) is an authorized party and has exhausted the available legal remedies.

56. However, the Court notes that the Applicant declares that he has received the contested Decision of the Supreme Court No. Rev 416/2016 on 10 February 2017, while he submitted the Referral (KI85/17) before the Court on 27 July 2017. Therefore, the Court considers that his Referral was submitted after the deadline of four (4) months.

57. In this regard, the above Applicant requests the Court to return the deadline to the previous situation, in accordance with Article 50 of the Law, stating that *"since 10.02.2017 he has been accompanying his wife [...] who was undertaking medical examination for cancer disease in France"*. Thus, taking into account the above reason *"he hopes that the Court will approve his request for return to the previous situation"*.

58. To support his arguments, the Applicant submitted evidence since when his wife was registered for medical examinations in France.

59. However, the Applicant did not provide evidence since when his wife returned from medical examinations in France, whether the Applicant accompanied her during this travel, and if so, how this situation resulted in his inability to submit the referral before the Court or to authorise a representative to submit the Referral before the Court on his behalf. In addition, the Applicant did not provide evidence showing that the Referral was filed within 15 days from the elimination of the obstacles justifying the request for return to the previous situation as requested by Article 50 of the Law.

60. Therefore, the Court concludes that the Applicant did not substantiate his claim for a return of the deadline to the previous situation in accordance with Article 50 of the Law and thus, his request is to be rejected.

61. The Court recalls that the purpose of the 4 (four) month legal time limit under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure is to promote legal certainty, to ensure that cases raising constitutional issues are dealt with within a reasonable time and that previously rendered decisions are not endlessly open to challenge (See case of *o' Loughlin and Others v. the United Kingdom* no. 23274/04, ECtHR Decision of 25 August 2005 and see case no. KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 17 March 2014, paragraph 24).

62. Based on the foregoing, it results that the Referral (KI85/17) of Applicant Sokol Goxhuli was submitted out of legal time limit stipulated by Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure, and as such is inadmissible.

63. Consequently, the Referrals*:*

i) regarding all 28 Applicants the Referrals (KI73/17 and KI78/17) are manifestly ill-founded on constitutional basis and should be declared inadmissible pursuant to Article 48 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure; and

ii) with regard Applicant Sokol Goxhuli (KI85/17) his Referral was submitted out of the legal time limit stipulated by Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure, and as such is inadmissible;

FOR THESE REASONS,

The Constitutional Court of Kosovo, in accordance with Article 113 (1) and (7) of the Constitution, Articles 48, 49 and 50 of the Law and Rules 36 (1) (c) 36 (1) (d), 36 (2) (d) of the Rules of Procedure, in the session held on 23 October 2017, unanimously

DECIDES

I. TO DECLARE the Referrals inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law; and

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Arta Rama-Hajrizi

Kl63/17, Applicant: Lutfi Dervishi, Constitutional review of Judgment Pml. Kzz. 19/2017, of the Supreme Court of Kosovo, of 11 April 2017

KI 63/17, Resolution on Inadmissibility of 18 October 2017, published on 30 November 2017

Key words: *Individual referral, detention, rights to liberty and security, referral manifestly ill-founded*

The Applicant filed an appeal with the Court of Appeals against the Decision [PKR. No. 11/2017] of the Basic Court which decided to impose a detention on remand against the Applicant for a term of one (one) month. 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. The Supreme Court, upon request for protection of legality filed by the Applicant, by Judgment [Pml. Kzz 19/2017] rejected as ungrounded the Applicant's request and upheld the Decision of the Basic Court and the Court of Appeals.

The Applicant alleged, before the Constitutional Court, inter alia that the Supreme Court by rejecting as ungrounded request for protection of legality, against the Decision of the Basic Court and Court of Appeals for detention on remand violated the Applicant's rights guaranteed by Article 29 [Right to Liberty and Security], and 31 [Right to a Fair and Impartial Trial] of the Constitution of the Republic of Kosovo. The Court considered that the facts presented by the Applicant did not in any way justify the allegation of a constitutional violation of his right to liberty and security, and that the Applicant did not present any evidence indicating that the proceedings before the regular courts were in any way a violation of his right to fair and impartial trial. Therefore, the Court considers that the Referral is manifestly ill-founded on constitutional basis and 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, declared it inadmissible.

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

KI 10/17 Applicant: Sadije Shabani, constitutional review of non-execution of Decision No. 112-158/1 of the Appeals Commission for Civil Servants of the Municipality of Skenderaj, of 12 June 2008

KI 10/17, Judgment of 13 November 2017, published on 30 November 2017

Keywords: individual referral, administrative procedure, enforcement procedure, labor dispute, res judicata, violation of the right to fair and impartial trial

The Applicant in the period from 2002-2007 worked as a teacher at the secondary school in Skenderaj when her employment relationship was terminated by the municipal directorate of education. The Applicant then filed a complaint with the Appeals Commission of the Municipality of Skenderaj as well as with the Independent Oversight Board of Kosovo.

Based on the decision of the Independent Oversight Board of Kosovo, the Applicant filed a complaint with the Appeals Commission for Civil Servants of the Municipality of Skenderaj for reinstatement to her working place. By Decision (No. 112-158/1), the Appeals Commission for Civil Servants approved a complaint and obliged the Municipal Directorate of Education to systematize Ms. Shabani in the administration service.

Due to failure to enforce the final decision to reinstate to her working place and unpaid personal income, the Applicant filed lawsuits with the regular courts against the Municipal Directorate of Education, but all of them were rejected.

The Applicant claims that there has been a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, by failing to enforce the decision of the ACCS-Municipality of Skenderaj by the municipal authorities who rejected to implement its decision.

The Court finds that it has been established that the Applicant was deprived the rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because the Municipality of Skenderaj and the regular executive courts for more than 8 (eight) years failed to enforce the decision of the ACCS -MA in Skenderaj (No. 112-158/1) of 12 June 2008, which the Court considers to be a *res judicata*.

JUDGMENT

in

Case No. KI10/17

Applicant

Sadije Shabani

Constitutional review of non-execution of Decision No. 112-158/1 of the Appeals Commission for Civil Servants of the Municipality of Skenderaj, of 12 June 2008

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 Sadije Shabani (hereinafter: the Applicant), residing in the village Tërnavc, municipality of Skenderaj, represented by Safet Voca, a lawyer.

Challenged decision

2. The Applicant challenges the constitutionality of the non-execution of Decision No. 112-158/1 of the Appeals Commission for Civil Servants of the Municipality of Skenderaj (hereinafter: ACCS-MA in Skenderaj), of 12 June 2008, by the Municipality of Skenderaj and by the regular courts in execution proceedings.

Subject matter

3. The subject matter is the constitutional review regarding the refusal of the Municipality of Skenderaj and the regular courts in execution proceedings to execute Decision No. 112-158/1, of the ACCS-MA in Skenderaj, of 12 June 2008. As a result of the non-execution of the said decision, the Applicant alleges a violation of her rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] Article 49 [Right to Work and Exercise Profession] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 [Right to a Fair Trial] in conjunction with Article 13 [Right to an effective remedy] of the European Convention on Human Rights (hereinafter: the Convention).

Legal basis

4. The Referral is based on Article 113, paragraph 7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of Law No. 03/L-121 on the 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

5. On 8 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 20 March 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Gresa Caka-Nimani.

7. On 11 April 2017, the Court notified the Applicant's authorized representative about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 23 April 2017, the Applicant submitted additional arguments to the Court.

9. On 13 November 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court to declare the Referral admissible and find a violation of Article 31 of the Constitution in conjunction with Article 6 of the Convention.

Summary of facts

Administrative proceedings

10. The Applicant from 2002 to 2007 worked as a teacher of the subject Civic Education and Human Rights at "Hamëz Jashari" high school in Skenderaj.

11. In October 2007, the Municipal Directorate of Education of the Municipality of Skenderaj (hereinafter: MDE in Skenderaj) terminated the Applicant's employment relationship.

12. On 20 November 2007, the Applicant filed an appeal with the Appeals Commission of the Municipality of Skenderaj, because the MDE in Skenderaj did not reply to her objection to the non-extension of her employment contract.

13. On 19 December 2007, the Appeals Commission of the Municipality of Skenderaj (Decision No. 112-567) rejected the Applicant's appeal as ungrounded, based on the case file and following the recommendation of the director of the high school "Hamëz Jashari" No. 46, of 23 October 2007, which stated that *"...only 10 class hours of the subject of civic education are stipulated for academic year 2007/08 and the teacher of history who had long experience was appointed to teach those 10 classes"*.

14. On 14 January 2008, the Applicant filed an appeal (Appeal No. 70/08) with the Independent Oversight Board of Kosovo (hereinafter: the IOBK) against the Decision of 19 December 2007 of the Appeals Commission of the Municipality of Skenderaj.

15. On 11 March 2008, the IOBK (Decision No. 499/2008) decided: "*I. Appeal No. 70/08, of 14 January 2008, submitted by Mrs. Sadije Shabani is partly approved, while*

Decision No. 112-567, of 19 December 2007, is annulled and the case is remanded to the Appeals Commission of MA of Skenderaj for reconsideration. II. The Board of IOBK ascertained EX OFFICIO that during the establishment of the Appeals Commission, the principles of Administrative Order 2003/2, Article 33.2, have been violated and there is conflict of interest regarding the issuance of the Decision and the establishment of the Commission (Chairperson), pursuant to Article 29 - 29.3 of Administrative Order 2003/2."

16. On 26 March 2008, the Applicant, based on the IOBK findings, filed an appeal with the ACCS-MA in Skenderaj for reinstatement to work.

17. On 12 June 2008, ACCS-MA in Skenderaj (Decision No. 112-158/1), approved the Applicant's appeal and obliged the MDE in Skenderaj, as follows: *"II. The Municipal Education Directorate is obliged to systemize Mrs. Sadije Shabani in the service of administration."* This decision became final, 15 (fifteen) days after its issuance, as no appeal had been filed against it (hereinafter: the final decision).

18. On an unspecified date, the Applicant filed a claim with the Municipal Court in Skenderaj against the MDE of Skenderaj because of the non-execution of the final decision for reinstatement to work and compensation of unpaid salaries.

19. On 14 November 2008, the Municipal Court in Skenderaj (Decision C. No. 168/08) rejected the Applicant's claim, reasoning that, according to Regulation No. 2001/36 on the Civil Service of Kosovo, competent to decide on this legal issue is the IOBK.

20. The Applicant claims that she notified the IOBK several times about non- execution of the final decision but never received a response from it.

Execution proceedings

21. On 11 December 2008, the Applicant, in a capacity of the creditor, submitted a proposal for execution of the final decision to the Municipal Court in Skenderaj.

22. On 8 September 2009, the Municipal Court in Skenderaj (Decision E. No. 46/2009) approved the Applicant's proposal for execution of the final decision.

23. The MDE in Skenderaj, in a capacity of the debtor, filed an objection with the second instance of the Municipal Court of Skenderaj against the Decision of 8 September 2009 of the first instance of the same court.

24. On 15 October 2009, the second instance of the Municipal Court in Skenderaj (Decision E. No. 46/2009) rejected as ungrounded the objection of MDE in Skenderaj and confirmed the decision of 8 September 2009 of the first instance. The Decision provides: *"The creditor (the Applicant) submitted a proposal based on execution document - final Decision No. 112-158/1, of 12 June 2008, issued by the Appeals Commission of the Civil Servants of the Directorate for Administration and Personnel of MA of Skenderaj."*

25. The MDE in Skenderaj, within the legal deadline, filed an appeal with the District Court in Mitrovica against the Decision of 15 October 2009 of the second instance of the Municipal Court of Skenderaj.

26. On 19 April 2010, the MDE in Skenderaj complained to the Office of the Disciplinary Counsel because the judge of the case was delaying the submission of the case file E. No. 46/2009 of the Municipal Court of Skenderaj to the District Court in Mitrovica.

27. On 27 May 2010, the Office of the Disciplinary Counsel notified the MDE in Skenderaj that her appeal together with the case file were sent to the District Court in Mitrovica on 21 April 2010, but that the District Court in Mitrovica, on 22 April 2010, remanded the case temporarily to the Municipal Court of Skenderaj, until the creation of normal working conditions at the District Court in Mitrovica.

28. On 13 February 2012, the District Court in Mitrovica (Decision Ac. No. 76/11) rejected as inadmissible the Applicant's proposal for execution of the final decision and modified the Decision of 15 October 2009 of the Municipal Court of Skenderaj, with the reasoning that *"where the employing authority concerned does not comply with the Board's decision and order, the Board shall report the matter to the Assembly, which shall forward the Board's report to the Prime Minister of Kosovo"*.

29. On 22 August 2012, the Applicant again notified the IOBK about the non-execution of the final decision, but according to her, the IOBK did not respond.

30. On 12 December 2012, the Applicant filed a claim with the Basic Court in Mitrovica, branch in Skenderaj, for the payment of unpaid salaries by the MDE in Skenderaj, relying on her right acquired by the final decision.

31. On 27 January 2014, the Basic Court in Mitrovica, branch in Skenderaj (Decision C. No. 109/2009), rejected the Applicant's claim as out of time, on the grounds that she missed the deadline to seek judicial protection of her rights to exhaust legal remedies, by which she would realize her rights acquired by the final decision. This decision was upheld by the Court of Appeals by Decision Ac. No. 1213/2014, of 5 May 2016), and by the Supreme Court by Decision Rev. No. 335/2016, of 14 July 2016.

Applicant's allegations

32. As to the allegations of the violation of Article 31 of the Constitution and Article 6 of the Convention due to non-execution of Decision no. 112-158/1 of ACCS-MA in Skenderaj, of 12 June 2008, by the authorities of Municipality of Skenderaj, the Applicant alleges, *"The Municipality of Skenderaj, without any reasoning, and by violating the law, has refused to implement its own Decision No. 112 – 158/1, by which it approved the appeal of the party (the applicant) as grounded, and concluded that the employment relationship of the party was terminated without legal grounds, and obliged the Municipal Directorate of Education to systemize Ms. Sadije Shabani, at the municipal administrative service."*

33. As to the allegations of the violation of Article 31 of the Constitution and Article 6 of the Convention due to non-execution of Decision no. 112-158/1 of ACCS-MA in Skenderaj, of 12 June 2008, by the regular courts of enforcement, the Applicant alleges, *"...considering the fact that in a democratic state, the competent authorities are obliged to establish a system for the execution of decisions, which is effective in the legal sense, as well as in the practical sense... Furthermore, I consider that a right acquired should not only remain in paper, but it should be realized in practice as well... In addition, the courts which the party addressed, have failed to ensure a fair and impartial trial for the latter."*

34. As to the allegations of violation by the regular courts of the rights protected by Article 54 of the Constitution, the Applicant alleges, *"...since the time of the termination of the employment relationship, continuously and without any interruption, has taken all the legal and other necessary actions for the realization of her lawful and grounded*

right. This fact can be confirmed by the relevant evidence contained in the case files of this case."

35. In addition, the Applicant alleges that the Municipality of Skenderaj and the regular courts violated her right to protection of property which is guaranteed to individuals by Article 46 of the Constitution due to non-execution of Decision No. 112-158/1 of the ACCS-MA of Skenderaj, of 12 June 2008, from which decision the Applicant claims that she had legitimate expectations to receive compensation for the unpaid salaries.

36. Furthermore, the Applicant alleges that the Municipality of Skenderaj and the regular courts through their actions violated her right guaranteed by Article 49 of the Constitution because it cannot be her fault that the competent authorities have failed to protect her legitimate rights to work and to exercise her profession.

37. The Applicant requests, *inter alia*, "*...the Constitutional Court of Kosovo to declare the Referral admissible, to hold that there has been a violation of Article 24, Article 31, Article 54, and Articles 49 and 46 of the Constitution, and a violation of Article 6 of the ECHR ...*"

Applicable legal provisions

UNMIK Regulation 2001/36 of 22 December 2001

(a) "Civil servant" means any employee of an employing authority, whose salary is paid from the Kosovo Consolidated Budget, except for: (i) members of the Board; (ii) exempt appointees; and (iii) members of the Kosovo Protection Corps.

Section 11 Appeals

11.1 A civil servant who is aggrieved by a decision of an employing authority in breach of the principles set out in section 2.1 of the present regulation may appeal such decision to the Board in accordance with the provisions of the present section.

Law No. 03 /L-008 on Executive Procedure

Article 1 (Content of the law)

1.1 By this law are determined the rules for court proceedings according to which are realised the requests in the basis of the executive titles (executive procedure), unless if with the special law is not foreseen otherwise.

1.2 The provisions of this law are also applied for the execution of given decision in administrative and minor offences procedure, by which are foreseen obligation in money, except in cases when for such execution, by the law is foreseen the jurisdiction of other body."

Article 24 .1

Execution titles are:

a) execution decision of the court and execution court settlement;
b) execution decision given in administrative procedure and administrative settlement, if it has to do with monetary obligation and if by the law is not foreseen something else;
c) notary execution document;
d) other document which by the law is called execution document.

Article 26.3 Executability of decision

Given decision in administrative procedure is executable if as such is done according to the rules by which such procedure is regulated.

Article 294
Reward of payment in case of return of worker to work
294.1 Execution proposer who has submitted the proposal for return to work, has the right to request from the court the issuance of the decision by which will be assigned that, the debtor has a duty to pay to him, in behalf of salary the monthly amounts which has become requested, from the day when the decision has become final until the day of return to work. By the same decision, the court assigns execution for realization of monthly amounts assigned.
294.2 Proposal for reward might be attached with the execution proposal, or might be presented latter until the conclusion of the execution procedure.

Article 295
The effect of execution proposal
295.3 Reward of monthly salary is assigned in amount which the worker would realize if at work.

Admissibility of the Referral

38. The Court shall examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and Rules of Procedure.

39. The Court must first determine whether the Applicant is an authorized party and whether she has exhausted all legal remedies to file the Referral with the Court in accordance with 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".*

40. The Court further takes into account the requirements of Article 49 of the Law, which stipulates:

> *"The referral should be submitted within a period of four (4) months (...)".*

41. The Court also takes into account the requirements of 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."*

42. In addition, the Court refers to Rule 36 (1) (d) of the Rules of Procedure, which establishes:

> *"The Court may consider a referral if:*
> *(...)*
> *(d) the referral is prima facie justified or not manifestly ill-founded".*

43. Based on the abovementioned requirements, the Court considers that the Applicant has exhausted all legal remedies available under applicable laws, and in the absence of any other effective remedy, in accordance with the requirements of Article 113 (7) of the

Constitution, she addressed the Court with a request for the realization of her rights guaranteed by the Constitution.

44. The Court further considers that the requirement for the submission of the Referral within the time limit of 4 (four) months does not apply because we are dealing with a continuing situation of non-execution of a final decision of the public authority (see, *mutatis mutandis, Iatridis v. Greece, No. 59493/00*, ECtHR, Judgment of 19 October 2000). ECtHR explicitly noted in a similar situation arising in *Iatridis v. Greece*, that the time-limit rule does not apply where there is a refusal of the executive to comply with a specific decision.

45. In fact, in a similar situation, the Court refers to its case law when it decided on the non-execution of the decisions of the Independent Oversight Board, decisions which were rendered in an administrative procedure but which by nature resolved disputes from employment relationship of the civil servants. In those cases, the Court found that there existed a continuing situation as a result of which the four-month time limit was not applicable. (See Judgments of the Constitutional Court in the cases KI50/12, *Agush Llolluni,* Judgment of 16 July 2012; KI94/13 *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanj*, Judgment of 24 March 2014).

46. Therefore, the time limit of 4 (four) months is not applicable to the case of the Applicant due to the existence of the continuing situation which is a result of the non-execution of the final decision.

47. The Court also notes that the Applicant has shown accurately what constitutional rights were violated by the non-execution of Decision ACCS-MA in Skenderaj of 12 June 2008, citing also public authorities allegedly denying her constitutional rights.

48. In sum, the Court considers that the Applicant is an authorized party, she has exhausted all legal remedies, fulfilled the time-limit requirement as a result of the continuing situation and has accurately explained the alleged violation of rights and freedoms, and has mentioned the public authorities allegedly violating her rights.

49. From the foregoing, the Court finds that the Applicant's Referral meets all admissibility requirements, and, therefore, the Court will further assess the merits of the Referral.

Assessment of merits of Referral

50. In the present case, the Court notes that the dispute regarding the employment relationship was finally resolved by the ACCS-MA in Skenderaj, by decision of 12 June 2008, in the administrative procedure, based on UNMIK Regulation 2001/36, of 22 December 2001, regulating the legal status of civil servants. By this decision, the Applicant was granted the right to be reinstated to work in the administration services of the Municipality of Skenderaj.

51. The Court notes that all the Applicant's allegations of violation of her rights as guaranteed by the Constitution and the Convention relate precisely to the non-execution of the decision of ACCS –MA in Skenderaj by the Municipality of Skenderaj itself and by the regular courts in execution proceedings.

52. In the light of these circumstances, the Applicant can legitimately claim to be a victim of violations of the fundamental rights guaranteed by the Constitution and the Convention.

53. First of all, the Court refers to Article 53 of the Constitution, which provides 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."*

54. In this regard, the Court will examine the merits of the Referral only with respect to the constitutional violations related to the non-execution of Decision of ACCS-MA of Skenderaj, of 12 June 2008.

55. In this respect, the Court refers to Article 31 of the Constitution, in conjunction with Article 6 of the Convention, which establish:

> *31.1. "Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*
>
> *6 (1) "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

56. From the case file it is clear that Decision No. 112-158/1of ACCS-MA of Skenderaj, of 12 June 2008, was an executable decision, also through execution proceedings in the regular courts.

57. According to the applicable laws, a decision becomes final and executable, *inter alia*, also in the case where the parties do not challenge it by appeal before higher instances, as it is the case with the Applicant.

58. Based on this fact, the Court considers that Decision No. 112-158/1of ACCS-MA of Skenderaj, of 12 June 2008, constitutes an adjudicated matter (*res judicata)*, which should have been executed by the competent authorities without undue delay in order to fulfill their obligations under Article 31 of the Constitution and Article 6 of the Convention, that a right acquired through a final decision should not remain unfulfilled even in practice.

59. In this regard, the Court notes that the Applicant used all the legal remedies at her disposal seeking the execution of the final decision. However, all the legal remedies used by her proved to be unsuccessful and ineffective as they did not provide her with a practical solution as required by the above mentioned Articles.

60. After analyzing the circumstances of the case, the Court considers that there was no reason for the authorities of the Municipality of Skenderaj and the regular courts in execution proceedings to delay and refuse to execute Decision No. 112-158/1 of ACCS-MA of Skenderaj, of 12 June 2008, for more than 8 years from the time this decision had become final and an executive title under the applicable law.

61. In this respect, the Court emphasizes that the execution of a final decision must be seen as an integral part of the right to fair trial guaranteed by Article 31 of the Constitution and Article 6 of the Convention. The above principle is of even greater importance in the context of administrative proceedings concerning a dispute whose outcome is decisive for a litigant's civil rights. (See, *mutatis mutandis*, ECtHR Judgment, in the case of *Hornsby v. Greece*, of 19 March 1997 Reports 1997-II, f 510, para 40. See also Judgment of the Constitutional Court, in the case KI112/12 *Adem Meta*, of 5 July 2013).

62. The Court recalls that Article 6 of the Convention also applies to administrative phases of judicial process, respectively is within the framework of the right to a fair trial. From

this it follows that the non-implementation of final decisions is a constituent element of Article 6 of the Convention, and is in violation of it (see, *mutatis mutandis* Judgment of the Constitutional Court, in the case KI47/12, *Islam Thaçi*, of 11 July 2012, paragraph 48). Furthermore, the Court emphasizes that a final decision issued by an administrative authority established by law produces legal effects on the parties, and as such is enforceable (See, Judgment of the Constitutional Court in Case KI04/12, *Esat Kelmendi*, of 20 July 2012).

63. The Court underlines that the right to initiate court proceedings in civil cases, as provided by the abovementioned Articles, would be illusory if the legal system of the Republic of Kosovo would allow that a final judicial decision remains ineffective in disfavor of one party. The interpretation of the above-mentioned Articles exclusively deals with the access to the court, administration and non-effectiveness of judicial procedures. Therefore, the non-effectiveness of judicial procedures would result in situations that are inconsistent with the principle of the rule of law, a principle which the authorities of the Republic of Kosovo are obliged to respect (see, *mutatis mutandis,* ECtHR Judgment in the case *Romashov v. Ukraine*, of 25 July 2004, Submission No. 67534/01).

64. The Court reiterates that the rule of law is one of the core principles of a democratic society that presupposes the respect of the principle of legal certainty, in particular as regards final decisions that constitute an adjudicated matter (*res judicata)*. No party is entitled to seek a reconsideration of a final decision merely for the purpose of obtaining a rehearing and a fresh determination of the case. (See, *mutatis mutandis, Sovtransavto Holding v. Ukraine*, No. 48553/99, paragraph 72, ECHR 2002-VII; and *Ryabykh v. Russia*, Appeal No. 52854/99, paragraph 52, ECHR 2003-IX).

65. In addition, the Court notes that the case law of the ECtHR requires that a person who has obtained a judgment against the State at the end of legal proceedings may not be expected to bring separate enforcement proceedings (See, ECtHR Judgment in case *Burdov v. Russia* of 15 January 2009, submission no.33509/04, (no. 2), § 68). The burden to ensure compliance with a judgment against the State lies with the State authorities (See ECtHR Judgment in case *Yavorivskaya v. Russia*, of 21 July 2005, no. 34687/02, § 25), starting from the date on which the judgment becomes binding and enforceable (See, *Burdov v. Russia* submission no.33509/04, (no. 2), § 69).

66. Furthermore, the competent authorities have the obligation to organize an efficient system for the implementation of decisions which are effective in law and practice, and should ensure their implementation within a reasonable time, without unnecessary delays *(*See, *mutatis mutandis*, case *Pecevi v. Former Yugoslavian Republic of Macedonia,* of 6 November 2008, Submission No. 21839/03, as well as case *Martinovska v. the Former Yugoslavian Republic* of *Macedonia* of 25 September 2006, Application no. 22731/02).

67. Regarding the other allegations of the Applicant for violations of Articles 24, 46, 49 and 54 of the Constitution, the Court does not consider it necessary to examine them, as it has already found a violation of Article 31 of the Constitution in conjunction with Article 6 of the Convention in respect of the non-execution of Decision No. 112-158/1 of the ACCS-MA of Skenderaj of 12 June 2008.

68. In sum, the Court finds that the Applicant has been denied of her rights guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the Convention, because the Municipality of Skenderaj and the regular courts in execution proceedings have failed to execute Decision No. 112-158/1 of ACCS-MA of Skenderaj, of 12 June 2008, for more than eight (8) years.

Conclusion

69. The Court reiterates that in its case law it has held on many occasions that questions of fact and questions of interpretation and application of law are within the domain of the regular courts and other public authorities within the meaning of Article 113.7 of the Constitution and as such are a matter of legality, unless and in so far, such questions result in a breach of fundamental human rights and freedoms or create an unconstitutional situation. Thus, the Court is under a constitutional obligation to make sure that in proceedings conducted before public authorities the fundamental human rights and the supremacy of the Constitution have been respected.

70. In conclusion, for all the reasons elaborated above, the Court finds that the failure of the competent authorities of the Republic of Kosovo to provide effective mechanisms for the execution of a final decision which has become *res judicata* is contrary to the principle of the rule of law, legal certainty and constitutes a violation of fundamental human rights guaranteed by the Constitution and the Convention.

71. Therefore, the Court concludes that the non-execution of Decision No. 112-158/1 of the Appeals Commission of Civil Servants of the Municipality of Skenderaj, of 12 June 2008, by the Municipality of Skenderaj itself and the former District Court in Mitrovica violates the Applicant's rights as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the Convention.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, and Rule 56 (1) of the Rules of Procedure, in its session held on 13 November 2017, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the Convention;

III. TO DECLARE that Decision No. 112-158/1 of the Appeals Commission of Civil Servants of the Municipality of Skenderaj, of 12 June 2008, constitutes an adjudicated matter (*res judicata)* which must be executed by the Municipality of Skenderaj;

IV. TO DECLARE invalid Decision Ac. No. 76/11 of the former District Court in Mitrovica, of 13 February 2012, and TO REMAND the Applicant's case in execution proceedings to the Court of Appeals for consideration in accordance with the Judgment of the Constitutional Court, namely to take into account that Decision No. 12-158/1 of the Appeals Commission of Civil Servants of the Municipality of Skenderaj, of 12 June 2008, must be executed within the time limits prescribed by law;

V. TO REMIND the competent authorities of their obligations, in accordance with Article 116 [Legal Effect of Decisions] of the Constitution and Rule 63 [Enforcement of Decisions] of the Rules of Procedure of the Court;

VI. TO REMIND the Municipality of Skenderaj and the Court of Appeals, in accordance with Rule 63 (5) of the Rules of Procedure, to submit information to the Constitutional Court regarding the measures taken to implement the Judgment of the Constitutional Court, within six (6) months;

VII. TO NOTIFY this Judgment to the Parties and to publish it in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

VIII. TO DECLARE this Judgment effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI87/17, Applicant: Hilmi Asllani, Constitutional review of Decision no. 9199 on termination of employment relationship issued by Kosovo Electricity Distribution and Supply Company J. S.C. of 4 November 2015

KI87/17, Resolution on inadmissibility of 14 November 2017, published on 4 December 2017

Key words: *Individual referral, civil procedure, effective legal remedies, premature referral*

The Applicant submitted a Referral to the Constitutional Court whereby he requested the constitutional review of the decision on terminating his employment relationship, issued by Kosovo Electricity Distribution and Supply Company.
The Applicant alleged that Kosovo Electricity Distribution and Supply Company (KEDS) had violated his rights guaranteed by Article 31, paragraph 5, of the Constitution because KEDS had dismissed him from his job before the criminal proceedings initiated against him were completed.

The Court considered that the Applicant's failure to exhaust available legal remedies before the regular courts shall be understood as a waiver of the right to continue with legal proceedings before the regular courts. The Court therefore declared the Referral inadmissible because the Applicant had not exhausted all the legal remedies available to him by the applicable law. Having regard to the circumstances of the case and the fact that the Applicant had not exhausted the legal remedies before the regular courts, did not consider it necessary to assess whether the challenged decision issued by KEDS falls under the jurisdiction of the Constitutional Court.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI87/17

Applicant

Hilmi Asllani

Constitutional Review of Decision No.9199 on termination of employment relationship issued by Kosovo Electricity Distribution and Supply Company J. S.C. of 4 November 2015

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 Hilmi Asllani from Village Stanovc i Ulët (hereinafter: the Applicant) represented by Afrim Salihu, lawyer in Prishtina.

Challenged Decision

2. The Applicant specifically challenges Decision No.9199 on termination of employment relationship issued by Kosovo Electricity Distribution and Supply Company J. S.C. (hereinafter: KEDS) dated 4 November 2015.

Subject Matter

3. The subject matter is the constitutional review of the challenged decision which has allegedly violated the Applicant's right as guaranteed by paragraph 5 of Article 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 Article 113, paragraph 7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 28 July 2017, the Applicant submitted his Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 31 July 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama Hajrizi and Gresa Caka Nimani.

7. On 4 August 2017, the Court notified the Applicant of the registration of the Referral and requested him to fill in the referral form and to specify which decision of a public authority he was challenging before the Court.

8. On 10 August 2017, the Applicant submitted the completed referral form and specified that he was challenging Decision No.9199 on termination of employment relationship issued by KEDS, dated 4 November 2015.

9. On 14 August, the Court sent a copy of the Referral to KEDS.

10. On 24 August 2017, KEDS submitted a letter with comments pertaining to the Applicant's allegations.

11. On 14 November 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of Facts

12. The Applicant was an employee of KEDS (hereinafter: the Employer).

13. On 15 June 2015, the Basic Prosecution in Prishtina (PP.I. No. 400/2015) filed an indictment accusing the Applicant for committing the criminal offense foreseen in Article 428 [Taking bribe] in conjunction with Article 31 [Cooperation] of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK).

14. On 4 November 2015, the Employer rendered Decision No.9199 on the termination of the Applicant's employment relationship (hereinafter: the Decision of KEDS).

15. In its Decision, the Employer stated that: "*The employee – Hilmi Asllani in cooperation with his colleague [...] agreed-with the [...] consumer to hide the manipulation of the electrical meter, on which occasion as a return they have accepted the offer made by the consumer in the amount of money [...], who were arrested in flagrancy [...] by the KPS Police Officers [...]. From this misconduct the employee has committed serious violation of work duties under Article 7, paragraph 7.1, subparagraph (f), (g), item (i) and subparagraph (h,) of the KEDS Disciplinary Code. [...] For misconduct - the violations under the previous item, the employment contract is terminated to the abovementioned from 23.10.2015.*

16. On 10 November 2015, against the Decision of the Employer, the Applicant filed an appeal with the Employer's second instance authority.

17. On 25 November 2015, the Employer rejected the appeal of the Applicant as ungrounded. In this decision, the Applicant was instructed to initiate court proceedings at the competent courts against the Employer's decision.

18. Based on the case file, it shows that the Applicant had not used the possibility to continue with legal proceedings before the competent courts.

19. With regard to the criminal procedure against the Applicant, on 14 September 2016, the Basic Court in Prishtina, Department for Serious Crimes (hereinafter: the Basic Court), by Judgment PKR.nr. 334/15 acquitted the Applicant from the criminal offence as it wasn't proven that the Applicant committed the criminal offence he was charged for.

20. On 2 February 2017, the Basic Prosecution in Prishtina (PP.I.no.400/2015) filed an appeal with the Court of Appeals alleging violation of Criminal Law, erroneous and incomplete establishment of factual situation and the decision on the criminal sanction.

21. On 25 April 2017, the Court of Appeals (Judgment PAKR.nr.93/17) rejected the Basic Prosecution's appeal as ungrounded and upheld the Judgment of the Basic Court.

Applicant's allegations

22. The Applicant alleges violation of *"his right to the presumption of innocence until* proven *guilty"* as foreseen in paragraph 5 of Article 31 of the Constitution.

23. In essence, the Applicant claims that: *"[...] KEDS violated the Constitution of the Republic of Kosovo, namely Article 31, paragraph 5, by terminating the employment relationship before the criminal procedure was completed [...]."*

24. Finally, the Applicant requests the Constitutional Court to conclude that: *"[...] the Constitution of Kosovo was violated, more precisely Article 31, paragraph 5, because KEDS before the criminal proceedings was completed has arbitrarily evaluated the factual situation and prematurely dismissed [the Applicant] from work and terminated the Employment Contract, while it could easily overcome this situation by returning [the Applicant] to his working place, compensating him for unpaid wages and annulling the unlawful decision."*

Comments of KEDS

25. On 24 August 2017, KEDS submitted its comments regarding the Applicant's case and *inter alia* stated that: *"Such a claim of the Applicant to the Constitutional Court of Kosovo is ungrounded to the fact that disciplinary responsibility and criminal liability are separate and in no case this implies that the release from criminal liability implies the release of disciplinary responsibility. The disciplinary right has to do with the discipline which refers to the work and behavior of the worker at work or related to the work. In cases when a worker commits a violation or violation of his / her job duties and behaves contrary to the norms of the employment discipline, he or she shall be subject to disciplinary responsibility [...]".*

26. In its comments KEDS also stated that: *"From the Referral of 28.07.2017, submitted to the Constitutional Court of Kosovo, it can be clearly seen that there is no final decision (the challenged decision No. 9199 of 04.11.2015 of KEDS JSC is not a final decision) in order to be challenged before the court, the Applicant has not exhausted all available legal remedies, according to the applicable law [...]."*

Admissibility of the Referral

27. The Court first will examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

28. In this respect, the Court refers to 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."*

29. The Court also refers to Article 47 [Individual Requests] of the Law which establishes that:

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

30. Moreover, the Court recalls Rule 36 (1) (b) of the Rules of Procedure, which stipulates that:

> *"(1) The Court may consider a referral if:*
>
> *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted"*
>
> *[...]*

31. The Court notes that the Applicant challenges the constitutionality of the Decision on termination of employment relationship issued by KEDS on 4 November 2015.

32. However, the Court recalls that the final decision in the Applicant's case is the second Decision of the Employer rendered on 25 November 2015. In this regard, the Court notes that, in the aforementioned last Employers' decision of 25 November 2015, the Applicant was informed of his right to initiate legal proceedings against the Employer's decision at the competent courts.

33. Based on the aforementioned facts, the Court notes that the Applicant had not used the possibility to continue with legal proceedings before the competent courts.

34. Based on the foregoing, the Court considers that the Applicant's failure to exhaust available legal remedies before the regular courts shall be understood as a waiver of the right to continue with legal proceedings before the regular courts. Thus, the Applicant has not exhausted all legal remedies afforded to him by the applicable law (See *mutatis mutandis*, Case of the European Court of Human Rights (hereinafter: the ECtHR) *Selmouni v. France*, No. 25803/94, Decision of 25 November 1996, Constitutional Court case KI07/09, *Demë and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paras. 28-29).

35. The principle of subsidiarity requires that the applicants exhaust all procedural possibilities in the regular proceedings in order to prevent the violation of the

Constitution or, if any, to remedy such violation of a fundamental right before coming to the Constitutional Court (See *mutatis mutandis*, ECtHR Case *Selmouni v. France*, No. 25803/94, Decision of 25 November 1996, see Constitutional Court cases KI120/11, *Ministry of Health*, Resolution on Inadmissibility of 4 December 2012, par. 32, KI118/15, *Dragiša Stojković*, Resolution on Inadmissibility of 17 May 2016, par. 34).

36. In view of the circumstances of the case and the fact that the Applicant did not exhaust the available legal remedies before the regular courts, the Court does not consider it necessary to assess whether the challenged decision issued by KEDS comes within the jurisdiction of the Constitutional Court.

37. Therefore, taking into account that the Applicant didn't exhaust all legal remedies in the regular courts proceedings before coming to Constitutional Court, the Court finds that the Applicant's Referral does not meet the admissibility requirements set forth in Article 113.7 of the Constitution, Article 47 of the Law and Rule 36 (1) (b) and is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113, paragraph 7 of the Constitution, Article 47 of the Law and Rule 36 (1) (b) of the Rules of Procedure, in its session held on 14 November 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Arta Rama-Hajrizi

KI104/17, Applicant, Naser Berisha, Constitutional review of Decision No. AC-I-15-0265 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 6 April 2017

KI104/17, Resolution on Inadmissibility of 14 November 2017, published on 6 December 2017

Key words: *Individual referral, claim for return of property, active legitimacy, referral manifestly ill-founded*

The applicant filed a claim against R. C. and Socially-Owned Enterprise KBI "Kosova Export", Municipality of Fushë Kosovë for the return of several land plots in the village of Bakshi, Obiliq, which were allegedly confiscated from Mr. Z. Z., the predecessor of the applicant's father. The Specialized Panel of the Special Chamber of the Supreme Court (Decision SCC-09-0217) rejected the applicant's claim as inadmissible as the claimant failed to provide the Decision on inheritance of heirs of Z.Z. to prove his active legitimacy in the case. The applicant filed an appeal against the Decision of the Specialized Panel (SCC-09-0217) with the Appellate Panel of the Special Chamber of the Supreme Court which appeal was rejected as ungrounded by the Appellate Panel (Decision AC-I-15-0265).

The applicant alleged, before the Constitutional Court that the Appellate Panel by rejecting as ungrounded his appeal, violated their rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo and Article 1 [Protection of Property] of Protocol No. 1 of the European Convention on Human Rights. The Court considered that the applicant has not presented any evidence, facts or arguments that showed that the proceedings before the Appellate Panel have constituted in any way a constitutional violation of his rights guaranteed by the Constitution, namely the right to fair and impartial trial and right to protection of property. Thus, the Court declared the applicant's referral inadmissible pursuant to Article 113 (1) and (7) of the Constitution, Articles 48 of the Law and Rules 36 (1) (d) and 36 (2) (d) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI104/17

Applicant

Naser Berisha

Constitutional review of Decision No. AC-I-15-0265 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 6 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 Naser Berisha from village Bakshi, Municipality of Obiliq (hereinafter: the Applicant), who is represented by Gani Asllani, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Decision No. AC-I-15-0265 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel) of 6 April 2017.

3. The challenged decision was served on the Applicant on 30 May 2017.

Subject matter

4. The subject matter is the constitutional review the challenged decision, which allegedly violates the Applicant's rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 1 [Protection of Property] of Protocol No. 1 of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

5. The Referral is based on Article 113.7 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

6. On 25 August 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On the same date, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

8. On 6 September 2017, the Court notified the Applicant and the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Special Chamber) about the registration of the referral and requested him to present evidence regarding date of receipt of the challenged decision by the Applicant. On the same date, the Referral was sent to the Privatization Agency of Kosovo (hereinafter: the PAK).

9. On 8 September 2017, the Court received confirmation of the date on which the challenged decision was served on the Applicant.

10. On 14 November 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 14 February 2007, the Applicant filed a claim against R. C. and Socially-Owned Enterprise KBI "Kosova Export", Municipality of Fushë Kosovë (hereinafter: Socially Owned Enterprise) for the return of several land plots in the village of Bakshi, Obiliq, which were allegedly confiscated from Mr. Z. Z., the predecessor of the Applicant's father.

12. On 6 February 2009, the Basic Court in Prishtina (Decision C. No. 231/2007) declared itself incompetent to decide the case and the claim was sent to the Specialized Panel of the Special Chamber on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel).

13. On 12 April 2011, the Specialized Panel (unspecified Decision) rejected the statement of claim regarding the Applicant R.C. as inadmissible.

14. On 26 April 2011, PAK, as a representative of the socially owned enterprise, filed a request for suspension of proceedings in this case as the socially owned enterprise was subject to the liquidation procedure.

15. On 21 November 2011, the Specialized Panel (Decision No. SCC-09-0217) rejected as ungrounded the request of the PAK to suspend the proceedings regarding the Applicant's claim.

16. On 18 December 2014, the Appellate Panel (Decision ASC-11-0108) rejected as ungrounded the PAK appeal against the Decision (No. SCC-09-2017) of the Specialized Panel.

17. On 26 October 2015, the Specialized Panel (Decision SCC-09-0217) rejected the Applicant's claim as inadmissible *"as the claimant failed to provide the Decision on inheritance of heirs of Z.Z."* to prove their active legitimacy in the present case.

18. On 24 November 2015, the Applicant filed an appeal against the Decision of the Specialized Panel (SCC-09-0217) with the Appellate Panel "*on the grounds of violation of the substantive law*."

19. On 6 April 2017, the Appellate Panel (Decision AC-I-15-0265) rejected as ungrounded the Applicant's allegation. The Appellate Panel, by upholding the Decision of the Specialized Panel, *inter alia*, reasoned that:

> *"Based on the minutes of the hearing session, it is very clear that the claimant was informed that he should bring the decision on the inheritance, but the claimant failed to do so, arguing that the disputed property is in the name of the [socially owned enterprise], therefore, the Decision on inheritance cannot be obtained. […]*
>
> *The complainant even upon his appeal in the appeal proceeding did not bring the decision on inheritance. In the appeal he claimed that the request to bring such a decision for proving the active legitimacy, according to him, was unlawful because his predecessor [Z.Z.] was seized his property […] and he has had no property to inherit.*
>
> *The Appellate Panel cannot accept such a justification of the claimant for failing to provide the requested Decision on inheritance, since under Article 157 of the Law on Out-Contentious Procedure, the inheritors have the right to request the Decision on inheritance even if there is no property to inherit".*

Applicant's allegations

20. The Applicant alleges that the Appellate Panel (Decision No. AC-I-15-0265) violated the rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Article 1 [Protection of Property] of Protocol No. 1 of the ECHR.

21. The Applicant specifies that the disputed parcels have been alienated *"since 1984-85 when the regulation of the agricultural land was carried out by consolidation, while up to this time they have been private property in the name of the father of the claimant, but were in arbitrary manner, without any legal grounds, illegitimately given in possession and use of the colonists brought from other parts of the former Yugoslavia".*

22. The Applicant alleges that the Socially Owned Enterprise *"represented by the Privatization Agency of Kosovo does not have any legal ground to keep as owner the cadastral parcels […] which it has acquired without any legal grounds, […] and contrary to the European Convention for Human Rights, and Protocol 1, Article 1 [Protection of Property]"* Article 46 of the Constitution and the laws on property of the Republic of Kosovo.

23. The Applicant also alleges that "*the Special Chamber of the Supreme Court of Kosovo by its decisions has legitimized all violations committed in the monistic system contrary to all aforementioned acts, and thus without any legal grounds has made the abovementioned expropriators".*

24. Finally, the Applicant requests the Court to annul the Decision of the Appellate Panel and the disputed parcels "*be returned for use*" to the Applicant.

Assessment of the admissibility of the Referral

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

26. In this respect, the Court, initially 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".*

27. The Court also refers to Article 49 [Deadlines] of the Law, which foresees:

> *"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. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."*

28. In the present case, the Court notes that the Applicant filed the Referral as an individual and as an authorized party, he submitted the Referral in accordance with the deadlines prescribed in Article 49 of the Law, after exhaustion of all legal remedies provided by law.

29. However, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides that:

> *"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".*

30. The Court also refers to paragraphs (1) (d) and (2) (d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which specify:

> *(3) "The Court may consider a referral if:*
> *[...]*
> *(d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(4) 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".*

31. The Court recalls that the Applicant alleges that the Appellate Panel (Decision AC-I-15-0265) violated the right to fair and impartial trial and the right to protection of property.

32. In this respect, the Court notes that the Applicant alleges that the Appellate Panel, by rejecting the Applicant's claim as ungrounded, has legitimized the confiscation, without legal basis, of the property of the Applicant's predecessors.

33. The Court recalls that the Appellate Panel rejected the Applicant's appeal against the Specialized Panel for procedural reasons, since the Applicant did not submit the inheritance decision to prove his active legitimacy in relation to the claim for return of the disputed parcels and that did not deal specifically with the essence itself of the Applicant's Referral.

34. In this respect, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the Supreme Court 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). 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*, Judgment of European Court on Human Rights (hereinafter: the ECHR] of 21 January 1999, *Garcia Ruiz v. Spain*, no. 30544/96, para. 28).

35. The role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Court cannot act as "*fourth instance court*" (see: ECtHR Judgment of 16 September 1996, *Akdivar v. Turkey*, No. 21893/93, para. 65; see also, *mutatis mutandis*, case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

36. In fact, the Court notes that the Appellate Panel assessed the interpretation of the Specialized Panel regarding the procedural provisions regarding the active legitimacy of the Applicant.

37. The Appellate Panel during the assessment of the Applicant's allegations argued that the Specialized Panel rightly dismissed the Applicant's claim, because the Applicant did not submit the inheritance decision to prove the active legitimacy regarding the disputed parcels.

38. The Appellate Panel further addressed the Applicant's allegation that it was not possible to conduct the inheritance proceedings concerning the predecessor of Applicant Z.Z, as he had no property to inherit, arguing that *"under Article 157 of the Law on Out-Contentious Procedure, the inheritors have the right to request the Decision on inheritance even if there is no property to inherit"*.

39. The Court considers that the conclusions of the Appellate Panel were reached after a detailed examination of all arguments submitted by the Applicant. In this way, the Applicant was given the opportunity to present at all stages of the proceedings the arguments and evidence which he considered relevant to his case.

40. All the arguments of the Applicant, which were relevant to the resolution of the dispute regarding the active legitimacy of the Applicant in the present case, were heard and properly assessed by the courts. All material and legal reasons related to the challenged decision were presented by the Applicant in detail and the Court concludes that the proceedings before the regular courts, viewed in their entirety, were fair (See, *mutatis mutandis*, ECHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, para. 29 and 30).

41. As to the alleged violations of the Applicant with regard to the right to protection of property, the Court recalls that the right to protection of property applies only to a person's existing possessions and that it does not guarantee the right to acquire

possessions (see: *mutatis mutandis*, case of ECtHR *Marckx v. Belgium*, No. 6633/74, Judgment of 13 June 1879, paragraph 50).

42. In certain circumstances a "*legitimate expectation*" of obtaining an asset may also enjoy the protection of Article 46 of the Constitution and Article 1 of Protocol No. 1 of ECHR (see, *mutatis mutandis*, *Béláné Nagy v. Hungary*, No. 53080/13, Judgment of 13 December 2016, § 74).

43. However, the Court recalls that a "*legitimate expectation"* must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. No "legitimate expectation" can be said to arise where there is a dispute as to the correct interpretation and application of law and the applicant's submissions are subsequently rejected by the regular courts (see, *mutatis mutandis*, *Béláné Nagy v. Hungary*, Ibidem, § 75).

44. Accordingly, the Court considers that the circumstances of the case did not givee the Applicant the right to a material interest protected by Article 46 of the Constitution and Article 1 of Protocol No. 1 of the ECHR.

45. In sum, the Court considers that the Applicant has not presented any evidence, facts or arguments that show that the proceedings before the Appellate Panel have constituted in any way a constitutional violation of his rights guaranteed by the Constitution, namely the right to fair and impartial trial and right to protection of property.

46. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

FOR THESE REASONS,

The Constitutional Court of Kosovo, in accordance with Article 113 (7) of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, in the session held on 14 November 2017, unanimously

DECIDES

I. TO DECLARE the Referrals inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law; and

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI 66/17 Applicants Ramadan Shishani and others, constitutional review of several individual decisions of the Privatization Agency of Kosovo

KI66/17 Resolution on Inadmissibility approved on 23 October 2017, published on 07 December 2017

Key words: Individual referral, Property rights, referral manifestly ill-founded

The subject matter was the constitutional review of the aforementioned decisions of PAK, which have allegedly violated the Applicants' rights and freedoms guaranteed by Article 46 [Protection of Property] and Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo.

The Court considered that the Applicants' rights to property have not been violated as a result of the delay in implementation of their rights, because this delay is a consequence of the legal condition that all legal proceedings before the SCSC must be concluded before PAK may make any payments to the Applicants. This condition was an integral part of the award of payment and compensation, as required by law.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI66/17

Applicant

Ramadan Shishani and others

Constitutional review of several individual decisions of the Privatization Agency of Kosovo

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

Applicants

1. The Referral was submitted by (a) Ramadan Shishani, (b) Halil Fetahu, (c) Jakup Ibriqi, (d) Maliqe Mjeku, (e) Rrustem Berisha, (f) Nexhat Lahu, (g) Afrim Beka, (h) Besim Sylejmani, (i) Sami Shehu, and (j) Zeqir Behrami, all former employees of the Socially Owned Enterprise (hereinafter: SOE) "Forestry Economy" (hereinafter: the Applicants), who are represented by Gani Asllani, a lawyer from Prishtina.

Challenged decisions

2. The Applicants challenge several individual decisions of the Privatization Agency of Kosovo (hereinafter: PAK) as they affect each Applicant: Applicant (a) challenges two decisions [No. 10876 of 14 October 2013 and No. 12/74 of 05 November 2013]; Applicant (b) challenges one decision [No.748 of 24 January 2014]; Applicant (c) challenges two decisions [No. 6518 of 16 August 2013 and No. 6521 of 16 August 2013]; Applicant (d) challenges two decisions, [No. 6515 of 16 August 2013, and No. 6520 of 16 August 2013]; Applicant (e) challenges one decision [No. 6526 of 16 August 2013]; Applicant (f) two decisions [No. 0517 of 16 August 2013 and No. 6523 of 16 August 2013]; Applicant (g) two decisions [No. 10878 of 14 October 2013 and No. 6512 of 16. August 2013]; Applicant (h) challenges two decisions [No. 6513 of 16 August 2013 and No. 6524 of 16 August 2013]; Applicant (i) challenges two decisions [No. 6525 of 16 August 2013 and No. 10877 of 14 October 2013]; and Applicant (j) challenges two decisions [No. 6514 of 16 August 2013 and No. 6522 of 16 August 2013].

Subject matter

3. The subject matter is the constitutional review of the aforementioned decisions of PAK, which have allegedly violated the Applicants' rights and freedoms guaranteed by Article

46 [Protection of Property] and Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of the Law No. 03/L-121 on the 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

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

6. On 5 June 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

7. On 4 July 2017, the Court notified the Applicants about the registration of the Referral and sent a copy of the Referral to PAK.

8. On 23 October 2017, after having considered the report of the Judge Rapporteur, the Review Panel by majority made a recommendation to the full Court on the inadmissibility of Referral.

9. Judge Altay Suroy voted against the proposal of the Judge Rapporteur.

Summary of facts

10. The Applicants were all employees of the SOE "Forestry Economy Prishtina".

11. On 20 January 2011, the Board of PAK rendered the decision on liquidation of the SOE "Forestry Economy Prishtina."

12. In 2011, all Applicants individually submitted claims to PAK requesting the payment of their unpaid personal income for the period from January 2003 to December 2010.

13. During 2013 and 2014, PAK made individual decisions regarding each of the Applicants' claims. By these decisions, PAK individually recognized the right of each of the Applicants to the payment of unpaid personal income, and determined the specific amounts of money due to each Applicant according to the financial evidence from the documentation and their individual work experience.

14. In these decisions, PAK also recognized the right to each Applicant individually to be paid an amount in compensation. This amount was equivalent to their personal income for 3 months due to the termination of the employment relationship. Each of the decisions of PAK state that,

> *"When deciding on your claim, the liquidation authority has found that you enjoy the right to unpaid salaries because your salaries have remained unpaid during your employment with the SOE "Forestry Economy Prishtina" for the period from January 2003 until December 2010, and such a conclusion is supported by the financial evidence in the SOE archive."*

15. The Decisions of PAK included an explanation on the distribution of the awarded amounts to the Applicants, which specified that,

> *"Claims will be satisfied according to the category priority determined by Article 40. Payment for satisfaction of claims shall be carried out pursuant to paragraphs 2 and 3 of Article 41 of the Annex to the PAK Law and follow the proceedings of the Liquidation authority in compliance with financial policies of the Agency issued in accordance with the Article 19 of the PAK Law."*

16. On 2 November 2016, the Applicants addressed PAK with a request for an explanation of the delays in payment of their entitlements. They also required the immediate payment of their unpaid personal income to which they had achieved the right in accordance with the decisions of PAK.

17. On 7 November 2016, PAK responded to the requests of the Applicants. Each of PAK's responses was based on the Law No. 04/L-34 on Privatization Agency of Kosovo and stated that,

> *"Regarding your request for the delay of further distribution of means, we inform you that until now, the Liquidation Authority (LA) has concluded the processing and issuance of the decisions on all submitted claims for the SOE "Forestry Economy Prishtina" (in liquidation).*
>
> *The Claimants who were dissatisfied with the LA decisions (in cases when the decisions were partly approved or rejected) had an opportunity to appeal the decision of LA with the Special Chamber of the Supreme Court of Kosovo (hereinafter: the SCSC) within 30 days after being served with the decision by the LA.*
>
> *From the foregoing, for the appeals submitted to the SCSC by the dissatisfied parties with the decisions of the Liquidation Authority should be taken the final decision from SCSC, in order to proceed with the distribution of payments also for the creditors of the Socially Owned Enterprise. Until today, the SCSC has not yet fully confirmed to the Liquidation Authority the full list of appeals submitted to the SCSC on the issued decisions.*
>
> *The Liquidation Authority of the Socially Owned Enterprise "Forestry Economy Prishtina" (in liquidation), with a purpose of the preparation of the distribution report, should assess (i) the situation after the sale of the assets, from which will be generated the proceeds, as well as (ii) receipt of confirmation of the list with full information of the appeals from the SCSC.*
>
> *Therefore, from the above, currently it cannot be determined the accurate time of the distribution, due to the dependence of the matter on the factors mentioned above, but [PAK] wishes to assure [you] that PAK is treating this matter with dedication."*

18. On 12 April 2017, the Applicants again addressed PAK as the Liquidation Authority with a request that they be paid their personal income, in accordance with the decisions of PAK.

19. The Applicants claim that, up to the date of submission of their Referral to the Court, they have not received any response from PAK regarding their request of 12 April 2017.

Applicant's allegations

20. The Applicants allege that their *right to property as guaranteed by Article 46 of the Constitution has been violated by PAK, because PAK is delaying the payment of the amounts awarded to the Applicants out of the proceeds of the liquidation of the SOE where they were previously employed.*

21. The Applicants in relation to that argue that, "*The salaries which they earned as former employees of the SOE "Forestry Economy Prishtina" ... with their commitment are their property, their families even survive by those salaries, while the Liquidation Authority [PAK] acts like a master of this property by not responding to the employees and without any reason it possesses and uses the property of others."*

22. The Applicants complaint relates exclusively to the failure of PAK to pay out the amounts which have been awarded them. The Applicants indicate that the Decisions of PAK regarding their unpaid salaries and compensation for early termination of their employment were in their favor. As such, the Applicants were not dissatisfied and had no reason to submit further appeals before the SCSC regarding this issue. This situation has been ongoing since those Decisions were taken in 2013-2014.

23. The Applicants also allege that, "*Article 49 of the Constitution has been violated, which guarantees the right to work, and from this automatically derives that even the fruits of the work shall be guaranteed as in the present case - the salaries of employees."*

24. The Applicants request the Court *"to order PAK (Liquidation Authority) to pay the unpaid salaries to each of [the Applicants] pursuant to the decisions of PAK, whereby the claims for the unpaid salaries have been approved for each individually in the amount as in the decisions, including the three (3) salaries approved by the decisions in compensation for premature termination of the employment relationship."*

Admissibility of Referral

25. The Court first will examine whether the Referral has met the admissibility requirements established in the Constitution, as further specified in the Law and foreseen in the Rules of Procedure.

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

> *"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."*

27. The Court considers that the Applicants are individuals alleging a violation of their fundamental rights by a public authority and, therefore, the Applicants are authorized parties to bring a referral under Article 113 (7) of the Constitution.

28. As regards the exhaustion of legal remedies, the Court notes that the Applicants' complaint only concerns the delays in the execution of the decisions of PAK awarding

them each rights to unpaid salaries and compensation. The Applicants twice sent letters to PAK requesting the implementation of their rights.

29. The Court notes that PAK accepts the responsibility to implement the Applicants' rights, but claims that the implementation must be delayed by the procedures before the SCSC when adjudicating on claims of other parties. The Court notes that PAK bases its position on the provisions of Law No. 04/L-34 on Privatization Agency of Kosovo.

30. The Court considers that the implementation of the payment of the Applicants' claims to unpaid salaries is the result of an ongoing situation.

31. Neither the Applicants nor PAK have referred to any legal remedies which may be available to the Applicants to enforce the immediate execution by PAK of the decisions awarding the Applicants rights to unpaid salaries and compensation.

32. In these circumstances, the Court finds that the delays in the implementation of the Applicants' rights are a result of legal proceedings based on law against which no remedy is available.

33. Consequently, the Court finds that the Applicants have exhausted all legal remedies provided by law.

34. The Court also refers to Article 49 [Deadlines] of the Law, which provides that,

> *"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. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."*

35. The Court recalls that the requirement for the submission of the Referral within the time limit of four (4) months does not apply in cases of an alleged continuous violation of fundamental human rights and freedoms (see European Court of Human Rights (hereinafter ECtHR) Judgment of 19 March 1997, Hornsby v. Greece, No. 18357/91, paras 34-37; and Constitutional Court of the Republic of Kosovo: Case No. KI50/12 Applicant, *Agush Lolluni,* Judgment of 20 July 2012).

36. In the present case, the Court notes that the decisions awarding the Applicants rights to unpaid salaries and compensation all date from 2013-2014. However, the payment to the Applicants of these awards is still pending further action by PAK, due to ongoing legal proceedings before the SCSC.

37. In these circumstances, the Court considers that the delay in implementation of the Applicants' rights is a result of an ongoing situation

38. Therefore, the Court finds that the Applicants do not need to comply with the time limit of four months when submitting their referral, as foreseen by Article 49 of the Law.

39. In conclusion, the Court finds that the Applicants are authorized parties, have exhausted all legal remedies and have submitted their Referral within the legal deadline.

40. Further, the Court also refers to Article 48 [Accuracy of Referral] of the Law, which provides that,

"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."

41. The Court recalls that the Applicants allege a violation of their rights to property and their right to work, as protected by Articles 46 and 49 of the Constitution. The Applicants claim that this violation of their rights is a result of the delays in the payment of the amounts in unpaid salaries and compensation awarded to them. The Applicants allege that this delay in the implementation of their rights is caused by PAK, which is a public authority established by Law.

42. Therefore, the Court finds that the Applicants have accurately clarified what rights they claim have been violated and what act of a public authority they challenge.

43. However, the Court refers to Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, which 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:

[...]

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

44. The Court recalls that the Applicants allege that, by delaying the implementation of the Decisions awarding them payment of unpaid salaries and compensation for early termination of their employment, PAK has violated their right to the protection of property as guaranteed by Article 46 of the Constitution.

45. The Court recalls that Article 46 [Protection of Property] of the Constitution provides, *inter alia*, that,

"1.The right to own property is guaranteed."

46. The Court considers that the Applicants' right to payment of the amounts awarded to them by the decisions of PAK come within the scope of the concept of property as protected by Article 46 of the Constitution.

47. The Court notes that the Applicants' rights to the awarded amounts are not in dispute between the Applicants and PAK.

48. The Court notes further that PAK has explained that the payment of the amounts awarded is waiting on the conclusion of judicial decisions by the SCSC regarding other claims on the assets of the SOE under liquidation. The Court notes that PAK based its position on the Law No. 04/L-34 on Privatization Agency of Kosovo.

49. Furthermore, the Court notes that the decisions awarding the amounts to the Applicants contained a clarification regarding the distribution of the awards. This clarification states that,

"Claims will be satisfied according to the category priority determined by Article 40. Payment for satisfaction of claims shall be carried out pursuant to paragraphs 2 and 3 of Article 41 of the Annex to the PAK Law and follow the proceedings of the Liquidation authority in compliance with financial policies of the Agency issued in accordance with the Article 19 of the PAK Law."

50. Based upon this clarification on distribution, the Court notes that the implementation of the Applicants' rights is conditioned upon the circumstances mentioned in the Decisions awarding the amounts, namely that distribution shall follow the conclusion of proceedings by the liquidation authority. The Court notes that these liquidation proceedings are still ongoing.

51. Therefore, the Court finds that the Applicants' demand for payment of their unpaid salaries is premature. The Court considers that the Applicants have a right to property which has been recognized by PAK. The implementation of this right, in accordance with PAK decisions, will be realized once the legal requirements mentioned in the decisions are fulfilled.

52. As such, the Court notes that PAK's delay in implementing the Applicants rights is based on law.

53. The Court recalls the case law of the European Commission on Human Rights, which has found that a right to property is not lost when a condition is not fulfilled, if that condition was an integral part of the right (see European Commission on Human Rights Decision on Admissibility of 5 October 1978, *Mario de Napoles Pacheco v. Belgium*, no. 7775/77).

54. Applying this reasoning to the present case, the Court considers that implementation of the Applicants' rights was conditioned by law on the conclusion of all judicial proceedings before the SCSC regarding the distribution of the assets of the SOE in liquidation. In contrast with the abovementioned case law, in the Applicants' case their right to property has not been lost, but is still pending the resolution of the legal conditions.

55. Therefore, the Court considers that the Applicants' rights to property have not been violated as a result of the delay in implementation of their rights, because this delay is a consequence of the legal condition that all legal proceedings before the SCSC must be concluded before PAK may make any payments to the Applicants. This condition was an integral part of the award of payment and compensation, as required by law.

56. In sum, the Court finds that the Applicants' have not substantiated their claim that their right to property has been violated by PAK because of the delay in implementation of the payment of the amounts awarded to them.

57. The Court recalls that the Applicants also allege that the delay in the payment of the amounts awarded to them constitutes a violation of their right to work as protected by Article 49 of the Constitution, because the payment of compensation for labour is an integral part of the right to work.

58. The Court recalls that Article 49 [Right to Work and Exercise Profession] of the Constitution provides, *inter alia*, that,

"1.The right to work is guaranteed."

59. The Court notes that the Applicants' rights to payment of certain amounts are based upon the Applicants' previous working relationship with the SOE.

60. As such, the Court considers that the decision of PAK awarding the Applicants rights to unpaid salaries and compensation for early termination of employment fully addresses the Applicants' rights in employment.

61. Furthermore, the Court recalls its previous case law with respect to the right to work and exercise a profession. The Court considers that the challenged decisions of PAK do not in any way prevent the Applicants from working or exercising a profession. As such, there is nothing in the Applicants claim that justifies a conclusion that their constitutional right to work has been violated (see, *mutatis mutandis*, Resolution of 10 February 2015, *Abdullah Bajqinca*, KI 136/14, paragraph 34).

62. In conclusion, the Court finds that the Applicants have not submitted any *prima facie* evidence nor have they substantiated their allegations indicating how and why PAK has violated their rights to the protection of property and the right to work as guaranteed by Article 46 and Article 49 of the Constitution

63. Consequently, the Referral is manifestly ill-founded on a constitutional basis and it should be declared inadmissible pursuant to Rule 36, paragraphs (1) (d) and (2) (d), of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 paragraph 7 of the Constitution, Article 47 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, in the session held on 23 October 2017, by majority

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 paragraph4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional**
Snezhana Botusharova	Arta Rama-Hajrizi

KI59/17, Applicant Mejdi Zymberi, Constitutional Review of Judgment E. Rev.29 /2016, of the Supreme Court of 27 December 2016

KI59/17, Decision on Inadmissibility of 18 October 2017, published on 7 December 2017

Key words: Individual Referral, civil procedure, manifestly ill-founded, non- exhaustion of remedies

The Applicant filed a Referral with the Court, requesting the constitutional review of the Judgment of the Supreme Court. He alleged violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, inter alia, alleging that the decisions of the regular courts were in contradiction in between themselves at the different levels of trials, and as such, violated the right to fair and impartial trial.

The Court ascertained that the Applicant's request concerning the allegation for a fair and impartial trial in the contested procedure is manifestly ill-founded, because the court decisions were reasoned and non-arbitrary. Whereas, regarding the enforcement procedure, the Court found that his application was inadmissible because it was premature since no final decision had yet been issued and subsequently all legal remedies had not been exhausted.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 59/17

Applicant

Mejdi Zymberi

Constitutional review of Judgment E. Rev. 29/2016 of the Supreme Court of Kosovo, of 27 December 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 Applicant is Mejdi Zymberi on behalf of NTN "Mega Engineering" with seat in Gjilan, represented by Ardi Shita, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Judgment E. Rev. No. 29/2016 of the Supreme Court of Kosovo of 27 December 2016, which was served on him on 25 January 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly, has violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 6 1) [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 25 May 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 26 May 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court appointed the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

7. On 2 June 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. 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

As to the contested procedure

9. On 19 August 2002, the Applicant filed a claim with the District Commercial Court in Prishtina (hereinafter: the Commercial Court) "Hidroteknika" Company from Gjilan in the capacity of the Contractor and the International Red Cross (hereinafter: the IRC) in the capacity of the donor for payment of the amount of money (22,903 euro) owed on behalf of the additional works performed by the Applicant that exceeded the foreseen construction works with the basic contract concluded between the Applicant and the responding parties.

10. On 27 September 2002, the District Commercial Court (Decision VII C. No. 147/2002) decided to reject the claim due to a lack of legal interest stating that the Applicant could directly file the request for permission to execute the debt.

11. On 14 October 2002, the Applicant submitted to the Commercial Court a proposal to allow the execution of the alleged debt towards the respondents.

12. On 17 October 200.2 the Court (Decision No. 103/02) allowed the requested execution.

13. On an unspecified date the first respondent "Hidroteknika" company filed an objection against the decision on permission of the execution.

14. On 4 March 2003, the Commercial Court deciding on the objection (Decision VCL No. 210/2002) declared itself incompetent to decide on this legal matter, deciding also that after this Decision becomes final, the case file should be sent to the Special Chamber of the Supreme Court as a competent court. This Decision under the legal remedy could be appealed to the Supreme Court of Kosovo.

15. On 19 June 2003, the Supreme Court of Kosovo, after reviewing the Applicant's appeal by Decision Ae 34/2003, decided that in the part related to the first respondent ("Hidroteknika") the appeal should be rejected, whereas in the part related to the International Red Cross, to approve the claim, quashing the Decision of the Commercial Court VCL 210/2002 in that part and remanded the legal mater for retrial and in the further proceedings at the Commercial Court.

16. On 28 October 2008, by Judgment II. C. No. 196/2008, the Commercial Court in the repeated procedure, according to the instructions of the Supreme Court, annulled Decision E. No. 103/02 on allowing the enforcement of 17.10.2002 and rejected in entirety the claim of the Applicant regarding the payment of the alleged debt.

17. On an unspecified date, the Applicant filed an appeal with the Supreme Court of Kosovo against the abovementioned Judgment of the Commercial Court.

18. On 2 May 2012, the Supreme Court (Decision Ac. No. 91/2009) decided that: *"The appeal of the claimant is approved as grounded and Judgment II. C. No. 196/2008 of the District Commercial Court in Prishtina of 28.10.2008 is quashed and the case is remanded to the same court for retrial."*

19. On 20 September 2012, the District Commercial Court (Judgment No. 224/2012), in the repeated and conducted proceeding according to the instructions of the Supreme Court, decided to approve the Applicant's claim regarding the respondent "IRC" whereas for the respondent "Hidroteknika" to reject it.

20. On an unspecified date, the IRC filed appeal with the Court of Appeals against Judgment III. c. No. 224/2012 of the District Commercial Court, on the grounds of: essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.

21. On 1 March 2016, the Court of Appeals of Kosovo (Judgment (Ac. No. 14/2013), rejected as ungrounded the appeal of the respondent "IRC" and upheld Judgment III C. No. 224/2012 of the District Commercial Court of 20 September 2009.

22. On 27 December 2016, the Supreme Court of Kosovo, deciding upon the request for revision filed by the respondent IRC decided to approve the revision (Judgment E. Rev. No. 29/2016) as grounded, so that it entirely rejected the Applicant's claim regarding the request to oblige the IRC to pay the alleged debt. The Supreme Court found that the International Red Cross did not have passive legitimacy to be a respondent to the dispute.

Enforcement procedure against IRC

23. Given that Judgment Ac. No. 14/2013 of the Court of Appeals became final and enforceable by which the IRC was obliged to pay the Applicant the debt mentioned in the claim, the Applicant on an unspecified date submitted a proposal for execution to the private enforcement agent for the purpose of collecting that debt.

24. On 17 May 2016, the private enforcement agent E.M issued Order P. No. 129/16 for permission of execution.

25. Against the order for allowing the execution of the abovementioned private enforcement agent, the IRC filed an objection with the Basic Court in Prishtina, within the legal deadline, stating, *inter alia*, that this institution has international immunity and cannot be a responding party.

26. On 14 December 2016, the Basic Court in Prishtina (Decision PPP No. 454/16) rejected the objection filed by the IRC.

27. On 19 January 2017, against the Decision of the Basic Court, the IRC filed an appeal with the Court of Appeals of Kosovo alleging that the International
Red Cross enjoys immunity based on a memorandum signed with Ministry of International Affairs and these immunities acquitted them from civil responsibility with regard to the debts end degames.

28. According to the documentation attached to the Applicant's Referral it results that this proceeding with the Court of Appeals has not yet been completed.

Applicant's allegations

29. The Applicant alleged that Judgment E. Rev. No. 29/2016 of the Supreme Court of Kosovo, of 27 December 2017, related to the request for revision, has violated the right to fair and impartial trial, because there were elements of contradiction in relation to previous judicial decisions and consequently the court decision is arbitrary and the right to a reasoned judicial decision as an inseparable component of Article 31 of the Constitution and Article 6 of the ECHR have been violated.

Assessment of admissibility of Referral

a) Regarding the part dealing with the contested procedure

30. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution and as further spoecified in the Law and in the Rules of Procedure.

31. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes:

> *"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".*

32. The Court further recalls 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."*

33. Finally, the Court further refers to Rule 36 of the Rules of Procedure, which foresees:

> *(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".*

34. The Court finds that the Applicant's Referral fulfills the requirements of Article 113.7 with regard to the authorized party and it is filed within the deadlines of Article 49 of the Law, while a part of it did not meet the requirement of exhaustion of legal remedies.

35. The Court notes that the Applicant specifically alleged that Judgment E. Rev. No. 29/2016 of the Supreme Court of the Republic of Kosovo, of 27 December 2016, violated the constitutional right to fair and impartial trial (Article 31 of the Constitution), and the right to fair trial (Article 6 of the ECHR) which has the following content:

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

"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".

Article 6 of ECHR [Right to a fair trial]

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

[...]

36. The Court finds that the Applicant's arguments regarding the violation of the right to fair and impartial trial consist in the Applicant's allegation regarding the issuance of contradictory decisions in the courts of the various judicial instances, stating that such decisions had infringed the guarantees of Article 31 of the Constitution and Article 6 of the ECHR concerning the right to a reasoned court decision and an arbitrary court decision.

37. When examining allegations of violation of the right to fair and impartial trial, the Court examines whether the court proceeding was fair and impartial in its entirety, as required by Article 31 of the Constitution (see, *inter alia, mutatis mutandis*, *Edwards v. the United Kingdom*, 16 December 1992, p. 34, Series A. No. 247, and *B. Vidal v. Belgium*, 22 April 1992, p.33, Series A. No. 235).

38. The Court finds that, as noted in paragraphs 5-17 of the report, that a series of the court proceedings were conducted between the period 2002-2016 at the District Commercial Court and the Supreme Court, and decisions were rendered with various conclusions by which the Applicant's claim was approved and then in the appeal proceedings the matter was remanded to the first decision-making instance for retrial.

39. Finally, the legal matter as to the contested procedure has taken its legal solution by Judgment E. Rev. No. 29/2016 of the Supreme Court of 27 December 2016 in which, the Supreme Court *inter alia*, reasoned the part related to the first respondent and to the fact whether the Applicant has the right to the required monetary compensation. *"For additional works there has not been concluded the annex contract nor the agreement by which the contracted parties would have defined rights and obligations which would have been considered as an offer for completion of additional works. Without the agreement with ordering party, there is no legal ground for compensation in the name of completion of additional works."*

40. The Supreme Court noted that *"pursuant to the provision of Article 630 paragraph 2 of the LCT, on the contracts on construction the written form of contract is required*

and such a form is required also for the amendment- contract annexes and subsequent amendments without specific form have no legal effects."

41. Regarding the claim of the second respondent "IRC", the Supreme Court in the reasoning of the judgment of the revision emphasized that *"The second respondent, the International Red Cross in the present case has no legitimacy since in this legal matter the second respondent was not in substantive-legal relation with claimant since they were not in contractual relation and this also confirmed by the contract that was concluded between the claimant and the first respondent that appear as the contracting parties, whereas the second respondent was a donor of the execution of works and has no obligations on the contract on construction which appears as well from the content of the contract in question."*

42. Regarding the foregoing, the Court reiterates that it is not its duty under the Constitution to act as a fourth instance court in respect of decisions rendered by the regular courts. It is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law (see: *mutatis mutandis, Garcia Ruiz v. Spain*, No. 30544/96, ECtHR, Judgment of 21 January 1999, para. 28. See: also case No. 70/11, Applicant: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011).

43. The Court can only consider whether the evidence was presented in such a way, that the proceedings, viewed in entirety, have been conducted in such a way that the Applicant had a fair trial (see: *inter alia*, *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991

44. In addition, the Court considers that Judgment Rev. no. No. 29/2016 of the Supreme Court, as well as lower instance court judgments, provided a full and complete description of the facts of the case and provided numerous reasons for their legal findings in the response to claims submitted by the Applicant. Therefore, the Court considers that the proceedings followed with regard to the case before the regular courts were fair and sufficiently reasoned (see: *mutatis mutandis, Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).

45. The Court notes that the Applicant had many opportunities to present his case before the Commercial Court, the Court of Appeals and the Supreme Court, by using the appeal remedies, he actively participated in all stages of the court proceedings, and therefore the proceeding as a whole cannot be considered arbitrary or unfair.

46. The Court, based on its case-law, recalls that in the identical circumstances in Case KI53/14, which had as a subject matter the procedure for monetary compensation for the additional works, had declared the Referral inadmissible, therefore, in the present case there is no reason to deviate from its case law (see: Case No. 53/14 of the Applicant NTP "Llabjani" of 7 July 2014 of the Constitutional Court)

47. In addition, the Court considers that its case KI72/14 mentioned by the Applicant cannot be applicable in this case. In such case, the Constitutional Court declared a violation of the Applicant's rights because the Supreme Court failed to provide clear and complete answers vis-a-vis crucial property submissions of the Applicant. This, in turn, resulted in a violation of the Applicant's right to be heard and his right to a reasoned decision deriving from the guarantees of Article 31 [Right to fair and Impartial Trial] of the Constitution.

48. The Court notes that the present Referral has to do with the compensation of a monetary claim which as such has not been granted or confirmed by the decisions of the regular courts.

49. In conclusion, the Court concludes that as regards the first part, the referral on constitutional basis is not *prima facie* justified and that the facts presented in the Referral by the Applicant do not in any way justify the allegation of a violation of a constitutional right, therefore, in accordance with Rule 36 (2) (a) and (b) the Referral is to be declared inadmissible as manifestly ill-founded.

b) Regarding the enforcement procedure

50. The Applicant alleges that the Judgment of the Court of Appeals Ac. No. 14/2013 of 1 March 2016 was final and enforceable and, therefore, in the enforcement procedure the private enforcement agent E. M. allowed its enforcement as well as the Basic Court in Prishtina by Decision PPP No. 454/16 rejected the objection of the respondent IRC.

51. The Court notes that after the Decision of the Basic Court, the IRC filed an appeal with the Court of Appeals and this procedure has not yet been completed.

52. In the circumstances where there is no final decision in the enforcement procedure, the Applicant's request for this part is premature and, therefore, inadmissible (see, *inter alia*, case of the Court KI151/13 of the Applicant *Sitkije Morina* of 23 December 2013).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law as well as Rules 29 and 36 of the Rules of Procedure, on session held on the 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 Court**
Snezhana Botusharova	Arta Rama-Hajrizi

KI46/17, Applicant: Privatization Agency of Kosovo, which requests the constitutional review of Judgment AC-I.-16-0084 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 14 December 2016

KI46/17, Resolution on inadmissibility of 7 September 2017, published on 7 December 2017

Key words: Individual referral, constitutional review of the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, preliminary injunction, manifestly ill-founded

The Applicant submitted its Referral based on Articles 113.7 and 116.2 of the Constitution, Articles 22, 27, and 47 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo, and Rules 29 and 54 of the Rules of Procedure of the Constitutional Court.

The Applicant–Privatization Agency of Kosovo (hereinafter: "PAK") challenges the decision of Enterprise Sanitas headquartered in Montenegro to transform the socially-owned enterprise into a Joint Stock Company, namely its subsidiary company located in Peja.

After the request of the transformed Enterprise Unifarm-Peja sent to PAK to confirm the ownership status of this company, the PAK Committee decided that Enterprise Unifarm-Peja had not been transformed into a Joint Stock Company and continued to be a socially-owned enterprise.

The Applicant initiated the proceedings for the enterprise liquidation, but the Specialized Panel, upon the request of the enterprise, rendered a decision to prohibit the liquidation; the same decision was rendered by the Appellate Panel and the Applicant's appeal was rejected.

The Applicant alleged that the challenged judgments had violated his rights guaranteed by Articles 102.3 and 46 of the Constitution, and that based on PAK Law of 31 August 2011, it has exclusive jurisdiction to administer the socially-owned enterprises and their property.

The Court considered that the provisions of Article 102 of the Constitution contain no individual rights and freedoms guaranteed by the provisions of Chapter II and Chapter III of the Constitution. Therefore, the Court concluded that Article 102 could not be relied upon in a Referral based on Article 113.7 of the Constitution.

The Court further noted that the Specialized Panel and the Appellate Panel had provided reasons to support their interpretation of the law.

Therefore, the Court concluded that the Applicant had not substantiated its allegation of a violation of its right to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

Therefore, the Court found that the Applicant had neither submitted any *prima facie* evidence nor substantiated its allegations whereby it would have demonstrated how and why the Appellate Panel had violated its right to property, as guaranteed by this provision.

Consequently, the Referral was manifestly ill-founded within the meaning of the constitutional provisions and had to be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 46/17

Applicant

Privatization Agency of Kosovo

Constitutional review of Judgment AC-I.-16-0084 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 14 December 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 Privatization Agency of Kosovo (hereinafter: the Applicant). In the proceedings before the Constitutional Court the Applicant is represented by Agron Kajtazi, Acting Head of Litigation Unit of the Legal Department of the Applicant.

Challenged decision

2. The Applicant challenges Judgment AC-I.-16-0084 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel) of 14 December 2015, in conjunction with Judgment C-I.-16-0001 of the Specialized Panel of the Special Chamber of the Supreme Court (hereinafter: the Specialized Panel), of 30 March 2016. The decision of the Appellate Panel was served on the Applicant on 15 December 2016.

Subject matter

3. The subject matter is the constitutional review of the abovementioned Judgment of the Appellate Panel, which, allegedly violated the Applicant's rights and freedoms guaranteed by Article 46 [Protection of Property] and Article 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter Constitution).

Legal basis

4. The Referral is based on Article 113 (7) and 116 (2) of the Constitution, Articles 22, 27 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo

(hereinafter: the Law) and Rules 29 and 54 of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 14 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 19 April 2017, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

7. On 27 April 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Special Chamber).

8. On 07 September 2017, the Review Panel considered the report of the Judge Rapporteur and made a unanimous recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. It appears from the file that, in 1973, a Socially-Owned Enterprise (hereinafter: SOE) called "Sanitas", based in Montenegro, established a subsidiary company located in Peja, Kosovo.

10. On 29 December 1995, according to the registration in the Commercial Court of Podgorica, Montenegro, based on the legislation of Montenegro, the SOE "Sanitas" was transformed into a Joint Stock Company (hereinafter JSC) called "Unifarm", and the subsidiary company located in Peja, Kosovo, was included in that transformation.

11. On 2 February 2010, the company "Unifarm-Peja" requested the Applicant to confirm the status of this company as a private company.

12. The Applicant established a Review Commission to report on this Status Determination Request (SDR). The Review Commission's report concluded that the company "Unifarm-Peja" had not been transformed into a JSC but was an SOE under Kosovo law and that, therefore, under article 5.1 of Law no. 04/L-034 on the Privatization Agency of Kosovo, the Applicant was authorized to administer the company "Unifarm-Peja" and its assets.

13. On 31 October 2013, the Applicant's Board adopted the report of the Review Commission on the SDR.

14. On 21 or 25 November 2013, the Applicant informed the company "Unifarm-Peja" about its decision that the company was an SOE under administration of the Applicant.

15. In July 2014, the Applicant informed the company "Unifarm-Peja" that it would proceed to liquidate the company.

16. The company submitted a claim to the Special Chamber against the Applicant's decision to liquidate. The company also sought an injunction against the liquidation. The injunction was granted by the Specialized Panel and confirmed by the Appellate Panel.

17. On 30 March 2016, the Specialized Panel (C-I.-16-0001) approved the claim and declared that, *"The decision of the [Applicant] to place the claimant under its administration is in breach of the law and affects the legal interest of the claimant, which is sufficient to nullify that decision."*

18. The Specialized Panel reasoned that,

> *"According to the allegations of the Claimant, that in essence have remained uncontested and are also in line with the findings of the Court, the SOE Unifarm in Peja with its assets, has been transformed, by privatization, to a joint stock company in the end of 1995. This has formally concluded a privatization procedure governed by the law of Montenegro. The natural consequence of this transformation would be that Unifarm Peja would no longer be an SOE, But retroactively, in 2002, UNMIK-regulation no, 2002/12 limits this by its article 5.3, which reads:*
>
> > *5.3 A subsequent transformation of an Enterprise into a different business organization form shall affect its status as a Socially-owned Enterprise only if such transformation either occurred before 22 March 1989 or, if it occurred thereafter, was:*
> >
> > *(a) Based on Applicable Law; and*
> >
> > *(b) Implemented in a non-discriminatory manner.*
>
> *The transformation in Montenegro occurred after 22.03.1989, Hence the transformation affected, according the aforementioned provision of 2002, the status of the company only, if it was based on the applicable Law and was implemented in a non-discriminatory manner,*
>
> *The retroactive denial of legal effects of this transformation would give rise to a number of legal issues, but those need not to be looked into, because the two conditions for acknowledgement of the transformation – firstly being based on the applicable law and secondly being implemented in a nondiscriminatory manner – are fulfilled. For the same reason it need not be discussed whether the powers of UNMIK included to override Law of Montenegro or was restricted to Law in Kosovo."*

19. On 26 April 2016, the Applicant appealed to the Appellate Panel.

20. On 14 December 2016, the Appellate Panel (AC-I.-16.0084-A001) rejected the Applicant's appeal and confirmed the decision of the Specialized Panel.

Applicant's allegations

21. The Applicant alleges that the challenged judgments violated the Applicant's rights as protected by Article 102 (3) [General Principles of the Judicial System] of the Constitution because the Appellate Panel and the Specialized Panel applied the laws of Montenegro when adjudicating the case, whereas Article 102 (3) of the Constitution obliges the courts to apply only the Constitution and the laws applicable in Kosovo.

22. The Applicant alleges that the company "Unifarm-Peja" is an SOE under the law applicable in Kosovo, and therefore comes under the exclusive administration of the Applicant, as confirmed by the decision of the Applicant's Board on 31 October 2013. The Specialized Panel and the Appellate Panel, when adjudicating the case, determined

that the SOE had been transformed in 1995 into a Joint Stock Company and used the laws that applied in Montenegro in 1995 to justify their conclusion.

23. The Applicant alleges that the transformation in 1995 of the socially-owned company "Unifarm-Peja" into a Joint Stock Company is not valid under the laws applicable in Kosovo today, and that in reaching their decisions, the Specialized Panel and the Appellate Panel applied the laws of Montenegro, in violation of Article 102 (3) of the Constitution.

24. Specifically, the Applicant alleges that,

> *"In Kosovo, in the period that the SOE claims to have been transformed into a Joint-Stock Company, in respect of transformation of property of a SOE or an asset of a SOE, the applicable law was Law No. 77/88 on Enterprises of SFRY, as amended and supplemented by Laws No. 40/89, 46/90 and 61/90 of SFRY. The Appellate Panel and the Specialized Panel did not take this fact into consideration at all, and justify their decisions with the reasoning that this transformation took place in Montenegro, at the time when Yugoslavia existed, of which Kosovo was also a part, thus the transformation of this Unit in Peja of "Unifarm" from Podgorica, was made in conformity with the laws that had legal value at the place and time in question. Furthermore, the Appellate Panel and the Specialized Panel have failed to determine whether the correct procedures were followed under the laws applicable at that time."*

25. Furthermore, the Applicant alleges that the challenged decisions violated its right to the protection of property, as guaranteed by Article 46 (1) [Protection of Property] of the Constitution, because, after 10 June 1999, the SOE no longer had a legal right to alienate socially-owned property within the territory of Kosovo, because, pursuant to UNMIK Regulation No. 2000/54, it is foreseen that UNMIK shall administer movable or immovable property which is in the territory of Kosovo, including finances, bank accounts and other properties, where UNMIK has reasonable and objective grounds to conclude that such property is socially-owned property.

26. The Applicant alleges that, under Law No. 04/L-034 on the Privatization Agency of Kosovo of 31 August 2011, the Applicant has exclusive powers to administer SOEs and their property.

27. The Applicant requests the Court to:

> I. Declare the Referral of the Applicant admissible; and
> II. Annul Judgment AC-I.-16-0084 of the Appellate Panel, of 14 December 2016, and Judgment C-I.-16-0001 of the Specialized Panel, of 30 March 2016.

28. The Applicant also requests the Court to impose Interim Measures to prevent the claimants to the SOE from alienating any property of the SOE, specifically to oblige *"Unifarm A.D. za medicisko snabdevanje sa p.o. Podgorica-Poslovna Jedinica Peć"*, to refrain from transferring parcel No. P-71611071-05092/1, Certificate No. -16 – 191313, CZ Peja, to third parties, until the Court renders a decision on this Referral.

Relevant Law

29. The work and functions of the Applicant are regulated by Law No. 04/L-034 on the Privatization Agency of Kosovo of 31 August 2011, Articles 1, 2 and 5, which provide that,

Chapter I – Legal Status, Purposes and Definitions

Article 1 Establishment and Legal Status of the Privatization Agency of Kosovo

"1. The Privatization Agency of Kosovo (hereafter the "Agency") is an independent public body that shall carry out its functions and responsibilities with full autonomy. The Agency shall possess full legal personality and in particular the capacity to enter into contracts, acquire, hold and dispose of property and have all implied powers to discharge fully the tasks and powers conferred upon it by the present Law; and to sue and be sued in its own name.

2. The Agency is the successor of the Kosovo Trust Agency (KTA) that was established and regulated by UNMIK Regulation 2002/12 "On the establishment of the Kosovo Trust Agency and all assets and liabilities of the latter shall be assets and liabilities of the Agency."

Article 2 Objective and Purposes

"1. The Agency, in accordance with the terms of the present Law, shall have the authority to administer - which shall include the authority to sell, transfer and/or liquidate - Enterprises and Assets as defined under the present Law.

2. To serve this objective, the Agency shall:

2.1. until its sale or other disposition in accordance with the present Law hold and administer each Enterprise and Asset in trust for the benefit of the relevant Owners and Creditors in accordance with the present Law and other applicable provision(s) of the Law of Kosovo.

2.2. sell, transfer or liquidate Enterprises and Assets in accordance with Articles 6, 8 and 9 of the present Law, without undue delay;

2.3. carry out, within the limits of its administrative resources, reasonable ancillary activities to preserve or enhance the value, viability and governance of Enterprises and Assets, to the extent this does not unreasonably delay the performance of the duty set out in paragraph 2.2 above;

2.4. satisfy, in the manner and to the extent provided for in the present Law, valid claims that have been timely submitted by Creditors and Owners relating to an Enterprise or Asset from the Proceeds that have been derived from the sale, transfer, liquidation or other disposition of such Enterprise or Asset; for which purpose all such funds, with the exception of Residual Funds, shall be held in trust for the benefit of the relevant Owners and Creditors and preserved by the Agency;

2.5. after the expiry of the applicable time limits for the submission of concerned Owner and Creditor claims, identify and transfer – in accordance with Article 19.3 - all Residual Funds held in trust by the Agency to the Government of Kosovo;

2.6. perform such other tasks as may be assigned to it by the present Law and other applicable provision(s) of the Law of Kosovo.

3. The present Law shall be implemented in accordance with the principles set forth in the European Convention on Human Rights and its Protocols."

Chapter II – Tasks and Powers of the Agency

Article 5 Enterprises and Assets Subject to the Administrative Authority of the Agency

"1. The Agency shall have exclusive administrative authority over:

1.1. socially-owned Enterprises, regardless of whether they underwent a Transformation;

1.2. any assets located in the territory of Kosovo, whether organized into an entity or not, which comprised socially-owned property on or after 22 March 1989, except as provided in Article 5.1, paragraph 2, below; and

1.3. all shares in Corporations and subsidiary Corporations established pursuant to the present Law; and all State Owned Interests in an Enterprise or other legal entity, regardless as to whether the Enterprise or legal entity underwent a Transformation.

2. If a regulation or Law that is in force and that was promulgated by a competent public authority in Kosovo after 10 June 1999 assigns responsibility for administering assets described in Article 5, paragraph 1.2, to another public authority, the Agency shall not have authority over such assets as of the effective date of such regulation or Law.

3. The extent of the Agency's administrative authority under 5 paragraph 1.1 shall extend to all property in the ownership or possession of an Enterprise, including property located outside of Kosovo; provided, however, that - notwithstanding its obligations set out in Article 2 paragraph 1 - with respect to such property located outside of Kosovo, the Agency is only required to exercise its authority over such property to the extent that the Agency deems such exercise reasonable, taking into account value and accessibility of such property and the limits of the Agency's administrative resources as referred to in Article 7.1. In deciding on such matters, the Agency shall take into account any relevant policies that may be adopted by the Government or Assembly of Kosovo.

4. If an Enterprise underwent a Transformation, such Transformation shall not affect the authority of the Agency under Article 5.1 or 5.2 or the rights and powers of the Agency under Articles 6, 8 and 9 unless:

4.1. the Transformation was based on and carried out in full compliance with the Law applicable to the Transformation;

4.2. all obligations connected with the Transformation, whether arising concurrently with or subsequent to the Transformation, whether imposed by Law or contract - including but not limited to obligations requiring the payment of full consideration for, and the actual issuance of, shares - have been fully performed; and

4.3. the Transformation was neither discriminatory nor in breach of the principles of the European Convention on Human Rights.

5. In exercising its rights and powers under articles 6, 8 and 9 in respect of an Enterprise that underwent a Transformation, the Agency shall be entitled to assume that the Transformation does not meet all requirements set out in paragraph 4 above, unless clear evidence is readily available to the Agency, which conclusively establishes that the Transformation meets these requirements. In such case, paragraph 6 below shall apply.

6. If, in accordance with paragraph 5 above, the Agency finds that the Transformation of an Enterprise meets all requirements set out in paragraph 4, and the Agency has not previously completed an action with respect to such Enterprise or any of its Assets under Article 6.2, the following rules shall apply:

6.1. if clear evidence is readily available to the Agency, which conclusively establishes the allocation of shareholder (or ownership) rights over such Enterprise between social capital (or ownership) and private capital (or ownership), the Agency shall cease to exercise any authority over such Enterprise other than for the purpose of exercising all shareholder (or ownership) rights arising from the social capital (ownership) portion of the total capital of the Enterprise, which shall include the right to sell such shareholder (ownership) rights; and

6.2. In the absence of such evidence, the Agency shall continue to exercise its rights and powers under articles 6, 8 and 9 and the other provisions of the present Law over such Enterprise.

7. All matters related to or arising in connection with the liquidation of an Enterprise or Corporation pursuant to the Agency's authority under Article 6, paragraph 2.1, including but not limited to the determination of the validity of any claim made by an alleged Creditor or any assertion of equity or ownership interest made by an alleged Owner and the determination of appropriate distribution of Proceeds to Creditors and Owners - shall be the responsibility of the concerned Liquidation Authority, which shall comply with the rules established by Annex 1 of the present Law. Any person filing such a claim or alleging such an interest who disagrees with the Liquidation Authority's determination affecting that claim or alleged interest shall have the right to challenge such determination at the Special Chamber by timely complying with the procedural requirements set forth in Article 37.7 of Annex 1."

Assessment of the Admissibility of the Referral

30. 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.

31. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes that,

"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."

32. The Court first considers that, pursuant to Article 21 (4) of the Constitution, which provides that *"fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable,"* the Applicant is entitled to submit a constitutional complaint, invoking fundamental rights which are valid for individuals as well as for legal persons (See, *mutatis mutandis*, Resolution of 27 January 2010, Referral KI41/09, AAB-RIINVEST University L.L.c., Pristina vs. Government of the Republic of Kosovo).

33. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

> *"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."*

34. The Court considers that the Applicant is an authorized party, has exhausted the available legal remedies and has submitted the Referral in due time.

35. However, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides that,

> *"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."*

36. In addition, the Court also refers to paragraphs (1)(d) and (2)(d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresee 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:*
> *[...]*
> *d) the Applicant does not sufficiently substantiate his claim."*

37. The Court recalls that the Applicant alleges that the challenged decisions of the Appellate Panel and the Specialized Panel violated its rights under Article 102 (3) of the Constitution.

38. The Court recalls that article 102 (3) [General Principles of the Judicial System] states that,

> *"3. Courts shall adjudicate based on the Constitution and the law."*

39. The Court recalls that Article 102 of the Constitution falls within Chapter VII [Justice System] of the Constitution. As such, the Court considers that provisions of Article 102 of the Constitution do not contain individual rights and freedoms as protected by the provisions contained in Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution. Consequently, the Court finds that Article 102 cannot be relied upon in a Referral based on Article 113.7 of the Constitution.

40. However, the Court notes that the Applicant alleges that the Specialized Panel and the Appellate Panel violated its rights due to the manner in which they adjudicated on the

case concerning the Applicant's rights and obligations with respect to the company "Unifarm-Peja."

41. Seen in this light, the Court considers that, in essence, the Applicant is complaining about a violation of its right to a fair and impartial trial in the determination of its rights and obligations. The Court recalls that the right to a fair trial is protected by Article 31 [Right to Fair and Impartial Trial] of the Constitution, and Article 6 (Right to a fair trial) of the European Convention on Human Rights (Hereinafter: the ECHR).

42. The Court recalls Article 31 (2) of the Constitution, which establishes:

> *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.*

43. The Court also recalls Article 6 (1) of the ECHR, which in its relevant parts, establishes:

> *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. […].*

44. The Court is mindful of Article 53 [Interpretation of Human Rights Provisions] of the Constitution which establishes 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."*

45. In that connection, the Court reiterates the jurisprudence of the ECtHR which held, *mutatis mutandis*, that *"its jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable."* See ECtHR case Anheuser-Busch Inc. v. Portugal, Application No. 73049/01, Judgment of 11 January 2007, para. 83.

46. The Court also recalls that *"[…] the [ECtHR] will not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness (see, mutatis mutandis, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008), in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or a denial of justice (see, mutatis mutandis, Farbers and Harlanova v. Latvia (dec.), no 57313/00 6 September 2001, and, albeit in the context of Article 1 of Protocol No. 1, Beyeler v. Italy [GC], no. 33202/96, para. 108, ECHR 2000-I)."* See ECtHR case Andjelković v. Serbia, Application No. 1401/08, Judgment of 9 April 2013, para. 24.

47. In light of the above, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of 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). 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, ECtHR case García Ruiz v. Spain, Application No. 30544/96, Judgment of 21 January 1999, para. 28.

48. The Court notes that in its Judgment, the Appellate Panel states that it did not apply the laws of Montenegro when adjudicating the Applicant's case. Instead, the Appellate Panel reasoned that,

> *"The issue in this contest is misleading because the issue at hand is not regarding the implementation of law of Montenegro in Kosovo, but for the recognition of the implementation of law of Montenegro (regarding the privatization) in Kosovo."*

49. The Applicant alleges that the Appellate Panel has erroneously applied the law because it has not merely "recognized the implementation of law of Montenegro" but has, in fact, implemented the law of Montenegro when reaching its conclusion that the transformation of "Unifarm-Peja" to a Joint Stock Company was in accordance with law.

50. The Court recalls that Article 4 of the Law No. 04/L-034 on the Privatization Agency of Kosovo of 31 August 2011, allows for the transformation of SOEs into joint stock companies that have taken place between 22 March 1989 and 10 June 1999, provided this transformation complied with a certain number of criteria.

51. In the present case, the Court notes that the Specialized Panel and the Appellate Panel concluded that the transformation of "Unifarm-Peja" that took place in 1995 did comply with the legal criteria set in the Law No. 04/L-034 on the Privatization Agency of Kosovo. Both the Specialized Panel and the Appellate Panel provided reasons to support their interpretation of the law. As such, the challenged decisions of the regular courts took account of the law as it applied to the Applicant's claims.

52. In these circumstances, the Court considers that the reasoning provided by the Specialized Panel and the Appellate Panel when deciding on the Applicant's claims are clear, comprehensive and coherent and that the proceedings before the regular courts have not been unfair or arbitrary. (See ECtHR Judgment of 30 June 2009, *Shub vs. Lithuania*, No. 17064/06).

53. Therefore, the Court concludes that the Applicant has not substantiated its allegation of a violation of its right to a fair and impartial trial as protected by Article 31 of the Constitution, and Article 6.1 of the ECHR.

54. The Court recalls that the Applicant also alleges a violation of its rights as protected by Article 46 (1) [Protection of Property] of the Constitution. The Applicant claims that, on the basis of Law no. 04/L-034, it has exclusive power to administer SOEs and their assets on the territory of Kosovo.

55. The Court recalls that Article 46 (1) of the Constitution provides that,

> *"1. The right to own property is guaranteed."*

56. The Court notes that Article 2 (1) of Law no. 04/L-034 provides the Applicant with the authorization to, "[…] *hold and administer each Enterprise and Asset in trust for the benefit of the relevant Owners and Creditors in accordance with the present Law and other applicable provision(s) of the Law of Kosovo."*

57. As such, the Court notes that the Applicant's authority extends to the administration "in trust" for the actual owners of SOEs and their assets. The Applicant has not explained how this authority is equivalent to the right of "ownership" as guaranteed by Article 46 of the Constitution.

58. Therefore, the Court finds that the Applicant has not submitted any *prima facie* evidence nor has it substantiated its allegations indicating how and why the Appellate Panel has violated its right to own property as guaranteed by this provision.

59. In conclusion, the Court considers that the Applicant has not presented facts showing that the decisions of the regular courts have in any way caused a constitutional violation of its guaranteed rights under the Constitution.

60. Consequently, the Referral is manifestly ill-founded on a constitutional basis and it should be declared inadmissible pursuant to Rule 36, paragraphs (1) (d) and (2) (d), of the Rules of Procedure.

Request for Interim Measures

61. The Court recalls that the Applicant has requested Interim Measures such that no assets of the SOE shall be alienated pending the decision of the Court on this Referral.

62. The Court recalls Rule 55 (4) (a) of the Rules of Procedure, which provides that,

> *"(4) [...] Before the Review Panel may recommend that the request for interim measures be granted, it must find that:*
>
> *(a) the party requesting interim measures has shown a prima facie case on the merits of the referral, and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral."*

63. Having found that the Referral is manifestly ill-founded on a constitutional basis, the Court rejects the request for Interim Measures.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113, paragraphs 1 and 7, of the Constitution, Article 46 of the Law, and Rules 36 (1)(d), (2)(d), and 55 (4)(a) of the Rules of Procedure, at its session held on 07 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for Interim Measures;

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	**President of the Constitutional Court**
Ivan Čukalović	Arta Rama-Hajrizi

KI16/17, Applicant: J.S.C. "Emin Duraku", constitutional review of Judgment AC-I-15-0297-A0001-A0002 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 16 September 2016

KI16/17, Resolution on inadmissibility of 4 December 2017, published on 7 December 2017

Keywords: *individual referral, constitutional review of Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, manifestly ill-founded*

The Referral is based on Article 113.7 of the Constitution, Articles 21.4 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court.

The Applicant conducted proceedings before the regular courts for the recognition of the status of a joint stock company until the decision of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo which approved the appeal of PAK and modified the decision of the Specialized Panel with the reasoning that, in the case of transformation of the company from the socially owned into the joint stock company, the criteria and legal provisions in force were not respected. The Applicant alleges that the aforementioned decision resulted in a violation of Article 31 of the Constitution of the Republic of Kosovo, in conjunction with Article 6 of the ECHR, and requests that the judgment of the Special Chamber of the Supreme Court be declared invalid and the case be remanded for retrial.

The Court notes that the Appellate Panel of the SCSC, as an essential issue, considered the transformation of the capital of the company, emphasizing that the first instance has erroneously established the substance of the disputed matter. The basic question is whether the company's capital has been lawfully transformed from socially owned to private ownership. In conclusion, the Court finds that the facts presented by the Applicant do not provide *prima facie* evidence that his rights guaranteed by the Constitution have been violated, and therefore, the Applicant's Referral on constitutional basis is to be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI16/17

Applicant

J.S.C. "Emin Duraku"

Request for constitutional review of Judgment AC-I-15-0297-A0001-A0002 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 16 September 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 the enterprise J.S.C. "Emin Duraku" Gjakova (hereinafter: the Applicant), which is represented by Bejtush Isufi, a lawyer.

Challenged decision

2. The Applicant challenges Decision No. AC-I-15-0297-A0001-A0002 (hereinafter: the challenged Decision) of the Appellate Panel of the Special Chamber of the Supreme Court (hereinafter: the Appellate Panel of SCSC), on Privatization Agency of Kosovo Related Matters (hereinafter: PAK), of 16 September 2016.

3. The challenged decision was served on the Applicant on 25 October 2016.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged decision of the Appellate Panel of SCSC, which has allegedly violated its rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 paragraph 1 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the Convention).

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 21.4 and 47 of Law No. 03/L-121 on the

Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 20 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 20 March 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.

8. On 11 April 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Special Chamber of the Supreme Court on PAK Related Matters.

9. On 21 June 2017, the Court also notified the PAK about the submission of the Referral.

10. On 24 October 2017, the Review Panel reviewed the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. On 19 August 1991, the councils of employees of limited liability companies (LLC) decided on the transformation of Business Corporations and LLC into Joint Stock Company Holding “Emin Duraku” JSC. This decision was based on Article 145 item b and Article 196 item g of the Law on Enterprises (OG of SFRY No. 77/88, 40/89).

12. On 31 December 1991, the Applicant was registered as JSC with the Commercial Court of Gjakova.

13. On 9 August 2000, the Applicant was registered with a temporary business number (80192983) at the UNMIK Registry Office.

14. On 19 November 2002, the Applicant submitted a request to the Kosovo Bar Association, the Commercial Chamber of Gjakova, by seeking professional opinion regarding the validity of the transformation of status from a socially-owned enterprise into a joint stock company conducted during 1991-1993.

15. On 22 November 2002, the Bar Association responded to the Applicant's request, claiming that the transformation of the enterprise was done in accordance with the Law on Enterprises (Official Gazette of SFRY 77/1988).

16. At the beginning of 2006, the Applicant filed a claim with the Commercial District Court in Prishtina requesting that this court orders the Business Registration Agency of Kosovo in the Ministry of Trade and Industry for registration of SOE "Emin Duraku" in the business books.

17. On 24 May 2006, the District Commercial Court in Prishtina approved the Applicant's request and ordered the Kosovo Business Registration Agency in the Ministry of Trade and Industry to register the SOE “Emin Duraku” in the business books.

18. On 13 July 2007, the Kosovo Trust Agency (KTA) (the predecessor of PAK) sent to socially owned enterprises of Gjakova a proposal for reformation of all socially-owned enterprises (SOEs), including the Applicant.

19. On 3 August 2007, the socially-owned enterprises of Gjakova sent a counter-proposal to the KTA, with some minor changes.

20. On 21 July 2008, the Applicant filed a claim with the SCSC, requesting recognition of the status of the joint stock company.

21. On 29 April 2010, the PAK Board issued a conclusion that the Applicant has the status of a Socially Owned Enterprise.

22. On 20 July 2010, the Applicant filed a request with the Review Panel of the PAK to annul the decision of the PAK Board of 29 April 2010.

23. On 10 August 2010, the Board of Directors of the Executive Branch of the Municipality of Gjakova proposed to PAK to suspend the decision on privatization of the company "Emin Duraku" in the Wave 45A pending completion of the audit procedure, as the company was not subject to the audit procedure, or until the judicial proceedings initiated by the claimant in the SCSC are completed.

24. On 28 August 2010, the Applicant filed a request with the SCSC for the imposition of interim measure to prevent the PAK from selling the property and other assets of the Applicant through the privatization wave.

25. On 7 September and 4 October, 2010, the PAK decided that the SOE "Emin Duraku" would be privatized through wave 45 A and 46 of the privatization.

26. On 13 September 2010, the Applicant again filed a request with the SCSC for the imposition of interim measure to prohibit the PAK in announcing the tender for the privatization of the Applicant's property and assets until the completion of the court proceedings.

27. On 22 September 2010, the SCSC sent a copy of the Applicant's request to the PAK to provide its response, which on 29 September 2010 filed the response.

28. On 8 October 2010, the Applicant submitted a Referral to the Constitutional Court (Referral KI99/10) and requested the constitutional review of the PAK Decision of 7 September 2010 regarding the privatization of the enterprise through wave 45A and 46. At the same time, the Applicant requested the Court to impose interim measure to prevent privatization.

29. On 2 November 2010, the SCSC (Order SCC-08-0237) upheld the Applicant's request for interim measure until the latter decides with a final decision on the case. Against this decision, the PAK filed a complaint with the Appellate Panel of the SCSC.

30. On 9 May 2011, the Applicant submitted another Referral to the Constitutional Court (Referral KI65/11) for the assessment of Order SCC-0041 of the SCSC of 27 April 2011.

31. On 19 May 2011, the Appellate Panel of the SCSC (Order ASC-10-0088) approved the PAK appeal and annulled the order of the Trial Panel of SCSC, ordering the latter to reconsider the order for interim measure.

32. On 2 March 2011, the Applicant filed a new request for interim measure to suspend the execution of the PAK decision of 9 April 2008, which changed the management of Holding Company "Emin Duraku". The Applicant's request was related to the reinstatement of the previous management and all employees to their working places.

33. On 4 March, PAK submitted a response to the request of 2 March 2011.

34. On 27 April 2011, the SCSC asked the Applicant to clarify its request and to bring additional evidence to establish the status of existence as a legal person.

35. On 16 May 2011, the Applicant submitted its response to the SCSC.

36. On 23 August 2011, the SCSC was informed that the Applicant filed a Referral with the Constitutional Court (Case KI65/11) for the assessment of the SCSC order of 27 April 2011.

37. On 28 September 2011, the SCSC rejected the Applicant's request for interim measure because it had not submitted sufficient evidence regarding its allegations.

38. On 31 October 2011, the Applicant filed an appeal with the SCSC against the decision of 28 September 2011.

39. On 23 November 2011, the Constitutional Court decided to declare the Applicant's Referral KI99/10 inadmissible on the ground of non-exhaustion of legal remedies, thus rejecting also the request for interim measure.

40. On 17 August 2012, the SCSC requested the Applicant to submit a copy of the complaint of 31 October 2011 in English.

41. On 27 September 2012, the Applicant submitted a copy of the complaint in English.

42. On 15 October 2012, PAK and UNMIK on behalf of the KTA submitted a response to the complaint.

43. On 21 January 2013, the Constitutional Court declared the Applicant's Referral KI65/11 inadmissible, due to non-exhaustion of legal remedies.

44. On 15 December 2015, the Specialized Panel of the SCSC, by Decision SCC-08-0237, approved the Applicant's statement of claim, recognizing the status of the joint stock company.

45. On 30 December 2015, the PAK filed an appeal with the Appellate Panel against the Decision of the Specialized Panel on the grounds that the Judgment was rendered in violation of the provisions of the Law on Contested Procedure.

46. On 16 September 2016, the Appellate Panel of the SCSC (Decision AC-I-15-0297-A0001-A0002) approved the PAK appeal and modified the Decision of the Specialized Panel which approved the Applicant's statement of claim. Furthermore, the Appellate Panel of the SCSC concluded that when transforming the enterprise from the socially owned company into a joint stock company, the criteria and legal provisions in force were not respected.

Applicant's allegations

47. The Applicant alleges that: *In the present case, Decision Fi 4346/91 of the Commercial Court in Gjakova, of 31 December 1991, is res judicata, and this fact has been confirmed also by the first instance of the Special Chamber of the Supreme Court of Kosovo. By this Decision, the enterprise was given the status of a joint-stock company. However, in contradiction with this final Decision, the second instance of the Special*

Chamber has rendered a Judgment by which it rejects the request for recognition of the aforementioned status, which had been previously recognized by the Commercial Court. Due to this reason, the Special Chamber of the Supreme Court of Kosovo has committed a violation of Article 31 of the Constitution of the Republic of Kosovo, as well as Article 6 of ECHR."

48. Moreover, the Applicant in relation to its allegation of violation of constitutional rights refers to the Judgment of the Constitutional Court in case KI51/11 of 19 June 2012 and claims that the case in question should be applied in the same way in the present case.

49. In addition, the Applicant requests the Court to: *I. The Referral is declared admissible. II. To hold that there has been a violation of Article 31 of the Constitution of Kosovo, in conjunction with Article 6 of ECHR, ... To declare invalid Judgment AC-I-15-0297-A0001-A0002 of the Special Chamber of the Supreme Court of Kosovo, and the case is remanded for retrial.*

Admissibility of Referral

50. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and as further specified in the Law and the Rules of Procedure.

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

> *"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."*

52. The Court also refers to Article 21 paragraph 4 [General Principles] of the Constitution, which provides:

> *"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."*

53. The Applicant must also prove that the Referral was filed with the Court in accordance with Article 49 of the Law, which provides that:

> *"The referral should be submitted within a period of four (4) months (...)."*

54. The Court further assesses the criteria required by Article 48 of the Law, which establishes:

> *"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."*

55. Based on the provisions above, the Court notes that the Applicant acts in a capacity of a legal entity and is authorized party in accordance with Article 113.7 of the Constitution, has exhausted all available legal remedies, has filed the Referral in accordance with the time limits stipulated by Article 49 of the Law, has accurately stated the articles of the Constitution, which have allegedly violated its rights, and the public authority as a violator of its constitutional rights.

56. In addition, the Court also takes into account Rule 36 (1) (d) and 36 (2) (b) and (3) (g) of the Rules of Procedure, which provide:

> *"(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."*

57. In this case, the Court notes that the Applicant alleges that the Appellate Panel of the SCSC, by its decision, amended the decision of the Special Chamber of the SCSC, confirming that Decision Fi 4346/91 of the Commercial Court of Gjakova, of 31 December 1991, was *res judicata*, thus violating Article 31 of the Constitution and Article 6 of the Convention.

58. The Court notes that the Appellate Panel of the SCSC as a substantive issue had dealt with the transformation of the company's capital, underlining the fact that: "*First instance has erroneously determined the essence of contested matter. The issue at stake is not only and simply transformation into structure and registration of the SOE. The underlying question is if capital of the company has been lawfully transformed from social into private ownership".*

59. The Court notes that the sole argument of the Applicant in this case is that the Appellate Panel of the SCSC did not recognize the decision of the District Commercial Court in Gjakova, whereby the Applicant was registered as a joint stock company.

60. With regard to this allegation, the Court notes that the Appellate Panel of the SCSC, arguing the allegation of the Applicant as to whether the decision Commercial Court 1991 to register the Enterprise had binding effect, held that: *"the court decisions on registration of Legal bodies have no binding effect and can be challenged as KTA and PAK actually did. Decision on registration does not ratify any irregularity that occurred in the transformation process regardless if the court was aware of it or not".*

61. In addition, the Appellate Panel of SCSC stated that, "*Workers Council decisions dated: I September 1990 and 19 August 1991 on transformation and subsequent court Commercial District Court in Gjakova decision no. Fi 4346/91, dated 31 December 1991 on registration of transformation shall be considered without legal effect."*

62. In this regard, the Court notes that the Appellate Panel of the SCSC concluded conclusion that "*This legal failure determines the validity of entire process of transformation of SOE "Emin Duraku" into Joint Stock Company. Transformation is a multi-stage process where validity of each step is determined also by the validity of previous steps. A substantial failure in one stage renders the whole process void even if no other failures have taken place."*

63. In this context, the Court notes that the Applicant merely disagreed with the conclusions of the Appellate Panel of the SCSC that the decisions of the Workers' Council and the decision of the Commercial District Court in Gjakova of 31 December 1991 did not produce any legal effect.

64. In the present case, the Court notes that the Appellate Panel of the SCSC in its Judgment addressed all essential issues relating to the Applicant's allegations. The conclusions of the Appellate Panel of the SCSC were reached after a detailed examination of all arguments submitted by the Applicant and the PAK. In this way, the Applicant was given the opportunity to present at all stages of the proceedings arguments and evidence which he considered relevant to the case.

65. In addition, the Court reiterates that it is not the task of the Constitutional Court to deal with errors of fact or the law (legality) allegedly committed by the regular courts unless they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law *(see, mutatis mutandis,* ECtHR case *Garcia Ruiz v. Spain,* no. 30544/96*,* Judgment of 21 January 1999, para. 28).

66. Complete determination of factual situation and correct application of the law is in the jurisdiction of the regular courts (issue of legality). Therefore, the Constitutional Court cannot act as a fourth instance court (See ECtHR 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).

67. The Court further considers that all the arguments of the procedural parties that were relevant to the resolution of the dispute were heard, carefully examined and reasoned by the Appellate Panel of the SCSC. Therefore, viewed in its entirety, the Court finds that the proceedings conducted with the Appellate Panel were correct in the constitutionally aspect (see *mutatis mutandis*, ECHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, paragraphs 29 and 30).

68. With regard to the Applicant's allegation that in identical circumstances such as these, the Court must apply its Judgment in case KI51/11, the Court considers that the circumstances of this case are completely different, both in terms of procedure and substance. This is because in that case the matter was adjudicated in substance, according to the contested procedure by the Municipal Court in Kamenica, which decision became final on 10 June 2009, after being upheld by the Supreme Court. However, in the execution procedure the execution of the final decision of the Municipal Court of Kamenica was suspended by the District Court in Gjilan, due to the filing of a new lawsuit for the dismissal of the servitude of the Applicant. Concerning the suspension of the execution of the final decision, the Court found that there was no reason for not enforcing the *res judicata* decision, as the second instance court acted.

69. In conclusion, the Court finds that the facts presented by the Applicant do not provide *prima facie* evidence that the rights guaranteed by the Constitution have been violated.

70. Therefore, the Applicant's Referral, on a constitutional basis, is to be declared inadmissible pursuant to Article 48 of the Law and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 36 (1) (d) and (2) (b) and 56 (2) of the Rules of Procedure, on 4 December 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**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI128/16, Applicant Vadet Morina, Constitutional Review of Judgment PML 136/16 of the Supreme Court of Kosovo of 22 August 2016

KI128/16, Decision on Inadmissibility of 20 November 2017, published on 15 December 2017

Key words: Individual Referral, criminal procedure, summarily procedure

The Applicant submitted a Referral with the Court, whereby requested the constitutional review of Judgment PML. 136/16, of the Supreme Court of Kosovo of 22 August 2016. He alleged violations of Articles 21, 31 and 53 of the Constitution. The Applicant, beside the letter sent by post-mail, describing the legal matter and being in capacity of the accused party, he did not submit to the Court any of the contested court decisions. The Court through the official communication requested from the Applicant to complete the Referral but, within the legal time limit, did not receive any additional documents from the Applicant.

The Court considers that it cannot take into account the allegations of the Applicant without documents and without any supporting material evidence, therefore in compliance with Article 22.4 of the Law and Rules 29 (2) (h) and 32 (5) of the Rules of Procedure, found that the Referral did not meet the procedural requirements for further consideration due to non-completion with supporting documents and declared the Referral inadmissible by summarily rejecting it.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI128/16

Applicant

Vadet Morina

Constitutional review of Judgment PML 136/16 of the Supreme Court of Kosovo, of 22 August 2016

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 Vadet Morina from the Municipality of Rahovec (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment PML 136/16, of the Supreme Court of Kosovo, of 22 August 2016, in conjunction with Judgment PAKR. No. 21/16 of the Court of Appeal of Kosovo, DSC in Pristina, of 18 February 2016, and Judgment P. No. 119/14 of the Basic Court, DSC in Prizren, of 20 October 2015.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decisions, which have allegedly violated the rights guaranteed by Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions].

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 8 November 2016, the Applicant submitted through mail service the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 December 2016, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Bekim Sejdiu.

7. On 2 March 2017, the Court notified the Applicant about the registration of the Referral and requested him to complete the Referral with relevant documentation. The Court, within the deadline, did not receive any documents requested from the Applicant.

8. On 2 June 2017, the Review Panel considered the report of the Judge Rapporteur, and recommended to the Court the inadmissibility.

Summary of facts

9. The Applicant merely mentions textually the challenged decisions, which have allegedly violated the rights guaranteed by the Constitution. However, the decisions mentioned by the Applicant were not attached to the Referral.

Applicant's allegations

10. The Applicant alleges:

> *"I've never committed a murder. No way. At one point, of a psychic violence and of a spiritual crisis I admitted, but I categorically revoked and denied it."*

Admissibility of the Referral

11. The Court first examines whether the Applicant has met the admissibility requirements, established in the Constitution the Law and the Rules of Procedure.

12. In this respect, the Court refers to the following provisions of the Law*:*

> *Article 22.4 [Processing Referrals]*
>
> *"4. If the referral ... is...incomplete, the Judge Rapporteur informs the relevant parties or participants and sets a deadline of not more than fifteen (15) days for ... supplementing the respective referral (...)".*

13. In addition, the Court refers to Rule 29 (2) [Filing of Referrals and Replies] and Rule 32 (5) [Withdrawal, Dismissal and Rejection of Referrals] of the Rules of Procedure, which provides::

> *29 (2) "The referral shall also include:*
> *[...]*
> *(h) the supporting documentation and information.*
> *[...]"*
>
> *32 (5) "The Court may summarily reject a referral if the referral is incomplete or not clearly stated despite requests by the Court to the party to supplement or clarify the referral (...)".*

14. In connection with the foregoing, the Court finds that the Applicant filed a Referral under Article 113.7 of the Constitution in a capacity of the individual but has not clarified and completed the Referral in accordance with the criterion of Rule 29 of the Rules of Procedure. Thus, the requirements for assessing the merits of the case have not been fulfilled.

15. The Court recalls that the Applicant alleges that the regular courts violated his rights guaranteed by the Constitution and international conventions, for the reasons mentioned above.

16. Pursuant to Article 22.4 of the Law, the Court requested the Applicant to submit the challenged decision and other decisions of the regular courts.

17. However, the Court did not receive any additional documents and hard copies of the challenged decisions of the regular courts, which constitutionality the Court could assess only after the criteria required by the Constitution, the Law and the Rules of Procedure are met.

18. The Court considers that it cannot take into account the Applicant's allegations without the supporting documents and material evidence, in accordance with Article 22.4 of the Law and Rules 29 (2) (h) and 32 (5) of the Rules of Procedure. (see decision of the Constitutional Court in case KI03/15, *Applicant Hasan Beqiri*, of 13 May 2015, paragraphs 14, 15, 17, 19, 20 and 21).

19. In sum, the Court considers that the Applicant's Referral does not meet the procedural requirements for further consideration due to non-completion of his Referral with the supporting documents, as required by Article 22.4 of the Law and Rules 29 (2) (h) and 32 (5) of the Rules of Procedure.

20. Therefore, the Court concludes that Referral is to be summarily rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 47 of the Law, and Rules 32 (5) and 55 (4) of the Rules of Procedure, in the session held on 2 June 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 Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI58/17, Applicant: Ukë Muçaj, who request the constitutional review of Judgment Pml. no. 326/2016 of the Supreme Court of Kosovo, of 23 January 2017.

KI58/17, Resolution on inadmissibility of 24 October 2017, published on 15 December 2017

Key words: Individual referral, constitutional review of the Judgment of the Supreme Court of Kosovo, criminal proceedings, manifestly ill-founded

The Applicant submitted his Referral based on Article 113.7 of the Constitution, Article 47 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Criminal proceedings for the criminal offense of "Accepting bribe" and "Trading in influence" had been conducted before the ordinary courts against the Applicant.

The said criminal proceedings against the Applicant were concluded by a judgment of the Supreme Court, which rejected the request for protection of legality as ungrounded and upheld the judgment of the first- and second-instance courts whereby the Applicant had been found guilty.

The Applicant alleged that the Decision of the Supreme Court led to the violation of his right to fair and impartial trial, guaranteed by ECHR, and his right not to be tried twice for the same criminal offence.

The Applicant requested the Court to hold the violations stated in the referral, quash the judgment of the Basic Court, hence the one of the Court of Appeals and Supreme Court as well, and remand the case for retrial in accordance with the assessment of the violations found.

The Court reiterated that the burden to support facts and arguments concerning the alleged violation of the constitution falls on the Applicant. Without this contribution, the Court cannot conclude whether the Supreme Court or regular courts acted in an unfair or unreasonable manner in establishing the facts or interpreting and applying the law.

The Court considered that the Applicant failed to substantiate by either factual evidence or necessary reasons his allegation that Articles 31 and 34 of the Constitution and Article 6 of Protocol no. 7 to ECHR had been violated.

Therefore, the Court concluded that the reasoning provided by the Court of Appeals and the Supreme Court, when deciding on the Applicant's appeals, had been extensive and comprehensive, and that the proceedings conducted before the regular courts had not been unfair or arbitrary.

Based on the foregoing, the Court decided that the Referral was manifestly ill-founded because the Applicant had not substantiated his claims concerning the alleged violation of the Constitution, thereby declaring it inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI58/17

Applicant

Ukë Muçaj

Constitutional review of
Judgment Pml. No. 326/2016 of the Supreme Court
of 23 January 2017

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 Ukë Muçaj from Peja (hereinafter, the Applicant), who is represented by Florent Latifaj, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the Judgment Pml. No. 326/2016 of the Supreme Court of 23 January 2017, which rejected as ungrounded the Applicant's request for protection of legality.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 34 (Right not to be Tried Twice for the Same Criminal Act) of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), and Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter, the ECHR).

Legal basis

4. The Referral is based on Article 113 (7) of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 22 May 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

6. On 22 May 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Ivan Čukalović (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

7. On 13 June 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 24 October 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 23 March 2009, the District Public Prosecutor in Mitrovica (hereinafter, the Prosecutor) filed with the Municipal Court in Prishtina an indictment against the Applicant due to reasonable suspicion of having committed the criminal offense of accepting bribes.

10. On 24 April 2009, the Municipal Court held a session to confirm the indictment; however, the session was adjourned due to the request of the Applicant's lawyer that the case be taken over by EULEX international judges.

11. On 8 May 2009, the Applicant's case was transferred to the jurisdiction of EULEX international judges and, on 17 November 2009, the then Municipal Court rejected the indictment against the Applicant on all counts.

12. On 18 December 2009, the District Prosecutor filed an appeal against this decision with the District Court, which quashed the Municipal Court's decision and remanded the case to the Prosecutor for reconsideration.

13. On 25 May 2010, the Pre-Trial Judge at the District Court approved the continuation of the investigation for a period of 6 months. The Applicant filed with the then District Court an appeal against that decision.

14. The District Court approved the Applicant's appeal and quashed the decision of 25 May 2010, because the decision was rendered by a Pre-Trial Judge of the District Court who did not have subject-matter jurisdiction. The District Court remanded the case to the Municipal Court for reconsideration.

15. On 30 August 2010, the Municipal Court approved the continuation of the investigation for a period of one month, to be conducted by the Municipal Prosecutor of Prishtina.

16. On 4 November 2010, the Municipal Prosecutor filed a new indictment against the Applicant for the criminal offense of accepting bribes. On 20 January 2011, the Municipal Court confirmed the new indictment.

17. On 18 January 2012, the then Municipal Court [Judgment P. No. 2668/11] found the Applicant guilty of the criminal offense of accepting bribes, as well as the criminal offense of trading in influence, sentenced him to imprisonment and prohibited him from exercising any public administration or public service functions for a period of

three years. The Applicant filed with the Court of Appeals an appeal against that Judgment of the Municipal Court.

18. On 27 March 2013, the Court of Appeals [PaKr. 87/13] upheld the Applicant's appeal, annulled the judgment of the Municipal Court and remanded the proceedings to the Basic Court for retrial.

19. On 26 May 2015, the Basic Court [P. No. 1462/14] found the Applicant guilty of the criminal offense of accepting bribes and sentenced him to imprisonment.

20. The Applicant filed with the Court of Appeals an appeal against that Judgment, claiming essential violations of the provisions of the criminal procedure, erroneous and incomplete determination of the factual situation, and violation of the criminal procedure and the decision on criminal sanctions.

21. On 18 April 2016, the Court of Appeals [PAKR 412/15] partially approved the Applicant's appeal in relation to the imposition of a more lenient sentence, whereas the remaining part of the challenged judgment was upheld in its entirety.

22. The Applicant filed with the Supreme Court a request for protection of legality against that Judgment of the Court of Appeals, "*on the grounds of essential violation of the provisions of the criminal procedure, other violations of the provisions of the criminal procedure that affected the legality of the court decisions".*

23. On 23 January 2017, the Supreme Court [Pml. No. 326/2016] rejected as ungrounded the Applicant's request for protection of legality.

Applicant's allegations

24. The Applicant claims that the challenged decision violated his right to a fair and impartial trial and his right not to be tried twice for the same crime.

25. The Applicant alleges that the evidence presented at trial included statements given by witnesses to the police. Those statements were inadmissible because the defense was not present when those statements were given and had not received them prior to the trial. The Applicant also alleges that the entire trial did not take place within a reasonable time because the investigation was continued after the rejection of the first indictment.

26. Furthermore, the Applicant alleges that *"remanding the case to the investigative procedure constitutes an essential violation of human rights and a violation of the principle known as res judicata, and therefore also a violation of Article 34 of the Constitution of Kosovo*".

27. The Applicant requests the Court *"to hold violations stated in the Referral, to quash the judgment of the Basic Court, accordingly, of the Court of Appeals and of the Supreme Court, and the case to be remanded for retrial in accordance with the assessment of the violations found".*

Admissibility of the Referral

28. The Court first examines whether the Applicant fulfilled the admissibility requirements established by the Constitution, and as further provided by the Law and foreseen by the Rules of Procedure.

29. In this respect, the Court refers to §§ 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.*

30. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

> *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.*

31. In that connection, the Court notes that the Applicant is an authorized party referring that a Judgment of the Supreme Court allegedly violated his constitutional rights, has exhausted all legal remedies available to him and filed his Referral within the four (4) months legal deadline.

32. However, the Court also refers to Article 48 [Accuracy of the Referral] 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.*

33. In addition, the Court refers to §§ (1)(d) and (2)(d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresee:

> *(1) The Court may consider a referral if:*
>
> *[...]*
>
> *(d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
>
> *[...]*
>
> *(d) the Applicant does not sufficiently substantiate his claim.*

34. In that connection, the Court considers that the Applicant has not proved and substantiated his allegations on violation of his constitutional rights, as required by Article 48 of the Law and Rule 36 (2) (c) and (d) of the Rules of Procedure, and as it will be explained hereunder.

35. The Court recalls that the Applicant claims that the challenged decision of the Supreme Court violated his (i) right to a fair and impartial trial as protected by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights (hereinafter, the ECHR), and (ii) his right not to be tried twice for the same crime.

(i) Alleged violation of the right to a fair and impartial trial

36. The Court refers to Article 31 of the Constitution and Article 6 of the ECHR.

Article 31 [Right to Fair and Impartial Trial]

[…]

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.

Article 6 [Right to a fair trial]

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. […]".

37. At the outset, the Court reiterates 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" (*Article 53 of the Constitution).

38. The Court recalls that the Applicant claims that *"constitutional violations have been committed through the essential violations of the procedural law and the substantive law",* namely arguing that *"through violations resulting from the material and procedural law, has directly resulted in violation of judicial decisions that are contested here by constitutional violation of the rights guaranteed by the Constitution".*

39. The Applicant specifically claims that the courts relied upon statements given by witnesses to the police and/or the prosecutor during the investigation and that he was denied the opportunity to challenge these witness statements. In addition, the Applicant alleges that the criminal proceedings against him violated his right to a trial within a reasonable time, because the Pre-trial Judge authorized the continuation of the investigation after the indictment based upon the original investigation had been quashed.

40. The Court notes that these allegations and arguments were already the grounds on which the Applicant filed his appeal with the Court of Appeals and the request for protection of legality with the Supreme Court.

41. Furthermore, the Court notes that the Judgments of the Court of Appeals and the Supreme Court both thoroughly examined and assessed the reasoning of the Judgment of the Basic Court and reasonably found it to be clear, comprehensive and coherent.

42. In fact, the Court recalls that the Applicant appealed the judgment of the Basic Court on the grounds of *"substantial violation of the provisions of criminal procedure; erroneous or incomplete determination of the factual situation; violation of the criminal law; and decision on criminal sanctions".*

43. The Court also recalls that the Court of Appeals partially granted the Applicant´s appeal and modified the judgment of the Basic Court, in relation to the sentence of imprisonment.

44. The Court notes that the Court of Appeals preliminarily examined the issues of applicable law in the case (procedural and substantive law), the competence of the

courts, the assignment of a EULEX prosecutor to the case and the admissibility of the appeal.

45. Following these preliminary issues, the Court of Appeals thoroughly examined the Applicant's appeal submissions.

46. In fact, the Court of Appeals considered the ground of appeal on substantial violation of the provisions of criminal procedure, namely the reasoning and comprehensibility of the impugned judgment. After detailed analysis, the Court of Appeals refused the appeal as unfounded.

47. The Court of Appeals also analyzed in detail the evidence administered during the main trial, including the examination page by page of the witnesses' statements. The Court of Appeals considered that the Basic Court completely and correctly established the factual situation and that the arguments raised in the appeals do not undermine these findings. Thus the Court of Appeals refused as unfounded that ground of the appeal.

48. The Court of Appeals also examined the decision on criminal sanction and found adequate and proportional the imprisonment of one year, to be suspended for the time period of two years.

49. The Court of Appeals *"carefully assessed the thorough and detailed analysis of the evidence (...) and found no contradictions in the stance of the Basic Court."* The Court of Appeals was "*fully convinced by the conclusions and reasoning of the Basic Court"*.

50. The Court also recalls that the Applicant requested for protection of legality on the grounds of *"essential violation of the provisions of the criminal procedure, other violations of the provisions of the criminal procedure that affected the legality of the court decisions"*.

51. The Court observes that the Supreme Court noted that *"the judgment of the court of the second instance has provided answers to all allegations made in the request for protection of legality; therefore there is no need to reiterate the aforementioned"*. The Supreme Court considered that *"the legal qualification of the criminal offence as well as the acquisition of the material benefit is an outcome of the correct and lawful evidence found in the case files of this matter, as well as the legal stance taken by the courts of the first and second instances as expressed in the impugned judgments are also approved by this court"*. The Supreme Court concluded that "*the legal provisions of the substantive law have been applied correctly"*.

52. The Court notes that the Supreme Court reviewed the evidence pertaining to the circumstances of the commission of the criminal offense and assessed the Applicant´s allegations presented in the request for protection of legality.

53. The Supreme Court noted that the Applicant was *"reiterating his formerly submitted appeal filed against the judgment of the court of the first instance"* and considered that *"the judgment of the court of the second instance has provided answers to all allegations made in the request for protection of legality"*.

54. Accordingly, the Supreme Court further considered that *"the legal qualification (designation) of the criminal offence as well as confiscation of the material benefit is an outcome of the correct and lawful evidence found in the case files of this criminal matter"*.

55. The Supreme Court also approved *"the legal stance taken by the courts of the first and second instances as expressed in the impugned judgments [...]. In other words, the legal provisions of the substantive law have been applied properly"*. Consequently, the Supreme Court found that *"conclusions reached by the first and second instance courts are correct"*.

56. Moreover, the Court, similarly as to the Supreme Court, notes that the Applicant is "*reiterating his formerly submitted appeal filed against the judgment of the court of the first instance"* and of the Court of Appeals, and he is repeating the same allegations before the Constitutional Court. However, even though colored by a constitutional appearance, these allegations pertain in substance to the domain of legality and as such do not fall under the jurisdiction of the Constitutional Court.

57. In that respect, the Court reminds that the mere reference to one or more provisions of the Constitution, alleging that they have been violated, does not constitute sufficient ground to lead the Court to assess whether there has been a violation of the Constitution or of the ECHR.

58. In fact, the Court considers that the allegations brought before the Court are related with errors of facts and law allegedly committed not only by the Supreme Court but also by the Court of Appeals and the Basic Court. The arguments made by the Applicant before the Constitutional Court are the same in substance as the ones presented before the Supreme Court. It appears that the Applicant is coming before the Constitutional Court as it would be a "fourth instance" court.

59. In that connection, the Court recalls that the European Court on Human Rights (hereinafter, the ECtHR) held that *"[...] it is not the [ECtHR's] function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see ECtHR Judgment of 12 July 1988, Schenk v. Switzerland, No. 10862/84, paras. 45-46). It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair"*. (See ECtHR case *Khan v. United Kingdom,* Application No. 35394/97, Judgment of 12 May 2000, § 34).

60. The Court emphasizes that, as a general rule, the establishment of the facts and the interpretation and application of law is a matter solely for the regular courts whose findings and conclusions in this regard are binding on the Constitutional Court. However, where a decision of a regular court is clearly arbitrary, the Court can and must call it into question. (See Constitutional Court case No. KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility, 17 August 2016, § 40).

61. Moreover, the Court reiterates that it is not its task to deal with errors of law allegedly committed by a regular court (legality), unless and in so far as such errors may have infringed rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which have 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. (See ECtHR case *García Ruiz v. Spain*, Application no. 30544/96, 21 January 1999, § 28; and Constitutional Court case No. KI63/16, *Ibidem*, §45).

62. Thus it is not up to the Court to speculate as to the establishment of the facts, the interpretation and application of the criminal and criminal procedural law by the Supreme Court and by the other courts during the course of the criminal proceedings.

63. On the contrary, the Court reiterates that it is up to the Applicant to substantiate with facts and arguments his alleged constitutional violation. Without that contribution the Court cannot conclude that the Supreme Court or the regular courts acted in an unfair or unreasonable manner in establishing the facts, or interpreting and applying the law. That consideration is also in conformity with the jurisprudence of the ECtHR and of the Court. (See the ECtHR case of *Alimuçaj v. Albania,* Application No. 20134/05, Judgment of 7 February 2012, § 176: see also Constitutional Court cases No. KI19/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, 5 December 2013).

64. Moreover, it is up to the Applicant to state the violation of his constitutional rights and to indicate which Articles of the Constitution have been breached; to describe the circumstances of the violation related to the challenged act or decision; to specify how and why they were violated; to present relevant and pertinent evidence on how and why the violation was committed; to define the nature of the violation and to explain the constitutional implications of the violation; to substantiate with valid and compelling arguments that the actions of the public authority are contrary to the constitutional norms.

65. The Court recalls that the Applicant claimed that *"constitutional violations have been committed through the essential violations of the procedural law and the substantive law"*. However, the Court reiterates that it is the master of the legal characterization to be given to the facts of the case and it does not consider itself bound by the characterization given by the Applicant or other parties in the proceedings. (See, the ECtHR case *Guerra and Others v. Italy,* Application No. 116/1996/735/932, Judgment of 19 February 1998, § 44).

66. In addition, the Court notes that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle; he was able to adduce the arguments and to submit the arguments he considered relevant to his case at the various stages of those proceedings; he was given the opportunity to challenge effectively the arguments and evidence presented by the prosecutor; all the arguments relevant for the resolution of his case were heard and reviewed by the regular courts; the factual and legal reasons against the challenged judgments were examined in detail by the regular courts. Accordingly, the decision-making process resulting in the challenged judgment was fair and was not arbitrary.

67. More specifically, the Court notes that the Applicant had opportunity to question the witnesses at the main trial. The trial court used the witness statements given in the pre-trial phase of the investigation to test the credibility of the witnesses. The Applicant had the opportunity to challenge the interpretation of the witnesses' credibility. The courts reasoned their decision that the statements given to police by two of the witnesses were credible and the statements given by these two witnesses at the trial were not, because only the statements given to police matched with the evidence given by the third witness at the trial.

68. In addition, the Court reiterates that "*the assessment of evidence is a matter for the domestic courts and that the Court shall not substitute its own view of the facts for an assessment which has been reached in the course of domestic proceedings. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts*

(see Dombo Beheer B.V. v. the Netherlands, 27 October 1993, § 31, Series A no. 274)". (See ECtHR case *Trofimchuk v. Ukraine,* Application No. 4241/03*,* Judgment of 28 October 2010, §50).

69. Moreover, the Court considers that the Applicant has not substantiated, neither with the necessary factual evidence nor with legal arguments, the allegation that the invoked provisions of the Constitution and of the ECHR have been violated. In sum, the Applicant has not showed that the proceedings viewed in their entirety were unfair or arbitrary. (See the ECtHR case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, § 29; and, *mutatis mutandis,* Constitutional Court case No. KI42/16, Applicant *Valdet Sutaj*, Resolution on Inadmissibility, of 7 November 2016, § 40).

70. In this respect, the Court reiterates that the requirement of "fairness" as guaranteed by Article 31 of the Constitution, in connection with Article 6 of the ECHR, covers proceedings as a whole, and the question whether a person has had a "fair" trial is looked at by way of a cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage. (See ECtHR case *Monnell and Morris v. the United Kingdom*, Application No. 9562/81; 9818/82, Judgment 2 March 1987, §§ 55-70).

71. Furthermore, the Court recalls that the "fairness" required by Article 31 of the Constitution, similarly as to Article 6 of the ECHR, is not a "substantive" fairness, but rather a "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court. (See ECtHR case *Star Cate – Epilekta Gevmata and Others v. Greece,* Application No. 54111/07, Decision of 6 July 2010).

72. Thus, the Court concludes that the reasoning provided by the Court of Appeals and the Supreme Court, when deciding on the Applicant's appeals, is extensive and comprehensive, and the proceedings before the regular courts have not been unfair or arbitrary. (See ECtHR case *Shub vs. Lithuania*, Application No. 17064/06, Judgment of 30 June 2009).

73. Therefore, the Court finds that the Applicant has not substantiated with facts and arguments his allegation that the Supreme Court has violated his right to a fair and impartial trial as guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

(ii) Alleged violation of the right not to be tried twice for the same crime

74. The Court recalls that the Applicant also claims a violation of his right not to be tried twice for the same crime, as guaranteed by Article 34 of the Constitution, because the decision to prosecute him has been based on the same facts as the earlier decision not to prosecute him.

75. The Court refers to Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution which establishes:

> *No one shall be tried more than once for the same criminal act.*

76. The Court also refers to Article 4 (1) of Protocol No. 7 to the ECHR, which establishes:

> *1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been*

finally acquitted or convicted in accordance with the law and penal procedure of that State.

77. The Court recalls that, with respect to this principle, as contained in Article 4 of Protocol 7 to the ECHR, the ECtHR held that *"a decision is final 'if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'".* (See ECtHR case *Ulf Sundqvist v. Finland*, Application No. 75602/01, Decision as to Admissibility, 22 November 2005).

78. In accordance with this reasoning, the Court considers that Article 34 of the Constitution, as Article 4 (1) of Protocol No. 7, requires a final decision on a criminal charge following full criminal trial proceedings before any new criminal proceedings can be considered to come within the scope of Article 34.

79. The Court recalls that the then Municipal Court (Judgment P. No. 2668/11) on 18 January 2012 found the Applicant guilty of the criminal offense of accepting bribes. The Applicant did not prove that he has been found guilty of having committed the same criminal offense prior to his conviction of 18 January 2012.

80. The Court considers that the wording "*more than once" (*Article 34 of the Constitution) and "*again"* (Article 4 of Protocol No. 7) means a trial and punishment *more than once* and *again* for an offence for which the Applicant has already been finally acquitted or convicted. The provision encompasses both the right not to be tried twice and the right not to be punished twice.

81. The Court also recalls that, on 17 November 2009, the Municipal Court rejected the indictment against the Applicant at the session on the confirmation of the indictment. A new indictment was filed on 4 November 2010, which was the beginning of the criminal proceedings leading up to a final decision.

82. The Court considers that a decision on rejecting the confirmation of an indictment, as such, does not constitute a final decision for the purpose of Articles 34 of the Constitution and 4 (1) of Protocol No. 7. Thus there had been no "final" decision.

83. The Court further considers that the new indictment of 4 November 2010 and the following conviction of 18 January 2012 do not amount to new proceedings falling under the sphere of Articles 34 of the Constitution and 4 (1) of Protocol No. 7. Consequently, those provisions are not applicable to the case.

84. Therefore, the Court finds that the Applicant has not substantiated with facts his allegation on that he was tried twice for the same criminal act, in violation of his right as guaranteed by Article 34 of the Constitution, in conjunction with Article 4 (1) of Protocol No. 7 to the ECHR.

Conclusion

85. The Applicant filed his Referral, alleging that the Judgment of the Supreme Court violated his rights to a fair and impartial trial and not to be tried twice for the same crime.

86. The Court considers that the Referral is manifestly ill founded, as the Applicant has neither substantiated his allegations on a constitutional basis nor has he showed that the decisions of the regular courts have in any way caused a constitutional violation of his guaranteed rights under the Constitution.

87. Thus the Referral has not met the admissibility requirements established by Article 113 (1 and 7) of the Constitution, provided by Article 48 of the Law and foreseen by Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

88. Therefore, the Court determines that the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (7) of the Constitution, Article 48 of the Law, and Rules 36 (1) (d) and 36 (2) (d), and 56 (b) of the Rules of Procedure, in the session held on 24 October 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Arta Rama-Hajrizi

KI48/17, Applicant: Slađana Radojković Marinković, Constitutional review of unspecified decisions of public authorities

KI48/17, Decision to reject the referral, approved on 14 November 2017, published on 15 December 2017

Key words: *individual referral, civil procedure, constitutional rights, summarily rejected*

The Applicant alleged that her requests to be included in the list of beneficiaries of proceedings from the sale of Socially-Owned Enterprise Urata/Voćar had been rejected. In addition, the Applicant alleged that with the aid of attorneys-at-law, workers who had two to three years of work experience and who were employed in 1999 had benefited from a part of the share of proceeds.

In sum, the Court concluded that the Applicant's Referral did not meet the formal criteria for further review because it was not completed with supporting documentation. Therefore, in line with Article 22.4 of the Law, Rules 29 (2) (h) and 32 (5) of the Rules of Procedure, the Court concluded that the Applicant's referral had to be summarily rejected.

DECISION TO REJECT THE REFERRAL

in

Case No. KI48/17

Applicant

Slađana Radojković (Marinković)

Constitutional review of unspecified decisions of the public authorities

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 Slađana Radojković (Marinković), residing at Str. "Piva Karamatijevića" 29/37, 11000 Belgrade (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges unspecified decisions of the public authorities, by which her request to participate in the distribution of proceeds from the sale of the SOE "Urata/Voćar" (hereinafter: the socially owned enterprise) was allegedly rejected.

Subject matter

3. The subject matter of the Referral is the constitutional review of the unspecified decisions of public authorities, which have allegedly violated the Applicant's rights. In fact, the Applicant did not specifically refer to any concrete provision of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 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 Kosovo (hereinafter: the Rules of Procedure).

Assessment of the admissibility of Referral

5. On 19 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 19 April 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

7. On 28 April 2017, the Court notified the Applicant about the registration of the Referral and requested her to supplement the Referral with supporting documentation, namely "*with decisions of public authorities or court decisions, the constitutionality of which is challenged."*

8. On 18 July 2017, the Applicant submitted to the Court a document through which she provided some additional information regarding her case, but she failed to submit and did not cite any decision of the public authorities which constitutionality is challenged, as required by the letter of 28 April 2017.

9. On 14 November 2017, the Review Panel reviewed the report of Judge Rapporteur and unanimously recommended to the full Court to summarily reject the Referral.

Summary of facts

10. On an unspecified date, the Applicant alleges to have filed a claim with the Privatization Agency of Kosovo (hereinafter: PAK), requesting participation in the distribution of proceeds from the privatization of the socially-owned enterprise claiming that she worked for the SOE Urata/Voćar from 1 June 1988 until 27 September 1990.

11. On 17 October 2016, PAK through the confirmation letter [No. 13580/2016], confirmed to the Applicant that *"referring to the data (from the Registry No. 1062) of the Socially Owned Enterprise Urata/Voćar (Mrs. Slađana Radojković, who is identified on the basis of personal ID number 2301966916408, born on 23.01.1966 in Prishtina, it results that she concluded the employment relationship with the Socially Owned Enterprise (SOE) Urata/Voćar on 10.06.1988 and was registered in this enterprise until 27.09.1990. "*

12. The above mentioned confirmation letter also had the following note: *"Please note that this document is valid only for the purpose of retirement benefits and cannot serve as evidence of any claim (unpaid wages or indemnity for termination of employment relationship) towards the Socially-Owned Enterprise Urata/Voćar in the liquidation procedure of this enterprise."*

Applicant's allegations

13. The Applicant alleges that *"In fact, for many years I am trying to file the claim with Privatization Agency of Kosovo, but I was not successful in that as they always rejected me with a reasoning that I am not eligible to a share of the proceeds allegedly I was not an employee of Voćar during 1999."*

14. The Applicant alleges that *"being supported by lawyers, employees who have had two or three years of work experience also benefited from a share of proceeds but who were not employed in 1999. I can state names and surnames of all those employees."*

15. The Applicant alleges that *"If you reject me and my claim is settled negatively, I will have to refer the case to the Supreme Court of Kosovo in order that they try and settle my case and if I will not be granted with positive response, I will file a complaint with the European Court on Human Rights in Strasburg"*.

Assessment of the admissibility of Referral

16. The Court first assess whether the Applicant has fulfilled the admissibility requirements established in the Constitution, Law and the Rules of Procedure.

17. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties], paragraphs 1 and 7 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".*
> *[...]*

18. The Court further refers to paragraph 4 of Article 22 of the Law, which establish:

> *"If the referral [...] is [...] incomplete, the Judge Rapporteur informs the relevant parties or participants and sets a deadline of not more than fifteen (15) days for [...] supplementing the referral [...]".*

19. In addition, the Court takes into account item 2 of Rule 29 [Filing of Referrals and Replies] and item 5 of Rule 32 [Withdrawal, Dismissal and Rejection of Referrals] of the Rules of Procedure, which establish:

> *"29 (2) The referral shall also include:*
> *[...]*
> *(h) the supporting documentation and information.*
> *[...]*
>
> *32 (5) The Court may summarily reject a referral if the referral is incomplete or not clearly stated despite requests by the Court to the party to supplement or clarify the referral [...]".*

20. The Court recalls that the Applicant alleges that public authorities violated her rights since she was not included in the list of employees of the socially owned enterprise to benefit from its privatization despite the fact that she was in employment relationship with this enterprise until 1990.

21. In accordance with the abovementioned provisions, the Court cannot take into account the Applicant's allegations because the Referral is incomplete, as the Applicant did not attach to the Referral the decisions of the public authorities or the challenged court decisions (see Decision to Reject the Referral of the Constitutional Court in case KI03/15, Applicant *Hasan Beqiri*, of 13 May 2015, paragraphs 14, 15, 17, 19, 20 and 21, as well as Case KI07/16, Applicant *Rifat Abdullahi*, of 14 July 2016, paragraph 22).

22. The Court, through the letter of 28 April 2017, requested the Applicant to submit to the Court within 15 (fifteen) days upon the receipt of the document, the challenged decisions of the public authorities or the decisions of the regular courts.

23. However, the Applicant did not submit any decision of public authorities or of the courts which constitutionality would be subject to constitutional review after fulfilling the admissibility requirements required by the Constitution as specified in the Law and the Rule of Procedure.

24. In sum, the Court concludes that the Applicant's Referral does not meet the formal criteria for further consideration, due to non-completion of the Referral with supporting documentation.

25. Therefore, pursuant to Article 22.4 of the Law, Rule 29 (2) (h) and Rule 32 (5) of the Rules of Procedure, the Court concludes that the Applicant's Referral is to be summarily rejected.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 32 (5) of the Rules of Procedure, on 14 November 2017, unanimously

DECIDES

I. TO summarily REJECT the Referral;

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; and

IV. This Decision is effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI43/17, Applicant: AGEH Civil Peace Service, Constitutional review of Decision no. 269/2015 of the Tax Administration of Kosovo, of 30 July 2015

KI43/17, Resolution on inadmissibility, approved on 24 October 2017, published on 15 December 2017

Key words: *individual referral, civil procedure, out-of-time referral*

The Applicant alleged that Department of Complaints–Tax Administration of Kosovo, Prishtina, rejected his request and instructed him to submit a referral to the Constitutional Court for the review of TAK Decision no. 269/2015, of 30 July 2015 The Applicant requested the Court to apply the legal norms of Articles 5.2 and 5.3 of Regulation 2000/20 on Tax Administration and Procedures. By applying these norms and laws, it will be concluded that TAK erred in calculating penalties and interest.

The Court found that the Applicant's request has been filed out of time and must be declared inadmissible because it was not submitted in line with Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI43/17

Applicant

AGEH Civil Peace Service

Constitutional review of Decision No. 269/2015 of the Tax Administration of Kosovo of 30 July 2015

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 "AGEH Civil Peace Service" with seat in Prizren (hereinafter: the Applicant), represented by Ymer Kubati from Prizren.

Challenged decision

2. The Applicant challenges constitutionality of Decision No. 269/2015 of the Tax Administration of Kosovo (hereinafter: TAK), of 30 July 2015.

Subject matter

3. The subject matter of the Referral is the assessment of the TAK Decision regarding the calculation of the fines paid for tax by the Applicant.

Legal basis

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 and 49 of the Law No. 03/L-121 on the 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

5. On 13 April 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 18 April 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

7. On 28 April 2017, the Applicant was notified about the registration of the Referral and he was asked to complete and clarify his Referral in accordance with Rule 29 of the Rules of Procedure.

8. On 23 May 2017, the Applicant submitted the completed referral form.

9. On 24 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

10. In 2004, the Applicant requested from TAK "refund of money-reimbursement" due to incorrect calculation of fines. The Applicant alleged that from 2004 until today he had paid an excessive amount in the name of fines in the amount of 1.213,50 €.

11. From the documents submitted, it results that the case was also dealt with by the Supreme Court (Judgments A. No. 6/2005 and A. No. 2174/2007 of 17 May 2006 and 13 March 2009) which approved the Applicant's statement of claim and remanded the case for retrial to competent institutions.

12. In this context, the Court notes that the abovementioned decisions of the Supreme Court were not submitted by the Applicant.

13. Meanwhile, the Applicant had the correspondence with TAK, where in some cases he was 'notified' that his complaint had been 'carefully' reviewed and that there was no overpayment of fines.

14. On 30 July 2015, TAK (Decision No. 269/2015) rejected the Applicant's appeal as ungrounded. TAK during the analysis of the complaints found that the Applicant failed to declare the payments in time and, consequently, the penalties and interest were calculated from the information technology system. TAK explained that taxpayers who do not submit a tax declaration within a certain time limit are fined by five (5) percent for each month of unpaid tax. TAK also advised the Applicant that in accordance with the Law on Tax Administration and Procedures, he has the right within thirty (30) days to file a complaint with the Basic Court in Prishtina.

Applicant's allegations

15. The Applicant alleges that: *"Received notifications on reassessment that also determine the same fines I have paid on 26.08.2004 in the total amount of 1,477.12 €, and which are in contravention with Article 5.2 and Article 5.3 of UNMIK Regulation No. 2000/20 on Tax Administration and Procedures ... Kosovo Tax Administration - The Appeals Department in Prishtina is rejecting the Referral and instructs me to address the Court."*

16. The Applicant alleges that: *"TAK did not respect Judgment A. No. 6/2005 of the Supreme Court of Kosovo... TAK did not respect its notices, which also have the same errors (with small differences in the calculation), accepted it as "ACCURATE"...Tax Administration is not interested in the implementation of legal norms, although under*

the Regulation 2000/20 was obliged ... TAK did not respect the Judgment A. No. 6/2005 of the Supreme Court of Kosovo... TAK did not respect the legal norms of Article 5.2 and Article 5.3 of Regulation 2000/20 and Article 7.1 of the present Regulation, did not calculate the fines foreseen by these legal norms..."

17. Finally, the Applicant requests the Court: *"that the legal norms of Articles 5.2 and 5.3 of UNMIK Regulation 2000/20 ON TAX ADMINISTRATION AND PROCEDURES are implemented...With the implementation of these norms laws comes the conclusion that Kosovo TAK has erred in calculating penalties and interest ... in the presented statement is clearly seen according to months of fines ... Therefore, the Tax Administration of Kosovo in Prishtina should APPROVE the 'reimbursement' claim in the total amount of € 1,213.50, also calculating the penalty interest rate according to the law."*

Admissibility of Referral

18. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and as further specified in the Rules of Procedure.
19. The Court refers to Article 113.7 [Jurisdiction and Authorized Parties] 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."*

20. In this respect, the Court refers to Article 21.4 [General Principles] of the Constitution, which provides that:

> *„Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

21. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

> *"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..."*

22. The Court takes into account Rule 36 (1) (c) [Admissibility Criteria] of the Rules of Procedure, which specifies:

> *"The Court may consider a referral if:*
>
> *(...)*
>
> *(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant."*

23. In the present case, the Court notes that the challenged TAK decision (Decision No. 269/2015) was pronounced and served on the Applicant on 30 July 2015; while the constitutional referral was filed on 13 April 2017.

24. In this regard, the Court notes that the constitutional referral was submitted out of the four (4) month legal deadline provided by Article 49 of the Law and further specified in Rule 36 (1) (c) of the Rules of Procedure.

25. The Court recalls that the purpose of the 4 (four) month legal time limit under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure is to promote legal certainty, to ensure that cases raising constitutional issues are dealt with within a reasonable time and that previously rendered decisions are not endlessly open to challenge (See case of *o' Loughlin and Others v. the United Kingdom* no. 23274/04, ECtHR Decision of 25 August 2005 and *mutatis mutandis,* see case no. KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 3 March 2014).

26. The Court notes that it is the duty of the applicants or of their representatives to act with '*due diligence*' to ensure that their claims for protection of rights and fundamental freedoms are filed within the legal deadline of four (4) months under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure (See Constitutional Court Case KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility, §§ 46-52, with further references mentioned in that decision).

27. Based on the foregoing, the Referral was not submitted in accordance with Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.

28. The Court finds that the Applicant's Referral is out of time and is to be declared inadmissible because it was not submitted in accordance with Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36 (1) (c) of the Rules of Procedure, on 24 October 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI14/17, Applicant: Shaban Syla, Constitutional review of Decision PN. no. 298/2016 of the Court of Appeals, of 25 May 2016

KI14/17, Decision approved on 24 October 2017 and published on 15 December 2017

Key words: *individual referral, criminal procedure, out-of-time referral*

The Applicant alleged that he has been held in house detention from 28 July 2011 until 23 March 2015, without the courts recognizing his "house arrest with hours and days". He requested the Court to have his time served in house detention recognized "with hours and days", as he had indeed served and strictly adhered to the court order, stating that he requests nothing more than the application of his rights guaranteed by the Constitution of the Republic of Kosovo.

The Court concluded that it is the Applicant's duty to act with "due diligence" to ensure that his request for protection of legality is submitted within the time limit of 4 (four) months. Therefore, the Referral is to be declared inadmissible as being filed out of time, in line with Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36 (1) (c) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI14/17

Applicant

Shaban Syla

Constitutional review of
Decision PN. No. 298/2016 of the Court of Appeals
of 25 May 2016

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 Shaban Syla (hereinafter, the Applicant) from Kishnarekë, currently serving a prison sentence in the Correctional Center Dubrava.

Challenged decisions

2. The Applicant challenges the Decision PN. No. 298/2016 of the Court of Appeals of 25 May 2016, which rejected as ungrounded the Applicant's appeal to include his house arrest time into the calculation of his imprisonment sentence.

3. That Decision was served upon the Applicant on 7 June 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged Decision of the Court of Appeals, which allegedly violated the provisions of the criminal procedure and of the criminal code and erroneous erroneously and incompletely determined its factual basis; no constitutional provisions were referred to.

Legal basis

5. The Referral is based on Article 113 (7) of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 47 the Law No. 03/L-121 on the 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 9 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 20 March 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of judges Snezhana Botusharova (presiding), Bekim Sejdiu and Gresa Caka-Nimani.

8. On 2 May 2017, the Court notified the Applicant about the registration of the Referral and asked to fill in the referral form and attach all relevant documents.

9. On 30 May 2017, a copy of the Referral was sent to the Basic Court in Prishtina which, requesting it to submit the acknowledgment of receipt by the Applicant of the Decision of the Court of Appeals.

10. On 17 May 2017, the Applicant submitted a complete Referral form.

11. On 6 June 2017, the Court sent a copy of the Referral to the Court of Appeals.

12. On 30 June 2017, the Basic Court in Prishtina submitted the requested acknowledgment of receipt by the Applicant.

13. On 24 October 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

14. On 17 December 2012, the District Court in Prishtina (Judgment P. No. 592/11) found the Applicant guilty for having committed the criminal offence of attempted aggravated murder and sentenced him to imprisonment. That Judgment was upheld by the Court of Appeals (Judgment PAKR. No. 102/13 of 12 December 2013).

15. After that Judgment, the Applicant furthered the proceedings regarding the calculation of the time spent in house arrest in the imprisonment imposed on him.

16. In fact, on 29 March 2016, the Basic Court in Prishtina (P. No. 592/2011) decided to include the time of the Applicant's house arrest into the period of his sentence of imprisonment.

17. The Applicant filed with the Court of Appeals an appeal against that Decision *"due to the substantial violation of the provisions of the criminal procedure and erroneous application of them, erroneous and incomplete determination of the factual situation and violation of the Criminal Code"*.

18. On 25 May 2016, the Court of Appeals (Decision PN. No. 298/2016) rejected as ungrounded the appeal of the Applicant and upheld the Decision (P. No. 592/2011) of the Basic Court.

19. The Court of Appeals concluded that *"the above mentioned appealed allegations are ungrounded and the Court of the first instance correctly calculated the measure of house arrest in the punishment imposed against the convicted Shaban Syla, pursuant to Judgment P. No. 592/11, of the District Court in Prishtina, of 17 December 2012, which becomes final on 12 December 2013".*

Applicant's allegations

20. The Applicant claims that he "*was in house arrest from 28 July 2011 until 23 March 2015,* without the Courts recognizing his *"house arrest with hours and days".*

21. The Applicant states that he filed his Referral due to *"substantial violation of the provisions of the criminal procedure and erroneous application of legal provisions, erroneous and incomplete determination of the factual situation and violation of the criminal code".*

22. The Applicant requests the Court to "*recognize* [his] *house arrest with hours and day as I served on strict adherence".*

23. Finally, the Applicant states: [I] *"do not request more or less than what the Constitution of the Republic of Kosovo guarantees to me".*

Admissibility of the Referral

24. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

25. In this respect, the Court refers to 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.*

26. The Court also refers to Articles 49 [Deadlines] of the Law, which provides:

> *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".*

27. The Court further takes into account § (1) (c) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresees:

> *(1) The Court may consider a referral if:*
> *[...]*
> *(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant"*

28. In this respect, the Court recalls that the challenged Decision was served upon the Applicant on 7 June 2016.

29. The Court notes that the Applicant submitted the Referral to the Court on 9 February 2017.

30. Thus the Court considers that the Referral was submitted more than three (3) months beyond the legal deadline of four months provided for by Article 49 of the Law and as further foreseen by Rule 36 (1) (c) of the Rules of Procedure.

31. Therefore, the Court concludes that the Referral was not filed within four months from the date on which the challenged Decision was served on the Applicant.

32. The Court recalls that the purpose of the four-month legal time limit under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure is to promote legal certainty, to ensure that cases raising constitutional issues are dealt with within a reasonable time and that previously rendered decisions are not endlessly open to challenging. (See ECtHR case *O' Loughlin and Others v. the United Kingdom,* no. 23274/04, Decision of 25 August 2005 and, *mutatis mutandis,* Constitutional Court case no. KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 3 March 2014).

33. Moreover, the Court reiterates that it is the duty of the applicants to act with '*due diligence'* to ensure that their claims for protection of rights are filed within the legal deadline of four (4) months. (See Constitutional Court Case KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility, §§ 46-52, with further references).

34. Consequently, the Court finds that the Referral is inadmissible as out of time, pursuant Article 113 (7) of the Constitution, Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 of the Constitution, Article 49 of the Law, and Rules 36 (1) (c) and 56 (2) of the Rules of Procedure, in the session held on 24 October 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Arta Rama-Hajrizi

KI05/17, Applicant Osman Sylanaj, Constitutional Review of Article 11 of the Law no. 05/L-068 on Amending and Supplementing the Law no. 04/L-042 on Public Procurement of the Republic of Kosovo, as amended and supplemented by Law no. 04/L-237

KI05/7, Decision on inadmissibility of 3 July 2017, published on 15 December 2017

Key words: Individual Referral, Law assessment procedure, unauthorized party

The Applicant filed a Referral with the Court, requesting the constitutional review of Article 11 of the Law no. 05/L-068 on Amending and Supplementing the Law no. 04/L-042 on Public Procurement of the Republic of Kosovo, as Amended and Supplemented by Law no. 04/L237, in the part related to the competences of the Public Procurement Regulatory Council (PPRC). The Applicant alleges that the contested law in unconstitutional way took the competencies of the Kosovo Institute of Public Administration (KIPA) in regards the training of Procurement Officers, which were previously regulated by the Law on Public Procurement and the Law on KIPA.

Upon reviewing the Referral, the Court found that the Kosovo Constitution does not anticipate the possibility that an individual may contest the compatibility of a law approved by the Assembly of Kosovo, but this competence is foreseen for the authorized parties in compliance with Article 113.2, the President of the Republic of Kosovo, the Government and the Ombudsperson, and in compliance with Article 113.8 for the Regular Courts.

In these circumstances, the Court ascertained that the Applicant failed to fulfill the condition of the authorized party pursuant to Article 113.1 of the Constitution and of Rule 36 (1) (a) of the Rules of Procedure. Therefore, the Referral is declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI05/17

Applicant

Osman Sylanaj

Constitutional Review of Article 11 of Law No. 05/L-068 on amending and supplementing Law 04/L-042 on Public Procurement of the Republic of Kosovo, amended and supplemented by Law No. 04/L-237

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 Applicant is Osman Sylanaj from Skenderaj (hereinafter: the Applicant), employed at the Kosovo Institute for Public Administration (hereinafter: KIPA).

Challenged law

2. The Applicant challenges the constitutionality of Article 11 of Law No. 05/L-068 on Amending and Supplementing Law No. 04/L-042 on Public Procurement of the Republic of Kosovo, amended and supplemented by Law No. 04/L-237, concretely in the part of the law t related to the competences of the Public Procurement Regulatory Commission (PPRC).

Subject matter

3. The subject matter is the constitutional review of the challenged law which, according to the Applicant's allegations, is in collision with Articles 2 and 5 of the Law on KIPA (Law No. 04/L-221 adopted by the Assembly of Kosovo on 20 March 2014) and in violation of Article 112.1 [General Principles] Article 79 [Legislative Initiative] and Article 16 [Supremacy of the Constitution] of the Constitution of the Republic of Kosovo

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 20 January 2017, the Applicant submitted through the mail service the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 27 February 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalović.

7. On 3 March 2017, the Court notified the Applicant about the registration of the Referral.

8. On 3 July 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 31 August 2011, the Assembly of Kosovo adopted the Law on Public Procurement in the Republic of Kosovo (04/L-042) which was published in the Official Gazette of the Republic of Kosovo on 19 September 2011 and entered into force 15 days after its publication.

10. The Law, in relevant provisions related to this case, has the following content:

Article 25

Training of Procurement Officers

1. KIPA in cooperation with PPRC is responsible to develop training modules and curriculum for procurement qualifications. KIPA and PPRC is required to identify, experienced in public procurement, suitable to teach the procurement courses designed by PPRC. KIPA shall arrange for the development and delivery, of a procurement training courses having duration of at least fifteen (15) days. PPRC in cooperation with KIPA ensures that such courses are developed and delivered by a trained person or training organizations having substantial expertise in best international procurement practices and the procurement system of the EU.
2. KIPA shall be responsible for organizing examinations.
3. Any interested person may attend a procurement professional training course. Contracting authority shall in relation to employed Procurement Officers treat such training time as time spent at work and shall compensate its Procurement Officer for such time in the same manner as that applicable to time spent at work. The contracting authority may also provide such person, in accordance with the applicable normative and sub-normative acts, reimbursement for expenses that such person necessarily incurs in order to attend such training.
4. KIPA shall issue a "basic procurement professional certificate" only to persons who have satisfactorily completed all of the basic courses and who are recommended by the trainer. KIPA shall issue an "advanced procurement professional certificate" only to persons who have satisfactorily completed all of the advanced courses.

[...]

11. On 14 January 2015, the Assembly of Kosovo adopted Law No. 05/L-068 on Amending and Supplementing the Law 04/L-042 on Public Procurement of the Republic of Kosovo, amended and supplemented by Law No. 04/L-237. The Law was published in

the Official Gazette of Kosovo on 6 January 2015 and entered into force 15 days after its promulgation.

12. The Law in Article 11, which is challenged by the Applicant and which has amended the content of Article 25 of the previous Law, has the following content:

Article 11

1. Article 25 of the basic Law, paragraphs 1, 2, 4, 5, 6, 7, 8, 9 shall be reworded with the following text:

1. PPRC is responsible to develop training modules and curriculum for procurement qualifications. PPRC is required to identify persons, experienced in public procurement, suitable to teach the procurement courses designed by PPRC. PPRC, in cooperation with KIPA, shall arrange for the development and delivery, of procurement training courses having duration of at least fifteen (15) days for basic training and ten (10) days for advanced training. PPRC ensures that such courses are developed and delivered by a trained person or training organizations having substantial expertise in best international procurement practices and the procurement system of the EU.
2. PPRC, in cooperation with KIPA, shall be responsible for organizing examinations.
4. PPRC, in cooperation with KIPA, shall issue a "basic procurement professional certificate" only to persons who have satisfactorily completed all of the basic courses and who are recommended by the trainer. PPRC, in cooperation with KIPA, shall issue an "advanced procurement professional certificate" only to persons who have satisfactorily completed all of the advanced courses.
[...]

Applicant's allegations

13. The Applicant alleges that the challenged provision of the law in question acquires the competencies previously established in the basic law on public procurement (Article 25, Law No. 04/L-042) and the Law on KIPA where professional training in the field of procurement was the competence of KIPA and now are within the PPRC.

14. This change of law, according to the Applicant, is in direct collision with the Law on KIPA (Articles 2 and 5) and the Law on Civil Service, whereas it is directly contrary to Articles 16, 79 and 112 of the Constitution.

Admissibility of the Referral

15. In order to be able to adjudicate the Applicant's Referral, the Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution, and, as further specified in the Law and the Rules of Procedure.

16. 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."

17. The Court further refers to Article 48 of the Law, which stipulates:

"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."

18. The Court also refers to Rule 36 of the Rules of Procedure which specifies:

"The Court may consider a referral if:

(a) the referral is filed by an authorized party, or
[...]."

19. In assessing the Referral and the admissibility requirements, and in particular the requirement of the authorized party to submit a referral for review, the Court finds that the Constitution of the Republic of Kosovo in its Article 113 [Jurisdiction and Authorized Parties] expressly provides:

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;
(2) the compatibility with the Constitution of municipal statutes.

8. *The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.*

20. Based on the above, it is clear that the Constitution of Kosovo does not foresee the possibility for an individual to challenge the compliance of a law approved by the Assembly of Kosovo but this competence is foreseen for the authorized parties, the President of the Republic of Kosovo, the Government and the Ombudsperson in accordance with Article 113.2, and for the regular courts with Article 113.8.

21. Apart from this, the Constitution of the Republic of Kosovo does not provide for *actio popularis* which is a modality of individual appeals enabling each individual who attempts to protect public interest and constitutional order to address the Constitutional Court with certain questions and requests, indicating a violation of the constitutional rights (*See* Resolution on Inadmissibility, Case KI157/11 of the Applicant Azem Ejupi *"Request for regulation of status of pensioners and of labor disabled persons and improvement of welfare of pensioners of the Republic of Kosovo by state authorities"* of 25 February 2013).

22. In the circumstances when a Referral is filed by an unauthorized party, the Court cannot assess the merits of the case and accordingly, in the present case, the Court does not assess the Applicant's allegations as to whether or not the challenged provisions are compatible with the Constitution, or the other allegation related to possible collision of laws.

23. In these circumstances, the Court finds that the Applicant has not fulfilled the requirement of the authorized party under Article 113.1 of the Constitution and Rule 36 (1) (a) of the Rules of Procedure, therefore, the Referral is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution, Article 48 of the Law and Rules 36 (1) (a) of the Rules of Procedure, on 3 July 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 Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI136/16, Applicant: Vllaznim Bytyqi, Constitutional review of Judgment Pml. No. 192/2016 of the Supreme Court of Kosovo of 3 October 2016

KI136/16, resolution on inadmissibility of 18 October 2017, published on 20 December 2017

Key words: *Individual referral, right to privacy, right to work, manifestly ill-founded*

By its Judgment, the Supreme Court of Kosovo had rejected the Applicant's request for protection of legality filed against the Judgment of the Court of Appeals of Kosovo as ungrounded.

In essence, the Applicant alleged that his rights guaranteed by the Constitution, namely the Right to Privacy and the Right to Work and Exercise Profession, had been violated by the challenged Decision, because the Anti-Corruption Agency had obliged him to declare his property, which is contradictory to Law no. 04/L-050 on the Declaration and Origin of the Property and Gifts of Senior Public Officials.

The Applicant, among others, alleged that pursuant to Law no. 04/L-050 the position he was holding was not foreseen as being subject to declaration of property.

The Court found that the Referral was inadmissible because the Applicant had not substantiated and sufficiently proven his allegation. The Referral was declared inadmissible as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI136/16

Applicant

Vllaznim Bytyqi

Constitutional review of Judgment Pml. No. 192/2016 of the Supreme Court of Kosovo, of 3 October 2016

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 Vllaznim Bytyqi, residing in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The challenged decision is Judgment [Pml. No. 192/2016] of the Supreme Court of Kosovo of 3 October 2016. The Applicant did not specify the date when the challenged Judgment was served on him.

Subject matter

3. The subject matter is the constitutional review of the Judgment [Pml. No. 192/2016] of the Supreme Court of Kosovo of 3 October 2016, which has allegedly violated the Applicant's rights guaranteed by Article 36 [Right to Privacy], Article 49 [Right to Work and Exercise Profession], Article 102 [General Principles of the Judicial System] and Article 142 [Independent Agencies] 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, Article 22 [Processing Referrals] and Article 47 [Individual Requests] of Law No. 03/L-121 on the 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 25 November 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 December 2016, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel, composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Bekim Sejdiu.

7. On 20 December 2016, the Court informed the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. 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 the Referral.

Summary of facts

9. Based on the case file, it results that the Applicant was employed in the position of *Senior Finance Officer* in the Kosovo Deposit Insurance Fund.

10. On 4 December 2014, the Basic Prosecution in Prishtina filed the indictment [PP. II. No. 6277/14], against the Applicant for commission of the criminal offense "*Failure to report or falsely reporting property, income, gifts, other material benefits or financial obligations"* under Article 437 of Criminal Code of Kosovo (hereinafter: CCK).

11. On 16 July 2015, the Basic Court in Prishtina, by Judgment [P. No. 3009/14] found the Applicant guilty and punished him with a fine and with imprisonment of 4 (four) months, which will not be executed within a period of one (1) year, provided that the accused, namely the Applicant during this period does not commit any other criminal offense. The Basic Court in Prishtina found that the Applicant, in a capacity of Senior Finance Officer in the Deposit Insurance Fund in Kosovo, was obliged to declare the property under Law No. 04/L-050 on the declaration and origin of the property and gifts of senior public officials (hereinafter: Law on Declaration of Property) .

12. The Applicant filed an appeal with the Court of Appeals against Judgment [P. No. 3009/14] of the Basic Court in Prishtina of 16 July 2015, with the proposal that the *"Court of Appeals in Prishtina, after reviewing the arguments provided and the evidence to render a right decision."*

13. On 18 February 2016, the Court of Appeals of Kosovo, through Judgment [PA1. No. 1433/2015] rejected the appeal as ungrounded and upheld the Judgment of the Basic Court [P. No. 3009/14] of 16 July 2015. The Court of Appeals in its Judgment provided a detailed response to all the Applicant's allegations.

14. The Applicant filed a request for protection of legality against the Judgment [PA1. no. 1433/2015] of the Court of Appeals of Kosovo of 18 February 2016, with the proposal that the latter be annulled and the case be remanded for retrial.

15. On 3 October 2016, the Supreme Court of Kosovo, by Judgment [Pml. No. 192/2016] rejected the request for protection of legality as ungrounded. The reasoning of this Judgment, among others, states:

> *"[...] there are no explanations in the request what procedural violations or of the criminal code were committed by the impugned judgments, but only documents*

are offered for review, which according to the request, show that the courts have issued unlawful judgments. In accordance with the provisions of Article 436, paragraph 1 of CPCK when deciding on the request for protection of legality, the Supreme Court of Kosovo is limited only to determine legal violations which the Applicant invokes in his referral, and given that in the concrete case it has not been stated nor reasoned what legal provisions have been violated, the request for protection of legality is ungrounded".

Applicant's allegations

16. The Applicant alleges that Anti-Corruption Agency, by obliging the Applicant to declare his property, violated his rights guaranteed by Article 36 [Right to Privacy], Article 49 [Right to Work and Exercise Profession], Article 102 [General Principles of the Judicial System] and Article 142 [Independent Agencies] of the Constitution.

17. As it pertains to the alleged violation of Article 36 [Right to Privacy] of the Constitution, the Applicant argues that "*arbitrary classification of technical expert position by AKK as subject of declaration is not in line with Article 3, paragraph 1.1.11 of the Law No. 04/L-50 and constitutes violation of constitutional right to privacy which guarantees freedom of citizens and right to privacy and protection of personal data when an individual is not subject to the declaration as defined by Law*".

18. As it pertains to the alleged violation of Article 49 [Right to Work and Exercise Profession], the Applicant argues that *"this constitutional right is very important to be protected especially in instances where expert's positions are at stake, and more importantly when young professionals graduated abroad have returned to contribute to economic development of country"*.

19. The Applicant further alleges that the decisions of the regular courts violated his rights guaranteed by Article 102 [General Principles of the Judicial System], without providing any reasoning pertaining to this specific allegation.

20. In addition, regarding allegation of violation of Article 142 [Independent Agencies] of the Constitution, the Applicant alleges that "*Anti-Corruption Agency (AAK) has violated Article 142, paragraph 1 to 3 of the Constitution (Independent Agencies), which guarantees independence of independent agencies established by the Assembly based on the respective laws that regulate their establishment, operation and competencies"*.

21. Finally, the Applicant requests the Court to annul the decisions of the regular courts and to order financial compensation for violation of the right to privacy.

Admissibility of Referral

22. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and foreseen in the Rules of Procedure.

23. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] 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".

24. The Court also examines whether the Applicant has met the admissibility requirements as provided by the Law. In this regard, the Court refers to Articles 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..."

25. As it pertains to the fulfillment of these requirements, the Court finds that the Applicant filed the Referral as an individual and in a capacity of the authorized party, challenging an act of a public authority, namely Judgment [Pml. No. 192/2016] of 3 October 2016 of the Supreme Court after having exhausted all legal remedies determined by law. The Applicant has also clarified the rights and freedoms 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.

26. However, the Court should examine whether the criteria provided by Rule 36 of the Rule of Procedure have been met.

27. Rule 36 [Admissibility Criteria] paragraphs (1) (d) and (2) (b) and (d) of the Rules of Procedure foresee:

"(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, or
[...]

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

28. The Court recalls that the Applicant alleges that the Anti-Corruption Agency, by obliging the Applicant to make the declaration of property violated his rights guaranteed by the Constitution, namely Article 36 [Right to Privacy], Article 49 [Right to Work and Exercise Profession], and Article 142 [Independent Agencies] of the Constitution. In

addition, the Applicant alleges that the decisions of the regular courts have violated his rights guaranteed by Article 102 [General Principles of the Judicial System] of the Constitution.

29. The Court notes that the Applicant bases his allegations for violation of the rights guaranteed by Article 36 [Right to Privacy] and Article 49 [Right to Work and Exercise Profession] of the Constitution, arguing that the erroneous interpretation of the Law on Declaration of Property by the regular courts has resulted on arbitrary decisions. The Court recalls that this allegation pertains to the scope of legality and as such does not fall within the jurisdiction of the Constitutional Court, thus it cannot, in principle, be considered by the Court.

30. In this regard, the Court reiterates that it is not its task to deal with errors of law allegedly committed by regular courts (legality), unless and in so far as such errors may have infringed rights and freedoms protected by the Constitution (constitutionality). The Court may not itself assess the law which have 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*, ECtHR, no. 30544/96, 21 January 1999, paragraph 28; and case: *Akdivar v. Turkey*, No. 2189/93, ECtHR, Judgment of 16 September 1996, para. 65; see also case: KI70/11, Applicants *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012, and KI32/16, Applicant *Ibrahim Svarça*, Resolution on Inadmissibility, of 16 November 2016, paragraph. 38).

31. The Court considers that the Applicant's Referral does not indicate that the regular courts acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to substitute its own assessment of the facts with that of the regular courts and, as a general rule, it is the duty of these courts to assess the evidence made available to them. The Constitutional Court can only consider whether the regular courts' proceedings in general have been conducted in such a way that the Applicant had a fair trial (see case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991; case KI 32/16, Applicant *Ibrahim Svarça*, Resolution on Inadmissibility, 16 November 2016, paragraph. 39, and KI88/16, Applicant *N.T.SH. "ELING"*, of 26 January 2017, para. 30, as well as KI72/16, Applicant, *Kosovo Security Bureau*, Resolution on Inadmissibility, of 16 November 2016, paragraph. 30).

32. The Court finds that, based on the facts of the case arising from the presented documents and the allegations of the Applicant, the regular courts provided detailed and clear reasoning for their decisions, including the reasons based on which the Supreme Court rejected the request for protection of legality as ungrounded through Judgment [Pml. No. 192/2016] of 3 October 2016, which is challenged by the Applicant before this Court.

33. The Supreme Court in its Judgment reasoned that the Applicant in the request for protection of legality did not claim that the challenged judgments contained essential violation of the provisions of the criminal procedure, as required by law, but only requested the reconsideration of the factual situation. Accordingly, after the review of the Applicant's allegations, the Supreme Court concluded that "*it is limited only to determine legal violations which the Applicant alleges and given in concrete case it has not been stated nor reasoned what legal provisions have been violated, the request for protection of legality is ungrounded*".

34. In addition, the Court further notes that the Basic Court by Judgment [P. No. 3009/14] of 16 July 2015, and the Court of Appeals, by Judgment [PA1. No. 1433/2015] of 18 February 2016, have dealt extensively with the issue of interpretation of the Law on the Declaration of Property and provided detailed reasoning for all the allegations of the Applicant raised before them.

35. Regarding the Applicant's allegations filed in his Referral, the Court also refers to Judgment [PA1. No. 1433/2015] of 18 February 2016, of the Court of Appeals, which, among others, reasoned that:

> *"[...] that the factual situation was correctly and completely determined and in this aspect no fact remained doubtful as it is unjustly alleged in the appeal of the accused [...]. The first instance court in the court hearing administered the evidence by hearing the witnesses [...] in the capacity of senior finance officer in the Deposit Insurance Fund of Kosovo (head of finance) according to the Law no.04/L-050 for the declaration, origin and control of property of senior public officials even though he was obliged to declare his property, income, gifts, other material benefits or financial obligations in the legal term from 01.03.2014 until 31.03.2014, respectively in the deadline for regular declaration of the property, according to the list of senior officials of DIFK willingly and conscious for the consequences for non declaration he failed to fulfil this obligation."*

36. Accordingly, the Court concludes that all the Applicant's allegations relevant to the resolution of the dispute were duly examined by the regular courts, that the factual and legal reasons for the impugned decisions were examined at length, and that, based on the above, the proceedings before the regular courts, taken as a whole were fair.

37. The Court also emphasizes that the mere mentioning of articles of the Constitution, alleging that they have been violated without providing further explanations as to how these violations occurred, is not sufficient to build an allegation for a constitutional violation. When alleging such violations of the Constitution, the applicants must provide a reasoned allegation and a compelling argument. (See: case of the Constitutional Court KI 136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33).

38. The Court in particular recalls the fact that the Applicant did not provide relevant arguments in his Referral that would justify his allegations that there has been in any way a violation of his constitutional rights, except that he is dissatisfied with the outcome of proceedings. (See: case *Mezotur-Tiszazugi Tarsulat v. Hungary*, No. 5503/02, ECtHR Judgment of 26 July 2005).

39. The fact that the Applicant does not agree with the outcome of the case, cannot of itself raise an arguable claim of a breach of the Constitution allegedly committed by the regular courts. (See: case *Mezotur - Tiszazugi Tarsulat v. Hungary*, No. 5503/02, ECtHR, Judgment of 26 July 2005; see: case KI 32/16, Applicant *Ibrahim Svarça*, Resolution on Inadmissibility, of 16 November 2016, paragraph. 44, and KI88/16, Applicant *N.T.SH." ELING*", of 26 January 2017, paragraph. 33).

40. As it pertains to the Applicant's allegation for violation of Article 102 [General Principles of the Judicial System] and Article 142 [Independent Agencies] of the Constitution, the Court notes that it is a general principle that the articles of the Constitution which do not directly regulate the fundamental rights and freedoms have no independent effect, as their effect is valid in relation to "*the enjoyment of the rights and freedoms*" guaranteed by the provisions of Chapters II and III of the Constitution. Accordingly,

these articles cannot independently be applied if the facts of the case do not fall within the scope of one or more of the provisions of the Constitution pertaining to the *"enjoyment of the rights and freedoms*". (see, *inter alia*, *E.B. v. France* [GC], paragraph 47, Judgment of 22 January 2008; *Vallianatos and others v. Greece*, paragraph 72, ECtHR Judgment of 7 September 2013; also case KI67/16 Applicant *Lumturije Voca,* Resolution on Inadmissibility, of 23 January 2017, paragraph. 28).

41. In sum, the Court considers that the Applicant has not substantiated his allegations for violation of human rights and fundamental freedoms guaranteed by the Constitution, because the facts presented by him do not show in any way that the regular courts denied him the rights guaranteed by the Constitution, as alleged by him.

42. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Rules 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 of the Constitution, Article 48 of the Law, and Rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure, in the session held on 18 October 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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

IV. TO DECLARE this Decision effective immediately;

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

KI129/16, Applicant "KOSBAU GmBH", Constitutional review of Judgment E. Rev.nr.21/2016 of the Supreme Court, of 02 June 2016

KI129/16, Resolution on Inadmissibility of 13 November 2017, published on 20 December 2017

Key words: *Individual referral, damage compensation, revision, right to property, legitimate expectations, referral manifestly ill-founded*

The Basic Court in Prishtina rendered the Judgment [C.nr.411/2012] rejecting as ungrounded the statement of claim of the Applicant against the Municipality of Gllogoc for additional works conducted by the Applicant for the finalization of the square of Municipality of Gllogoc. The Court of Appeals, upon the appeal of the Applicant, through its Judgment [Ae.nr.90/2015] rejected the appeal of the Applicant as ungrounded and confirmed on its entirety the Judgment of the Basic Court. The Supreme Court [E.Rev.nr.21/2016], rejected the revision of the Applicant against the Judgment of the Court of Appeals as ungrounded.

The Applicant contested before the Constitutional Court the Supreme Court Judgment [E.Rev.nr.21/2016], which allegedly violated his rights guaranteed by Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo in conjunction with Article 1 of Protocol 1 (Protection of Property) of the European Convention of Human Rights. The Court considered that the Applicant did not substantiate that the circumstances of the case conferred to the Applicant a "legitimate expectation" protected under the right to property under Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the Convention. Thus, the Court declared the Applicant's referral inadmissible pursuant to Article 113 (1) and (7) of the Constitution, Articles 48 of the Law on Constitutional Court and Rules 36 (1) (d) and 36 (2) (d) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY
in

Case No. KI129/16

Applicant

"KOSBAU GmBH"

Constitutional review of Judgment E. Rev.nr.21/2016 of the Supreme Court, of 02 June 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 "KOSBAU GmBH", registered in Kosovo as a foreign company with an office in Tërstenik, Gllogoc (hereinafter: the Applicant) represented by Shaqir Behrami and Visar Morina, lawyer and professor of law, respectively.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo [E. Rev.nr.21/2016] of 02 June 2016, which was served on the Applicant on 22 July 2016.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's rights guaranteed by Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 1 of Protocol 1 (Protection of Property) of the European Convention of Human Rights (hereinafter: the Convention)

Legal basis

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

Proceedings before the Constitutional Court

5. On 11 November 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 12 December 2016, the President of the Court by Decision No. GJR. KI129/16, appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Ivan Cukalovic.

7. On 22 December 2016, the Court notified the Applicant on the registration of the Referral.

8. On the same day, the Supreme Court and the Municipality of Gllogoc (hereinafter: the Municipality) were notified on the registration of the Referral and were served with a copy of the Referral.

9. On 13 November 2017, the Review Panel considered the report of the Judge Rapporteur and made an unanimous recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 03 November 2009, the Applicant concluded contract no.611-09-101-521 (hereinafter: the Contract) with the Municipality to refurbish the "Fehmi Lladrovci" Square in the amount of 61.718,29 Euro.

11. The Applicant was fully paid the monetary amount specified in the Contract. However, after the requirements foreseen by the Contract were met, according to the Applicant, at the oral request of Municipality, it continued additional works for another 90 days for the finalization of the square. No additional contract was signed between the Applicant and the Municipality. The additional work was conducted at the amount of 135.760,18 Euro, as indicated in invoices that were submitted to the Municipality by the Applicant. This amount was never reimbursed by the Municipality.

12. On 10 September 2012, the Applicant filed to the Basic Court in Prishtina (hereinafter: the Basic Court) the proposal for enforcement regarding the debt in the total amount of 135.760,18 Euro towards the Municipality. The Applicant specified that "*if the Municipality presents its eventual objection then it proposes to the court to consider [the] proposal as a Claim.*"

13. On 11 September 2012, the Basic Court rendered a decision approving the Applicant's proposal for enforcement. However, within the legal deadline, the Municipality filed an objection against this proposal, reasoning that the Municipality *"has no obligation towards the Creditor as it stands in his proposal for enforcement, as with the Creditor there was no signed contract in relation to the execution of works"*.

14. Upon the objection of the Municipality, the Basic Court repealed the decision on approving the Applicant's proposal for enforcement, and decided to continue the assessment of the Applicant's claim following the contested procedure.

15. On 5 January 2015, the Basic Court rendered the Judgment [C.nr.411/2012] rejecting the statement of claim of the Applicant as entirely ungrounded. The Judgment of the Basic Court, among others, reasoned that according to the Law on Obligational Relationships (hereinafter: LOR), construction work must be performed based on prior

written contract between the parties, a condition which was not fulfilled in the current case.

16. On 5 January 2015, the Applicant filed an appeal against the Judgment [C.nr.411/2012] of the Basic Court, claiming violation of the provisions of the contested procedure; erroneous determination of the factual situation; and erroneous application of the substantive law. The Applicant primarily maintained that the contract between the Applicant and the Municipality is not to be regarded as a construction contract but rather a services contract for which no written consent is required. In addition, the Applicant maintained that the Municipality not only requested, but never objected the work performed by the Applicant.

17. On 14 March 2016, the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) through its Judgment [Ae.nr.90/2015] rejected the appeal of the Applicant as ungrounded and confirmed on its entirety the Judgment of the Basic Court. The Court of Appeals, in addressing the allegations of the Applicant maintained that, as specialized organization for construction works, the Applicant should have known that without a written contract or amendment to the main Contract no work could have been performed, especially considering that the main Contract clearly defined that no additional work is allowed exceeding the contracted amount.

18. The Applicant filed a Revision against Judgment [Ae.nr.90/2015] of the Court of Appeals alleging essential violations of the provisions of the contested procedure and erroneous application of the substantive law, raising the same allegations raised before the Court of Appeals.

19. On 2 June 2016, the Supreme Court [E.Rev.nr.21/2016] rejected the revision of the Applicant against the Judgment of the Court of Appeals as ungrounded. The Supreme Court, among others, reasoned that there is no legal basis to realize the right for compensation for the performed works conducted by the Applicant, as the additional works were not authorized by the contracting authority, being the sole competent authority for issuing consent for additional works.

Applicant's allegations

20. The Applicant claims that the Supreme Court Judgment [E.Rev.nr.21/2016] violates its rights guaranteed by Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol 1 (Protection of Property) of the Convention.

21. As it pertains to alleged violations for the Article 46 of the Constitution, the Applicant maintains that the Municipality requested additional work for the finalization of the square, allowing the Applicant to undertake serious financial investments *"while not providing compensation for the works performed*". The Applicant added that during 90 days of performing the additional work, the Municipality never informed the Applicant "*through any action or document that for this additional work in the square a separate contract must be singed"*. On the contrary, the Municipality allowed and supervised the works performed by the Applicant.

22. Further, the Applicant maintains that Municipality, as a public authority, has positive obligations to protect the rights of property of individuals, including the Applicant. The absence of any action of the Municipality to inform and to prevent the Applicant to make the investment in the Municipality Square, according to the Applicant, constitutes a violation of Article 46 of the Constitution in conjunction with Article 1 Protocol 1 of the Convention. In relation to the positive obligation of the state to protect the property of

individuals, the Applicant makes reference to the Case *Zolatas v Greece* of the European Court of Human Rights (hereinafter: the ECtHR).

23. While not alleging violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution specifically, the Applicant further maintains that the regular courts failed to address the Applicant's allegations for violation of Article 46 of the Constitution, especially as it pertains to the positive obligations of the public authority to protect property rights.

24. In addition, the Applicant alleges that in a similar case [Judgment E.Rev. 35/2013 of 9 December 2013], the Supreme Court while deciding for compensation of the debt on behalf of additional works for fixing the sewage system in one of the villages in Prishtina, obliged the Government of Kosovo to pay for additional works conducted by D.H, because of the fact that "the invoices delivered by the Claimant were not objected to".

25. Finally, the Applicant requests the Constitutional Court to approve the Referral as admissible and declare violation of Article 46 [Protection of Property] in conjunction with Article 1, Protocol 1 (Protection of Property) of the Convention and to annul Judgment [Rev. 21/2016] of the Supreme Court, remanding the case for retrial.

Admissibility of the Referral

26. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and as further provided by the Law and foreseen by the 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 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."*

28. In continuation, the Court also examines whether the Applicant has fulfilled the admissibility requirements as further specified in the Law and Rules of Procedure. In this respect, the Court first 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."

29. Regarding the fulfillment of these requirements, the Court notes that the Applicant is an authorized party, contesting an act of a public authority, namely, the Supreme Court Judgment [E. Rev.nr.21/2016] of 02 June 2016, after having exhausted all legal remedies provided for by law. The Applicant has also accurately specified the rights, guaranteed by the Constitution and the Convention that have allegedly been violated, in accordance with Article 48 of the Law and has submitted the referral within the four (4) month legal deadline foreseen in Article 49 of the Law.

30. In addition, the Court must examine whether the Applicant has fulfilled the admissibility requirements provided by Rule 36 [Admissibility Criteria] of the Rules of Procedure. Rule 36 (1) of the Rules of Procedure specifies the requirements under which the Court may examine a referral, including the requirement that the referral is not manifestly ill-founded. According to Rule 36 (2), a Referral is manifestly ill-founded when it is satisfied 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;"

31. In this respect, the Court recalls that the Applicant challenges the Judgment of the Supreme Court [E. Rev.nr.21/2016] of 02 June 2016, arguing that, *i)* the Supreme Court failed to consider his claim for payment for additional works conducted in the square in light of the right to property as guaranteed by the Constitution; *ii)* the Municipality, as a public authority, based on the Constitution, Convention, and the ECtHR case law, has a positive obligation, to prevent the Applicant from undertaking investments, which in the view of the Municipality had no legal basis and, *iii)*that the Supreme Court in a case that is similar to the one of the Applicant has decided differently, thus rising issues of the right to fair and impartial trial under Article 31 of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the Convention.

As to the alleged violation of the Right to Protection of Property

32. The Court first recalls the content of Article 46 of the Constitution and Article 1 Protocol No. 1 of the Convention:

Article 46 [Protection of Property] of the Constitution:

"1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.
[...]

Article 1 [Protection of Property] of Protocol nr. 1 of the Convention:

1. *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

2. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

33. The content of Article 1 of Protocol no. 1 of the Convention and its application, have been interpreted by the ECtHR through its case law, and the Court based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret human rights and freedoms guaranteed by the Constitution in harmony with the case law of the ECtHR. Consequently, regarding the interpretation of allegations concerning violation of Article 46 of the Constitution in conjunction with Article 1, Protocol no. 1 of the Convention, the Court will refer to the ECtHR case law.

34. As it pertains to the rights guaranteed and protected by Article 46 of the Constitution, the Court firstly notes that the right to property under paragraph 1 Article 46 of the Constitution guarantees the right to own property; paragraph 2 of Article 46 of the Constitution defines the method of use of the property, by clearly specifying that it's use is regulated by law and in accordance with the public interest and in paragraph 3, it guarantees that no one can be deprived of property in an arbitrary manner, while also determining the conditions under which property can be expropriated. (see, *mutatis mutandis*, Case KI50/16, Applicant *Veli Berisha and others*, Resolution on Inadmissibility of 10 March 2017, para. 31).

35. As it pertains to the rights guaranteed and protected by Article 1 of Protocol 1 of the Convention, the Court notes that the ECtHR has held that the right to property comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; this appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; this is contained in the second paragraph. (See, *mutatis mutandis,* the Judgment of the ECtHR of 23 September 1982, *Sporrong and Lonnrot v. Sweden*, no. 7151/75; 7152/75, para. 61).

36. The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule. (See, mutatis mutandis, the Judgment of the ECtHR of 21 February 1986, *James and others v. UK*, no. 8793/79, para. 37).

37. In addition, the concept of "possessions" and "legitimate expectations" have a central place in the interpretation on the property rights guaranteed by the Convention and further developed by the ECtHR case law.

38. As it pertains to the first, the ECtHR has consistently held that the concept of "possession" within the meaning of Article 1 of Protocol No. 1 of the Convention has an autonomous meaning which is not limited to ownership of material goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions". (See, the Judgment of the ECtHR of 13 December 2016, *Béláné Nagy v. Hungary*, no. 53080/13, para.73 and 75; the Judgment of ECtHR of 22 June 2004, *Broniowski v Poland*, no. 31443/96, para. 129).

39. On the other hand, the "legitimate expectations may give rise to possessions". Although Article 1 of Protocol No. 1 applies only to a person's existing possessions and does not create a right to acquire property, in certain circumstances a "legitimate expectation" of obtaining an asset may also enjoy the protection of Article 1 of Protocol No. 1. (See, the Judgment of the ECtHR of 13 December 2016, *Béláné Nagy v. Hungary*, no. 53080/13, para.73 and 75; the Judgment of ECtHR of 22 June 2004, *Broniowski v Poland*, no. 31443/96, para. 129).

40. The Court recalls however that the ECtHR also maintains that: a "legitimate expectation" must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. (See, the Judgment of the ECtHR of 13 December 2016, *Béláné Nagy v. Hungary*, no. 53080/13, para.75). No "legitimate expectation" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts. (See, the Judgment of the ECtHR of 13 December 2016, *Béláné Nagy v. Hungary*, no. 53080/13, para.75).

41. In the present case, the allegation of the Applicant falls within the first rule set out in the first sentence of the first paragraph of Article 1 of Protocol no. 1 of the Convention – peaceful enjoyment of possessions. This guarantee also entails, according to the ECtHR case law, the positive obligations of the state to protect possessions, which the Applicant refers to and alleges constitute violations of property rights in its case.

42. The Court recalls that the ECtHR, in this respect maintains that *"Genuine, effective exercise of the rights protected by that provision does not merely depend on the state's duty to not interfere, but may acquire positive measures of protection, particularly where there is a direct link between the measures which an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions"*. (See, the Judgment of the ECtHR of 30 November 2004, *Oneryildiz v Turkey*, no. 48039/99, para.134).

43. However, in determining whether the concept of positive obligations, preventive or remedial, to protect peaceful enjoyment of possessions, applies in the circumstances of the Applicant, firstly, the question to be examined in the present case is whether the circumstances of the case, considered as a whole, conferred on the Applicant a title to a

substantive interest protected by Article 46 of the Constitution and Article 1 of Protocol No. 1. (See, *mutatis mutandis*, the Judgment of ECHR of 22 June 2004, *Broniowski v Poland*, no. 31443/96, para. 129).

44. The Court recalls that while "legitimate expectations may give rise to possessions", a "legitimate expectation" must be of a concrete nature, be based on legal provision or a judicial decision, and that one cannot arise where there is a dispute as to the correct interpretation or application of domestic law.

45. In this respect, the Court recalls that the Applicant failed to secure a written contract or amendment to existing contract for conducting the additional works in the Square, which it claims were requested by the Municipality, as required by the LOR. The Court also recalls that the allegations of the Applicant were rejected by the regular courts, Basic, Appeals and Supreme Court, respectively.

46. The Court recalls that the Basic Court [Judgment C.nr.411/2012] based its decision, among others, on the reasons that there was "*no prior written consent from the [Municipality], or addendum to the contract in regard to performing the works"* as required by the applicable legislation.

47. The Basic Court has also addressed the Applicant's arguments that the work performed should not have been considered as a construction contract, but a services contract instead. The Basic Court, in responding to this allegation, reasoned:

> *"based on the provision of Article 630 of LOR, this is a contract on construction as such it was foreseen in the job description mentioned in general requirements of the contract of 03.11.2009, therefore, in this case we are not dealing with a services contract as Claimant supposes in his written closing statement."*

48. The Court notes that the reasoning adopted by the Basic Court was confirmed by the Court of Appeal, which among others, reasoned that:

> *"The [Applicant] as a contractor is a specialized organization for contracting construction works and being that, in this respect it should have known that without consent, without addendum to the contract no work can be done if not foreseen by the contract. Moreover, the [Applicant] was aware of this fact where in in Article 2.2, Article 21 and 28.4 of the [main] contract it is clearly defined that no additional work is allowed which exceed the contracted price."*

49. The Court also reiterates that the Supreme Court, among others, concluded that:

> *"the additional works were not authorized by the contracting authority being the sole competent authority for issuing consent for additional works or through getting consent from the [Agency on Public Procurement] for signing the contract through the negotiated procedure in this case the [Applicant] has no legal basis to realize the right of compensation for the performed works, as was rightfully determined by the two courts".*

50. In this respect, the Court considers that the conclusions of the Basic Court, Court of Appeals and the Supreme Court were reached after a detailed examination of all arguments submitted by the Applicant. In this way, the Applicant was given the opportunity to present at all stages of the proceedings the arguments and evidence which he considered relevant to his case.

51. All the arguments of the Applicant, which were relevant to the resolution of the dispute, were heard and properly reviewed by the courts and the Court concludes that the proceedings before the regular courts, viewed in their entirety, were fair. (See, *mutatis mutandis*, ECHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, para. 29 and 30).

52. Considering the above, and the circumstances of the case as a whole, the Court notes that the Applicant did not substantiate that the circumstances of the case conferred to the Applicant a "legitimate expectation" protected under the right to property under Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the Convention. The ECtHR case law clearly maintains that a "legitimate expectation" cannot arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts. (See, the Judgment of the ECtHR of 13 December 2016, *Béláné Nagy v. Hungary*, no. 53080/13, para.75).

53. The Court also recalls that the Applicant, relying in ECtHR Judgment *Zolotas v. Greece (no. 2),* alleges that the state has a positive obligation to protect the right to property of the citizen, so it would be legitimate for the Applicant in this case to expect to be notified or prevented by the Municipality to continue making investments which put his financial interest to risk. The Applicant maintains that an early notification regarding this situation by the Municipality as public authority would have resulted in Applicant's actions that would ensure that the work would be performed in accordance with the law, and that it would therefore be able to preserve and protect his right to property.

54. In this regard, the Court notes that in the above Judgment (Zolotas v Greece (no2)) of the ECtHR found that: *"State has a positive obligation to protect citizens and to require that banks, in view of the potentially adverse consequences of limitation periods, should inform the holders of dormant accounts when the limitation period is due to expire and thus afford them the possibility of stopping the limitation period running, for instance by performing a transaction on the account."* Accordingly, by not notifying the account holders about the limitation period, the bank *"placed account holders, especially when they are ordinary citizens unversed in civil or banking law, at a disadvantage vis-à-vis the bank or even the State".* (See ECtHR judgment of 29 January 2013, *Zolotas v. Greece (no. 2),* application no.66610/09, paragraph 53).

55. However, the lack of establishment of a "legitimate expectation" aside, the Court also notes that the circumstances of the case of the Applicant differ from the circumstances in the case *Zolotas v. Greece (no. 2)*, because as specified, among others, by the Court of Appeals, the Applicant is a specialized organization for contracting construction works and being that, it was in a position to know that without a written contract or addendum to the existing contract, no additional work can be performed in accordance with the legislation in force. Therefore, with no prejudice to the appropriateness of actions of the municipality, this allegation of the Applicant is not grounded.

As to the allegations of the Applicant regarding the right to fair and impartial trial

56. The Court recalls that the Applicant alleges that the Supreme Court in a case that is similar to the one of the Applicant has decided differently, thus rising issues of the right to fair and impartial trial under Article 31 of the Constitution in conjunction Article 6 of the Convention.

57. In this, regard the Court recalls the ECtHR case law, which, among others, emphasizes: *"[...] save in the event of evident arbitrariness, it is not the Court's role to question the*

interpretation of the domestic law by the national courts. (See, for example, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008). *Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts [...]".* (Judgment of the ECtHR of 20 October 2011, *Nejdet Şahin and Perihan Şahin v. Turkey*, No. 13279/05, paragraph 50).

58. The Court notes that the Applicant specifically refers to the Judgment of the Supreme Court [Rev. No. 35/2013 of 9 December 2013] submitted to the Court, by which the Supreme Court had rejected as ungrounded the revision against Judgment of the Court of Appeals which approved the findings of the Basic Court to oblige a government institution to pay for the additional works conducted by a contractor that where not foreseen in the initial contract.

59. With regard to the Applicant's claim, the Court again refers to the ECtHR case law, which has admitted that*: "A certain degree of distinction in legal interpretations [by the courts] can be accepted as an inherent feature of any judicial system [...] However, when the higher court finds no solution to contradictory decisions without any valid reason, it becomes a source of legal uncertainty. (*See ECtHR cases, *Beian v. Romania*, application No. 30658/05, Judgment of 6 March 2008, paragraph 39 and *Tomić and Others v. Montenegro*, applications no. 18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09 and 7316/10, Judgment of 17 April 2012, paragraph 53).

60. However, the ECtHR has established in its case law the criteria for assessing the conditions in which contradictory decisions of the last instance courts are in contradiction with the right to a fair trial, namely it must be established whether there are any profound differences in the case law, whether the domestic law provides for a mechanism to overcome those inconsistencies, whether this mechanism has been implemented and if so, to what extent. (See *mutatis mutandis* the case of ECtHR *Iordan Iordanov and Others v. Bulgaria*, Application no. 23530/02, Judgment of 2 October 2009, para. 49-52).

61. In the present case, the Court finds that the Applicant referred and submitted only one Judgment of the Supreme Court [Rev. No. 35/2013 of 9 December March 2013], which, the Applicant alleges, in similar factual circumstances interpreted differently the substantive law.

62. In the light of the ECtHR case law, however, the Court considers that it is not possible to ascertain the existence of profound and long-lasting differences in the case law of the Supreme Court which endangers the principle of legal certainty by invoking only one Judgment of the Supreme Court, rendered around four (4) years earlier.

63. In addition, the Court notes that the Applicant did not explain and argue how his case is similar with the other case decided by the Supreme Court, referred to by the Applicant. The Applicant only concluded that the Supreme Court obliged the Government *"to pay off the debt on behalf of additional works for fixing the sewage system as the Commission of the Respondent concluded that the works are completed and by the fact that the invoices delivered by the Claimant were not objected to*".

64. Therefore, the Court considers that the Applicant has not submitted evidence nor has it substantiated its allegations for violation of his rights on fair and impartial trial or equality before the law. When such constitutional violations are alleged, the applicant should provide well-reasoned justification and convincing arguments. (See the

Constitutional Court Case, KI45/15, *Elizabeta Arifi*, Resolution on Admissibility of 7 April 2016, para. 49).

65. In addition, the Court considers that the Applicant has not succeeded to show and prove that the proceedings before the Supreme Court were unfair or tainted by arbitrariness or that his rights and freedoms protected by the Constitution have been infringed by the alleged erroneous interpretation of the respective law. The Court reiterates that, the interpretation of law is a matter solely for the regular courts and is a matter of legality. No constitutional matter was substantiated by the Applicant. (See the Constitutional Court case KI63/16, Applicant *Astrit Pira*, Resolution on Admissibility, of 8 August 2016, para. 44. And also CaseKI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 dhe KI64/16, applicant *Arben Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku and Sami Lushtaku*, Resolution on Admissibility, of 15 November 2016, para. 62).

66. In this regard, the Court emphasizes that it is not its task to deal with errors of law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess that law that lead a regular court to issue one decision instead of another. If it was different the Court would act as "fourth instance court", which would result in a exceeding the limitations provided for its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and material law. (See case, of 21 January 1999, *Garcia Ruiz v. Spain*, no. 30544/96, para. 28; see also, case KI70/11, Applicant *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011.

67. The Court notes that the Applicant does not agree with the conclusions of the decision of regular courts. However, the mere fact that the Applicant is not satisfied with the outcome of the decisions of regular courts cannot raise on itself an arguable claim for violations of Article 31 [Right to a Fair and Impartial Trial] guaranteed by the Constitution. (See, *mutatis mutandis*, the ECtHR case *Mezotur Tiszazugi Tarsulat v Hungary*, No. 5503/02, Judgment of 26 July 2005).

68. Thus, the Court considers that the admissibility requirements established by the Rules of Procedure have not been met, because the referral must be considered as manifestly ill-founded as the presented facts do not in any way justify the allegation of a violation of the constitutional rights and as the Applicant does not sufficiently substantiate its claim.

69. Accordingly, the Referral is manifestly ill-founded on constitutional basis 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 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS,

The Constitutional Court of Kosovo, in accordance with Article 113 (7) of the Constitution, Articles 48 of the Law and Rule 36(1) (d) and (2) (b) of the Rules of Procedure, in the session held on 13 November 2017, unanimously

DECIDES

I. TO DECLARE the Referrals inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law; and

IV. TO DECLARE this Decision effective immediately;

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

KI 108/17, Applicant: SH.A. Elektromotorri, constitutional review of the Decision, Ac. no. 1275/2016 of the Court of Appeal of the Republic of Kosovo, of 7 April 2017

KI 108/17, Resolution on inadmissibility approved on 23 October 2017 and published on 20 December 2017

Key words: *Individual referral, referral filed out of time*

The subject matter of the Referral is the constitutional review of the challenged Decision whereby the Applicant's appeal concerning his request to annul the enforcement proceedings against its enterprise was rejected.

The Applicant alleged that its rights guaranteed by Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo were violated.

The Constitutional Court declared the Referral inadmissible because the Applicant had filed it out of the time limit determined by the Law and the Rules of Procedure, recalling that the objective of the four-month legal deadline is to promote legal certainty by ensuring that cases raising issues under the Constitution are dealt with within a reasonable period of time and that past decisions are not continually open to challenge.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI108/17

Applicant

Elektromotorri SH.A

Constitutional review of the Decision, Ac. no. 1275/2016 of the Court of Appeal of the Republic of Kosovo, of 7 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
Gresa Caka-Nimani, Judge.

Applicant

1. The Applicant is Elektromotorri SH.A with seat in Gjakova (hereinafter: the Applicant), represented by Mr. Idriz Daci, a practicing lawyer from Gjakova.

Challenged Decision

2. The Applicant challenges the Decision (Ac. no. 1275/2016, of 7 April 2017) of the Court of Appeal of the Republic of Kosovo (hereinafter, the Court of Appeal).

3. The challenged Decision was served on the Applicant on 28 April 2017.

Subject Matter

4. The subject matter of the Referral is the constitutional review of the challenged Decision which rejected the Applicant's appeal related to its request for annulment of enforcement proceedings against his company.

5. The Applicant alleges that through the challenged Decision, the Court of Appeal has violated his *"right to protection of property."*

Legal basis

6. The Referral is based on Article 21 (4) and 113 (7) of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter, the Law), and Rule 56 of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 8 September 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 11 September 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

9. On 18 September 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeal.

10. On 23 October 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. Following the conclusion of regular court proceedings on the merits of the case, the Applicant was obliged to pay a certain amount of money to a creditor. An enforcement order was issued which was subsequently challenged by the Applicant before the Basic Court in Gjakova.

12. On 13 January 2016, the Basic Court in Gjakova (Decision PPP. no. 176/15) rejected the Applicant's objection to enforcement because it was filled out of time.

13. The Applicant appealed the aforementioned Decision before the Court of Appeal.

14. On 7 April 2017, the Court of Appeal (Decision Ac. no. 1275/2016, of 7 April 2017) rejected the Applicant's appeal filed against the Decision of the Basic Court it Gjakova with the following reasoning:

> *"The Court of Appeal observes that [...] the objection* [by the Applicant] *was filed 7 days beyond the prescribed time-limit and that the court of first instance* [Basic Court in Gjakova] *has rightfully dismissed the objection as out of time [...]".*

Applicant's allegations

15. The Applicant alleges that the Court of Appeal has violated his right guaranteed by Article 46 [Protection of Property] of the Constitution by not approving his appeal filed against the Decision of the Basic Court in Gjakova.

16. Consequently, the Applicant requests the Court to annul the challenged Decision and return the matter to the Basic Court of Gjakova for retrial.

Admissibility of the Referral

17. The Court first examines whether the Applicant has met the admissibility requirements set by the Constitution and as further provided by the Law and the Rules of Procedure.

18. In this respect, the Court refers to 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."

19. In addition, the Court refers to Article 49 of the Law which provides:

"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. [...]."

20. The Court also takes into account Rule 36 (1) (c) of the Rules of Procedure:

"(1) The Court may consider a Referral if:

[...]

(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant [...]."

21. Based on the case file, the Court notes that the Applicant filed his Referral on 8 September 2017 whilst the challenged Decision (Ac. no. 1275/2016, of 7 April 2017) of the Court of Appeal was served on the Applicant on 28 April 2017.

22. These facts demonstrate that the Applicant submitted his Referral to the Court after the expiry of legal deadline of four months, as requested by the admissibility requirements stipulated in Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.

23. The Court recalls that the objective of the four months legal deadline is to promote legal certainty by ensuring that cases raising issues under the Constitution are dealt within a reasonable time and that past decisions are not continually open to challenge (See cases of the European Court of Human Rights: *Sabri Güneş v. Turkey*, No. 27396/06, ECtHR, Judgment of 29 June 2012; *Idalov v. Russia*, No. 5826/03, ECtHR, Judgment of 22 May 2012; *O'LOUGHLIN and Others v. United Kingdom*, No. 23274/04, ECtHR, Decision of 25 August 2005; see also cases of the Constitutional Court: Case No. KI175/14, *Sylejman Daut Dibra*, Resolution on Inadmissibility of 25 March 2015; Case No. KI102/14, *Arben Ademi*, Resolution on Inadmissibility of 22 January 2015).

24. For the foregoing reasons, the Court concludes that the Referral is out of time and should be declared as inadmissible pursuant to Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.

FOR THESE REASONS

Pursuant to Articles 113.1 and 113.7 of the Constitution, Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure, on 23 October 2017, unanimously:

DECIDES

I. TO DECLARE the Referral as 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. TO DECLARE this Decision effective immediately

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Arta Rama-Hajrizi

KI 101/17 Applicant Nesim Cena, constitutional review of Judgment AC-I-14-0030 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 27 July 2017

KI101/17 Resolution on Inadmissibility approved on 23 October 2017, published on 20 December 2017

Key words: Individual referral, Property rights, referral manifestly ill-founded

The Applicant did not specify in the Referral which Constitutional rights and freedoms have been violated by the challenged Judgment of the Appellate Panel.

The Court noted that, in essence, the Applicant complains of the fairness of the court proceedings relating to the rejection of his appeal regarding the property claim he has filed with the Liquidation Commission of the SOE "Silos".

The Court finds that the Applicant's allegations of erroneous application and inconsistent interpretation of the relevant legal provisions, allegedly committed by the Specialized Panel and the Appellate Panel, raise questions that fall within the scope of the regular courts (legality), and not in the domain of the Constitutional Court (constitutionality).

The Court considered that the Applicant has not substantiated his allegations, nor has he submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI101/17

Applicant

Nesim Cena

Constitutional review of Judgment AC-I-14-0030 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 27 July 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 Nesim Cena from Rahovec (hereinafter: the Applicant), who is represented by Ismet Kërçagu, a lawyer from Rahovec.

Challenged decision

2. The Applicant challenges Judgment AC-I-14-0030 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel) of 27 July 2017.

Subject matter

3. The Applicant did not specify in the Referral which constitutional rights and freedoms have been violated by the challenged Judgment of the Appellate Panel.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the 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

5. On 21 August 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 22 August 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.

7. On 28 August 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Appellate Panel.

8. On 23 October 2017, the Review Panel considered the report of the Judge Rapporteur, and made a recommendation to the Court on the inadmissibility of Referral.

Summary of facts

9. The Applicant had established an employment relationship with the Socially Owned Enterprise "Silosi" (hereinafter: SOE "Silosi").

10. On 19 November 1991, the management of SOE "Silosi" rendered Decision No. 278, which terminated the Applicant's employment relationship.

11. On 16 November 2005, the Board of Directors of the Privatization Agency of Kosovo (hereinafter: PAK Board of Directors) rendered decision to start the liquidation process of SOE "Silosi" on 17 November 2005. The decision on liquidation states *[…] all interested parties have a deadline to submit their property claims to the Liquidation Commission of the SOE "Silosi" by 26 February 2006."*

12. On 25 January 2008 (after the expiry of the legal deadline), the Applicant filed his property claim with the Liquidation Commission of SOE "Silosi", with the reasoning: "*… that he was a little late with his complaint because he did not know that his claim should be submitted to the Liquidation Commission".*

13. On 14 February 2013, the Liquidation Authority of the Privatization Agency of Kosovo (hereinafter: the Liquidation Authority of PAK), rendered Decision No. PRZ004-0397, which rejected the Applicant's property claim as ungrounded because "*it was filed out the time-limit in which the parties had the opportunity to file their property claims."*

14. On 7 March 2013, the Applicant filed a complaint with the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Special Chamber), against Decision No.PRZ004-0397 of the Liquidation Authority of PAK.

15. The Applicant, among other things, stated in the appeal: *"that he was late with his claim due to the fact that he did not know that he had to address the authorities for the payment of unpaid salaries."*

16. On 31 July 2013, the Liquidation Authority of PAK responded to the Applicant's appeal and proposed to the court to reject the appeal as inadmissible and ungrounded with the reasoning "*that the appeal is ungrounded, that the claim was statute-barred because it was filed after the expiration of the prescribed deadline for filing claims."*

17. The Applicant's appeal and the PAK response were forwarded by the Special Chamber to the Specialized Panel No. IV of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel) for rendering decision.

18. On 15 January 2014, the Special Chamber rendered Judgment C-IV-13-0102, rejecting the Applicant's appeal as ungrounded, with a reasoning:

> "*Neither in his complaint nor in his response to the respondent's defense filed later on, the complainant (the Applicant) has provided any credible evidence whereby would have been excused his very long delay in filing the claim with Liquidation Authority.*"
>
> *Article 37, paragraph 4, item 4.1 of Annex to the Law no. 04/L-034 on Privatization Agency of Kosovo determines that claims that are barred by a limitation period established by the law applicable thereto and claims that have not been properly and timely brought in a court having jurisdiction with respect thereto, shall be rejected and shall not be eligible to participate in any distributions from the liquidation.*"

19. On 7 March 2014, the Applicant filed an appeal with the Appellate Panel.

20. The Liquidation Authority of PAK sent also its responses to the Appellate Panel, which among other things stated "*that the deadline expired on 26 February 2006. Accordingly, his claim was out of time.*"

21. On 27 July 2017, the Appellate Panel rendered Judgment AC-I-14-0030 rejecting the Applicant's appeal as ungrounded. The reasoning of the Judgment reads:

> *"The panel found that the liquidation of SOE "Silosi" Xërxë started on 17 November 2005, based on the decision of the Board of Directors of PAK dated 16 November 2005. The deadline for submitting the claims to the Liquidation Commission expired on 26 February 2006. The complainant submitted his claim on 25 January 2008, as can be seen from the KTA stamp. […] Based on all the above, the Appellate Panel considers that the appeal must be rejected as unfounded."*

Applicant's allegations

22. The Applicant states that *"It is true that he had a small delay on submitting the request in question but as we provided an explanation initially he was not aware that he shall address the body regarding the request for the compensation of unpaid salaries, he does not read press; he is a driver, he does not deal with politics."*

23. The Applicant claims that the legislator regarding the delays in cases such as his, also provides the facilitations, so that Article 380, paragraph 2 and Article 193 of the Law on Obligational Relationships tolerate a delay of up to five years. His claim must be analogously linked with these Articles.

24. The Applicant requests the Court to "*…take into consideration the allegations in the Referral and to approve the referral as grounded, and to make the payment of 161 unpaid salaries which amount to 80.0498. Euros."*

Admissibility of the Referral

25. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and as further specified in the Rules of Procedure.

26. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties], 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."

27. The Court notes in the present case that the Applicant did not specify in his Referral what constitutionally guaranteed rights and freedoms have been violated by the decisions of the regular courts, although Article 48 of the Law [Accuracy of Referral] stipulates that:

"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."

28. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

"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."

29. The Court notes that the Applicant is an authorized party; the Referral was filed in accordance with the time limits stipulated by Article 49 of the Law and the Applicant has exhausted all legal remedies.

30. The Court further refers to Rule 36 (1) (d) and (2) (b) of the Rules of Procedure, which foresees:

"(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. "

31. The Court notes that, in essence, the Applicant complains of the fairness of the court proceedings relating to the rejection of his appeal regarding the property claim he has filed with the Liquidation Commission of the SOE "Silos".

32. Therefore, the Court will deal with the examination of the Applicant's Referral based on the right to fair trial guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution.

33. As to Article 31 [Right to Fair and Impartial Trial] of the Constitution, the Court first recalls its case law, where it has established:

"*By the Constitution, it is not its duty to act as court of appeal, or a fourth instance court, in relation to decisions made by lower courts. The role of the lower courts is to interpret the law and apply the appropriate rules of procedure and substantive law (see, mutatis mutandis, Garcia Ruiz v. Spain [GC], No. 30544/96, paragraph 28, European Court of Human Rights [ECtHR] 1999-1).*

The Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see, Constitutional Court Judgment of 23 June 2010, Kosovo Energy Corporation against 49 individual judgments of the Supreme Court of the Republic of Kosovo, paras 66 and 67).” (See Constitutional Court Resolution on Inadmissibility of 18 October 2010, *Karfeta v. Supreme Court*, KI 42/09, para. 18, 19).”

34. The Court also recalls 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.”*

35. In this respect, the Court reiterates that, according to the European Court of Human Rights (hereinafter: the ECtHR) *“the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law*” (see: ECtHR, case Judgment of 21 January 1999, *Garcia Ruiz v. Spain* [GC], No. 30544/96, para. 28).

36. The Court notes in the present case that the Applicant mentions as main argument for alleged constitutional violations the fact that *“the courts should have applied the legal provisions of Article 380, paragraph 2, and Article 193 of the Law on Obligational Relationships, which regulate different time-limits for the statutory limitation.”*

37. Precisely as far as these Applicant’s allegations are concerned, the Court recalls the reasoning of the ECtHR in the case *Anđelković v. Serbia* (Judgment of 9 April 2013, No. 1401/08, paragraph 24):

“The Court reiterates at the outset that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, among many authorities, Brualla Gómez de la Torre v. Spain, 19 December 1997, § 31, Reports of Judgments and Decisions 1997-VIII). That being so, the Court will not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness (see, mutatis mutandis, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008), in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or a denial of justice (see, mutatis mutandis, Farbers and Harlanova v. Latvia (dec.), no 57313/00, 6 September 2001, and, albeit in the context of Article 1 of Protocol No. 1, Beyeler v. Italy [GC], no. 33202/96, § 108, ECHR 2000-I).”

38. Based on this, the Court finds that the Applicant's allegations of erroneous application and inconsistent interpretation of the relevant legal provisions, allegedly committed by the Specialized Panel and the Appellate Panel, raise questions that fall within the scope of the regular courts (legality), and not in the domain of the Constitutional Court (constitutionality).

39. In addition, the Court finds that the Specialized Panel and the Appellate Panel in their judgments applied the legal provisions of Article 37, paragraph 4, item 4.1 of the Annex to the Law No. 04/L-034 on the Privatization Agency of Kosovo, which regulate precisely the time limits for the statutory limitation of claims:

“Annex to the Law No. 04/L-034 on the Privatization Agency of Kosovo

Article 37 paragraph 4 item 4.1

> *[...]*
> *4.1. Claims that are barred by a limitation period established by the law applicable thereto and claims that have not been properly and timely brought in a court having jurisdiction with respect thereto, shall be rejected and shall not be eligible to participate in any distributions from the liquidation."*

40. The Court further notes that the Appellate Panel in its judgment AC-I-14-0030 also responded to the Applicant's allegations concerning the application of Article 380 para. 2 and Article 193 of the Law on Obligational Relationship, and why that legal provision was not applied in the present case and this Court finds it as legally based and justified.

> *"Article 35.3 of the Annex envisages that "if the alleged creditor or interest holder provides compelling justification for late filing, the Liquidation Authority may in its sole discretion accept a Proof of Claim or Interest submitted after the Claims Submission Deadline, if the proof of Claim or Interest is filed not later than thirty (30) days after the Claims Submission Deadline. In this specific case, the appellant has submitted his submission approximately 23 months after expiry of the deadline. Therefore, Article 35.3 of the Annex cannot be applied. As the Article 35.3 of the Annex is a more specific Law for the case subject to this review, the Article 380.2 of the Law on Obligations is not applicable."*

41. In these circumstances, the Court considers that nothing in the case presented by the Applicant indicates that the regular court proceedings were unfair or arbitrary such that the Constitutional Court to reach the conclusion that the very essence of the right to a fair and impartial trial was violated, or that that the Applicant has been deprived of any procedural guarantees which could lead to a violation of that right under Article 31 of the Constitution or Article 6 of the ECHR.

42. Furthermore, as regards the violation of Article 46 [Protection of Property], based on the conclusions of the regular courts and also based on the Applicant's allegations in the Referral, the Court finds that the Applicant failed to pursue his property rights, that is to say, to gain the right to unpaid earnings which he considers to be entitled to, because he submitted his property claim with the competent authorities out of time, and what the regular courts have concluded in their judgments.

43. Bearing in mind the above, the Court considers that the Specialized Panel and Appellate Panel gave clear and precise arguments to substantiate all their findings and conclusions. Accordingly, the Court cannot assess the proceedings before the regular courts as arbitrary.

44. The Court considers that it is the Applicant's obligation to substantiate his constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR. That consideration is in conformity with the jurisprudence of the Court (See Constitutional Court cases No. KI19/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, 5 December 2013).

45. However, the Court finds that the Applicant has neither substantiated his allegation nor has he demonstrated that there was any violation of his constitutional rights.

46. In sum, the Court considers that the Applicant has not substantiated his allegations, nor has he submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR.

47. Therefore, the Referral is manifestly ill-founded on constitutional basis and it is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 paragraph 7 of the Constitution, Article 47 of the Law and Rule 36 (1) (d) and (2) (b) of the Rules of Procedure, in the session held on 23 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 paragraph 4 of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional**
Snezhana Botusharova	Arta Rama-Hajrizi

KI56/17 Applicant: Lumturije Murtezaj, constitutional review of Judgment Rev. No.442/2016 of the Supreme Court of Kosovo of 15 February 2017

KI56/17, Resolution on inadmissibility of 18 October 2017, published on 20 December 2017

Keywords*: individual referral, constitutional review of judgment of the Supreme Court of Kosovo, civil proceedings, compensation of damage, statute of limitation, manifestly ill-founded*

The Applicant filed the Referral based on Article 113, paragraphs 1 and 7 of the Constitution, Article 47 of the Law No. 03/L-121on the Constitutional Court of the Republic of Kosovo, and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo. In this case, the Applicant sustained serious bodily injury in a traffic accident caused by the insurance user of the insurance company Kosova e Re in Prishtina. Between the Applicant's spouse and the Kosova e Re company was reached extrajudicial settlement regarding the compensation of material damage that had been sustained in the vehicle, however, the company Kosova e Re rejected the claim for payment of compensation for the Applicant's damages because „there was no data on injuries in the police record."

The Applicant initiates the proceedings before the regular courts, which end with the Judgment of the Supreme Court that the request is ungrounded and upholding the Judgment of the Court of Appeals that the claim for compensation of damage was statute-barred in accordance with the LOR. The Court notes at the outset that the Applicant does not substantiate her allegations of violation of Articles 21 and 23 of the Constitution, while she bases the allegation on violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution on the erroneous interpretation of the LOR by the Court of Appeals and the Supreme Court. From the foregoing, the Court finds that the Applicant's Referral does not meet the admissibility requirements established in the Rules of Procedure, because the Referral is manifestly ill-founded on constitutional basis and as such is declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI56/17

Applicant

Lumturije Murtezaj

Constitutional review of Judgment [Rev. No. 442/ 2016] of the Supreme Court of Kosovo of 15 February 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 Lumturije Murtezaj from Gjilan (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [Rev. No. 442/2016] of the Supreme Court of Kosovo of 15 February 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly has violated the Applicant's rights guaranteed by Article 21 [General Principles], Article 23 [Human Dignity] and Article 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] the Constitution, Article 47 [Individual Requests] of Law No. 03/L-121 on the 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

5. On 03 May 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 4 May 2017, 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 Gërxhaliu-Krasniqi.

7. On 8 May 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.

8. 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

9. On 09 May 2007, the Applicant sustained serious injuries in a traffic accident, which was caused by the user of the insurance company "Kosova e Re" in Prishtina (hereinafter: Kosova e Re).

10. On 15 January 2008, an extrajudicial agreement was reached between Kosova e Re and the Applicant's spouse for compensation of material damage caused to the vehicle.

11. On 31 March 2010, the Applicant filed a request for compensation of material and non-material damage with the company Kosova e Re.

12. On 30 August 2010, Kosova e Re rejected the request for compensation of damage of the Applicant, reasoning "*that in the police record of the scene, there are no data that there have been injuries.*"

13. On 23 November 2010, the Applicant filed a claim for compensation of damage with the Basic Court in Gjilan against Kosova e Re, specifying the maximum amount of compensation for all types of damage she alleged was caused.

14. On an unspecified date, Kosova e Re submitted a response to the claim, where it did not challenge the factual situation concerning the traffic accident, but it emphasized that the claim for compensation of damage was statute-barred, because it was filed after the legal deadline of three (3) years, as required by the Law on Obligational Relationships of SFRY (nos. 29/78, 39/85, 57/89) (hereinafter: the LOR).

15. On 11 June 2013, the Basic Court in Gjilan through Judgment [C. No. 575/2010], partly approved the Applicant's statement of claim for compensation of material and non-material damage and ordered Kosova e Re to compensate the respective damage to the Applicant.

16. In this Judgment, addressing the allegations of the respondent, namely Kosova e Re, as it pertains to the statute of limitations, on the basis of Articles 388 and 392 of the LOR, the Court reasoned that the statement of claim was not statute-barred, as by the filing of the first claim for damage on 31 March 2010, the 3 year deadline set by the statute of limitations was discontinued. In support of this finding, the Basic Court, among others, reasoned:

"And as in the present case from the date when the claimant filed the abovementioned claim with the respondent for compensation of damage on 31.03.2010, until the filing of the claimant's claim on 23.11.2010 the three year deadline was not exceeded, thus we do not have a statutory limitation of the claimant's claim."

17. Against the Judgment of the Municipal Court in Gjilan, the Applicant and Kosova e Re filed appeals with the Court of Appeals. The Applicant requested that the Court of Appeal approves her statement of claim in its entirety, while Kosova e Re challenged the statement of claim in its entirety, continuing to allege that based on the LOR, the deadline for filing the statement of claim is statute barred.

18. On 10 October 2016, the Court of Appeals by Judgment [Ac. No. 2623/13] approved the appeal of Kosova e Re, modified Judgment [C. No 575/10] of the Basic Court in Gjilan and rejected in its entirety the Applicant's statement of claim as ungrounded because it is statute-barred.

19. The Court of Appeals rejected as ungrounded the interpretation of the Basic Court that the statute of limitations period of three years was discontinued. On the contrary, on the basis of Articles 371 and 391 of the LOR, the Court of Appeals concluded that in the circumstances of the present case, the legal requirements for the discontinuation of the statute of limitations period have not been met, and that the deadline for filing the statement of claim started to run from the date of the accident, at the moment when the claimant, namely the Applicant became aware of the damage. In support of the conclusion that the three year deadline for filing the statement of claim was time-barred, the Court of Appeals, among others, had reasoned:

> *"...The reasoning of the first instance court cannot be accepted that by filing a claim for compensation by the claimant, addressing the respondent on 31.03.2010, the statutory limitation is interrupted pursuant to Article 388 of the LOR, because according to this provision, the statutory limitation can be interrupted only by those remedies which simultaneously terminate disputed relations and enable fulfillment of the right for which the statutory limitation was applicable. By provision of Article 391 of the LOR, it is foreseen that for interruption of the statutory limitation is not sufficient if the creditor has merely given the debtor notice in writing or verbally to fulfill the obligation [...] The factual situation has been correctly determined by the first instance court, but in this factual situation the first instance court erroneously applied the substantive law and for this reason the appealed judgment of the first instance court was modified and the statement of claim filed by the claimant was entirely rejected as ungrounded."*

20. On 17 November 2016, the Applicant filed a request for revision with the Supreme Court of Kosovo against Judgment [Ac. No. 2623/13] of the Court of Appeals. The Applicant argued that the Court of Appeals erroneously interpreted the LOR.

21. On 15 February 2017, the Supreme Court of Kosovo by Judgment [Rev. No. 442/2016] rejected the request for revision of the Applicant as ungrounded, upholding the Judgment of the Court of Appeals pertaining to the interpretation of the statute of limitation periods applicable to the statement of claim.

Applicant's allegations

22. The Applicant alleges that the Judgment of the Supreme Court violated her rights guaranteed by Articles 21 [General Principles], Article 23 [Human Dignity] and Article 31 [Right to Fair and Impartial Trial] of Constitution.

23. The Applicant alleges that the Supreme Court has erroneously interpreted the LOR when it found that the statute of limitation period of three years ran from the date of the accident and the legal requirements to consider the running of this deadline as discontinued were found not to be met.

24. The Applicant alleges that the dates 15 January 2008, when Kosova e Re entered into an extrajudicial agreement with her husband pertaining to vehicle damages, and 31 March 2010, when the Applicant filed a claim for compensation of damage with Kosova e Re, are moments that meet the legal requirements to discontinue the running of the statute of limitation period, and as a consequence, her claim for compensation of damage filed on 23 November 2010 with the Basic Court in Gjilan should have been treated as timely.

25. From the above, the Applicant concludes that *„...it results that in the present case we are not dealing with the statutory limitation of the request for compensation of the damage because the traffic accident happened on 5 September 2007; therefore, in the present case the time limit of 3 years should have been calculated from 1 January 2008, when we are dealing to the fact that the claim and the statement of claim for compensation of the damage was submitted to the court on 19 November 2010, from this follows that 3 years have passed."*

26. The Applicant requests the Court to hold that "*...that in the present case, both court authorities, the Court of Appeals and Supreme Court as well, violated the substantive law to her detriment; therefore, I consider the decisions of these courts as unlawful and I request to allow the realization of the right to compensation of the non-material damage for the injuries which caused serious consequences - 20 % reduction of general life activity and reduction of the working activity, which are presented in the medical documentation which is contained in the case files and mentioned in the challenged Judgments, the consequences of which are still being suffered because the applicant is continuously rehabilitating.*"

Admissibility of the Referral

27. The Court first examines whether the Applicant has met the admissibility requirements established in the Constitution and as further foreseen in the Law and specified in the Rules of Procedure.

28. 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."*

29. The Court also examines whether the Applicant has met the admissibility requirements as provided by the 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."

30. As to the fulfillment of these requirements, the Court finds that the Applicant filed the Referral in the capacity of an authorized party, challenging an act of a public authority, namely the Judgment of the Supreme Court [Rev. No. 442/2016] of 15 February 2017, after having exhausted all legal remedies determined by law. The Applicant has also clarified the rights and freedoms that she claims 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.

31. However, the Court must further assess whether the requirements as set forth in Rule 36 [Admissibility Criteria] of the Rules of Procedure have been met.

32. Rule 36, paragraphs (1) (d) and (2) (b) and (d) of the Rules of Procedure, stipulates:

(5) The Court may consider a referral if:

[...]

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

(6) 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, or

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

33. The Court first recalls that the Applicant alleges that the Judgment of the Supreme Court violated her rights guaranteed by Articles 21 [General Principles], 23 [Human Dignity] and 31 [Right to Fair and Impartial Trial] of the Constitution. The allegation for violation of her right to fair and impartial trial guaranteed by Article 31 of the Constitution is based on the erroneous interpretation of the provisions of the LOR by the Court of Appeals and the Supreme Court, pertaining to the statute of limitation period applicable to her statement of claim.

34. The Court initially notes that Applicant does not substantiate her allegations for violation of Articles 21 and 23 of the Constitution, while she bases the allegations for violation of her rights to fair and impartial trial guaranteed by Article 31 of the Constitution on the erroneous interpretation of the LOR by the Court of Appeals and the Supreme Court.

35. The Court considers that the Applicant has built her case on grounds of legality, namely on the erroneous determination of the factual situation pertaining to the calculation of the statute of limitation period, constituting an allegation for the erroneous interpretation of the LOR. The Court recalls that this allegation relates to the domain of legality and as such does not fall within the jurisdiction of the Constitutional Court, and, in principle, cannot be considered by the Court.

36. Moreover, the Court considers that the Applicant did not show and prove that the proceedings before the Supreme Court were unfair or arbitrary or that her rights and freedoms protected by the Constitution have been infringed by the alleged erroneous interpretation of the provisions of the LOR. The Court emphasizes that the interpretation of the LOR is a matter of legality. No constitutional matter has been substantiated by the Applicant. (See: case KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility, of 8 August 2016, para. 44. and see, also case KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants *Arben Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku dhe Sami Lushtaku*, Resolution on Inadmissibility, of 15 November 2016, para. 62).

37. In addition, the Court notes that the Supreme Court reasoned in detail and specifically addressed all the Applicant's allegations regarding the erroneous interpretation of the LOR.

38. The Court first notes that the Applicant repeats the same allegations which she also raised in the request for revision which the Supreme Court took into account and reasoned, emphasizing that:

> *"The Supreme Court of Kosovo accepts as fair and lawful the conclusion of the second instance court when it considers that the claim of the claimant for the reimbursement of the damage was not filed within the three-year subjective period from the day the claimant became aware of the damage and the person causing the damage, as defined in Article 376 par. 1 of the LOR, from the day the claimant became aware (found out) about the damage caused and the person who caused the damage."*

39. In addition, the Court notes that the Supreme Court responded in detail to the Applicant's allegations regarding the discontinuation of the statute of limitation period, reasoning that:

> *"... The allegations provided in the revision that the statutory limitation period for the reimbursement of the damage was terminated on the basis of Article 388 of the LOR, when the claimant in the claim of 31 March 2010 addressed the respondent for the reimbursement of the damage as well as when extrajudicial settlement was concluded on 15.1.2008 for compensation of the material damage for the car of the claimant's spouse (15.1.2008), in which car was also present the claimant. This Court found such allegations as ungrounded and, as such, they were rejected because according to this provision it is provided that the statutory limitation can be terminated only by those remedies which at same time terminate the contractual relations and enable fulfillment of the right for which the statutory limitation was applicable. Therefore, the Applicant's verbal or written request does not present a legal reference that can have an impact on termination of the statutory limitation, by the fact that, under Article 391 of the LOR, for interruption of the statutory limitation it is not sufficient to have written or verbal request of the creditor for fulfillment of the obligation by the debtor, but it is required that the creditor addresses a Court for fulfillment of debtor's obligations. In case the debtor does not respond on the creditor's call for fulfillment of the obligations for which*

the statutory limitation is foreseen, than there are no legal effects that can cause the interruption of statutory limitation..."

40. Therefore, the Court considers that the Applicant had the opportunity to present before the regular courts the material and legal reasons related to the dispute; her arguments were duly heard and examined by the Court of Appeals and the Supreme Court; and the proceedings, taken as a whole, were fair and the decisions rendered were reasoned in detail.

41. 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 o Inadmissibility, of 16 December 2011).

42. The Court further considers that the Applicant does not agree with the outcome of the proceedings before the regular courts. However, the dissatisfaction of the Applicant with the outcome of the proceedings cannot of itself raise an arguable claim for violation of the right to fair and impartial trial. (see: *mutatis mutandis* case *Mezotur - Tiszazugi Tarsulat v. Hungary*, paragraph 21 no. 5503/02, ECtHR, Judgment of 26 July 2005).

43. The Court notes that the Applicant did not accurately substantiate her allegations for violation of her rights and did not explain how and why the Judgment of the Supreme Court may have violated her constitutional rights; she only emphasized the there has been a violation of her constitutional rights. She did not provide any *prima facie* evidence which would indicate a violation of her constitutional rights. (see *Trofimchuk v. Ukraine*, ECtHR, paragraph 50-55, Judgment no. 4241/03, of 28 October 2010).

44. As a result, the Court considers that the Applicant has not substantiated her allegations that the relevant proceedings have been in any way unfair or arbitrary and that the challenged decision violated her constitutional rights and freedoms guaranteed by the Constitution and the European Convention on Human Rights. (see *mutatis mutandis: Shub vs. Lithuania*, No. 17064/06, ECHR, Decision of 30 June 2009).

45. Thus, the Court considers that the admissibility requirements established by the Rules of Procedure have not been met, because the referral must be considered as manifestly ill-founded as the presented facts do not in any way justify the allegation for a violation of the constitutional rights and as the Applicant does not sufficiently substantiate her claim for constitutional violation.

46. Accordingly, the Referral is manifestly ill-founded on constitutional basis and, in accordance with Rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure, is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (1) and (7) of the Constitution, Article 48 of the Law and Rule 36 (2) (b) and (d) and 56 of the Rules of Procedure, in the session held 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 Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI33/17, Applicant: Jusuf Bleta and others, Constitutional review of Decision AC-I-16-0179 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related matters, of 13 October 2016

KI33/17, Resolution on inadmissibility, approved on 4 July 2017, published on 20 December 2017

Key words: *individual referral, civil procedure, right to fair and impartial trial, out-of-time referral*

The Applicants alleged that their right to fair and impartial trial was violated by the challenged decisions because their right to equality of arms was violated through disregard to indisputable and notary-certified evidence concerning inheritance, and several of submissions of the Privatization Agency of Kosovo (PAK) submitted to the SCSC Specialized Panel and the SCSC Appellate Panel had not been served on the applicants as party to proceedings.

Having regard to the circumstances of the case, the Court found that the Referral had been submitted out of the time limit stipulated by Article 49 of the Law on the Constitutional Court and Rule 36 (1) (c) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI33/17

Applicants

Jusuf Bleta and others

Constitutional review of Decision AC-I-16-0179 of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency of Kosovo Related Matters, of 13 October 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 to the Court through the mail service by Jusuf Bleta, Nazim Bleta, Arsim Shuki, Vjollca Bajraktari, Besnik Shuki, Fevzi Shilik, Tyrkan Berisha, Hajrid Shilik, Urhan Shilik, Gjylten Ihtimani, Shyret Pirana, Shahdan Shilik, Nehari Iggji and Nazim Potori, all from Prizren and other heirs of the now-deceased Rasim B., former from Prizren Behar Shporta, Muhterem Muriq, Mudesir Mujo, Nersin Fusha, Hasar Fusha, Nesiman Shinik, Afrim Kula, Florija Geshmegji, Feria Karajagdihi, Sevim Shehi, Izet Kovaqi , Orhan Kovaqi, Perihan Spahi, Erdohan Shilik and Erol Shilik, all from Prizren and heirs of now-deceased Hasan Bleta, former from Prizren, represented by Mas-har Pirana, a lawyer from Prizren (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge Decision AC-I-16-0179 of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency of Kosovo Related Matters, of 13 October 2016 (hereinafter: the Appellate Panel of the SCSC), which was served on the Applicant's representative on 21 October 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, whereby the Applicant' rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) have allegedly been violated.

Legal basis

4. The Referral is based on Article 113.7 of 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

5. On 10 March 2017, the Applicants submitted the Referral through post service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court)

6. On 13 March 2017, the Referral was registered with the Court under number KI33/17.

7. On 7 April 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

8. On 24 April 2017, the Court notified the Applicants about the registration of the Referral and requested additional documentation. On the same date, the Court sent a copy of the Referral to the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC).

9. On 8 May 2017, the Court received the requested additional documentation.

10. On 4 July 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of Referral.

Summary of facts

11. On 18 July 2006, the Municipal Court in Prizren by Judgment C. No. 144/03 approved the claim of H. B, Y.B. and A.M. (all cousins and blood relatives to the Applicants) and declared them the owners of several cadastral parcels which were previously registered as the property of KBI "Progress" from Prizren.

12. On an unspecified date, the Applicants filed a claim with the Municipal Court in Prizren against H. B, Y. B. and A. M, claiming the right of ownership over 1/3 of the real part of that immovable property, alleging that they are also equal heirs of their predecessors and in an earlier court proceeding of 1996 all of them, as the heirs of their predecessors, together with the respondents became the owners in equal parts of another immovable property.

13. The Applicants claimed that the claim filed by their cousins H. B, Y. B. and A. M. without their inclusion was unlawful and based on false and incomplete documentation. This claim was reviewed in the Municipal Court with number C. No. 343/07.

14. On 4 July 2007, KBI "Progres" from Prizren made a proposal to the Municipal Court in Prizren and requested reopening of the procedure in case C. no. 144/03, completed with the final Judgment of 18 July 2006.

15. On 26 September 2007, the Municipal Court in Prizren, by Decision C. No. 470/07 allowed the repetition of the procedure and annulled the final Judgment C. No. 144/03 of 18 July 2006 and decided to reopen the procedure from the beginning, deciding that both claims, of the Applicants and of the respondents, are joined in a case, which was reviewed by the court with the number C. No. 470/07.

16. On 2 March 2011, the Municipal Court in Prizren, after the assessment of the claims, by Decision C. No. 470/07 was declared as incompetent and the case was referred to the Special Chamber of the SC for deciding.

17. On 3 June 2016, by Decision C-III-12-0683 of the Specialized Panel of the SCSC, the Applicants' claim was dismissed as inadmissible.

18. On 8 August 2016, against Decision C-III-12-0683, the Applicants filed appeal with the Appellate Panel of the SCSC.

19. On 13 October 2016, the Appellate Panel of the SCSC, by Decision AC-I-16-0179, rejected the Applicants' appeal as ungrounded and upheld Decision C-III-12-0683 of the Specialized Panel of the SCSC, of 30 June 2016.

Applicant's allegations

20. The Applicants allege that the challenged decision violated their right to fair and impartial trial, because the equality of arms was violated in such a way that the indisputable evidence certified by a notary stamp regarding the inheritance was not taken into account, and also some of the submissions of the Privatization Agency of Kosovo (PAK) submitted to the Specialized Panel of the SCSC and to the Appellate Panel of the SCSC were not served on the Applicants as parties to the proceedings.

Admissibility of Referral

21. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and in the Rules of Procedure.

22. In this respect, the Court refers to Article 113, paragraph 7 of the Constitution, which establishes that:

> *"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."*

23. In addition, the Court notes whether the Applicants filed appeal within the prescribed time limit, and in this case refer to Article 49 of the Law, which provides that:

> *"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. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."*

24. In order to verify whether the Applicants have submitted the Referral within the prescribed four 4 (four) month deadline, the Court refers to the date of receipt of the

final decision by the Applicants and the date of submitting the Referral to the Constitutional Court.

25. The "final decision" for the purposes of Article 49 of the Law will normally be the final decision rejecting the Applicants' claim (See *Paul and Audrey Edwards v. United Kingdom*, No. 46477/99, ECtHR, Decision of 14 March 2002).

26. The time limit starts to run from the final decision resulting from the exhaustion of remedies which are adequate and effective to provide redress in respect of the matter complained of (See *Norkin v. Russia*, App. 21056/11, ECtHR, Decision of 5 February 2013 and see also *Moya Alvarez v. Spain*, No. 44677/98, ECtHR, Decision of 23 November 1999).

27. Regarding the appeal filed against Decision AC-I-16-0179, of 13 October 2016, the Court notes that the Applicants' representative, based on his own statement, received on 21 October 2016, whereas he submitted the Applicants' Referral addressed to the Constitutional Court through mail service on 10 March 2017, therefore, clearly after the expiry of the deadline foreseen by Article 49 of the Law, within which an individual referral can be filed with the Court.

28. The Court notes that the representative of the Applicants was aware of the expiration of the deadline, but he justified the delay with his health condition. The representative of the Applicants presented to the Court medical documentation justifying his health condition, requesting the Court to consider the Referral as timely.

29. Not wanting to challenge the data regarding the health condition of the Applicant's representative, the Court notes that it received the last decision regarding the case on 21 October 2016,However, based on its records of referrals submitted to the Court, results that the same lawyer in a capacity of an authorized representative of other applicants submitted on 24 November 2016 a referral to the Court and on 12 January 2017 additional documents (case KI136/16, Applicants T.J. and others), therefore, the Court cannot take into account the justification for expiration of the legal deadline.

30. The Court notes that the Applicants' representative was aware of the expiration of the deadline, but justified the delay with his health problems by submitting to the Court the medical documents justifying his health condition, and requested the Court to consider the referral as submitted in time.

31. Not wanting to challenge the data regarding the health condition of the Applicants' representative, the Court notes that the final decision in respect of the case was served on him on 21 October 2016, whereas according to his allegations, the health reasons prevented him from filing the Referral in time, however, the Court from its evidence of the referrals submitted to the Court, finds that the same lawyer in a capacity of the representative with the power of attorney filed a Referral with the Court for other applicants on 24 November 2016, and submitted additional documentation on 12 January 2017 (case KI136/16, Applicants *T.J. and others*), therefore, the Court cannot take into account the justification for the expiry of the legal deadline.

32. In addition, the Court notes that the Applicant authorized the aforementioned lawyer to represent him in the proceedings before the Constitutional Court and other courts. The Court considers that the procedural actions taken by the legal representative of the party, under the power of attorney, are considered to be the party's own actions. In this case, such actions also include the filing of requests and appeals and receipt of the court decisions (see case KI46/13, KI47/13, KI48/13 and KI68/13, Applicants *Naim Marina,*

Bukurije Drançolli, Avdi Imeri and Genc Shala, the Constitutional Court, Resolution on Inadmissibility of 5 July 2013).

33. Based on the foregoing, the Court refers to the case law of the European Court of Human Rights, which concluded that *"a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes"* (See *Kamasinski v. Austria,* No. 9783/82, ECHR, Judgment of 19 December 1989, A. no. 168). In analogous fashion, the Court considers that public authorities cannot be held responsible for the actions of the lawyer, moreover, when the lawyer is authorized by the party itself, in this case the Applicant.

34. Therefore, in the circumstances of the present case, the Referral is out of time, and the Court cannot consider the allegations filed regarding the violations of the right to fair trial in all its elements (see, *inter alia*, Resolution on Inadmissibility of the Constitutional Court KI105/15, of the Applicants *Mehmet Bajraktari and others*, of 19 December 2016).

35. Based on the foregoing, it results that the Referral has not been submitted within the legal deadline stipulated by Article 49 of the Law, and it is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 49 of the Law and Rule 36 (1) (b) of the Rules of Procedure, on 4 July 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**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI27/17 Applicant: Maliq Zeqiri, request for constitutional review of the procedure applied by the Department of Social Policy and Families, in accordance with Article 179 of the Family Law No. 2004/32 of 20 January 2006, regarding the adoption of children in the Republic of Kosovo

KI27/17, Resolution on Inadmissibility of 8 December 2017, published on 20 December 2017

Keywords: *individual referral, constitutional review of the procedure by the Department of Social Policy and Families, adoption procedure, inadmissible referral*

The Applicant submitted the referral based on Article 113, paragraph 7 of the Constitution of the Republic of Kosovo, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

The Applicant is working in the Center for Social Work (CSW) in the municipality of Viti. There, a couple, Kosovo citizens, working in Italy, filed a request for the adoption of a child. Their request for the adoption of a child was submitted based on of documents issued by the Republic of Kosovo. However, the DSPF panel responded to their request, suggesting that the CSW instructs the family to the procedure for international adoption, as well as to complete the documentation in accordance with the criteria laid down in the applicable legal regulations in Kosovo. The Applicant states that Kosovo citizens working abroad, but who appear with local documentation of Kosovo do not need to be subject to an international treatment for adoption by the DSPF.

The Court emphasizes that the requests that basically raise the issues of legality, and request the Court to interpret the law in respect of the conducted proceedings, as in the present case, as a rule, fall within the jurisdiction of the regular courts. In fact, it is not the role of the Constitutional Court to deal with the claim and interpretation of the Applicant that the proceedings conducted by the DSPF are erroneous and unlawful. For the reasons above, the Court concludes that the Applicant's Referral on constitutional basis does not meet the admissibility requirements, and the Court declares that itself incompetent.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI27/17

Applicant

Maliq Zeqiri

Request for constitutional review of the procedure applied by the Department of Social Policy and Families, in accordance with Article 179 of the Family Law No. 2004/32 of 20 January 2006, regarding the adoption of children in the Republic of Kosovo

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 Applicant is Zeqir Maliqi from village Goshica, municipality of Viti (hereinafter: the Applicant).

Challenged act

2. The Applicant challenges the procedure as applied by the Department of Social Policy and Families of the Ministry of Labor and Social Welfare (hereinafter: DSPF), pursuant to Article 179 of the Family Law No. 2004/32 of 20 January 2006 (hereinafter: the Family Law).

Subject matter

3. The subject matter of the Referral is the constitutional review of the procedure applied by DSPF in accordance with Article 179 of the Family Law which establishes the criteria for adoption of children in the Republic of Kosovo by nationals with citizenship of the Republic of Kosovo who work abroad.

4. The Applicant requests from the Court to confirm his allegation that the procedure as followed by the DSPF pursuant to Article 179 of the Family Law is wrong, because the

citizens of the Republic of Kosovo applying for adoption of a child based on documentation issued by the Republic of Kosovo, but living and working outside of the Republic of Kosovo, are required by DSPF to undergo child adoption procedure as if they were foreign nationals.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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 6 March 2017 the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 7 April 2017 the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

8. On 11 April 2017 the Court notified the Applicant about the registration of the Referral.

9. On 20 June 2017 the Applicant submitted additional documentation to the Court.

10. On 13 November 2017 the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court to declare the Referral inadmissible due to the failure to meet the procedural requirements under Article 113 of the Constitution.

Summary of facts

11. The Applicant works at the Center for Social Work (CSW) in the Municipality of Viti. There a married couple of Kosovo nationals, working in Italy, applied for adopting a child. Their request for adoption of a child was made based on the documentation issued by the Republic of Kosovo. On 6 April 2017 the DSPF Panel responded to their request that "*It is recommended that the CSW instructs the family to follow the procedures for international adoption and to complete the documentation according to the criteria established in the applicable legislation in Kosovo.*"

Applicant's allegations

12. The Applicant alleges that *"... Kosovo nationals working abroad but appearing with local documentation of Kosovo should not be subject to international treatment by the DSPF, there is no reason for that, because this is not provided by any legal rule. This is our complaint - the treatment of locals as internationals."*

13. In addition, the Applicant states that *"The consideration by the Department of Social Policy and Families in Prishtina of the Kosovo citizens as internationals is unacceptable, the dilemmas are here. [The Court is] kindly asked to take the opinion of the Department of Social Policy and Families and assess the legality of the DSPF allegations. Such an assessment would solve some dilemmas among the professional workers of the Centers for Social Work in relation to the Department of Social Policy and Families of Kosovo in Prishtina".*

14. Furthermore, the Applicant requests *"...the Constitutional Court of Kosovo in Prishtina to prevent the Department of Social and Family Policy from treating the local nationals as internationals only because they work abroad."*

Admissibility of the Referral

15. The Court will first examine whether the Applicant has met the admissibility requirements established in the Constitution and further specified in the Law and in the Rules of Procedure.

16. It is to be noted that the Applicant acts in the capacity of an individual (natural person) and bases his Referral on Article 113.7 of the Constitution.

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

> *"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".*
> *[...]*

18. In addition, the Court also takes into account Article 48 [Accuracy of the Referral] of the Law, which foresees:

> *"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."*

19. Regarding this case, the Court specifically refers to Rule 36 [Admissibility Criteria] (3) (a) of the Rules of Procedure, which stipulates:

> *"(3) A referral may also be deemed inadmissible in any of the following cases:*
> *(a) the Court does not have jurisdiction in the matter;*
> *[...]"*

20. The Court notes that Article 113 of the Constitution defines the jurisdiction of the Constitutional Court and the authorized parties that can refer questions of constitutional nature to the Court.

21. The Court finds that the Applicant's Referral is related to the procedure applied by DSPF in children adoption and the Applicant is alleging that this authority is erroneously interpreting the Law on Family by treating the local married couples, who work abroad, as foreign nationals.

22. The Court specifies that the essence of the Applicant's Referral relates to the procedure followed by DSPF pursuant to Article 179 of the Law on Family which regulates the procedure of application for child adoption in the Republic of Kosovo.

23. The Applicant requests from the Court to confirm his understanding and interpretation that the procedure as followed by DSPF is wrong and contradictory to the Law on Family itself.

24. Regarding this, the Court reiterates that referrals that basically raise issues of legality and request from the Court an interpretation of a law with respect to the procedure followed, as in the present case, as a rule, fall within the jurisdiction of the regular courts. Indeed, it is not the task of the Constitutional Court to deal with the Applicant's allegation and interpretation that the procedures followed by DSPF are wrong and unlawful.

25. The Court may interfere only where the allegations of a violation of the rights guaranteed by the Constitution are substantiated on a constitutional basis and fall within its jurisdiction as provided by the Constitution, after all formal and procedural criteria stipulated by the Constitution, the Law and the Rules of Procedure have been met.

26. The Court reiterates that it is the role of the regular courts to interpret and apply the relevant rules of procedural and material law (See, *mutatis mutandis*, European Court of Human Rights, case *Garcia Ruiz v. Spain*, no. 30544/96, Judgment of 21 January 1999, para. 28).

27. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and within its constitutional jurisdiction. In other words, the correct interpretation and application of a law is in the jurisdiction of the regular courts (issue of legality) (See ECtHR case, *Akdivar v. Turkey*, Application No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, and see also *mutatis mutandis,* Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

28. Therefore, for the reasons elaborated above, the Court concludes that the Applicant's Referral on constitutional basis does not meet the admissibility requirements, as established by Article 113 of the Constitution and Rule 36 (3) (a) of the Rules of Procedure.

29. Accordingly, in compliance with the abovementioned provisions, the Applicant's Referral is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution, Article 20 of the Law and Rules 36 (3) (a) and 56 (2) of the Rules of Procedure, on 8 December 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

Snezhana Botusharova

President of the Constitutional Court

Arta Rama-Hajrizi

KI 06/17 Applicants L. G. and five others, constitutional review of Judgment Rev. No. 248/2016 of the Supreme Court of Kosovo, of 25 October 2016

KI06/17 Resolution on Inadmissibility approved on 23 October 2017, published 20 December 2017

Key words: *Individual referral, Right to Fair and Impartial Trial, referral manifestly ill-founded*

The subject matter is the constitutional review of the abovementioned Judgment of the Supreme Court, whereby the Applicants' rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 50 [Rights of Children] of the Constitution of the Republic of Kosovo have allegedly been violated

The Court noted that the Applicants base their allegations on the manifestly erroneous interpretation of the provisions of the Law on Contract and Torts, allegedly made by the Supreme Court. The Court recalls that this allegation relates to the scope of legality and as such does not fall within the jurisdiction of the Constitutional Court, and, therefore, in principle, cannot be considered by the Court.
The Court considered that in the present case there are no elements of illogical interpretation, or of incorrect and arbitrary application of the law, because the relevant provisions of the law, have been applied and the regular courts have provided clear and complete reasons for their decisions.

The Court declared that Referral is manifestly ill-founded on a constitutional basis and it is declared inadmissible pursuant to Rule 36, paragraphs (1) (d) and (2) (d), of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI06/17

Applicants

L. G. and five others

Request for Constitutional Review of Judgment Rev. No. 248/2016 of the Supreme Court of Kosovo, of 25 October 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 L. G. and her five children from Obilić (hereinafter: the Applicants). The Applicants are represented by Zaim Istrefi, a lawyer from Prishtina.

Challenged decision

2. The Applicants challenge Judgment [Rev. no. 248/2016] of the Supreme Court of Kosovo of 25 October 2016, which was served on them on 16 November 2016.

Subject matter

3. The subject matter is the constitutional review of the abovementioned Judgment of the Supreme Court, whereby the Applicants' rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 50 [Rights of Children] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) have allegedly been violated.

4. The Applicants also request that in the proceedings before the Constitutional Court (hereinafter: the Court) their identity not be disclosed, because they consider that *"this*

case is of a sensitive nature, as it relates to claims in connection to a tragically deceased parent."

Legal basis

5. 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 Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 25 January 2017, the Applicants submitted the Referral to the Court.

7. On 27 February 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.

8. On 3 March 2017, the Court notified the Applicants about the registration of the Referral, and sent a copy of the Referral to the Supreme Court.

9. On 23 October 2017, the Review Panel considered the report of the Judge Rapporteur, and made an unanimous recommendation to the Court on the inadmissibility of Referral.

Summary of facts

10. The Applicants' spouse and father, respectively, died on 08 May 2005, as a consequence of an accident at his working place. He was an employee of the Kosovo Energy Corporation (hereinafter: KEK). On 24 March 2005, he had an accident at his working place, where he sustained injuries leading to his death.

11. On an unspecified date, the Applicants filed a statement of claim with the Municipal Court in Prishtina requesting that the respondent (KEK) pays them compensation for "*sustained mental anguish*" experienced due to the loss of the spouse and parent.

12. On 27 December 2006, the Municipal Court in Prishtina rendered Judgment [C. No. 987/05], which approved the statement of claim of the Applicants. The Municipal Court decided that:

> *"The statement of claim of the claimants [...] is granted as grounded and the respondent – Kosovo Energy Corporation in Prishtina is obliged to reimburse to each claimant € 7000, respectively the total amount of € 42.000, in the name of sustained mental anguish due to death of the spouse and father – the late F. G."*

13. The respondent (KEK) filed to the District Court in Prishtina an appeal alleging incomplete and erroneous determination of the facts and violation of provisions of the contested procedure.

14. On 7 October 2008, the District Court rendered Judgment [Ac. No. 267/2007], which rejected the respondent's appeal as ungrounded, and upheld the Judgment of the Municipal Court in its entirety.

15. In order to implement the Judgment of the Municipal Court, KEK decided to pay the total amount due in a series of monthly payments for a period of 5 years. These monthly payments took place from 01 July 2005 until 01 July 2010, which concluded payment of the total amount of 42,000 EUR ordered by the regular courts.

16. On 03 February 2010, the Applicants submitted to the Municipal Court in Prishtina a new statement of claim against KEK, requesting the reimbursement of material damage, specifically, the reimbursement of the lost profit, based on the Law on Contract and Torts in force at the time (Official Gazette of the SFRY No. 29/78 as amended). The Applicants maintained that, "*due to the lost alimony the respondent makes monthly payments and considering the costs which the deceased would have had if he was alive, in the amount € 500 per month, as long as the conditions for this exist.*"

17. KEK responded to the Applicants' claims by arguing that it does not have passive legitimacy in the case because the business units under whose authority the accident had occurred had been privatized and now formed part of the new company Kosovo Transmission, System and Market Operator (KOSTT), and that, the Applicants claim for damages had expired due to the statute of limitations, as specified in Article 376 of the Law on Contracts and Torts.

18. On 29 December 2015, the Basic Court rendered Judgment [C. No. 241/10], which approved the Applicants' statement of claim as grounded. The Basic Court addressed the allegations related to passive legitimacy invoked by the responded (KEK). As it pertains to the allegations related to the statute of limitations, the Basic Court, among others, reasoned:

> *"Also, allegations made against the annuity claim being subject of statute of limitations, the court assessed being ungrounded because, pursuant to provisions of Article 373, paragraph 3 of LOR, is provided that the right to alimony determined by the law, is not subject of statutory limitations."*

19. The respondent (KEK) filed an appeal with the Court of Appeals against the Judgment of the Basic Court [C. No. 241/10], claiming erroneous application of the law, specifically pertaining to passive legitimacy and expiration of statute of limitations period for claiming compensation for the damages for the loss caused.

20. On 17 June 2016, the Court of Appeals rendered Judgment [CA. No. 1735/2016], which approved the appeal of KEK and annulled the Judgment of the Basic Court [C. No. 241/10].

21. The Court of Appeals based on Article 376 of the Law on Contract and Torts reasoned that claims of damages for the loss caused expire after three years after the party sustained or became aware of injury. It rejected the interpretation of the Basic Court on the application of Article 373 of the Law on Contracts and Torts, according to which right to alimony is not subject to statute of limitations, as in the reasoning of the Court of Appeals, in this specific case, the question does not pertain to the right to alimony but rather to claim for damages for loss caused.

22. The Applicants filed a request for revision with the Supreme Court against Judgment [CA. no. 1735/2016] of the Court of Appeals alleging erroneous application of the substantive provisions of the law and the fact that the second instance court applied Article 376 of Law on Contracts and Torts (claiming damages for loss), whereas in fact, according to the Applicants it should have applied Article 373 of Law on Contracts and Torts (claims for alimony).

23. On 25 October 2016, the Supreme Court rendered Judgment [Rev. No. 248/2016] which rejected the Applicants' request for revision as ungrounded and upheld the Judgment of the Court of Appeals with detailed reasoning.

Applicant's allegations

24. The Applicants allege that the Judgment [Rev. no.248/16] of the Supreme Court of 25 October 2016, in conjunction with the Judgment [CA no. 1735/2016] of the Court of Appeals of 23 May 2016, violated their right to a fair and impartial trial as guaranteed by Article 31 [Right to a Fair and Impartial Trial], and their right to protection and care as guaranteed by Article 50.1 [Protection of Children] of the Constitution.

25. With respect to Article 31 of the Constitution, the Applicants claim that the Supreme Court and the Court of Appeals Judgments violated their right to a fair and impartial trial because they manifestly erroneously applied the provisions of the Law on Contract and Torts as it pertains to the statute of limitations.

26. With respect to Article 50 of the Constitution, the Applicants allege that by rejecting their claims, the Supreme Court and the Court of Appeals violated the rights of the children of the deceased for protection and care necessary for their well-being. The Applicants claim that they are dependent upon the payment of an annuity for their continued survival and well-being.

27. Finally, the Applicants request the Court to declare their Referral admissible and to uphold Judgment [C. No. 241/10] of 29 December 2015, of the Basic Court in Prishtina, by declaring invalid Judgment [Rev. No. 248/2016] of the Supreme Court of 25 October 2016 in conjunction with Judgment [Ac. No. 1735/16] of 23 May 2016 of the Court of Appeals.

Admissibility of Referral

28. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and Rules of Procedure.

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

> *"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."*

30. In continuation, the Court examines whether the Applicants has fulfilled the admissibility requirements as further specified in the Law. In this respect, the Court 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...."

31. Regarding the fulfillment of these requirements, the Court finds that the Applicants submitted the Referral in the capacity of an authorized party, challenging an act of a public authority, namely the Supreme Court Judgment [Rev. No. 248/2016] of 25 October 2016, after having exhausted all legal remedies determined by law. The Applicants 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.

32. However, the Court must further assess whether the criteria foreseen in Rule 36 [Admissibility Criteria] of the Rules of Procedure have been met. Rule 36, paragraphs (1) (d) and (2) (d) of the Rules of Procedure, 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:

[...]

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

33. The Court recalls that the Applicants' proceedings relate to the issue of a claim for damages for loss caused against the respondent (KEK), as compensation for the death of the Applicants' spouse and father on 08 May 2005. The dispute was settled by the Supreme Court Judgment [Rev. no. 248/2016] of 25 October 2016, which the Applicants challenges in the Court claiming violation of their rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 50 [Rights of Children] of the Constitution, because the Supreme Court allegedly manifestly erroneously applied the Law on Contract and Torts. The Applicants argue that in the circumstances of their specific case, Article 373 applies, which provides that the right to alimony is not subject to statute of limitations, instead of Article 376 which regulates claims for damages for loss caused. According to the Applicants, if the correct provision of the Law on Contract and Torts were applied, their claims would have been approved.

34. The Court initially notes that in the first set of proceedings against KEK, the Applicants only requested compensation for the "*sustained mental anguish*" as a consequence of the death of their spouse and father. The Municipal Court awarded the Applicants an amount in compensation, and this award was upheld by the District Court in its Judgment [Ac. No. 267/2007] of 07 October 2008. KEK fulfilled the obligations resulting from this Judgment.

35. Subsequently, the Court notes that on 03 February 2010, the Applicants filed a new statement of claim with the Municipal Court, starting a second set of proceedings.

Through the new statement of claim, the Applicants requested the continued payment of a monthly annuity, which was approved by the Municipal Court Judgment, and annulled by the Court of Appeals and Supreme Court Judgments. The Applicants maintained that if the provisions of the Law on Contract and Torts pertaining to the statute of limitations would have been applied correctly, the initial Municipal Court Judgment would have been upheld.

36. In this regard, the Court notes that the Applicants base their allegations on the manifestly erroneous interpretation of the provisions of the Law on Contract and Torts, allegedly made by the Supreme Court. The Court recalls that this allegation relates to the scope of legality and as such does not fall within the jurisdiction of the Constitutional Court, and, therefore, in principle, cannot be considered by the Court.

37. The Court reiterates that it is not its task to deal with errors of facts or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed the fundamental 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*, ECtHR no. 30544/96, of 21 January 1999, par. 28 and see, also case: KI70/11, Applicants *Faik Hima, Magbule Hima and Besart Hima,* Resolution o Inadmissibility, of 16 December 2011).

38. This stance has been consistently held by the Court, following the case law of the European Court of Human Rights (hereinafter: ECtHR), which clearly maintains that it is not the role of this Court to review the conclusions of the regular courts in respect of the factual situation and application of the substantive law. (see: ECtHR, *Pronina v. Russia*, Decision on admissibility of 30 June 2005, application no. 65167/01).

39. The Court, however, also notes that the case-law of the the ECtHR also provides for the circumstances under which exceptions from this position can be made. In *Anđelković v. Serbia* (Judgment of 9 April 2013, No. 1401/08, paragraph 24), the ECtHR reiterated again that it will not question the interpretation of law by the courts, unless, however, it is evidently arbitrary or the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable. In this case the ECtHR maintains:

> *"The Court reiterates at the outset that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation* (see, among many authorities, Brualla Gómez de la Torre v. Spain, 19 December 1997, § 31, Reports of Judgments and Decisions 1997-VIII). *That being so, the Court will not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness* (see, mutatis mutandis, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008)*, in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or a denial of justice*. (see, mutatis mutandis, Farbers and Harlanova v. Latvia (dec.), no 57313/00 6 September 2001, and, albeit in the context of Article 1 of Protocol No. 1, Beyeler v. Italy [GC], no. 33202/96, § 108, ECtHR 2000-I)."

40. The ECtHR reiterated this standing view also holding that *"while it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation, the role of the Court is to verify whether the effects of such*

interpretation are compatible with the Convention". (see, mutatis mutandis, Miragall Escolano and Others v. Spain, no. 38366/97, §§ 33-39, ECtHR 2000-I). *"Therefore, even though it has only limited power to review compliance with domestic law, the Court may draw appropriate conclusions under the Convention where it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions".* (see the above cited Anheuser-Busch Inc. Judgment, § 83; *Kuznetsov and Others v. Russia*, no. 184/02, §§ 70-74 and 84, 11 January 2007; *Păduraru v. Romania*, no. 63252/00, § 98, ECtHR 2005-... (extracts); Sovtransavto Holding v. Ukraine, no. 48F553/99, §§ 79, 97 and 98, ECtHR 2002-VII, Beyeler v. Italy [GC], no. 33202/96, § 108, ECtHR 2000-I; and, mutatis mutandis, *Tsirlis and Kouloumpas* v. Greece, judgment of 29 May 1997, Reports of Judgments and Decisions 1997-III, §§ 59-63. See also the ECtHR case *Koshoglu v. Bulgaria*, Application No. 48191/99, Judgment of 10 May 2007, § 50).

41. Accordingly, based on the case law of the Court and the case law of the ECtHR it is the task of the regular courts to assess the facts and the evidence presented (see ECtHR judgment, *Thomas v. United Kingdom*, 10 May 2005, application no. 19354/02). The task of the Constitutional Court is to examine whether there has been a violation of constitutional rights (right to a fair trial, right of access to court, right to an effective remedy, etc.), and whether the manner in which the regular courts have applied of the law was manifestly erroneous or otherwise arbitrary or discriminatory. (See, for example, ECtHR cases *Koshoglu v. Bulgaria*, Judgment of 10 May 2007, No. 48191/99*;* Anheuser-Busch Inc. v. Portugal, Judgment of 11 January 2007, No. 73049/01; *Kuznetsov and Others v. Russia*, Judgment of 11 January 2007, No. 184/02; *Khamidov v. Russia*, Judgment of 15 November 2007, No. 72118/01; *Andelković v. Serbia*, Judgment of 9 April 2013, No. 1401/08; *Dulaurens v. France*, Judgment of 21 March 2000, No. 34553/97).

42. In this specific case, the Applicants argue that the regular courts have manifestly erroneously and arbitrarily applied the law. The Court notes however that the Court of Appeals, and subsequently the Supreme Court, reviewed the Applicants' essential allegations, and addressed and reasoned the allegations pertaining to the application and interpretation of the correct provisions of the Law on Contract and Torts in this specific case.

43. In this regard, the Court of Appeals found that under Article 376 of Law on Contract and Torts it is provided that a claim for compensation for damages expires after three years from the date when the injured party became aware of the damage. The Court of Appeals found that the Applicants became aware of the damage on the date when their spouse and father died, namely on 05 May 2005, whereas they did not submit their new statement of claim until 03 February 2010. As a result, the Court of Appeals concluded that the new claim for damages was barred by statute of limitations.

44. The Court notes that the Supreme Court also reviewed the Applicants' claim in revision, and concluded that the period of statutory limitation starts to run from the date when the claimant becomes aware of the damage. In this case, it is not in dispute when the Applicants became aware of the damage, and taking into account the date of filing the statement of claim, namely 03 February 2010, the Supreme Court concluded that the statement of claim was barred from consideration due to the statute of limitations as foreseen by Article 376 of the Law on Contracts and Torts. In addition, the Supreme Court also explained why the Applicants arguments for the application of Article 373 of the Law on Contract and Torts do not apply and the difference between the right to alimony and the right for compensation for damages. The Supreme Court has, among others, reasoned:

"Starting from the determined factual situation, the court of revision finds that the conclusion of the second instance court is correct due to the fact that the accident happened on 24 March 2005 whereas his death occurred on 08 May 2005 while the claim was filed with the court on 03 February 2010, which is after expiry of the time limit set by Article 376 of LOR whereby is envisaged that a claim for damages for loss caused shall expire three years after the party sustaining injury or loss became aware of the injury and loss and of the tort-feasor. It is considered that the claimants became aware of the damage and of the tort- feasor on the date when the accident occurred. From this perspective, there is no room to apply Article 373, paragraph 1 of LOR and the objection to the statute of limitations period shall be assessed based on Article 376 of LOR because, we are here dealing with the claim for material compensation in the form of a payment, a monetary rent which according to Article 373, paragraph 3 is not a claim because the legal maintenance (alimony) shall mean the legally established liability as it is the case with supporting the minor children by their parents, support to the parents by their children, support among the spouses and close relatives; whereas the claim for an annuity in the form of material award and counting for statute of limitations for a claim shall be based on Article 376 of LOR. "

45. Based on the foregoing, the Court considers that in the present case there are no elements of illogical interpretation, or of incorrect and arbitrary application of the law, because the relevant provisions of the law, have been applied and the regular courts have provided clear and complete reasons for their decisions.

46. In addition, the Court considers that the Applicants did not show and prove that the proceedings before the Supreme Court were unfair or arbitrary or that their fundamental rights and freedoms protected by the Constitution were infringed by the alleged erroneous interpretation of the specific articles of the Law on Contract and Torts. No constitutional matter has been substantiated by the Applicants. (See, case KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility, of 8 August 2016, para. 44. and see, also case KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants *Arben Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku dhe Sami Lushtaku*, Resolution on Inadmissibility, 15 November 2016, para. 62).

47. Accordingly, the Court is of the opinion that there had been no violation of the right to a fair and impartial trial as guaranteed by Article 31 of the Constitution.

48. The Court recalls that the Applicants also allege that by rejecting their request for compensation, the regular courts have violated their right for protection and care of children, as guaranteed by Article 50(1) of the Constitution. The Applicants base this allegation on the fact that they received a monthly payment from KEK between 01 July 2005 and 01 July 2010, and they had requested the courts to order KEK to continue to pay a monthly annuity after that date.

49. The Court notes that the monthly payments which the Applicants received from KEK were as the result of an award for compensation for "*sustained mental anguish*" due to the death of the Applicants' spouse and father. The Court notes that the regular courts awarded a total sum to the Applicants, which the respondent party (KEK) decided to pay out in the form of a monthly annuity. As such, the Court notes that these monthly payments were not designated as payments for child protection and care.

50. Furthermore, the Applicants have not indicated how the respondent party (KEK) was under any other legal obligation to provide for the protection and care of the children of the deceased. The Applicants in support of their allegation primary argue that the

regular courts manifestly erroneously applied the law pertaining to the statute of limitations' provisions to their claim for the continued payment of an annuity, an argument that has already been addressed in this Resolution. The Applicants' allegations that their right to protection and care necessary for their wellbeing had been violated by the challenged decisions of the regular courts have not been further substantiated by any additional argument.

51. Having found that there was no violation of the right to a fair and impartial trial in the application of the law by the regular courts, the Court considers that the Applicants' allegation that they were entitled to the continued payment of a monthly annuity for the protection and care of the minor children does not rise to the level of a constitutional violation.

52. Therefore, the Court considers that the Applicants have not substantiated their allegations, nor have they submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the European Convention on Human Rights (hereinafter: the Convention). (See, case No.KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Syla*, Constitutional Court of the Republic of Kosovo, Constitutional Review of Decision CA. no. 2129/2013, of the Court of Appeal of Kosovo, of 5 December 2013, and Decision CA. no. 1947/2013, of the Court of Appeal of Kosovo, of 5 December 2013).

53. In sum, the Court considers that in the challenged Judgment there are no facts or circumstances that would in any way indicate that in the proceedings before the regular courts, the Applicants' human rights or freedoms guaranteed by the Constitution or the Convention have been violated.

54. Consequently, the Referral is manifestly ill-founded on a constitutional basis and it should be declared inadmissible pursuant to Rule 36, paragraphs (1) (d) and (2) (d), of the Rules of Procedure.

The request for non-disclosure of identity

55. The Court recalls that the Applicants requested for his identity not to be disclosed to the public, "*due to the reason that my name is irrelevant in reviewing the case, and publicity may indirectly affect my children*".

56. In this connection, the Court refers to Rule 29 (6) of the Rules of Procedure, which provides:

> "*The party filing the referral may request that his or her identity not be publicly disclosed and shall state the reasons for the request. The Court may grant the request if it finds that the reasons are well-founded".*

57. The Court also refers to Article 8 (1) of the Convention on the Rights of the Child, which establishes;

> "*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."*

58. The Court considers that in a family case the publicity may, even indirectly, affect the identity, name and family relations of the children.

59. Therefore, pursuant to Article 8 (1) of the Convention on the Rights of the Child and Rule 29 (6) of the Rules of Procedure, the Court grants as well-founded the Applicants' request for not disclosing their identity to the public.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 paragraph 7 of the Constitution, Article 47 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, in the session held on 23 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 paragraph 4 of the Law; and

IV. This Decision is effective immediately.

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

KI138/15, Applicant Sharr Beteiligungs GmbH SH.P.K, Constitutional Review of Judgment Rev.no.116/2015, of the Supreme Court of 17 June 2015

KI138/17, Judgment of 4 September 2017, published on 21 December 2017

Key words: Individual Referral, Judgment, constitutional violation, fair and impartial trial,

The Applicant filed a Referral with the Court, requesting the constitutional review of Judgment Rev. no.116/2015 of the Supreme Court of 17 June 2015, alleging that his constitutional right to a fair and impartial trial (Article 31 of the Constitution) was violated due to the failure to justify the court decision and consequently the right to a legal remedy (Article 32 of the Constitution) was also violated.

The Applicant, inter alia, emphasized that the regular courts throughout the proceedings at all court instances did not address his allegations regarding the passive legitimacy of the party in the proceedings and that they erroneously applied the substantive law – the incorrect law, and failed to confirm the key facts of the contested legal matter, a fact that was followed by unjustified court decisions, as required by Article 31 of the Constitution and Article 6 of the ECHR.

Upon reviewing the Referral, the Court found that from the content of the Judgment of the Supreme Court it is evidently that one of the Applicant's key allegations, concerning the party's legitimacy had been addressed by the Supreme Court only superficially in one sentence, whereas the matter of applying the applicable law in relation to the disciplinary procedure was not addressed at all.

Assessing the process as a unique entirety, based on the assessment of the Judgment of the Supreme Court and judgments of the lower instance courts, the Court finds that the lack of fully addressing the allegations, and giving adequate answers on three basic allegations made by the Applicant: the passive legitimacy of the party in the proceedings, the issue of disciplinary proceedings against the employee and the entirely erroneous application of the law, assessed as crucial issues of the process, constitute an insurmountable flaw of the content of the judgment and of the reasoning of the court. Because of that, the Court finds that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and of Article 6.1 [Right to a Fair Trial] of the ECHR.

In addition, the Court decided to declare the Referral admissible, declare invalid the Judgment Rev. no.116/2015 of the Supreme Court of Kosovo of 17 June 2015, and remand the case for reconsideration to the Supreme Court, in accordance with the findings of this Judgment.

I. TO DECLARE the referral as admissible;

II. TO ASCERTAIN that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO REMAND the Judgment of the Supreme Court for reconsideration incompliance with the Judgment of this Court;

IV. REMAINS strongly engaged in this matter pending the implementation of this Judgment.

The Kosovo Constitution does not anticipate the possibility that an individual may contest the compatibility of a law approved by the Assembly of Kosovo, but this competence is foreseen for the authorized parties in compliance with Article 113.2, the President of the Republic of Kosovo, the Government and the Ombudsperson, and in compliance with Article 113.8 for the Regular Courts.

In these circumstances, the Court ascertained that the Applicant failed to fulfill the condition of the authorized party pursuant to the Article 113.1 of the Constitution and of Rule 36 (1) (a) of the Rules of Procedure, therefore, the referral is declared inadmissible.

JUDGMENT

in

Case No. KI138/15

Applicant

Sharr Beteiligungs GmbH LLC

Constitutional review of Judgment Rev. no. 116/2015, of the Supreme Court, of 17 June 2015

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 Applicant is Sharr Beteiligungs GmbH LLC, which is represented by Dastid Pallaska, a lawyer from Prishtina.

Challenged decision

2. The challenged decision is Judgment Rev. no. 116/2015, of the Supreme Court of Kosovo of 17 June 2015, which rejected as ungrounded the Applicant's request for revision against Judgment of the Court of Appeal (Ac. no. 3128/2012, of 3 February 2015).

3. The challenged decision was served on the Applicant on 10 July 2015.

Subject matter

4. The subject matter of the Referral is the constitutional review of the aforementioned Judgment of the Supreme Court, by which the Applicant alleges that his rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR) were violated.

Legal basis

5. The Referral is based on Article 21.4 and 113.7 of the Constitution, Article 47 of the Law No. 03/L-121, on Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 56 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 9 November 2015, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 8 December 2015, the President of the Court, by Decision no. GJR. KI138/15, appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President of the Court, by Decision no. KSH. KI138/15, appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Arta Rama-Hajrizi.

8. On 15 December 2016, the President of the Court appointed Judge Altay Suroy as a member of the Review Panel, replacing Judge Robert Carolan, who resigned from a position of a judge on 9 September 2016.

9. On 11 January 2016, the Court notified the Applicant about the registration of the Referral. On the same date, the Court sent a copy of the Referral to the Supreme Court.

10. On 4 September 2017, the Review Panel considered the report of the Judge rapporteur and unanimously recommended to the Court the admissibility of the Referral.

Summary of facts

11. Based on the case file, it results that Mr. S. Z. (hereinafter: the employee) was employed as a "*Head of Accounting*", in the '*SharrCem"* from Hani i Elezit.

12. On 4 December 2008, based on Notice No. 712, the Applicant notified his employee about the termination of his employment relationship because *"he has unlawfully misappropriated money from the salaries he was obliged to pay to the Applicant's employees*" by misusing the position of the Head of Accounting.

13. On an unspecified date, the employee addressed the Municipal Court in Kaçanik with a statement of claim regarding the annulment of the notice for termination of employment relationship and reinstatement to his working place.

14. On 13 April 2010, the Municipal Court in Kaçanik (Decision C. no. 214/08), obliges the Applicant to submit to the court the reply to the claim in writing within 15 (fifteen) days from the day of service of the claim.

15. On an unspecified date, the Applicant submitted a reply to the claim to the Municipal Court in Kaçanik which in ten points challenged the filed claim and attached to this reply as evidence the official extracts of "Raiffesen Bank", which according to the Applicant proved that the claim filed against it was ungrounded.

16. On 24 January 2012, the Municipal Court in Kaçanik (Judgment C. No. 214/08), approved the statement of claim in entirety, obliging the Applicant to reinstate its employee to his working place in the position "Head of Accounting" with all rights arising from the employment relationship, obliging the Applicant to compensate the costs of the contested proceedings to his subordinate.

17. On 8 February 2012, the Applicant filed an appeal with the District Court against Judgment C. No. 214/08, of the Municipal Court in Kaçanik, claiming essential violation of the contested provisions, erroneous determination of facts and erroneous application of the substantive law, and on this ocassion also raised the issue of the passive legitimacy of the party and the subjective identity of the Applicant.

18. On 3 February 2015, the Court of Appeal of Kosovo (Judgment Ac. No. 3128/12), rejected the appeal as ungrounded and upheld Judgment, C. no. 214/08, of the Municipal Court in Kaçanik.

19. On 23 March 2015, the Applicant filed a revision against Judgment, Ac. no. 3128/12, of the Court of Appeal of Kosovo with allegation of: "*Essential violation of the contested procedure provisions and Erroneous application of the substantive law*". While in its request for revision, the Applicant has repeated the same allegations as they were in the Court of appeals emphasizing that the lower instance courts didn't give any answers regarding the raised allegations.

20. On 17 June 2015, the Supreme Court of Kosovo (Judgment Rev. No. 116/2015) rejected as ungrounded the revision regarding the first part of the Judgment, C. No. 214/08, of the Municipal Court in Kaçanik that has to do with the annulment of the notice for termination of employment relationship, and in the second part related to the obligation of the Applicant to reinstate his employee to work.

Applicant's allegations

21. The Applicant alleges that the regular courts have violated his right to fair and impartial trial, as guaranteed by Article 31 [Right to Fair and Impartial Trial] because the court decision was not reasoned stating further that "*As a consequence of the lack of justification, the challenged decision deprived the Applicant of the right to legal remedies*", and with it were violated his rights guaranteed by Article 32, and as a result of these violations, the Applicant's right to property under Article 46 [Protection of Property] of the Constitution was violated. The Applicant also asserts that there has been a violation of Article 6 [Right to a fair trial] of the ECHR.

22. In its Referral, the Applicant complains about erroneous application of the substantive law by regular courts. In addition, it also alleges erroneous determination of the factual situation, noting that "*at the time when the First Instance Decision was issued the Applicant has already closed his activity as a tenant of Cement Factory "SharrCem" in Hani Elezit. This due to the fact that, on December 2010, Cement Factory "SharrCem" was privatized from "Titan" Group headquartered in Athens"*. In this respect, it alleges that:

> "*-the Challenged Decision did not consider at all that the entity whom the First Instance Decision "SharrCem" LLC was addressing to, was different from the legal entity addressed to on the Second Instance Decision, Sharr Beteiligungs GmbH.*
>
> *- the Supreme Court legitimizes serious violation of the substantive law according to which the private enterprises are obliged to apply AD No. 2003/2 on the Civil Service even though this legal instrument exclusively applies to civil servants [...].*
>
> *- Challenged Decision also failed in addressing the factual allegations [...]".*

23. The Applicant concludes by requesting the Court to declare invalid the Judgment, Rev. no. 116/2015, of the Supreme Court of Kosovo and to remand the case for retrial.

Admissibility of Referral

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

25. In this regard, the Court recalls Article 113.1 and 113.7 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".*

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

> *"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. In addition, the Court recalls Rule 36 of the Rules of Procedure, which foresees:

> *"(1) The Court may consider a referral if:*
>
> *d) the referral is prima facie justified or not manifestly ill-founded."*

28. Regarding the above, the Court finds that the Applicant has submitted an individual referral, it has the capacity of an authorized party, has filed the referral within the time limit prescribed by Article 49 of the Law, and after exhausting all legal remedies. Therefore, the Court considers that all formal admissibility requirements have been met, in order for the referral to be reviewed by the Court.

Assessment of the merits of the case

29. First, the Court recalls that Article 53 [Interpretation of Human Rights Provisions] of the Constitution obliges the Constitutional Court that the "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*"

30. The Court notes that the Applicant's main allegation regarding the violation of the human rights is related to Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to fair trial] of the ECHR and according to the Applicant, this violation caused also the violation of Article 46 [Protection of Property] of the Constitution, because the court decisions were not sufficiently reasoned. The constitutional and ECHR provisions that are contested have the following content.

> *Article 31 [Right to Fair and Impartial Trial]*
>
> *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.

[...]

Article 6 ECHR
Right to a fair trial

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

[...]

31. The Court reiterates that, in principle, while reviewing allegations regarding the violation of the right to a fair and impartial trial, it also examines whether the court proceeding in its entirety was fair and impartial, as stipulated in Article 31 of the Constitution (see, inter alia, *mutatis mutandis*, *Edwards vs. United Kingdom*, 16 December 1992, p. 34, series A. no. 247 and *Vidal vs. Belgium*, 22 April 1992, p. 33, series A, no. 235).

32. In the present case, the Court notes that the regular courts obliged the Applicant to reinstate a former employee, dismissed due to alleged disciplinary violations, to his previous working place, thereby declaring unlawful all Applicant's legal actions related to the case.

33. In light of the claims made by the Applicant and the reasoning given by the regular courts, the Court considers that it is the task and full jurisdiction of the regular courts to determine the factual situation and assess evidence of the case, and that the Constitutional Court exceptionally, in specific cases, intervenes only when the regular courts, through their actions, violate the right to fair and impartial trial (Article 31 of the Constitution) – right a fair trial (Article 6 of the ECHR). In these cases, the Court analyzes the facts and circumstances to the extent that they affect the rights and freedoms provided by Articles 31 and 32 of the Constitution.

34. Regarding the above, the Court finds that the Applicant alleged that the Judgment Rev. No. 116/2015, of 17 June 2015, of the Supreme Court regarding the revision has not respected the standard of reasoning of the court decisions and as such it contradicts the guarantees of Article 31 of the Constitution and Articles 6 of the ECHR.

35. In this regard, the Court emphasizes that the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, includes also the right to have a reasoned judicial decision. The reasoning of decisions is an essential element of a fair decision. The function of a reasoned decision is to demonstrate to the parties that they have been heard and affords a party the possibility to appeal against it. It is only by giving a

reasoned decision there can be public scrutiny of the administration of justice (see case of the Constitutional Court, KI72/12, Applicant, *Veton Berisha,* and Judgment of 17 December 2012).

36. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *Hirvisaari vs. Finland*, ECtHR Judgment, 27 September 2001, par. 30).

37. In the present case, the Court notes that the Municipal Court in Kaçanik, in the reasoning of its Judgment, among others, stated: "*The Court approved the statement of claim of the claimant as grounded and obliged the respondent to reinstate the claimant to the working place where he has been working before, because the claimant did not cause the respondent "SharrCem" any damage by his actions, the respondent did not conduct the foreseen legal procedure, it could have imposed any lenient measure on the claimant rather than the termination of the employment relationship, such as: verbal warning, written warning, prohibition to increase the salary for one year, prohibition of advancement and reduction of personal income and not to impose the final measure termination of the employment relationship, then, the disciplinary commission of the respondent should have decided regarding this measure and not the ad hoc committee.*"

38. The Court notes that the Applicant challenged the claim as being premature by filing a reply to the claim and submitted to the Municipal Court in Kaçanik the entire case file of the disciplinary proceedings conducted against its employee, but the Applicant's allegations in his reply to the claim were not addressed at all by the Municipal Court Judgment.

39. In addition, the Court finds that the Applicant following the Judgment of the Municipal Court, besides the formal grounds of appeal, had challenged that Judgment as to the substance as well, by stating in the appeal that the Judgment of the Municipal Court: a) was addressed to and obliged a legal entity that was not a party to the contested proceedings, and b) did not contain factual and legally coherent grounds on which it was rendered. In addition, in its appeal, the Applicant explained that the Municipal Court in Kaçanik had erroneously applied the provisions of the Basic Law on Labor when it found that the disciplinary procedure was obligatory and provided by law.

40. In its Judgment Ac. No. 3128/12, the Court of Appeals of Kosovo after reviewing the Applicant's appeal decided to reject the appeal by reasoning that "*[...] this Court has considered the conclusion of the first instance court and has found that it is fair and grounded, it is substantiated on the administered evidence and on the case file and the justifiable reasons have been given, which are also approved by this court [...]*
This court also considers that the first instance court did not violate the provisions of the contested procedure, of which this Court acts ex officio, and that it has ascertained the factual situation correctly and completely and has also applied the substantive law correctly [...]."

41. The Court finds that the Applicant had filed the request for revision with the Supreme Court by maintaining its stance as already expressed before the lower instance courts and, among others, clearly stated in the request that the legal entity Sharr Cem LLC, which was obliged and addressed by the appealed Judgment, was registered as a limited liability company on 12 November 2012, almost 2 (two) years after the claim in this contested matter had been filed. The separate personality of Sharr Cem LLC from that of the respondent is also confirmed by the fact that Sharr Cem LLC has a different business number, namely 70708396, and a different fiscal number, namely 600653754, from that of the respondent.

42. In its request for revision, the Applicant has also clearly stated that this issue raised with the first and second instance courts, in addition to not being corrected by the Court of Appeals, it was not addressed at all.

43. The Court notes that the Supreme Court by the challenged Judgment decided to reject the request for revision regarding the first part of the court decisions of the first and second instance, dealing with the annulment of the Applicant's decision on termination of employment relationship to its former worker, while in terms of the Applicant's obligation to ensure to the worker "*all the rights and obligations arising from the employment relationship"* the court decisions of the lower instances were quashed and remanded for retrial, considering as unclear and indefinable this part of the decisions.

44. The Court finds that the Applicant throughout the court proceedings, in each court instance when using legal remedies for appeal, which are elaborated in more detail above, had repeatedly raised the issue of establishing the passive legitimacy of the party to the proceedings (the principle of the disposition according to the Applicant), alleging that the sued entity (the Applicant) and addressed in the decision of the first instance, and the sued entity in subsequent instances are not the same and they are entirely separate. The Applicant also alleged that the courts of different judicial instances have determined in different ways, even contradictory, the factual situation without clarifying the key fact if there was or not the disciplinary proceeding against the former employee of the Applicant as well as the fact which was the law in force and which law should be used in this case.

45. From the content of the Judgment of the Supreme Court it is noted that one of the key allegations, namely the one concerning the legitimacy of a party, was addressed by the Supreme Court only superficially with one sentence, while the issue of the application of the law in force regarding the disciplinary proceedings was not addressed at all.

46. Regarding the first allegation, the Supreme Court stated "*This Court adds that the allegations regarding the subjective identity of the responding party are ungrounded, because in the enacting clause of the challenged judgment it was stated that: "The appeal of Respondent "SharrCem" – Sharr Beteiligungs GmbH, from Hani i Elezit, is rejected as ungrounded …", which legal entity was also written in the challenged notice of the Respondent."*

47. From the above, it appears that the Supreme Court had not reviewed on merits the allegation stated by the Applicant that "*the first instance decision is addressed to and obliges a legal entity that did not exist at all at the moment when the Notice on Termination of Employment Relationship was issued and – as a consequence - did not participate at all in the contested procedure regarding this case."*

48. The Court considers that this issue is of essential character for the case, therefore its clarification is necessary, furthermore when the Applicant had stated and presented evidence for two separate legal entities, with different registration and fiscal numbers. From the court decisions it cannot be ascertained whether there was any legal act on the transfer or inheritance of obligations between two legal entities, so it is not clear whether in fact the addressed entity in the decision (in this case, the Applicant) is the one that should bear the legal obligations ordered by the court decisions.

49. Regarding the other Applicant's allegation concerning the issue of disciplinary proceedings against its former employee and the way of addressing this issue by the regular courts, the Court finds as follows:

The Municipal Court in Kaçanik, in Judgment C. no. 214/08 of 24 January 2012, reasoned that "d) *The Respondent terminated the employment relationship of the Claimant without conducting any procedure foreseen by law, and the Court confirmed this fact by Notice no. 712, of the Respondent, of 04.12.2008, wherein in the reasoning of the Notice is written that his employment relationship was terminated pursuant to the Report of ad hoc Committee, of 29.11.2008".*

50. The Court of Appeal of Kosovo (Judgment Ac. no. 3128/12, of 3 February 2015) reasoned that "*Therefore, with regard to appealing allegations, such as the appealing allegation regarding the disciplinary procedure, this Court considers that they are ungrounded. This because by the Regulation 2001/27, on Essential Labour Law in Kosovo, the disciplinary procedure was not foreseen, but this procedure was foreseen by Administrative Direction no. 2003/2, of the SRSG, on implementation of this Regulation, which procedure in the present legal – civil matter, as results by the case files, was not conducted at all."*

51. The Supreme Court of Kosovo (Judgment, Rev. no. 116/2015, of 17 June 2015) concluded that "*The Supreme Court of Kosovo considers that the lower instance courts have applied the provisions of the substantive law correctly when they approved the statement of claim of the Claimant for annulment of the Notice on termination of the employment relationship and reinstatement to the working place, as unlawful, because also according to the assessment of this Court, the Respondent, in accordance with the legal provision under Article 11.5, in cases where Article 11.2 of the Essential Labour Law in Kosovo applies, item (b), a meeting shall be held between the employer and the employee, and at such meeting the employer shall provide the employee with an oral explanation of the grounds for termination."*

52. The Court notes that the issue of possible disciplinary proceedings against an employee of the Applicant by the regular courts in three instances was addressed in different ways, so it is difficult to conclude from the court decisions whether or not followed a disciplinary procedure. Even if there was one, the legal basis on which it was conducted or should have been conducted is unclear. The Court considers that there are contradictory elements in the decisions of the courts of different instances regarding this matter, which anyway plays a crucial role in the final outcome of the dispute.

53. The Applicant raised in its request for revision the issue of completely wrong reference of the Court of Appeal to AD 2003/2, noting that this administrative direction does not serve for implementation of the Essential Labor Law but Regulation 2001/36 on Civil Service in Kosovo. As long as the former employee did not have the status of a civil servant, this AD does not apply at all in his case. Therefore, the Applicant alleged that this fact was decisive for rendering the judgment of that court, but the Supreme Court did not address this issue at all, but only concluded that "*the lower instance courts applied correctly the provisions of the substantive law."*

54. While the possibility of divergence in case-law was an inherent consequence of any judicial system based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. However, the role of a supreme court was precisely to resolve such conflicts (See *SC Uzinexport S.A. v. Romania*, ECHR Judgment of 31 March 2015, par 29) see, *inter alia*, (*Zielinski and Pradal and Gonzalez and Others vs. France* [GC], no. 24846/94 and 34165/96) .

55. By assessing the process as a unique entirety, based on the reading of the judgment of the Supreme Court and judgments of the lower instance courts, the Court finds that the lack of fully addressing the allegations and giving adequate answers on three basic allegations made by the Applicant: passive legitimacy of the party; the issue of

disciplinary proceeding against the employee; and entirely erroneous application of the law, assessed as crucial issues of the process, constitute an insurmountable flaw of the content of the judgment and of the reasoning of the court.

56. Setting from what has been argued above, and based on the consolidated case law of the ECtHR, in this regard, in the present case under review, the Court considers that the Judgment of the Supreme Court, which rejected the revision, has not respected the constitutional standard of the reasoning of the court decision. Accordingly, the Court concludes that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6.1 [Right to a fair trial] of the ECHR.

57. Since the alleged violation of the right to property [Article 46 of the Constitution] was not sufficiently justified by the Applicant but it was only mentioned that it has occurred as a result of the violation to fair and impartial trial, the Court finds no reason to consider it as a separate allegation.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, and Rules 56 (1) and 74 (1) of the Rules of Procedure, in its session held on 4 September 2017, unanimously:

DECIDE

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE null and void the Judgment Rev. no. 116/2015 of the Supreme Court of Kosovo, of 17 June 2015;

IV. TO REMAND the Judgment of the Supreme Court for reconsideration in conformity with the Judgment of this Court;

V. TO REMAIN fully seized of the matter pending the implementation of this Judgment;

VI. TO ORDER that this Judgment be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette.

VII. TO DECLARE this Judgment effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Arta Rama-Hajrizi

KI106/17, Applicant: Qerim Begolli, constitutional review of Judgment ARJ-UZVP no. 41/2017 of the Supreme Court of Kosovo, dated 19 Jul 2017

KI 108/17, Resolution on inadmissibility approved on 13 November 2017 and published on 21 December 2017

Key words: *Individual referral, request for preliminary injunction, manifestly ill-founded*

The Applicant was one of the candidates competing for the position of judge at basic courts in Kosovo. He was not selected as judge and, for this reason, he initiated legal proceedings against the Kosovo Judicial Council.

The subject matter was the constitutional review of the challenged Judgment of the Supreme Court rejecting the Applicant's request for extraordinary review of his request for preliminary injunction following the proceedings in which he requested that the Kosovo Judicial Council decision be annulled.

The Applicant alleged that the challenged Judgment had violated his rights guaranteed by Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial], and Article 49 [Right to Work and Exercise Profession] of the Constitution in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights.

In addition to requesting the annulment of the challenged Judgment, the Applicant requested the Constitutional Court to impose an interim measure suspending the decreeing of the selected judges pending a decision by the Constitutional Court. He also requested the Court to hold a public hearing in order to clarify the submitted evidence.

The Constitutional Court declared the Referral inadmissible as manifestly ill-founded. The Court referred to the doctrine of the fourth instance to reiterate that it does not act as a fourth-instance court regarding the decisions rendered by ordinary courts. The Court considered that the Applicant had ample opportunities to submit his allegations before ordinary courts and that the latter have dealt with his allegations concerning the inadmissibility of his claim in compliance with the Constitution and the Convention.

The Court, therefore, rejected the Applicant's request for interim measure since he did not show a *prima facie* case on the admissibility of the Referral. The Court also rejected the Applicant's request to hold a hearing reasoning that doing so is not necessary in the give case since there is no need to clarify any evidence.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI106/17

Applicant

Qerim Begolli

Constitutional review of the Judgment ARJ-UZVP no. 41/2017 of the Supreme Court of Kosovo, dated 19 July 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
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Qerim Begolli, from Peja (hereinafter, the Applicant).

Challenged Decision

2. The Applicant challenges the Judgment (ARJ-UZVP no. 41/2017 of 19 July 2017) of the Supreme Court which rejected the Applicant's request for extraordinary review of the rejection of his request for security measures following proceedings in which he requested annulment of the Decision (No. 47/2017, of 6 March 2017) of the Kosovo Judicial Council (hereinafter, the KJC).

3. The challenged Judgment was served on the Applicant on 12 August 2017.

Subject Matter

4. The subject matter is the constitutional review of the challenged Judgment, which allegedly violated the Applicant's rights guaranteed by Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution). The Applicant also alleges a violation of Article 6 [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter, the Convention).

5. The Applicant also requests the Court to impose an interim measure, namely "*to postpone the appointment of the selected judges following the vacancy* [of the KJC] *for recruitment of judges in basic courts of Kosovo […]*".

6. In addition, the Applicant requests the Court to hold a public hearing *"with the purpose of clearing the presented evidence in accordance with Rule 39 of the Rules of Procedure."*

Legal basis

7. The Referral is based on Article 113 (7) of the Constitution, in conjunction with Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter, the Court) and Rules 54 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

8. On 30 August 2017, the Applicant submitted the Referral to the Court.

9. On the same day, the President appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodriguez (presiding), Snezhana Botusharova and Ivan Čukalović.

10. On 6 September 2017, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court.

11. On 18 September 2017, the Applicant filed an additional letter with the Court.

12. On 13 November 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. In April 2016, the KJC announced a vacancy for 61 new judges to be appointed at the basic court level in Kosovo. The Applicant was one of the candidates competing for a position. In the qualifying test, the Applicant had accumulated less than 45 points.

14. On 6 March 2017, the KJC (Decision no. 47/2017) decided as follows:

> *"1. To annul the Decision of the KJC no. 131/2016, for the lowering of the passage threshold of 28 October 2016.*
> *2. To annul the results of the written exam of 3 and 4 December 2016, for all the candidates that have applied for a position as judge in basic courts.*
> *3. To repeat the written exam only for 75 candidates who in the qualifying test of 15 October 2016 have managed to accumulate 45 points or more."*

15. On 22 March 2017, the Applicant filed a claim against the KJC with the Basic Court in Prishtina requesting the annulment of the abovementioned Decision. In addition, the Applicant requested an interim measure [security measure] to be granted through which the KJC would be ordered to halt the appointment procedure for new judges until the merits of his claim are dealt with by the regular courts.

16. On 24 March 2017, the Basic Court in Prishtina [number of the Decision missing] invited the Applicant to revise his claim *"in accordance with the applicable law which regulates the issue of postponement of the execution of an administrative act"*.

17. On 3 April 2017, the Applicant reaffirmed his position stated in his initial claim. He argued that the Basic Court in Prishtina should grant him the interim measure in

accordance with *"Article 63 of the Law No. 03/L-202 on Administrative Conflicts in conjunction with Article 306 of the Law No. 03/L-006 of Contested Procedure"*.

18. On 4 April 2017, the Basic Court in Prishtina (Decision, A. no. 524/17) dismissed the Applicant's request for interim measures as impermissible by law by reasoning that: *"[...] the proposal of the claimant* [the Applicant] *as it is contains flaws which make it impossible to conduct proceedings in relation to this claim, whilst the latter* [the Applicant] *did not fix them in accordance with the concrete instructions given by the court."*

19. The Applicant appealed before the Court of Appeal. He contested the legality of the Decision of the Basic Court in Prishtina by arguing that the Law on Administrative Conflicts as well as the Law on Contested Procedure was not correctly applied.

20. On 25 May 2017, the Court of Appeal (Decision, AA. no. 163/2017) rejected the Applicant's appeal and thus confirmed the Decision of the Basic Court in Prishtina. *Inter alia*, the Court of Appeal reasoned that:

> *"The Appeal's Panel, same as the court of first instance, considers that the proposal of the claimant [...] is not based on legal provisions of Article 22 of the Law on Administrative Conflicts, which regulates the manner of submission of requests for postponing the final Decision of an administrative authority until the case is decided on merits pursuant to the claim. [...] The court of first instance returned the proposal for further corrections and completion and to submit it within the meaning of Article 22 of the Law on Administrative Conflict but the proposers again acted in the same manner by requesting interim measure of security even in the appeal but this institute is not applied in the procedure of the administrative conflict [...] therefore, the Court of the first instance rightfully dismissed the proposal of the claimants as impermissible due to the legal flaws and the failure to avoid them by completion and correction [...]."*

21. Against the Decision of the Court of Appeal, the Applicant filed a request for extraordinary review before the Supreme Court alleging violations of material and procedural law.

22. On 19 July 2017, the Supreme Court (Judgment ARJ-UZVP no. 41/2017) rejected the Applicant's request as ungrounded. The Supreme Court considered that the lower courts had rightfully applied the material law and thus confirmed their decisions. The relevant part of the Judgment reads:

> *"[...] the court of second instance made a fair application by rejecting the appeal of the claimants [...]. Article 63 of the Law on Administrative Conflicts stipulates that if this Law does not contain provisions for the procedure in administrative conflict, the provisions of the Law on Contested Procedure will be adequately applied. [...] In the present case, according to fair interpretation, the claimants should have requested by the court of first instance the postponement of the execution of the administrative act until the issuance of a court decision, pursuant to Article 22.6 of the Law on Administrative Conflict and not Article 306 of the Law on Contested Procedure [...] because Article 36 of the Law on Administrative Conflict is applied only of this law does not contain provisions for the procedure in the administrative conflict."*

Applicant's allegations

23. The Applicant claims that the challenged Judgment of the Supreme Court violated his rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 49 [Right to Work and Exercise Profession] of the Constitution as well as his right guaranteed by Article 6 [Right to Fair Trial] of the Convention.

24. With regards to his right to *"equality before the law"* and the right to *"work and exercise profession"* the Applicant claims that by not imposing an interim measure and by not reviewing the evidence he presented, the basic courts have *"caused irreparable damage"* to him and have not afforded him equal treatment with *"other candidates."*

25. With regards to his right to *"fair and impartial trial",* the Applicant further alleges that the challenged Judgment of the Supreme Court was *"partial because while decision upon the appeal [...] the Presiding Judge of the Supreme Court was Judge N.B. (who at the time of announcement of the vacancy was a member of the Commission for accepting candidates for judge)."* According to the Applicant, Judge N.B. *"should have requested exclusion"* from his case.

26. The Applicant concludes by requesting the Court the following:

> *"[...] I request from the Constitutional Court of Kosovo to declare invalid Decision ARJ-UZVP. no. 41/2017 of the Supreme Court of Kosovo, of 19 July 2017, to decide upon the matter of protection as it was requested by the proposal for imposing the temporary measure of protection in the statement of claim submitted on 22 March 2017, to suspend the decree of selected candidates pursuant to the vacancy for recruiting judges for basic courts of Kosovo, declared by the Kosovo Judicial Council on 24 April 2016 due to the alleged violation of the Constitution."*

Admissibility of the Referral

27. The Court examines whether the Applicant has met the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

28. In that respect, Article 113 of the Constitution provides:

> *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 exhausting all legal remedies provided by law.*

29. In addition, Article 49 of the Law provides that: *"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".*

30. In the instant case, the Court notes that the Applicant has exhausted all available legal remedies considering that the Judgment of the Supreme Court may be contested only before the Constitutional Court. The Court also notes that the Applicant was served with the challenged Judgment on 12 August 2017 and filed his Referral with the Court on 30 August 2017.

31. Thus, the Court considers that the Applicant is an authorized party, has exhausted all legal remedies afforded to him by the applicable law and the Referral was submitted within the four months' time limit.

32. However, the Court also must take into account Article 48 of the Law and Rule 36 of the Rules of Procedure.

> Article 48 of the Law
>
> *"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."*
>
> Rule 36 of the Rules of Procedure
>
> *"(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:*
> *[…], or*
> *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".*

33. The Applicant, as stated above, challenges the Judgment (ARJ-UZVP no. 41/2017, dated 19 July 2017) of the Supreme Court, alleging a violation of his right to fair and impartial trial, equality before the law and the right to work and exercise a profession, as protected by the Constitution and the Convention respectively.

34. In respect to his right protected by Articles 24 and 49 of the Constitution, the Applicant claims that the regular courts have not reviewed the evidence presented by him which created a situation of *"irreparable damage"*. He further claims that the regular courts have placed him on an unequal position with the other candidates.

35. In light of these allegations, the Court first recalls that the Applicant's claim was procedurally rejected since it was considered to be *"impermissible by law"*. Even after a specific request by the Basic Court in Prishtina to correct and align the claim in accordance with the applicable law, the Applicant confirmed his initial claim and did not correct it as per the request of the first instance court. The latter reasoned its decision on this point by referring to the relevant material law.

36. Further on this crucial point, the Court recalls that the Applicant submitted his first claim and his revised claim based partly on the provisions of the Law on Contested Procedure and partly on the Law on Administrative Conflicts. However, the regular courts explained to the Applicant that a claim may be submitted under the provisions of the Law on Contested Procedure only and if the Law on Administrative Conflicts did not regulate such matters itself. Considering that the Law on Administrative Conflicts regulated the matter of "*postponement of the execution of an administrative act*", the Applicant was invited to correct his claim in accordance with the provisions of such law. Despite that, the decisions of the regular courts show that the Applicant had once again based his claim on provisions of the Law on Contested Procedure – which was subsequently considered as a claim impermissible by law by the regular courts.

37. The Court also recalls that the stance of the Basic Court in Prishtina with respect to impermissibility of the claim submitted by the Applicant was fully confirmed by the Court of Appeal and the Supreme Court. The Court of Appeal considered that the claim of the Applicant was *"not based on legal provisions of Article 22 of the Law on Administrative Conflicts";* whilst, the Supreme Court confirmed that the Applicant should have requested postponement of the execution of the administrative act [Decision (No. 47/2017 of 6 March 2017) of the KJC] pursuant to *"Article 22.6 of the Law on Administrative Conflict and not Article 306 of the Law on Contested Procedure."*

38. In this regard, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the public authorities, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

39. The Constitutional Court also reiterates that it does not act as a court of fourth instance, in respect of the decisions taken by the regular courts or other public authorities. It is the role of the regular courts or other public authorities, when applicable; to interpret and apply the pertinent rules of both procedural and substantive law (See, *mutatis mutandis*, *García Ruiz v. Spain,* No. 30544/96, ECtHR, Judgment of 21 January 1999, para. 28. See also Constitutional Court case No. KI70/11, *Applicants Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).

40. In this respect, the Court notes that the Applicant had ample opportunities to present his case before the regular courts. The issue of the applicable law has been extensively addressed by all regular courts. The Court of Appeal and the Supreme Court have responded to the claim of the Applicant as to why his claim has been considered as impermissible by law.

41. The Constitutional Court can only consider whether the proceedings in general and viewed in its entirety have been conducted in such a way that the Applicant had a fair trial (See, *inter alia*, *Edwards v. United Kingdom,* No. 13071/87, Report of European Commission of Human Rights of 10 July 1991). The mere fact that the Applicant is not satisfied with the outcome of the proceedings in his case do not give rise to an arguable claim of a violation of their rights as protected by the Constitution and ECHR.

42. The Court considers that the proceedings before the Supreme Court, the Court of Appeal and the Basic Court in Prishtina have been fair and reasoned (See, *mutatis mutandis, Shub v. Lithuania,* No. 17064/06, ECtHR, Decision of 30 June 2009).

43. In respect to his right protected by Article 31 of the Constitution and Article 6 of the ECHR, the Applicant claims that the Supreme Court has not been impartial considering that one of the Judges of the Supreme Court who decided on his request for extraordinary review has been "*a member of the Commission for accepting candidates for judge"*. According to the Applicant, Judge N.B. *"should have requested exclusion"* from his case.

44. In this regard, the Court notes that despite claiming impartiality of one particular Judge of the Supreme Court, the Applicant has not presented any facts to substantiate his claim. He has not submitted any *prima facie* evidence indicating a violation of his right to fair and impartial trial as protected by the Constitution and the Convention (See *Vanek v. Slovak Republic*, No. 53363/99, ECtHR, Decision of 31 May 2005) and did not specify how the referred articles of the Constitution and the Convention support his claim, as required by Article 48 of the Law and Rules 36 (2) (b) and (d) of the Rules of Procedure.

45. The mere fact that a Judge was part of a certain commission does not make him automatically disqualified to sit on a bench. The burden of proof lays with the Applicant to convince this Court as to how and why it should question the impartiality of the Judge.

The Applicant has not provided any evidence or arguments to that end and as a result the Court sees no grounds to rule that the impartiality of the Judge raises any concerns that could lead to a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

46. In view of the circumstances of the case and the above examined safeguards, the Court finds that the Applicant's complaints about the impartiality of Judge N.B. are not objectively justified and substantiated.

47. In sum, the allegations of a violation of his rights and freedoms guaranteed by the Constitution and the Convention are unsubstantiated on constitutional grounds and not proven and thus are manifestly ill-founded.

48. For the foregoing reasons, the Court considers that, in accordance with Article 48 of the Law and Rules 36 (2) (b) and (d) of the Rules of Procedure, the Referral is inadmissible.

Request for Public Hearing

49. The Applicant also requested that the Court holds a public hearing *"with the purpose of clearing the presented evidence in accordance with Rule 39 of the Rules of Procedure."*

50. The Court recalls that, in accordance with Rule 39 [Right to Hearing and Waiver], *"only the referrals determined to be admissible may be granted a hearing before the Court […]."*

51. The Court has concluded that the Referral is inadmissible therefore there is no need to hold a public hearing.

Request for Interim Measure

52. The Applicant requested the Court to impose an interim measure, namely to postpone the appointment of selected judges following the finalization of the selection process by the KJC for basic court judges.

53. The Applicant did not provide any arguments or reasons as to why the interim measure should be granted by the Court. He merely mentioned it in the concluding part of his Referral, without providing any convincing reasons or arguments.

54. In order for the Court to decide on an interim measure, pursuant to Rule 55 (4) and (5) of the Rules of Procedure, it is necessary that:

> *"(a) the party requesting interim measures has shown (…), if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
>
> *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*
> *[…]*
> *If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application."*

55. As emphasized above, the Applicant has not shown a *prima facie* case on the admissibility of the Referral. Therefore, the Court rejects the request for interim measure as ungrounded.

FOR THESE REASONS

Pursuant to Articles 113.1 and 113.7 of the Constitution, Articles, 27, 47, 48 of the Law and Rule 36 (2) (b) and (d), 39, 55 (4) and 56 (3) of the Rules of Procedure, on 13 November 2017, unanimously:

DECIDES

I. TO DECLARE the Referral as 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. TO DECLARE this Decision effective immediately

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

KI90/16 Applicant: Branislav Jokić, constitutional review of non-execution of Decision KKPK/D/R/230/2014, of Kosovo Property Claims Commission, of 13 March 2014

KI90/16, Judgment of 5 December 2017, published on 21 December 2017.

Keywords: *individual referral, civil proceedings, right to fair and impartial trial, protection of property, the prohibition of discrimination*

In this case, the Applicant challenges the non-execution of Decision KKPK/D/R/230/2014, of the Kosovo Property Claims Commission (KPCC) which recognizes his property right over the parcel in the territory of the Peja municipality. After his property right was recognized, the Applicant requested the Kosovo Property Agency to enable him to enter into possession and make the necessary changes in the registration of the ownership rights in the Municipal Cadastre of Peja in accordance with the final decision of the KPCC. The Kosovo Property Agency renders the decision notifying the Applicant that it is not able to execute the KPCC decision because the Municipal Assembly of Peja approved the decision of the Directorate for Property and Legal Issues of the MA of Peja, by which the decision on the recognition of ownership is considered absolutely null and void *ex tunc*.

The Applicant considers that there has been a violation of the right to fair and impartial trial, then a violation of the right to a legal remedy, as well as a violation of Article 46 of the Constitution on the protection of property. The Court notes that in his referral the Applicant claims that there is a final decision confirming his right to property. He constantly tried to execute it, but this has not happened so far and thus it violates his right to fair and impartial trial.

The Court finds that the non-execution of the final decision of the KPCC, as in the Applicant's case constitutes a violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR. The Court also finds that the annulment of the final decision of the KPCC through an administrative decision by the Municipal Assembly of Peja constitutes a violation of judicial protection of rights. Finally, the Court finds that as a result of the non-execution of the final and binding decision, the Applicant has been unfairly denied his property. In that way, the Applicant’s right to peaceful enjoyment of his property has also been violated.

JUDGMENT

in

Case No. KI90/16

Applicant

Branislav Jokić

Constitutional review of non-execution of Decision KKPK/D/R/230/2014, of Kosovo Property Claims Commission, of 13 March 2014

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

Applicant

1. The Referral was submitted by Branislav Jokić (hereinafter: the Applicant), residing in Mlladenovc, Serbia.

Challenged decision

2. The Applicant challenges the non-execution of Decision KKPK/D/R/230/2014, of the Kosovo Property Claims Commission, of 13 March 2014 (hereinafter: the KPCC).

Subject matter

3. The subject matter of the Referral is the constitutional review of the non-execution of the abovementioned decision of the KPCC, for alleged violations of the fundamental freedoms and rights guaranteed by Article 3 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property], Article 53 [Interpretation of Human Rights Provisions], and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial), Article 13 (Right to an effective remedy), Article 14 (Prohibition of discrimination), Article 1 of Protocol no. 1 (Protection of property) of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113. 7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 10 June 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 12 July 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

7. On 20 July 2016, the Court notified the Applicant about the registration of the Referral and requested him to bring additional documents.

8. On 19 August 2016, the Applicant submitted the requested documents to the Court.

9. On 30 January 2017, the Court notified the Municipality of Peja and the Kosovo Property Agency about the registration of the Referral and sent them a copy of it, giving them the opportunity to submit comments to the Court.

10. On 7 February 2017, the Kosovo Property Agency (hereinafter: the KPA) submitted its comments to the Court.

11. On 5 December 2017, after having considered the report of the Judge Rapporteur, the Review Panel unanimously proposed to the Court the admissibility of the Referral and finding of a violation.

12. On the same date, the Court unanimously voted that the Referral is declared admissible and to hold a violation.

Summary of facts

13. The Municipality of Peja by Decision No. 463-449/97, of 26 May 1997, decided that the Applicant be recognized the property right over the plot 5351/7, on the surface area of 0.03,52 ha, CZ Peja.

14. On an unspecified date, the Applicant filed a claim with the KPA for the confirmation of his possession rights of over the abovementioned property.

15. By group Decision KPCC/D/R/230/2014, of 13 March 2014, the Kosovo Property Agency Commission decided that:

> *"(a) The Applicant has proved that he is a property right holder Branislav Jokić, the owner of 1/1 of the property in question and was the owner of the demolished property on the day of the destruction of the residential property and the right to use the land on which he is located the latter, or he inherited the abovementioned ownership;*
>
> *And ordered that:*
>
> *b) Branislav Jokić exercises the right to possession of the said property;*
>
> *c) The respondent, if any, and any other person occupying the property, vacate the property within 30 (thirty) days of the delivery of this order; and*

d) should the respondent or any other person occupying the property fail to comply with this order to vacate the claimed property within the time period stated, they shall be evicted from the property;

In addition, the Commission has issued a decision that:

a) In cases in which there is more than one owner to the claimed property, the above decision and order do not affect the rights of any respective co-owners.
b) The claim for compensation for damage or the loss of the right to use the claimed property is rejected as the Commission has no jurisdiction over such claims."

16. In the reasoning of the abovementioned decision of the KPCC, it is emphasized:

"...the Applicants or the property right holders, as may be the case, except claim no. 48054 and claim no. 50686, have fulfilled the requirements for order which confirms the ownership over the claimed property and the relevant plot. In claims no. 48054 and claim no. 50686 the Applicants showed that they fulfilled the conditions for the order confirming the ownership over the claimed property and the right to use the relevant plot since the date of destruction of the residential property. The fact that the properties have been destructed does not affect the rights of the Applicant for receiving the Decision from the Commission which would confirm the ownership over the property of the Applicant on the date of destruction of the claimed property."

17. On 12 January 2016, the Applicant requested the KPA to return the possession of his property and make the appropriate changes to the registration of the property in the Cadastre of the Municipality of Peja, in accordance with the final and binding decision of KPCC and applicable law in Kosovo.

18. On 14 March 2016, the KPA through the submission Ref. 00327/16 against which no legal remedy can be exercised, notifies the Applicant that it is not able to execute the KPCC decision in case KPA 48054. In the reply it is stated that the KPA has received from the Directorate for legal-property issues of the Municipality of Peja, the decision number 01-463-65203 of 14 May 2015, based on which the Municipal Assembly approved the proposal of this directorate to declare as absolutely invalid the decision for allocation of land for use no. 463-499/97 of 26 May 1997, and at the same time annulled the *ex-tunc* (retroactive effect) all the factual and legal actions of this decision.

Applicant's allegations

19. The Applicant alleges violation of Article 3 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property], Article 53 [Interpretation of Human Rights Provisions], and Article 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6, paragraph 1 (Right to a fair trial), Article 13 (Right to an effective remedy) , Article 14 (Prohibition of discrimination), Article 1 of Protocol no. 1 of the ECHR.

20. The Applicant's main allegation is that the final decision of the KPCC of 13 March 2014 was not executed.

21. The Applicant states that *"By KPCC Decision KPCC/D/R/230/2014 of 13.03.2014, I have been recognized the property right over the property in question. No appeal was filed against that decision with the Supreme Court's Appeals Panel. In this context, the KPCC decision has become final and presents an adjudicated matter."*

22. He further states that "*As far as the execution of this decision is concerned, I have addressed the KPA with a claim to return the possession of property.*" Because *"the burden of non-implementation and lack of appropriate mechanisms for the implementation of this final decision of KPCC KPCC/D/R/230/2014, of 13.03.2014, falls on the KPA. The decision of the municipal administrative authority should not in any way present any reason for the denial of my right to enjoy the property"*.

23. Finally he states that *"Regarding the violation of the right to protection of property, the Decision of KPCC presents a legitimate expectation for me, since I have the right to that property. Therefore, I request my right in order to enjoy the above mentioned property peacefully, as it is guaranteed by Article 1 of Protocol 1 of the Convention."*

24. The Applicant requests the Constitutional Court to hold violation of fundamental freedoms and rights; to decide on compensation for material and non-material damage and order the Kosovo Property Agency to execute KPCC Decision KPCC/D/R/230/2014 of 13 March 2014, within the shortest possible deadline.

Response of Kosovo Property Agency

25. The KPA informed the Court that Decision KPCC/D/R/230/2014, of 13 March 2014, approved the claim of Mr. Jokić through which it was decided to *"confirm his ownership right in the ideal part of 1/1 and also he was the owner on the day of the demolition of the claimed residential property and the right to use the land on which it was located and to return the right to possess the claimed property."*

26. The KPA further states that *"on 22 October 2014, a copy of the Commission's decision was sent to the Municipality of Peja and within the legal deadline the Agency did not receive any Complaint against the Decision of the Commission, whereas on 29 April 2015, the Agency received from the Municipality of Peja namely from the Directorate for Legal Property Issues the letter dated 18 March 2015, Ref. no. 15-463-LP-324, through which the Agency was notified that regarding the plot 5351/7, namely the property of Mr. Branislav Jokić, a decision was issued by the Municipal Assembly of Peja through which the Decision on the allocation of land for use no. 463-449/97, was declared an absolutely invalid act"*.

27. Finally, the KPA states that the failure to implement Decision KPCC/D/R/230/2014 of the Kosovo Property Claims Commission of 13 March 2014 was the result of the declaration as an absolutely invalid act of the initial decision of this Municipality in 1997.

Admissibility of the Referral

28. In order to be able to adjudicate the Applicant's Referral, the Court shall first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, foreseen in the Law and as further specified in the Rules of Procedure.

29. As to the Applicants' referrals, the Court refers to Article 113.7 of the Constitution, which defines: *"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."*

30. In this respect, the Court notes that the Applicant has exhausted all legal remedies provided by law and in the absence of any other effective remedy available to him, he addressed the Constitutional Court with the request for execution of the Decision of the

Housing and Property Claims Commission, namely Decision KPCC/D/R/230/2014, of 13 March 2014.

31. The Court further refers to Article 49 of the Law, which stipulates that: *"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."*

32. The Court further notes that the requirement for the submission of the Referral within the time limit of 4 (four) months does not apply in the case of the non-execution of the decisions by the public authority. The European Court of Human Right (hereinafter: the ECtHR) explicitly noted in a similar situation arising in case *Iatridis v. Greece*, that the time limit rule does not apply where there is a refusal of the executive to comply with a specific decision (see, *mutatis mutandis Iatridis v. Greece, No. 59493/00*, ECtHR, Judgment of 19 October 2000).

33. The Court also refers to Article 48 of the Law, which provides that: *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*

34. Regarding the fulfillment of this criterion, the Court notes that the Applicant has accurately indicated what rights, guaranteed by the Constitution, have allegedly been violated by the failure to execute the KPCC decision in his case.

35. The Court notes that the Applicant can legitimately claim to be the victim of the non-execution of the KPCC decision.

36. In sum, the Court considers that the Applicant is an authorized party; he has exhausted all legal remedies; that the requirement to submit a referral within the legal deadline has been fulfilled as a result of the ongoing situation and that he has accurately clarified the alleged violations of rights and freedoms, and referred to the case law of the ECtHR in relation to the realization of his rights to enjoyment and possession of the property.

37. Therefore, the Referral cannot be considered as manifestly ill-founded within the meaning of Rule 36 (1) (d) of the Rules of Procedure and no other ground for declaring it inadmissible has been established (See, for example, case *A and B v. Norway*, [GC], applications No. 24130/11 and No. 29758/11, Judgment of 15 November 2016, paragraph 55, and also see *mutatis mutandis* case No. KI132/15, *Deçan Monastery*, Judgment of the Constitutional Court of the Republic of Kosovo, of 20 May 2016), therefore, the Court considers that the Referral is admissible for review on merits.

Merits of Referral

38. The Court notes that the Applicant alleges a violation of his rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property], Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 6.1 [Right to a fair trial], Article 13 [Right to an effective remedy], Article 14 [Prohibition of discrimination] Article 1 of Protocol no. 1 of the ECHR [Protection of Property] of the Convention.

39. In these cases, the Court will review the merits of the Referral pursuant to Article 31 in conjunction with Article 6.1 of the ECHR, Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of the ECHR, and Article 54 [Judicial Protection of Rights] of the Constitution.

Regarding the alleged violation to fair and impartial trial

40. The Court notes that the Applicant in his Referral alleges that there is a final decision by which his right to property is confirmed. He has consistently tried to execute the latter, but this has not happened so far and, consequently, his right to fair and impartial trial is being violated.

41. In this regard, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

> *"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."*

42. In addition, Article 6.1 [Right to a fair trial] of ECHR foresees:

> *"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."*

43. Furthermore, the Court refers to Article 54 [Judicial Protection of Rights] of the Constitution, which specifies:

> *"Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated."*

44. The Court notes that the KPCC decision was issued on 13 March 2014. This decision has become final and binding on 22 November 2014, because no interested party exercised a legal remedy against this decision.

45. The Court notes that requesting the execution of this decision, the Applicant addressed the KPA in writing, with a request for execution of the decision in his case. The Applicant has consistently tried to enforce the final decision in his case.

46. The Court recalls its case law, as emphasized in case KI144/14 and KI156/14, pursuant to UNMIK Regulation 2006/50, as amended and supplemented by Law No. 03/L-079 on amendment of UNMIK Regulation 2006/50 on the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property of the Republic of Kosovo, the Court finds that the KPA is the only authority competent to enforce the KPCC decisions and decisions of the KPA Appeals Panel. This fact was confirmed by the representatives of the KPA, who participated as a party to the public hearing, held on 10 March 2014, at the Constitutional Court of the Republic of Kosovo, case No. KI187/13.

47. In the present case, the Court notes that although the final decision of the KPCC was rendered on 13 March 2014, the KPA alleged that the non-execution of this decision came as a result of another decision issued in the administrative procedure, specifically, Decision no. 01-463-65203 of 14 May 2015 of the Municipal Assembly of the Municipality of Peja.

48. The Court recalls that the independence of judges is violated when the executive interferes with a pending case before the courts in order to influence the outcome of that case (see, the judgment of 25 July 2002, *Sovtransavto Holding v. Ukraine*, No. 48553/99 and the Judgment of ECtHR of 26 November 2002, *Mosteanu and Others v. Romania*, No. 33176/96).

49. In the present case, the Court notes that the Municipality of Peja has overturned a final and binding court decision through an administrative decision; which conflicts with the principle of independence of judiciary and also violates the enforcement of final decisions of judiciary.

50. In this respect, the Court notes that it would be meaningless if the legal system of the Republic of Kosovo would allow that a final court decision remains ineffective in disfavor of one party. Therefore, the non-effectiveness of procedures and non-implementation of decisions produce effects that would bring to situations that are inconsistent with the principle of rule of law (Article 7 of the Constitution), a principle which the authorities of the Republic of Kosovo are obliged to respect (see, ECtHR Judgment of 25 July 2004, in the case *Romashov v. Ukraine*, No. 67534/01).

51. The Court recalls that final decisions of the KPCC are binding on all natural and legal persons and are not subject to any extraordinary judicial or administrative review (see Judgment of 23 April 2012, KI104/10 *Draža Arsić*, Constitutional review of Decision GZ No. 78/2010 of the District Court of Gjilan, of 7 June 2010).

52. Therefore, the Court finds that Decision No. 01-463-65203, of 14 May 2015, of the Municipal Assembly of the Municipality of Peja is invalid.

53. The Court emphasizes that the execution of a final decision must be seen as an integral part of the right to fair trial, a right guaranteed by the abovementioned articles (See, ECtHR Judgment of 19 March 1997, *Hornsby v. Greece*, No. 18357/91, para. 40). In the present case, the ECtHR found that the Applicants should not have been deprived of the benefit of the execution of the final decision, which had been taken in their favor.

54. In addition, the Court considers that no authority, can justify the non-enforcement of decisions merely for the purpose of obtaining a rehearing and a fresh determination of the case. (See, Judgment of ECtHR of 25 July 2002, *Sovtransavto Holding v. Ukraine*, No. 48553/99, paragraph 72, and Judgment of ECTHR of 24 July 2003, *Ryabykh v. Russia*, No. 52854/99, paragraph 52).

55. The competent authorities have the obligation to organize an efficient system for the implementation of decisions which are effective in law and practice, and should ensure their application within a reasonable time, without unnecessary delays *(*See, *mutatis mutandis*, case *Pecevi v. Former Yugoslavian Republic of Macedonia,* of 6 November 2008, Submission No. 21839/03, *Martinovska v. the Former Yugoslavian Republic* of *Macedonia* of 25 September 2006, Submission no. 22731/02).

56. The Court emphasizes that it is not its task to determine what the most appropriate way is for the KPA, within its competencies, to find effective mechanisms of an executive nature, in the sense of full compliance with the obligations established by law and Constitution. However, every individual enjoys the right to judicial protection in the event of violation or denial of any rights guaranteed by this Constitution or by law (see: Article 54 of the Constitution).

57. The Court wishes to emphasize that in its Judgment of 16 April 2014 in case No. KI187/13, it has already dealt with the constitutional review of the non-execution of

HPCC decisions. In that judgment, the Court found that there was a violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR and Article 54 of the Constitution, as well as a violation of the Applicants' right to peaceful enjoyment of their property, guaranteed by Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR as a consequence of non-execution (see Judgment of 16 April 2014, KI187/13 *N. Jovanović*, Constitutional Review of the Non-Execution of the Decision of the Appellate Panel of the Supreme Court, GSK-AKP-A-001/12, of 8 May 2012, and of the Kosovo Property Claims Commission Decision No. KPCC/D/A/114/2011 of 22 June 2011).

58. Therefore, the burden of non-execution and lack of appropriate mechanisms for execution of final decisions of the KPCC in the Applicant's case falls solely on the KPA.

59. Therefore, the Court recalls that the KPA has an obligation to enforce HPCC decisions.

60. In conclusion, the Court finds that the non-execution of the final and binding decision of the KPCC constitutes a violation of the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

Regarding allegations of violation of the right to protection of property

61. The Applicants allege that there has been a violation of Article 46 of the Constitution [Protection of Property] and Article 1 of Protocol No. 1 of the ECHR.

62. Article 46 [Protection of Property] of the Constitution, stipulates:

> *1) The right to own property is guaranteed.*
>
> *2) Use of property is regulated by law in accordance with the public interest.*
>
> *3) No one shall be arbitrarily deprived of property. (...)"*
>
> *[...]*

63. Article 1 of Protocol No. 1 of the ECHR, provides:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

64. The Court recalls its Judgment of 23 April 2012, stating that since the decisions of the Housing and Property Claims Commission become final and *res judicata*, *"the Applicant enjoyed the right to possession of the property, as guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 to the ECHR"* (Constitutional Court of the Republic of Kosovo: Case No. KI104/10, Applicant *Draža Arsić*, Constitutional review of Decision GZ 78/2010 of the District Court in Gjilan, 7 June 2010, Judgment of 10 May 2012).

65. In the Applicant's case, the relevant KPCC decision became final and binding on 22 November 2014.

66. As such, the right to possession of property within the meaning of Article 46 of the Constitution and Article 1 of Protocol No. 1 of the ECHR for each of the Applicants had begun on these respective dates.

67. The Court notes that, despite the fact that the KPCC decision became final and binding, it was never executed.

68. The Court finds that as a result of the non-execution of this decision, the Applicant has been denied the right to peaceful enjoyment of his property, in violation of Article 46 of the Constitution, and Article 1 of Protocol No. 1 of the ECHR.

Conclusion

69. In conclusion, the Court finds that the non-execution of the final decision of the KPCC in the Applicant's case constitutes a violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR.

70. The Court also finds that the dismissal of the final decision of the KPCC through an administrative decision by the Municipal Assembly of Peja constitutes a violation of Article 54 of the Constitution.

71. In addition, the Court finds that as a result of the non-execution of final and binding decision, the Applicant was unjustly deprived of his property. In this way, the Applicant's right to peaceful enjoyment of his property, as guaranteed by Article 46 of the Constitution and Article 1 of Protocol No. 1 of the ECHR has been violated.

72. Finally, the Court considers that there is no need to further deal with allegations of violation of Articles 24 and 32 of the Constitution, in conjunction with Articles 13 and 14 of the ECHR, in addition to the Applicant's request to grant monetary compensation, because such allegations and requests have been exhausted by the Court's findings of a violation of Articles 31, 46 and 54 of the Constitution in conjunction with Article 6.1 of the ECHR and Article 1 of Protocol No. 1 of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 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 5 December 2017, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR;

III. TO HOLD that there has been a violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of the ECHR;

IV. TO HOLD that there has been a violation of Article 54 of the Constitution.

V. TO DECLARE INVALID Decision No. 01-463-65203, of 14 May 2015 of the Municipal Assembly of Peja.

VI. TO HOLD that Decision No. KKPK/D/R/230/2014 of Kosovo Property Claims Commission of 13 March 2014 should be enforced by the Kosovo Property Agency (KPA);

VII. TO ORDER the Kosovo Property Agency (KPA), that in accordance with Rule 63 of the Rules of Procedure of the Court to submit information as soon as possible, but not later than 6 (six) months, to the Constitutional Court regarding the measures taken to implement the Judgment of this Court;

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. This decision is effective immediately

Judge Rapporteur

Altay Suroy

President of the Constitutional Court

Arta Rama-Hajrizi

KI67/17, Applicant: Hazir Krasniqi, Constitutional review of Judgment (Pml. no. 48/2017) of the Supreme Court of Kosovo of 16 March 2017

KI67/17, Resolution on inadmissibility, approved on 18 October 2017, published on 21 December 2017

Key words: *individual referral, criminal procedure, right to fair and impartial trial, effective legal remedies, equality before the law, manifestly ill-founded referral, inadmissible referral*

In his Referral, the Applicant challenged the judgment of the Supreme Court of Kosovo whereby his request for protection of legality filed against the judgment of the Court of Appeals of Kosovo and Judgment of the Basic Court in Mitrovica had been rejected as ungrounded. The Applicant alleged that Articles 3, 21, 30, 31 and 32 of the Constitution of the Republic of Kosovo had been violated.

The Court reiterated that it is not its duty to deal with errors of facts or law allegedly made by regular courts, unless the rights and fundamental freedoms guaranteed by the Constitution or ECHR have been violated. Furthermore, the Court concluded that the Applicant had not substantiated his allegations that the relevant proceedings had been, in any way, unfair and arbitrary, and that the challenged judgment had led to the violation of his rights and freedoms guaranteed by the Constitution and ECHR. Therefore, the Court found that the Applicant's referral is manifestly ill-founded in constitutional basis, hence inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI67/17

Applicant

Hazir Krasniqi

Constitutional review of Judgment (Pml. No. 48/2017) of the Supreme Court of Kosovo of 16 March 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 Hazir Krasniqi from Vushtrri (hereinafter: the Applicant) who is represented with power of attorney by lawyer Sheremet Ademi.

Challenged decision

2. The Applicant challenges Judgment (Pml. No. 48/2017) of the Supreme Court of Kosovo of 16 March 2017, which rejected as ungrounded the Applicant's request for protection of legality filed against the Judgment (PAKR. No. 355/2016) of the Court of Appeals of Kosovo of 6 January 2017 and Judgment (P. No. 509/2013) of the Basic Court in Mitrovica of 12 November 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly has violated the Applicant's rights guaranteed by Articles 3 [Equality Before the Law], 21 [General Principles], 30 [Rights of the Accused], 31 [Right to Fair and Impartial Trial], and 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter: Constitution) as well as Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 05 June 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

6. On 5 June 2017, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

7. On 14 June 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.

8. 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

9. On 30 December 2009, the Basic Prosecution Office in Mitrovica filed an indictment (PP.I.333/2009) against the Applicant due to grounded suspicion of having committed the criminal offense of misappropriation in office.

10. On 12 November 2016, the Basic Court in Mitrovica, by Judgment (P. No. 509/2013), found the Applicant guilty for the criminal offense of Misappropriation in office and sentenced him to an imprisonment sentence of one (1) year, which will not be executed if the accused fails to commit another criminal offense within 2 (two) years.

11. By the same Judgment, the Applicant is obliged to compensate the injured Crediting-Saving Association "Ardhmeria Begaj"in Vushtrri in the amount of EUR 25,061.79 under the threat that the imprisonment sentence will be executed in case the Applicant fails to fulfill the obligation in relation to the compensation of damage in the abovementioned amount.

12. By this Judgment an accessory punishment was also imposed on the Applicant prohibition on exercising public functions within 3 (three) years and a fine in the amount of 1,000 euro.

13. The Basic Court in Mitrovica based the Judgment on the Applicant's guilty plea for all counts of the indictment in the presence of his defense counsel.

14. The Basic Prosecution Office in Mitrovica filed an appeal with the Court of Appeals of Kosovo against the Judgment of the Basic Court due to decision on the length of sentence, with a proposal that the Judgment be modified and on the Applicant be imposed higher fine and effective imprisonment sentence.

15. The Applicant also filed an appeal against the same Judgment, on the grounds of essential violation of the criminal procedure and violation of the criminal law, with a proposal to annul the judgment, and to dismiss the prosecution's indictment, stating that the time-limits for the investigation were unlawfully extended by the Basic Court and that the indictment is filed out of the prescribed deadline.

16. On 6 January 2017, the Court of Appeals of Kosovo, by Judgment (PAKR. No. 655/2016) upheld the Judgment of the Basic Court in Mitrovica and rejected the appeals of the Basic Prosecution in Mitrovica and the Applicant as ungrounded.

17. The Applicant filed a request for protection of legality with the Supreme Court of Kosovo against the Judgment of the Court of Appeals, repeating the same appealing allegations concerning the length of the investigation and raising the indictment out of time, with a proposal that the request be approved, the challenged judgment be annulled or modified, so that the indictment be rejected.

18. On 3 March 2017, the State Prosecutor of Kosovo by submission (KMLP. II. No. 36/2017), filed a response to the Applicant's request for protection of legality, proposing that the request be rejected as unfounded.

19. On 16 March 2017, the Supreme Court of Kosovo, by Judgment (Pml. No. 48/2017) rejected the Applicant's request for protection of legality as ungrounded.

Applicant's allegations

20. First, the Applicant alleges that the Prosecutor's Office violated the time-limit for the investigation of 6 (six) months, and that the indictment was filed only after 18 (eighteen) months.

21. The Applicant considers that the extension of the investigations was done unlawfully and that the right to fair and impartial trial was violated.

22. Secondly, the Applicant alleges that the Basic Court should have dismissed such an indictment, because it was filed out of time and should not have accepted as correct the evidence obtained in such an investigation.

23. The Applicant considers that the evidence was obtained unlawfully, that these allegations were pointed out in the appeal proceedings before the Court of Appeals and the Supreme Court, which did not provide a reasoned response to these allegations, thereby allegedly denied the Applicant's right to a reasoned court decision.

24. Finally, the Applicant alleges a series of violations of the Criminal Code and the Criminal Procedure Code, which he emphasized in the appeal proceedings and concludes that these violations resulted in violation of the Constitution.

25. The Applicant requests the Court *"...TO CONCLUDE that there were violations of Articles 3, 21, 30, 31 and 32 of the Constitution of the Republic of Kosovo... TO DECLARE invalid Judgment Pml. No. 48/2017 of the Supreme Court of 16.03.2017, and TO REMAND the Judgment to thr Supreme Court [...] for reconsideration."*

Admissibility of the Referral

26. The Court first examines whether the Applicant has met the admissibility requirements established in the Constitution and as further specified in the Law and foreseen in the 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 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."

28. The Court also refers to Article 48 [Accuracy of Referral] 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.

29. In addition, the Court recalls Rule 36 (1) (d) and (2) (a) of the Rules of Procedure, which stipulates:

(7) The Court may consider a referral if:
[...]
(d) the referral is prima facie justified or not manifestly ill-founded.
(8) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:
[...]
(a) the referral is not prima facie justified.

30. In the present case, the Court notes that the Applicant is authorized party to submit a Referral to the Court and that he has exhausted effective legal remedies. Therefore, he met the procedural requirements provided for in Article 113.7 of the Constitution. However, to determine the admissibility of the Referral, the Court still has to assess whether the Applicant has met the requirements of Article 48 of the Law and the admissibility criteria stipulated in Rule 36 of the Rules of Procedure.

31. The Court considers that the Applicant has built his case on legal grounds, namely on erroneous interpretation of a large number of legal norms of the Criminal Procedure Code and the Criminal Code.

32. The Court notes that the Applicant repeats identical allegations which he emphasized also in the appeal before the Court of Appeals and the Supreme Court, regarding the length of investigations and non-reasoned court decision.

33. The Court first notes that the Court of Appeals, in its reasoning, gave a detailed and exhaustive reply to these allegations of the Applicant:

"The appealing allegations whereby the appealed judgment was based on inadmissible evidence allegedly all evidence were processed by the prosecutor after expiry of set deadline for investigations, are not grounded because; based on the case files and by the reasoning of the appeal, it is established that the first instance court , during the pre-trial, has extended time limit of investigations as it is provided in provisions of CCRK....

Also, appealing allegations whereby the appealed judgment does not contain reasoning on decisive facts, respectively it does not contain evidence whereby the factual situation was established are ungrounded because of the guilty plea; therefore, it is considered that the factual situation was correctly and completely deermined."

34. Furthermore, the Applicant reiterates his claims regarding the incorrect application of the substantive law and the exceeding of the time-limit for filing the indictment, which he pointed out before the Supreme Court in the request for protection of legality.

35. The Court also notes that the Supreme Court has responded in detail, by reasoning:

> *"...If the State Prosecutor does not complete investigations within this time limit, the prosecutor cannot take investigative actions after it; however, the prosecutor may file the indictment even after expiry of the time limit if it is considered that evidence collected provide sufficient ground to refer the case for trial before the court.*
>
> *In this specific case, as stated by the case files, all evidence were collected within this time limit because; we are here mostly dealing with material evidence collected within the time limit, whereas it is true that the indictment was filed later on; however within the time limit of the provisions stated above...*"

36. 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). When alleging violation of the rights and freedoms guaranteed by the Constitution, committed by the public authority, the Applicant must present a reasoned and a convincing argument.

37. In addition, the Court also reiterates that the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution, and not to deal with, the interpretation and application of the domestic law; it is the role of regular courts (see case: *Garcia Ruiz vs. Spain*, No. 30544/96, ECtHR, Judgment of 21 January 1999, see also case: KI70/11, Applicants: *Faik Hima, Magbule Hima and Bestar Hima* Constitutional Court, Resolution on Inadmissibility of 16 December 2011).

38. The Court considers that the Applicant had the opportunity to present before the regular courts the factual and legal reasons for the resolution of dispute; his arguments were duly heard and examined by the Court of Appeals and the Supreme Court; the proceedings taken as a whole were fair and the rendered decisions were reasoned in detail.

39. The Court further considers that the Applicant does not agree with the outcome of the proceedings before the regular courts. However, the dissatisfaction of the Applicant with the outcome of the proceedings before the regular courts cannot of itself raise an arguable claim of the violation of the right to fair and impartial trial (see: *mutatis mutandis* case *Mezotur - Tiszazugi Tarsulat v. Hungary*, paragraph 21 no. 5503/02, ECtHR, Judgment of 26 July 2005).

40. The Applicant did not provide any *prima facie* evidence which would indicate a violation of his constitutional rights (see: *Trofimchuk v. Ukraine*, ECtHR, paragraph 50-55, Judgment no. 4241/03, of 28 October 2010).

41. The Court considers that the Applicant has not substantiated his allegations that the relevant proceedings have been in any way unfair or arbitrary and that the challenged judgment violated constitutional rights and freedoms guaranteed by the Constitution and the ECHR (see: *mutatis mutandis: Shub vs. Lithuania*, No. 17064/06, ECHR, Decision of 30 June 2009).

42. Therefore, the Court considers that the admissibility requirements, established in the Constitution, as further specified in the Law and foreseen in the Rule of Procedure have not been met.

43. Accordingly, the Court finds that the Applicants' Referral is inadmissible, as manifestly ill-founded on constitutional basis.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (1) and (7) of the Constitution, Article 48 of the Law and Rule 36 (2) (a) and 56 of the Rules of Procedure, in the session held 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**
Ivan Čukalović	Arta Rama-Hajrizi

KI120/17, Applicant Hafiz Rizahu, Constitutional review of Decision No. AC-I-17-0132 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, of 1 August 2017

KI120/17, Resolution on inadmissibility of 7December 2017, published on 27 December 2017

Key words: *Individual referral, restitution of property, final decision, referral filed out of time*

Municipal Court of Gjilan (Judgment C. No. 241/2006) partially approved the Applicant's statement of claim, recognizing the Applicant's property right over a part of a parcel disputed by the Applicant and a socially-owned enterprise. The Appellate Panel of the Special Chamber of the Supreme Court (Judgment AC. II-12-0006) partially granted the appeals of the Socially-owned Enterprise and the PAK, by modifying the Judgment of the Basic Court (C. no. 341/2006) and recognizing the Applicant the right of ownership over only a part of the parcel, with such right having been recognized to him by the Municipal Court. The Appellate Panel (Decision no. AC-I-17-032), acting upon the revision and the request for reconsideration of the procedure filed by the Applicant against the Judgment of the Appellate Panel (Judgment AC. II-12-0006), rejected the revision and the request for reconsideration of the procedure as inadmissible.

The Applicant alleges that his right guaranteed by Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo was violated. The Court found that the "final decision" under Article 49 of the Law will normally be the Judgment of the Appellate Panel (AC-II-12-0006) of 8 December 2016, which modified the Judgment of the Municipal Court (C. no. 241/2006) and was final and non-appealable. As a result, the Court found that in line with Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36 (1) (c) of the Rules of Procedure, the Applicant's referral concerning the Judgment of the Appellate Panel (AC-II-12-0006) has been submitted out of the legal time limit of 4 (four) months.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI120/17

Applicant

Hafiz Rizahu

Constitutional review of Decision No. AC-I-17-0132 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, of 1 August 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
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Hafiz Rizahu from village of Malisheva, Municipality of Gjilan (hereinafter: the Applicant), who is represented by Halit Azemi, lawyer from Gjilan.

Challenged decision

2. The Applicant challenges Decision No. AC-I-17-0132 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel), of 1 August 2017, and Judgment No. AC-II-12-0006, of the Appellate Panel, of 8 December 2016.

3. The Decision No. AC-I-17-0132 of the Appellate Panel was served on the Applicant on 7 August 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged decisions which allegedly violate the Applicant's rights guaranteed by Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 22 [Processing Referrals] and Article 47 [Individual Requests] of Law No. 03/L-121 on the 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

6. On 10 October 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 12 October 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.

8. On 16 October 2017, the Court notified the Applicant's representative about the registration of the Referral and requested him to submit to the Court the power of attorney to represent the Applicant before the Court.

9. On the same date, the Referral was sent to the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Special Chamber) and the Privatization Agency of Kosovo (hereinafter: PAK).

10. On 30 October 2017, the Applicant's representative submitted the power of attorney proving that he was authorized to represent the Applicant before the Court.

11. On 7 December 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. On 9 February 2006, the Applicant filed a claim with the Special Chamber against the Socially-Owned Enterprise N.Sh-KBI "Agrikultura" from Gjilan (hereinafter: the Socially-owned Enterprise) for the release and delivery of possession to the Applicant of the cadastral parcel no. 1651, at the place called "Zabeli i Sahit Agës" registered in the possession list with no. 7267, MA of Gjilan (hereinafter: the disputed parcel), claiming that the socially-owned enterprise had occupied illegally his property and had built chicken farm in it.

13. On 22 March 2006, the Special Chamber by Decision [No. SCC-06-0051] referred the claim to the Municipal Court in Gjilan (hereinafter: the Municipal Court). The parties were advised that any appeal against the Judgment of the Municipal Court should be submitted to the Special Chamber.

14. On 21 February 2011, the socially owned enterprise filed a counterclaim against the Applicant requesting the recognition of property rights over the disputed parcel claiming that the disputed parcel had been in its possession since 1960 when the Socially Owned Enterprise was established.

15. On 13 September 2011, the Municipal Court (Judgment C. No. 241/2006) partially approved the Applicant's statement of claim, recognizing the Applicant's property right in a part of the disputed parcel and rejected the counterclaim of the Socially-owned Enterprise.

16. Against the Judgment of the Municipal Court (C. No. 241/2006), the appeals with the Special Chamber were filed by the Socially-owned Enterprise and the PAK. The social enterprise alleged "*violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the*

substantive law", while the PAK challenged, *inter alia*, the competence of the Municipal Court to decide on the case.

17. On 8 December 2016, the Appellate Panel (Judgment AC.II-12-0006) partially approved the appeals of the Socially-owned Enterprise and the PAK by modifying the Judgment of the Municipal Court (C. No. 341/2006) and recognizing the right of ownership to the Applicant over only one part of the parcel which property right was recognized by the Municipal Court. The aforementioned judgment was final and non-appealable.

18. On 28 February 2017, the Applicant filed a revision against the Judgment of the Appellate Panel (Judgment AC-II-12-0006) with the Basic Court in Gjilan (hereinafter: the Basic Court) *"on the grounds of essential violations of the contested procedure provisions and violation of the substantive law*".

19. On 6 April 2017, the Applicant submitted a request for reconsideration of the Judgment of the Appellate Panel (Judgment AC-II-12-0006) to the Appellate Panel for the same reasons stated in the revision.

20. On 28 April 2017, the Basic Court (accompanying act C. No. 341/2006) forwarded the revision to the Supreme Court, whereas on 2 June 2017 (Accompanying act Rev. No. 123/2017), the Supreme Court of Kosovo forwarded the revision to the Special Chamber.

21. On 1 August 2017, the Appellate Panel (Decision AC-I-17-032) rejected as inadmissible the revision and the request for reconsideration of the procedure filed by the Applicant against the Judgment of the Appellate Panel (Judgment AC.II-12 -0006). The Appellate Panel, among others, reasoned that:

> *"The Appellate Panel considers that pursuant to Article 10 paragraph 14 of Law No. 04/L-033 on the Special Chamber [...] all judgments and decisions of the Appellate Panel are final and not subject to any further appeal. The LSC and its Annex do not provide any extraordinary remedy against such decisions or judgments of the Appellate Panel of SCSC."*

Applicant's allegations

22. The Applicant alleges that the Appellate Panel (Judgment AC-II-12-0006 and Decision AC-17-0132) violated his rights guaranteed by Article 46 [Protection of Property] of the Constitution.

23. The Applicant specifies that *"usurpation of the private ownership was done without any legal or material ground but arbitrarily. Private ownership [is] inviolable and guaranteed by the Law, and that the right of property based on Article 46 of the Constitution of the Republic of Kosovo, was violated."*

24. Finally, the Applicant requests the Court that *"due to essential violation of the contested procedure [...] non-determination of factual situation and erroneous application of the substantive law*" the Judgment of the Appellate Panel (AC-II-12 -0006) of 8 December 2016 be annulled and the case be remanded for retrial.

Admissibility of the Referral

25. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

26. 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."*

27. In addition, the Court refers to Article 47 [Individual Requests] of the Law which establishes that:

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

28. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

> *"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 [...]."*

29. The Court also takes into account Rule 36 (Admissibility Criteria), sub-rule (1) (b) and (c) of the Rules of Procedure, which provides:

> *"(1) The Court may consider a referral if:*
>
> > *[...]*
> > *b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted;*
> > *c) referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant*
> > *[...]."*

30. The Court recalls that the four (4) month period starts from the "final decision" in the proceeding of exhaustion of legal remedies by which the Applicant's request has been rejected (see, *mutatis mutandis*, case of ECtHR, *Paul and Audrey Edwards v. United Kingdom*, no. 46477/99, Decision of 14 March 2002).

31. The Court also recalls that the Applicant must exhaust remedies which are expected to be effective and sufficient. Only effective remedies can be taken into account by the Court as an applicant cannot extend the strict time-limit imposed under the Law and Rules of Procedure, by seeking to file legal remedies to the institutions which have no power or competence to offer effective redress for the complaint in issue (see, *mutatis*

mutandis, the ECtHR case, *Fernie v. the United Kingdom*, No. 14881/04, Decision of 5 January 2006).

32. In this respect, the Court notes that the proceedings against the Applicant before the regular courts concerning the merits of his case had been completed by the Judgment of the Appellate Panel (AC.II-12-0006) of 8 December 2016.

33. In this connection, the Court refers to the Decision of the Appellate Panel (AC-I-17-032), which found that *"pursuant to Article 10, paragraph 14 of the Law No. 04/L-033 of the Special Chamber [...], all judgments and decisions of the Appellate Panel of the SCSC are final and are not subject to any other appeal."*

34. The Court also refers to its case law where it has ascertained that: "*It is quite clear that the SCSC decisions cannot be subject to any further proceedings, even the court proceedings, except the subject of review in the Constitutional Court"*. (See Resolution in Case KI02/15, Applicant *Social, Sports, Cultural and Economic Centre, "Pallati i Rinisë" Prishtina*, Resolution on Inadmissibility of 18 May 2015, paragraph 29).

35. The Court recalls that, in the Applicant's case, upon the receipt of the Judgment by the Appellate Panel (AC-II-12-0006) of 8 December 2016, nothing has prevented him from addressing the Constitutional Court. However, he has used legal remedies as a revision and a request for reconsideration of Judgment (No. AC-II-12-0006), which were not foreseen by law.

36. Therefore, as a "final decision" under Article 49 of the Law will normally be the Judgment of the Appellate Panel (AC-II-12-0006) of 8 December 2016, which modified the Judgment of the Municipal Court (C. No. 241/2006) and which was final and non-appealable (see, *mutatis mutandis*, *Paul and Audrey Edwards v. United Kingdom*, No. 46477/99, ECtHR, Decision of 14 March 2002).

37. In this regard, the Court recalls that the Judgment of the Appellate Panel (Judgment AC-II-12-0006) was rendered on 8 December 2016. Although the Applicant did not specify the date of receipt of the Judgment, from the facts of the case it is clear that the time between the receipt of the Judgment and the date of the submission of Referral on 10 October 2017 to the Constitutional Court, has passed the period of four (4) months.

38. Therefore, the Court concludes that the Applicant's Referral pertaining to the Judgment of the Appellate Panel (AC-II-12-0006) was filed after the legal deadline of four (4) months.

39. The Court recalls that the purpose of the 4 (four) months legal deadline under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedures is to promote legal certainty by ensuring that cases raising issues under the Constitution are dealt within a reasonable time and that past decisions are not continually open to constitutional review (See case *O'Loughlin and Others v. United Kingdom*, Application No. 23274/04, ECHR, Decision of 25 August 2005, and see also: Case no. KI140/13, *Ramadan Cakiqi,* Decision on Inadmissibility of 17 March 2014, paragraph 24).

40. Based on the reasons above, the Court finds that the Referral does not meet the procedural admissibility requirements established by Article 113.7 of the Constitution, Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure, and as such the Referral is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36 (1) c) of the Rules of Procedure, in its session held on 7 December 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. TO DECLARE this Decision effective immediately

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Arta Rama-Hajrizi

INDEX OF LEGAL TERMS

D

E

F

G

H

I

J

K

L

M

W

INDEX OF ARTICLES OF THE CONSTITUTION

VIOLATION OF ARTICLES 24, 31, 46, 54 AND 108 OF THE CONSTITUTION