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

Prishtina, on 31 December 2018
Ref. no.:AGJ1314/18

JUDGMENT

in

Case no. KI150/16

Applicant

Mark Frrok Gjokaj

Constitutional review of Decision CLM. No. 11/2016 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
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Mark Frrok Gjokaj, residing in the village Osek Pashe, Municipality of Gjakova (hereinafter: the Applicant), who is represented by Teki Bokshi, a lawyer from Gjakova.

Challenged decision

2. The Applicant challenges the Decision [CLM. No. 11/2016] of 13 September 2016 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) in conjunction with the Decision [AC. No. 1579/2015] of 4 April 2016 of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals).

3. The Applicant did not specify the date when he was served with the challenged decision.

Subject matter

4. The subject matter of the Referral is the constitutional review of the abovementioned Decision of the Supreme Court, which allegedly violate the Applicant's rights guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments], 29 [Right to Liberty and Security], Article 30 [Rights of the Accused], Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR), Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol No. 1 (Protection of property) of the ECHR and Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

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 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

6. On 31 May 2018, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Court

7. On 7 December 2016, the Applicant submitted the Referral to the Court.

8. On 23 December 2016, the Court requested the Applicant to complete the referral form.

9. On 27 December 2016, the Applicant submitted the referral form to the Court.

10. On 16 January 2017, 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.

11. On 1 February 2017, the Court notified the Applicant about the registration of the Referral and requested him to submit to the Court the power of attorney of the representative he claims he has before the Court and requested that he completes his referral with the relevant documentation, namely the relevant decisions of the regular courts. On the same date, the Court notified the Supreme Court about the registration of the Referral.

12. On 6 April 2017, the Court requested again the Applicant to submit to the Court the relevant documentation relating to his Referral.

13. On 8 May 2017, the Applicant submitted the requested documents to the Court.

14. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues was terminated. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Čukalović was terminated.

15. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.

16. On 10 September 2018, the President of the Court rendered a Decision on the replacement of the Judges: Snezhana Botusharova and Ivan Čukalović as members of the Review Panel, and in their place the Judges: Arta Rama-Hajrizi and Nexhmi Rexhepi were appointed as members of the Review Panel.

17. On 8 November 2018, the Court notified about the referral and sent a copy of it to the respondent in a capacity of the interested party, namely the debtor M.R. The court notified M.R. that possible comments could be submitted to the Court within 7 (seven) days.

18. Within the time limit of 7 (seven) days, no comment was submitted to the Court by M.R., regarding the Applicant's Referral.

19. On 12 November 2018, the notification and copy of the referral were returned by the mail service to the Court, with the explanation that M.R. was not at the indicated address.

20. On 19 December 2018, the Review Panel considered the Report of the Judge Rapporteur and by majority of votes made a recommendation to the Court on the admissibility of the Referral.

21. On the same date, the Court voted by majority of votes, that the Referral is admissible, and that the challenged decisions, the Decision [CLM. No. 11/2016] of 13 September 2016 of the Supreme Court in conjunction with the Decision [AC. No. 1579/2015] of 4 April 2016 of the Court of Appeals are in compliance

with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

22. On an unspecified date, F.GJ., the Applicant's predecessor, filed a lawsuit with the Municipal Court in Gjakova against M.R., for confirmation the right of servitude.

Decisions on assigning and granting the enforcement of interim measure

23. On 25 December 1996, the Municipal Court in Gjakova, by the Decision [C. No. 270/96], approved the request for interim measure, ordering M.R. to allow F.GJ. to use the existing road linking the main road of the village to the parcels of the Applicant's predecessor. In the relevant Decision, *inter alia,* it was emphasized that the interim measure would last until the end of the dispute between the parties by a final decision.

24. On an unspecified date, the Applicant and other co-litigating parties, as heirs of F.GJ, filed a request with the Municipal Court in Gjakova for allowing the execution of the Decision [C. No. 270/96] of 25 December 1996, of the same Court.

25. On 3 February 1997, the Municipal Court in Gjakova, by the Decision [E. No. 419/97], allowed the execution of the Decision [C. No. 270/96] of 25 December 1996, against the debtor M.R.

26. From the case file it results that this Decision was never executed. Furthermore, it results from the latter that the debtor, namely M.R., was served with this Decision on 9 June 2009.

Applicant's request for enforcement of the Decision on interim measure

27. On an unspecified date, the Applicant addresses the Municipal Court in Gjakova requesting the enforcement of the Decision [C. No. 270/1996] of 25 December 1996 of the Municipal Court in Gjakova, which according to his allegation, became final as of 16 June 1997.

28. On 25 June 2010, the Municipal Court in Gjakova, by Decision [E. No. 419/97], allowed the reconstruction of the case file of this enforcement case.

29. On 28 and 29 June 2010, the debtor, namely M.R. filed two complaints. One was addressed to the Municipal Court in Gjakova against the Decision [E. No. 419/97] of 3 February 1997 of this Court, for allowing enforcement, requesting that all enforcement actions taken in this enforcement case be abrogated. The other complaint was addressed the District Court in Peja against the Decision [C. No. 270/97] of 25 December 1996 of the Municipal Court in Gjakova, which decided on the interim measure, alleging an essential violation of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law, proposing that the District Court modify the challenged

decision, by rejecting to impose an interim measure or by remanding the contested matter for a retrial to the first instance.

Proceedings as a result of the first appeal of the debtor M.R.

30. On 31 May 2011, the Municipal Court in Gjakova, by the Decision [E. No. 419/97] approved the objection of the debtor M.R., and suspended the enforcement procedure assigned by the Decision [E. No. 419/97] of 3 February 1997 of the Municipal Court in Gjakova. The Municipal Court in Gjakova, *inter alia,* reasoned that it was impossible to obtain the source file and considering that from the time of the Decision 15 (fifteen) years have passed and that the enforcement of the Decision has never been realized, despite the fact that enforcement in the present case was to be considered as an urgent matter, the enforcement of the Decision on the interim measure "*has lost meaning*". Furthermore, according to the respective Decision, the Court could not prove that the decision on the imposition of interim measure was final and enforceable.

31. On an unspecified date, the Applicant and other co-litigants filed appeal with the Court of Appeals against the Decision [E. No. 419/97] of 31 May 2011 of the Municipal Court in Gjakova, alleging violation of the provisions of the enforcement procedure, erroneous determination of the factual situation and erroneous application of substantive law.

32. On 2 May 2013, the Court of Appeals, by the Decision [AC. No. 4864/2012], rejected as ungrounded the appeal of the creditors, namely the Applicants. The Court of Appeals upheld the Decision [E. No. 419/97] of 31 May 2011 of the Municipal Court in Gjakova.

Proceedings as a result of the second appeal of the debtor M.R.

33. On 4 April 2013, the Court of Appeals, by the Decision [CA. No. 3662/2012], acting upon the appeal of M.R. of 29 June 2010, rejected his appeal as out of time. The Court of Appeals reasoned that the Decision [C. No. 270/96] of 25 December 1996 of the Municipal Court in Gjakova became final on 16 June 1997. It also reasoned that this Decision was served on the debtor on 9 June 2009, and consequently, the debtor, namely the respondent, submitted the appeal after the deadline of 15 (fifteen) days provided by Law No. 03/L-006 on Contested Procedure (hereinafter: the LCP).

The second request of the Applicant for enforcement of the Decision on interim measure

34. On 7 November 2013, the Applicant and other co-litigants submitted to the Basic Court in Gjakova a proposal for enforcement of the Decision [C. No. 270/96] of 25 December 1996 of the Municipal Court in Gjakova, which was confirmed by the Decision [Ca. No. 3662/12] of 4 April 2013 of the Court of Appeals after declaring the debtor's appeal as out of time.

35. On 11 November 2013, the Basic Court in Gjakova, by the Decision [Cp. No. 1281/2013], imposed the enforcement based on the Decision [C. No. 270/96] of 25 December 1996 of the Municipal Court in Gjakova.

36. On 11 December 2013, the debtor, namely M.R., filed an objection with the Basic Court in Gjakova against the aforementioned Decision of the Basic Court. The debtor referred to the Decision [Ac. No. 4864/2012] of 2 May 2013, which confirmed the suspension of the enforcement procedure in the circumstances of the case.

37. On 14 May 2014, the Applicant and other co-litigants filed a request with the Basic Court in Gjakova for transferring the case to the private enforcement agent.

38. On 15 May 2014, the Basic Court in Gjakova, according to the case file, before deciding on the objection of debtor M.R. of 11 December 2013 against the Decision [Cp. No. 1281/2013] of 11 November 2013, through the Conclusion [E. No. 1281/2013] approved the Applicant's request and transferred the enforcement case [E. No. 1281/13] to the private enforcement agent. According to the Legal Remedy, no appeal was allowed against this decision.

39. On 21 July 2014, the Basic Court in Gjakova, by the Decision [CP. No. 281/13], rejected as ungrounded the objection of debtor M.R. filed against the Decision [CP. No. 1281/2013] of 11 November 2013 of the Basic Court in Gjakova, allowing the enforcement and emphasizing that the appeal against this decision does not stop the enforcement procedure.

40. On 24 July 2014, the debtor M.R. filed appeal with the Court of Appeals against this Decision, namely the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova. The debtor again referred to the Decision [Ac. No. 4864/2012] of 2 May 2013, which upheld the suspension of the enforcement procedure in the circumstances of the case.

41. On 7 October 2014, the Court of Appeals, by the Decision [AC. No. 3356/14], rejected as ungrounded the appeal and upheld the Decision [CP. No. 1281/2013] of 21 July 2014 of the Basic Court in Gjakova. The Court of Appeals reasoned that the Decision [C. No. 270/96] of 25 December 1996 became final and was an enforcement title from 4 April 2013, when it was upheld by the Decision [CA. No. 3662/2012] of the Court of Appeals.

42. On 24 March 2015, the private enforcement agent, through the Conclusion [P. No. 02/14], notified the debtor M.R. about the assignment of the enforcement on 31 March 2015 according to the Applicant's proposal, based on the Decision [C. No. 270/96] of 25 December 1996 of the Municipal Court in Gjakova.

Repeal of the Decision on interim measure

43. On 30 March 2015, the debtor M.R. filed a request with the Basic Court in Gjakova, seeking the suspension of the enforcement procedure with the private enforcement agent and to quash all procedural actions taken in the enforcement case. Among other things, the debtor M.R. referred again to the

Decision [Ac. No. 4864/2012] of 2 May 2013, which confirmed the suspension of the enforcement procedure. The creditors, namely, the Applicants did not file an answer to this appeal.

44. On 2 April 2015, the Basic Court in Gjakova, by the Decision [PPP. No. 59/15] rejected the Referral as ungrounded, finding that it did not notice any irregularity in the enforcement procedure. In addition, the Basic Court in Gjakova reasons that the Decision [C. No. 270/96] of 25 December 1996 was upheld by the Decision [CA. No. 3660/2012] of 4 April 2013 and consequently, the Decision by which the interim measure was final and based on the Law No. 04/L-139 on the Enforcement Procedure (hereinafter: the LEP) was an enforcement document. The appeal against this Decision, according to the latter, was allowed in the Court of Appeals.

45. On 13 April 2015, the debtor M.R. filed an appeal with the Court of Appeals against the Decision [PPP. No. 59/15], of 2 April 2015 of the Basic Court in Gjakova, alleging violation of the provisions of the enforcement procedure and violation of the provisions of the substantive law. The debtor, *inter alia*, requested that the enforcement procedure be suspended and that all preliminary enforcement actions be quashed. The response to the appeal was also filed by the Applicants. Both parties referred to the decisions of the Court of Appeals, the Decision [CA. No. 3662/2012] of 4 April 2013, and the Decision [AC. No. 4864/2012] of 2 May 2013, namely, contradictory to one another, in their respective favor.

46. On 4 April 2016, the Court of Appeals, by the Decision [AC. No. 1579/2015] approved as grounded the appeal of the debtor M.R., and modified the Decision [PPP. No. 59/2015] of the Basic Court in Gjakova of 2 April 2015, considering the enforcement procedure as completed based on Article 66 of the LEP due to the absolute prescription in conjunction with Article 361 of the LOR and annulled all actions taken in this enforcement case. The Court of Appeals, *inter alia*, reasoned that under Article 66 of the LEP, the enforcement procedure ends *ex officio*, when the absolute deadline of prescription for enforcement is exceeded, a requirement that was fulfilled in the circumstances of the case.

47. On 25 May 2016, upon the Applicants' request, the State Prosecutor of Kosovo filed a request for protection of legality [KMLC. No. 30/2016], against the Decision [AC. No. 1579/015] of 4 April 2016 of the Court of Appeals, alleging essential violation of the provisions of the contested procedure, with a proposal that this Decision should be quashed by leaving the Decision [PPP. No. 59/2015] of 2 April 2015 of the Basic Court in Gjakova or proposing that the case be remanded for retrial.

48. On 13 September 2016, the Supreme Court, by the Decision [CLM. No. 11/2016] rejected as ungrounded the request for protection of legality of the State Prosecutor reasoning that, based on the LCP, it is limited only to examining the violations that the Public Prosecutor points out in his request, while the latter, according to the Supreme Court, "*does not have legal support in the essential violations established by the provision of Article 247, paragraph 1 a) of the LCP*".

Applicant's allegations

49. The Applicant alleges that the Decision [CLM. No. 11/2016] of 13 September 2016, of the Supreme Court, violated the rights guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments], Article 29 [Right to Liberty and Security], Article 30 [Rights of the Accused], Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 (Right to a fair trial) of the ECHR , Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol No. 1 (Protection of property) of the ECHR and Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

50. The Applicant alleges that the Decision [CP. No. 1281/13] of 21 July 2014 of the Basic Court in Gjakova, which allowed the enforcement of the Decision on interim measure and which was upheld by the Court of Appeals by the Decision [AC. No. 3356/14] of 7 October 2014, is final. According to these decisions, the Decision [C. No. 270/96] of 25 December 1996 became final and was an enforcement title from 4 April 2013, when it was upheld by the Decision [CA. No. 3662/2012] of the Court of Appeals.

51. The Applicant further alleges that the Decision [AC. No. 1579/2015] of the Court of Appeals of 4 April 2016 was found to be in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, because according to the allegation, the Court of Appeals had exceeded the legal powers set forth in Article 52 of the LEP, modified the Decision [PPP. No. 50/2015] of the Basic Court of 2 April 2015 considering the enforcement procedure as completed, and annulling all preliminary actions related to the initial Decision on interim measure of 1996.

52. In addition, the Applicant alleges that his Referral relates to the case KI70/16, Resolution on Inadmissibility of 5 October 2017.

53. 53. The Applicant addresses the Court with the request to annul the Decision [CLM.nr.11 / 2016] of 13 September 2016 of the Supreme Court in relation to Decision [AC.nr.1579 / 2015] of 4 April 2016 of the Court of Appeals.

Admissibility of the Referral

54. The Court examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution and further specified in the Law, and foreseen in the Rules of Procedure.

55. 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".

56. In addition, the Court also examines whether the Applicant has met the admissibility requirement as provided by the Law. In this regard, the Court first refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] 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…".

57. As to the fulfillment of these requirements, the Court considers that the Applicant is an authorized party and challenges an act of a public authority, namely the Decision [CLM. No. 11/2016] of 13 September 2016 of the Supreme Court after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms that have allegedly been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines foreseen in Article 49 of the Law.

58. The Court also refers to the admissibility criteria laid down in its Rules of Procedure. In this regard, the Court notes that the Applicant has met the admissibility criteria established in items a), b) and c) of paragraph 1 of Rule 39.

59. However, in the circumstances of the present case, the Court also refers to item b) of paragraph 3 of Rule 39, according to which the Court may consider a referral inadmissible if it is incompatible *ratione materiae* with the Constitution.

60. In this regard, the Court notes that, having regard to the fact that in the circumstances of the case, the judicial proceedings resulting in the challenged decisions for the subject of review had an "*interim measure*" and therefore, relate to the "*preliminary proceedings*", based on the case law of the European Court of Human Rights (hereinafter: the ECtHR), Article 31 of the Constitution in conjunction with Article 6 of the ECHR, are in principle not applicable.

61. Therefore, in order to find whether this Referral is compatible *rationae materiae* with the Constitution, the Court will first elaborate and then apply

the principles established by the case law of the ECtHR and the case law of the Court, as to the applicability of the procedural guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in the circumstances of the present case, namely in the "*preliminary proceedings*".

Applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in the "preliminary proceedings"

62. The Court notes that the ECtHR case law limits the applicability of Article 6 of the ECHR to the "*preliminary proceedings*". Consequently, the applicability of procedural guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the case, the Court will determine, basing on the case law of the ECtHR. (See also Judgment in case No. KI122/17, Applicant, *Česká Exportní Banka A. S.*, Judgment of 30 April 2018, paragraph 124).

63. The Court notes first that the scope of Article 6 of the ECHR, in the civil section, applies to proceedings that define "*civil rights or obligations". (*See case of ECtHR: *Ringeisen v. Austria,* Application No. 2614/65, Judgment of 22 June 1972*).* The ECtHR has held that, in order to be Article 6 in its applicable civil context*, "there must be a dispute over a civil right", which can be said, at least on an argumentative basis, that is recognized in local law, regardless of whether it is also protected by the Convention. The dispute must be true and serious; it can be related not only to the existence of the right, but also to the scope and manner of its realization; and finally, the outcome of the proceedings should be directly determinant of the right in question; unclear connections or distant consequences are not enough to activate Article 6 paragraph 1". (*See ECtHR: *Mennitto v. Italy*, Application No. 33804/96, Judgment of 5 October 2000, para. 23; *Gülmez v. Turkey*, Application No. 16330/02, Judgment of 20 May 2008, para. 28; and *Micallef v. Malta*, No. 17056/06, Judgment of 15 October 2009, paragraph 74).

64. The Court further notes that the "*preliminary proceedings"*, like those concerned with the granting of an interim measure/injunctive relief - are not considered to determine *"civil rights and obligations"* and therefore, do not usually fall within the ambit of such protection under Article 6 of the ECHR. (See ECtHR cases: *Wiot v. France*, appl. no. 43722/98, Judgment of 7 January 2003; *APIS a.s. v. Slovakia*, appl. no. 39754/98, Decision of 13 January 2000; *Verlagsgruppe NEWS GMBH v. Austria*, appl. no. 62763/00, Decision of 23 October 2003; *Libert v. Belgium*, appl. no. 44734/98, Judgment of 8 July 2004; *Micallef v. Malta,* application no. 17056/06, Judgment of 15 October 2009, paragraph 83, see also Case No. KI 122/17*,* Applicant *Ceska Exportni Banka A.S,* Judgment of 30 April 2018, paragraph 126).

65. Nevertheless, in certain cases, the ECtHR has applied Article 6 of the ECHR to such "*preliminary proceedings"* when it considered that the injunctive relief measures were determinant for the civil rights of the Applicant. (See, *inter alia*, ECtHR cases *Aerts v. Belgium*, appl. No. 25357/94, Judgment of 30 July 1998; *Boca v. Belgium*, appl. no. 50615/99, Judgment of 15 November 2012; *Micallef v. Malta,* application no. 17056/06, Judgment of 15 October 2009, paragraph

75; see also Case of the Court No. KI122/17, Applicant *Ceska Exportni Banka A.S,* Judgment of 30 April 2018, paragraph 127).

66. By Judgment *Micallef v. Malta* in 2009, the ECtHR altered its previous approach towards regarding non-applicability of procedural safeguards of Article 6 of the ECHR in the "*preliminary proceedings*". (see also Case No. KI122/17, Applicant *Ceska Exportni Banka A.S*, Judgment of 30 April 2018, paragraph 128). In changing this position, the ECtHR argued, *inter alia*, as follows:

> *"The exclusion of interim measures from the ambit of Article 6 has so far been justified by the fact that they do not in principle determine civil rights and obligations. However, in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently interim and main proceedings decide the same civil rights or obligations and have the same resulting long-lasting or permanent effects." (See ECtHR case: Micallefv. Malta, appl. no. 17056/06, Judgment of 15 October 2009, paragraph 79).*

67. However, this Judgment does not eliminate all limitations as to the applicability of Article 6 of the ECHR with regard to interim measures. The judgment in question concluded the applicability of Article 6 of the ECHR to "*preliminary proceedings*" on the eligibility of the same as "*civil rights or obligations*". (See, ECtHR case, *Micallef v. Malta*, application no. 17056/06, Judgment of 15 October 2009, paragraph 83). While this qualification was conditional on the fulfillment of two essential conditions: a) the "*preliminary procedure*" should cover a "*civil*" right, and b) this procedure should effectively determine civil law. (See, *inter alia*, ECtHR case, *Micallef v. Malta*, application 17056/06, Judgment of 15 October 2009, paragraphs 84 and 85, and Case KI122/17, Applicant *Ceska Exportni Banka AS*, Judgment of 30 April 2018, paragraphs 129-131).

68. More specifically, as to the first requirement, the right at stake in both the main and the injunction proceedings should be "*civil*" within the autonomous meaning of that notion under Article 6 of the ECHR. (See*, inter alia*, ECtHR cases: *Stran Greek Refineries and Stratis Andreadis v. Greece*, application no. 13427/87, Judgment of 9 December 1994, paragraph 39; *König v. Germany*, application no. 6232/73, Judgment of 28 June 1978, paragraphs 89-90; *Ferrazzini v. Italy*, application no. 44759/98, Judgment of 15 July 1999, paragraphs 24-31; *Roche v. United Kingdom*, application no. 32555/96, Judgment of 9 December 1994, paragraph 119; and *Micallef v. Malta*, application no. 17056/06, Judgment of 15 October 2009, paragraphs 84).

69. As regards the second requirement, the ECtHR notes that the nature of the interim measure should be scrutinised, as whenever an interim measure/injunction relief can be considered effectively to determine the civil right or obligation at stake -Article 6 will be applicable. (See the case of ECtHR

Micallef v. Malta, application no. 17056/06, Judgment of 15 October 2009, paragraph 85).

The application of the above referred principles to the circumstances of the present case

70. In this regard, and in the circumstances of the present case, the Court notes that the interim measure was imposed until the resolution of the civil dispute between the parties concerned with the right of servitude. The Court also notes that the "*preliminary procedure*", namely the provisional measure in the circumstances of the present case, covers a "*civil*" right, thus fulfilling the first condition for the applicability of the procedural guarantees of Article 6 of the ECHR. In addition, with regard to the second condition, the Court notes that the interim measure initially imposed in 1996, in fact effectively establishes the civil law in question. The Court notes that the interim measure for which all court proceedings were further conducted, in essence and effectively resolves the civil dispute between the parties in favor of the Applicant. As a result, all the court proceedings were focused on the imposition and challenging the interim measure and were not directed at resolving the civil dispute.

71. Therefore, taking into account the right included in the "*preliminary proceedings*", namely the interim measure and its decisive nature for the civil law in question, the Court finds that the circumstances of the case, based on the ECHR case law, meet the criteria for the application of the procedural safeguards embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

72. Therefore, the Court finds that the Applicant's Referral is compatible *rationae materie* with the Constitution.

73. Finally, the Court also finds that this Referral is not manifestly ill-founded in accordance with Rule 39 (2) of the Rules of Procedure and that it is not inadmissible on any other ground based on the Rules of Procedure. Accordingly, it must be declared admissible. (see case of ECtHR *Alimuçaj v. Albania*, application no. 20134/05, Judgment of 9 July 2012, paragraph 144; see also case KI97/16, Applicant *IKK Classic*, Judgment of 9 January 2018, paragraph 38).

Relevant legal provisions

LAW NO. 04/L-139 ON THE ENFORCEMENT PROCEDURE

TITLE V
APPLICATION OF ENFORCEMENT
[...]

Article 52
Irregularities during the conduct of enforcement
1. Party or other participant in the procedure may request the court through a submission to correct irregularities caused by the enforcement body

during the conduct of enforcement. The present delivery shall be done to the court within seven (7) days of alleged irregularity.
2. Upon request from paragraph 1 of this article, if the submitter has proposed this, the court shall issue a decision within three (3) days from the day of delivery of submission.

TITLE VII
POSTPONEMENT, SUSPENSION AND CONCLUSION OF THE ENFORCEMENT

[...]

Article 66
Completion of enforcement procedure
1. Unless foreseen otherwise by this law, the enforcement will conclude ex officio if the enforcement document is annulled, amended, revoked, invalidated or in other manner rendered ineffective, respectively if the certificate for its enforceability is annulled by a final decision. Enforcement will also conclude ex officio if a case has been suspended twice and fulfills the criteria for entering suspended status as defined in paragraph 1 of Article 65 of this Law.
2. Enforcement will end ex officio also when in accordance with legal provision by which are regulated obligatory relations, third person fulfills obligation in benefit of the creditor instead of debtor.
3. Enforcement will end also when it has become impossible or for other purposes it cannot be enforced, and after expiring the absolute statute of limitation for enforcement.
4. After the settling of the creditor's credit, a decision shall be issued ending the enforcement procedure.

TITLE VIII
LEGAL REMEDIES

Article 67
Regular legal remedies
1. 1. In the enforcement procedure, regular legal remedies are:
1.1. objection, and
1.2. complaint.

Article 68
Extra-ordinary legal remedies
1. No repetition and revision of the procedure is allowed in enforcement procedure.
2. Restitution into previous state shall be permitted only in case of disrespecting the deadline for filing an objection and appeal against the enforceable decision for compulsory enforcement.

Article 69
Objection against decision on enforcement
1. Objections may be presented only against the decision allowing the enforcement.

2. Objections shall be filed in written in the basic court that issued the challenged enforcement, when the court is the enforcement body.
3. Objections shall be filed in written, in the basic court as provided under paragraph 5 of Article 5 of this Law when the enforcement body is a private enforcement agent.
4. The basis for the objection must be stated and supported by appropriate evidence. Evidence for objection must be submitted in written otherwise the objection shall be rejected.
5. Objections against the enforcement decision or enforcement writ may be filed exclusively under the provisions of Article 71 of this Law.
6. Objection shall contain details of the enforcement decision appealed, reasons of objection and debtor's signature.
7. The decision by which the enforcement proposal is rejected or refused may be attacked only by an appeal of the enforcement creditor. This appeal shall be governed by Article 77 of this Law.

[...]

Article 71
Reasons for objection
1. Objection under article 69 of this Law may be based only on findings that::
1.1. the document, based on which the enforcement decision or enforcement writ has been issued, does not have an executive title, or if it does not have any feature of enforceability;
1.2. the enforcement, based on which the enforcement decision or enforcement writ has been issued, is overruled, annulled, amended or in other way invalidated, respectively if in other way has lost its effect or it is concluded that it is without legal effect;
[...]
1.4. deadline by when, according to the law the enforcement may be requested, has expired;
[...]

Article 74
Enactment and enforceability of decisions in enforcement procedure

1. The decision against which an objection is not filed within the foreseen deadline shall become final and enforceable.
2. The decision against which an objection is refused as untimely becomes enforceable, while if an appeal against the decision is not permitted, then it also becomes final.
3. The decision in which the objection is rejected becomes final if an appeal against it is not filed in the foreseen legal deadline, or if the filed appeal is dismissed as ungrounded.

[...]

Article 77
Appeals against the decision on the objection
1. Against the decision on objection parties have the right on appeal.
2. The appeal against the decision on objection shall be filed through the first instance court for the second instance court within seven (7) days from the day of acceptance.
3. Copy of the appeal shall be submitted to opposing party and other participants who may present response to the appeal within three (3) days.
4. Following receiving the response to appeal or following the deadline for response, the case with all submissions shall be sent to the second instance court within three (3) days. Regarding the appeal, the second instance court shall decide within fifteen (15) days.
5. The appeal on the decision on the objection does not halt the executive procedure unless guarantees have been provided for the full amount of the credit as described under Article 78 of this law.
6. In the event the debtor as appealing party is successful in its appeal, and if its assets have been enforced against upon pursuant to the enforcement decision, he may seek counter enforcement under the provisions on counter enforcement of this law.

[...]

Article 79
Complaints against irregularities during the conduct of enforcement
1. A party or another participant in the procedure may file a complaint with a court concerning irregularities committed by the enforcement body during the conduct of enforcement procedure. The present delivery is made by a written submission to the competent court within seven (7) days of the alleged irregularity.
2. Upon request from paragraph 1 of this Article, if the submitter has proposed this, the court issues decision within three (3) days from the day of delivery of submission.
3. Against the decision provided in paragraph 2 of this Article, parties or other participants in the procedure are entitled to appeal. The provisions of article 77 of this Law on appeal against the decision are applicable.

LAW NO. 04/L-077 ON OBLIGATIONAL RELATIONSHIPS

SUB-CHAPTER 2
PERIOD REQUIRED FOR STATUTE-BARRING
[...]

Article 361
Claims determined before court or other relevant authority
1. All claims determined by a final court ruling or by a ruling by another relevant authority or through settlement before the court or another relevant authority shall become statute-barred after ten (10) years,

including those for which a shorter period is stipulated by the statute of limitations.
2. All periodic claims originating from such rulings or settlement and falling due in the future shall become statute-barred after the period stipulated for the statute-barring of periodic claims.

Merits of the Referral

74. The Court recalls that the Applicant alleges that the abovementioned Decision of the Supreme Court in conjunction with the Decision [AC. No. 1579/2015] of 4 April 2016 of the Court of Appeals, were rendered in violation of his rights guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments], Article 29 [Right to Liberty and Security], Article 30 [Rights of the Accused], Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol no. 1 (Protection of property) of the ECHR, as well as Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

75. The Court initially notes that, with regard to allegations of violation of Articles 22, 29, 30, 46 and 53 of the Constitution, the Applicant does not provide any reasoning in support of the alleged violations of these articles. Consequently, the Court will focus on examining the Applicant's allegations of violation of the procedural guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

76. In this regard, the Court recalls that the Applicant alleges that when rendering the Decision [AC. No. 1579/2015] of 4 April 2016, the Court of Appeals exceeded its competences as provided by law, by modifying the Decision [PPP. No. 59/2015] of 2 April 2015 of the Basic Court in Gjakova. The Applicant further claims that two preliminary decisions in the circumstances of the present case, Decision [AC. No. 3356/14] of 7 October 2014 of the Court of Appeals in conjunction with the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova, became final and consequently, *res judicata*.

77. In this regard, the Court notes that the Applicant's essential allegations relating to the alleged violations of the procedural safeguards guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been interpreted in detail through the case law of the ECHR, in accordance with which the Court, pursuant to Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, is required to interpret the fundamental rights and freedoms guaranteed by the Constitution. Therefore, in interpreting the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR as regards the respect or the possibility of modifying a final decision, the Court will refer to the case law of the ECtHR.

78. In assessing these allegations of the Applicant, the Court will first elaborate the general principles regarding the right to legal certainty and the respect of a final court decision, as established by the ECtHR and the Court, in order to apply them in the circumstances of the present case.

General principles regarding the right to legal certainty and observance of a final court decision

79. The Court initially recalls that the right to fair and impartial trial requires that a matter which has become *res judicata* is to be considered irreversible, in accordance with the principle of legal certainty. (See ECtHR case *Brumarescu v. Romania,* appl. no. 28342/95, Judgment of 28 October 1999, paragraph 61; also Case of the Court KI122/17, Applicant *Ceska Exportni Banka A.S*, Judgment of 30 April 2018, paragraph 149, and Case KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility of 4 January 2017, paragraph 87).

80. This approach is consistent with the ECtHR case law, which has emphasized that one of the fundamental aspects of the rule of law is the principle of legal certainty, which presupposes respect for the principle of *res judicata*, which is the principle of final court decisions. (See, *inter alia*, ECtHR cases: *Ponomaryov v. Ukraine*, application no. 3236/03, Judgment of 3 April 2008, paragraph 40; *Ryabykh v. Russia*, application no. 52854/99, Judgment of 24 July 2003, paras 52 and 56; and Case KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility of 4 January 2017, paragraph 85). This principle, according to the ECtHR, provides that *"no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case"*. (See, *inter alia*, ECtHR case *Ryabykh v. Russia*, application no. 52854/99, Judgment of 24 July 2003, paragraph 52; and Case KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility of 4 January 2017, paragraph 86). According to ECtHR, *"a departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character"*. (see case of ECtHR *Ponomaryov v. Ukraine*, application no. 3236/03, Judgment of 3 April 2008, para. 40).

81. In the function of respecting this principle, the ECtHR, through its case law, has held that in reviewing appeals, higher courts should exercise their legal powers in function of correcting court and justice errors, but not conduct a new review, simply to introduce a new viewpoint. (See case of the ECtHR *Ryabykh v. Russia*, application No. 52854/99, Judgment of 24 July 2003, paragraph 52 and case of KI122/17, Applicant *Ceska Exportni Banka AS*, Judgment of 30 April 2018, paras 152 and 153). The latter, according to the ECtHR, is possible only in exceptional circumstances. Specifically, in this regard, the ECtHR has held that:

> *"Higher courts' power of review should be exercised for correction of judicial mistakes, miscarriages of justice, and not to substitute a review. The review cannot be treated as an appeal in disguise, and the mere possibility of two views on the subject is not a ground for re-examination. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character".*[...] (See, for example, the case of ECtHR *Ryabykh v. Russia*, application no. 52854/99, Judgment of 24 July 2003, paras 52 and 56).

82. Moreover, the ECtHR, through case *Nikiti v. Russia*, has further defined the definition of the *res judicata* concept, defining the general criteria on the basis

of which a decision will be considered as such. (See also case of the Court KI122/17, Applicant *Ceska Exportni Banka A.S*, Judgment of 30 April 2018, paragraph 150). Based on the judgment in question, a decision will be *res judicata* if: a) the decision is irrevocable because there are no further available remedies, or b) when the deadline for the use of the latter has expired. Specifically, the ECtHR emphasized:

> *"According to the explanatory report to Protocol NO.7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, 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 case *Nikitin v. Russia*, application no. 50178/99, ECtHR, Judgment of 15 December 2004, para 37).

83. Therefore, and based on the ECtHR case law, in principle, a decision becomes final and *res judicata* if a) the decision is irrevocable because no further remedies are available; or b) when the time limit for using them has expired. The latter are considered irreversible in accordance with the principle of legal certainty as one of the fundamental aspects of the rule of law. Furthermore, the competences of the courts cannot be exceeded in the assessment of such decisions in view of the new case review or the issuance of a new view which has no basis for reconsideration.

84. However, the case law of the ECtHR provides an exception to these principles: *the circumstances of a substantial and compelling character*. More specifically, in exercising the function of the courts to "*correct judicial errors and errors of justice*", a departure from that principle of respect for a final decision, namely *res judicata*, is justified only when made *necessary by the circumstances of a substantial and compelling character*".

85. Finally and in this regard, the Court recalls that the ECtHR has established that the principle of *res judicata* not only applies to final judicial decisions on merits, but also to decisions related to "preliminary proceedings" . (see, *inter alia*, the case, *Okyay and Others v. Turkey*, Judgment of 12 July 2005, application no. 36220/97, paragraphs 72-75 and other references included therein; see also, Case no. KI122/17, *Česká Exportní Banka A.S*, Judgment of the Constitutional Court of 18 April 2018, paragraph 158).

Application of the above referred principles to the circumstances of the present case

86. The Court first recalls that the parties to the dispute from 1996 until the final decision of the Supreme Court of 2016, which the Applicant challenges before the Court, have gone through judicial proceedings regarding the enforcement of the Decision [C. No. 270/96] of 25 December 1996 of the Municipal Court in Gjakova, through which the request for interim measure was initially approved. Despite the fact that the same Court, by the Decision [E. No. 419/97] of 3 February 1997, had allowed the execution of this measure, it was never executed. The parties to the dispute since 2009 addressed to the regular courts

by requesting, namely challenging the execution of the interim measure of 1996. The following court proceedings resulted in a number of decisions, contradictory to one another.

87. On one hand, on 4 April 2013, the Court of Appeals, by Decision [CA. No. 3662/2012], rejected the appeal of the respondent, namely the debtor M.R., filed against the Decision [C. No. 270/96] of the Municipal Court in Gjakova, of 25 December 1996, as out of time, upholding the finality of the interim measure established in 1996. The Court notes that against the above-mentioned Decision of the Court of Appeals, no appeal was allowed. Therefore, the Applicants allege that after this decision, the question of the interim measure had become an adjudicated matter.

88. On the other hand, a month later, the same court, namely, the Court of Appeals, by the Decision [AC. No. 4864/2012] of 2 May 2013, upheld the Decision [E. No. 419/97] of 31 May 2011 of the Municipal Court in Gjakova, confirming the approval of the appeal of the respondent, namely the debtor M.R., and thus suspending the enforcement procedure of the interim measure. The Court notes that against the above-mentioned Decision of the Court of Appeals, no appeal was allowed. Consequently, the respondent, namely the debtor M.R., during all further court proceedings, alleged that after this decision, the question of the interim measure had become an adjudicated matter.

89. The Court emphasizes the fact that the Court of Appeals in the same case rendered two opposite decisions, one in favor of the Applicant, while the other in favor of the debtor M.R. Moreover, the Court reiterates that no appeal was allowed against the respective decisions of the Court of Appeals and accordingly, pursuant to Article 74 of the LEP, the two decisions had become final and were consequently became *res judicata*.

90. This was also stated in the recent Decision of the Court of Appeals, namely the Decision [AC. no. 1579/2015] of 4 April 2016, which the Applicant challenges before the Court. The Court of Appeals in its reasoning had drawn attention to the fact that the Court of Appeals by the Decision [CA. No. 3662/2012] of 4 April 2013 upheld the Decision [C. No. 270/96] of 25 December 1996, reasoning that it was final and consequently, enforceable. Whereas, the same court, one month later, respectively, on 2 May 2013, by the Decision [AC. No. 4864/2012], upheld the Decision [E. No. 419/97] of 31 May 2011 of the Basic Court in Gjakova , confirming the suspension of the enforcement of the interim measure. In this regard, the Court of Appeals, among other things, emphasized:

> *"As a result, in the present case two first instance decisions and two second instance decisions - contradictory to one another - are filed, even though they concern the same enforcement case, namely the enforcement of the same enforcement title that is the Decision C. no. 270/1996 of the Municipal Court in Gjakova, of 25.12.1996, on the imposition of an interim measure - scheduled 20 years ago from the present moment (1996-2016)".*

91. However, as to these two decisions, the Court notes that the final decision, at this stage of the proceedings was the Decision [AC. No. 4864/2012] of 2 May 2013 of the Court of Appeals and which suspended the enforcement procedure, the continuation of which the Applicant had never requested, despite the fact that the manner of continuing a suspended procedure was determined by the provisions of the LEP, specifically Article 65 thereof, and which, on the contrary, with the elapse of the 6-month time limit is considered completed. The Court of Appeals has also emphasized this by a decision challenged by the Applicants. In this regard, the Court of Appeals, by the Decision [AC. No. 1579/2015] of 4 April 2016, emphasized:

> *"Whereas, the second time, the creditors did not even have the right to file a new enforcement proposal on 11.11.2013, which was in the second time allowed by the first instance court according to the Decision E. No. 1281/2013 of 11.11.2013, upheld by the decision of the second instance Ac. No. 3356/2014 of 21.07.2014 - but could have requested the continuation of the suspended enforcement procedure within the meaning of the provisions of the LEP".*

92. Despite this, the Court recalls that the Applicants focused their actions in the direction of the enforcement of the preliminary decision of the Court of Appeals, namely Decision [CA. No. 3662/2012] of 4 April 2013 and which by declaring the appeal of the debtor as out of time, upheld the Decision [C. No. 270/96] of the Municipal Court in Gjakova of 25 December 1996 on the imposition of the interim measure. As a result, on 7 November 2013, the Applicant addressed the Basic Court in Gjakova with a proposal for the enforcement of the above-mentioned Decision of the same court.

93. Following this request of the Applicant, a number of court decisions follow, which are based solely on the Decision [CA. No. 3662/2012] of 4 April 2013, despite the fact that the respondent, namely, the debtor M.R., by the objections and appeals, had raised the fact that there was another final decision, namely, the Decision [AC. No. 4864/2012] of 2 May 2013 of the Court of Appeals.

94. As a result and initially, the Basic Court in Gjakova, by the Decision [Cp. No. 1281/2013] of 11 November 2013, assigned the enforcement. The enforcement was also confirmed by the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova after having rejected the objection of the debtor M.R. The enforcement case in the meantime was transferred to the private enforcement agent. Moreover, the appeal of the debtor M.R, filed with the Court of Appeals against the Decision [AC. No. 3356/14] of the Basic Court was rejected by the Decision [AC. No. 3356/14] of 7 October 2014, and consequently the Decision [CP. No. 1281/2013] of 21 July 2014 of the Basic Court in Gjakova was upheld. Subsequently, in March of the following year, namely in 2015, the debtor M.R. was notified about the assignment of the enforcement.

95. The Applicant alleges that the Decision [AC. No. 3356/14] of 7 October 2014 was *res judicata*. He also alleges that after the assignment of the enforcement by the Conclusion [P. No. 02/14] of 24 March 2015, the appeals of the debtor M.R., could only relate to the irregularities during execution of the

enforcement within the meaning of Article 52 of the LEP, and that in no way through further court decisions the permissibility of enforcement could be considered, but only the irregularities in its implementation. Therefore, according to the Applicant, in rendering the Decision [AC. No. 1579/2015] of 4 April 2016, the Court of Appeals had exceeded the competencies prescribed by law, examining the admissibility of enforcement beyond the irregularities in the execution of the enforcement, and consequently, it violated the constitutional rights of the Applicant.

96. In this respect, and in the following, the Court will examine the Applicant's allegations regarding the challenged decision of the Court of Appeals, namely, the Decision [AC. No. 1579/2015] of 4 April 2016. The Court will examine three essential issues related to the Applicant's allegations of violation of his fundamental rights and freedoms: a) whether the Decision [AC. No. 3356/14] of 7 October 2014 of the Court of Appeals in conjunction with the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova was final; b) whether the Court of Appeals through the challenged decision violated the Applicant's fundamental rights and freedoms by modifying the Decision [PPP. No. 59/2015] of the Basic Court in Gjakova of 2 April 2015 and considering the enforcement procedure as completed, and repealing all the preliminary actions taken in the enforcement cases in the circumstances of the present case; and c) whether the Decision [CLM. No. 11/2016] of 13 September 2016 of the Supreme Court resulted in a violation of the Applicant's fundamental rights and freedoms.

97. As to the first issue, the Court initially notes that the LEP establishes the possibility of appealing for irregularities in carrying out the enforcement, not only by Article 52 of the LEP to which the Applicant refers, but also through Article 79 of the LEP. Both these articles specify the parties' ability to proceed through a complaint to request the elimination of irregularities during execution of the enforcement actions. In addition, Articles 52 and 79 also refer to Article 77 of the LEP. The latter regulates the appeals against the decisions on objections, also stipulating that the appeals do not stay the enforcement procedure, except in the cases provided by law, and leaving the possibility of counter- enforcement in the event of successful appeals. However, Article 77 of the LEP does not expressly limit the court's competence in the case of an appeal related to irregularities in the execution of the enforcement. Consequently, the Decision [AC. No. 3356/14] of 7 October 2014 of the Court of Appeals in conjunction with the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova did not become final within the meaning of Article 52 of the LEP, to which the Applicant refers but in the context of Article 74 of the LEP.

98. In this regard, the Court refers to Article 74 of the LEP which defines the final form and enforceability of the decisions in the enforcement procedure. According to this Article, *inter alia*, "*The decision in which the objection is rejected becomes final if an appeal against it is not filed in the foreseen legal deadline, or if the filed appeal is dismissed as ungrounded*".

99. The Court notes that the Decision [Cp. No. 1281/2013] of 11 November 2013 of the Basic Court in Gjakova had assigned the execution. The objection against

the Decision was rejected by the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova. An appeal was filed against this decision with the Court of Appeals, which by the Decision [AC. No. 3356/14] of 7 October 2014 had rejected the latter as ungrounded. Consequently, the objection and the appeal were also rejected, and on the basis of paragraph 3 of Article 74 of the LEP, the Decision [AC. No. 3356/14] of 7 October 2014 of the Court of Appeals in conjunction with the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova, became final.

100. As to the second issue, namely the assessment whether the Court of Appeals by the challenged Decision violated the Applicant's fundamental rights and freedoms by repealing a *res judicata* decision, the Court will refer to the case law of the ECtHR and elaborated above, with respect to the observance of the *res judicata* decisions, and relevant exemptions. In this regard, the Court recalls that the ECtHR has established in its case-law that a departure from the principle of the respect of a final decision, namely *res judicata*, is justified only when *"made necessary by circumstances of a substantial and compelling character*".

101. In this regard, the Court refers to the main arguments of the challenged Decision of the Court of Appeals on the basis of which it concluded the enforcement procedure and repealed all the actions taken in this enforcement case, as follows: a) absolute statute of limitation in the circumstances of the present case under Article 361 of the LOR, the basis for the completion of the enforcement procedure according to Article 66 of the LEP; b) the Decision [AC. No. 4864/2012] of 2 May 2013, which suspended the enforcement procedure and which extension was not requested extension the Applicant within the 6-month deadline stipulated by the LEP provisions, thus resulting in the completion of the enforcement procedure, according to the provisions of the latter; and c) two decisions of the Court of Appeals of 2013, Decision [CA. No. 3662/2012] and Decision [AC. No. 4864/2012], both final and contradictory to one another.

102. In this regard, the Court refers to the Decision [AC. No. 1579/2015] of 4 April 2016 of the Court of Appeals, which, *inter alia*, reasoned, as follows:

> *By Article 71 of the LEP, the reasons of the objection are foreseen, which in paragraph 1 item 1.4 of this article as a cause of the objection is foreseen "deadline by when, according to the law the enforcement may be requested, has expired".*
>
> *Whereas, by Article 379 paragraph 1 of the LOR (old), it is foreseen that "all requests that are certified by a final court decision or other competent body, by agreement before the court or before the other competent body, are statute-barred for ten years, as well as for those for which the law provides for shorter deadlines of statute of limitation", which is also foreseen by Article 361 paragraph 1 of the LOR of the Republic of Kosovo, No. 04/L-077, in force from 19.1.12.2012.*
>
> *In the present case, within the meaning of this Article of the LOR, the absolute statute of limitation for the enforcement of the decision of the*

court of first instance C. No. 270/1996, of 25 December 1996 was reached, final from 16.6.1997, which deals with an interim measure, after almost 20 years have elapsed since the court decision which execution is required became final, this court, as a court of second instance, assesses that the legal requirements established in Article 71 paragraph 1 item 1.4, in conjunction with Article 66 paragraph 3 of the LEP, have been fulfilled, for the completion of the enforcement procedure in this enforcement case".

103. The Court notes two effects of this Decision in the circumstances of the present case: a) the completion of the enforcement procedure and b) the repeal of all preliminary enforcement actions, including the final decisions.

104. The conclusion of the enforcement procedure, the Court of Appeals based on the third paragraph of Article 66 of the LEP, according to which the enforcement will end *ex officio*, if *inter alia,* the enforcement has become impossible or for other purposes it cannot be enforced, and after expiring the absolute statute of limitation for enforcement. The latter is defined by Article 361 of the LOR.

105. Upon the completion of the enforcement procedure, the Court of Appeal also annulled all preliminary enforcement actions, among them 3 decisions, which had become final in this enforcement procedure, namely, the Decision [AC. No. 3356/14] of 7 October 2014, the Decision [AC. No. 4864/2012] of 2 May 2013, and the Decision [CA. No. 3662/2012] of 4 April 2013 of the Court of Appeals in connection with the relevant decisions of the lower instance court. These final decisions, as stated above, were contradictory to each other, giving the creditor and the debtor the right in the same enforcement case, namely the enforcement of the Decision on interim measure of 1996.

106. In such exceptional circumstances, the Court considers that the annulment of the contradictory and final decisions of the same court in the same enforcement case, is in the function of "*correcting judicial errors and errors of justice*" as established by the ECtHR case law, and that a departure from that principle is justified only when made necessary by circumstances of a "*substantial and compelling character*".

107. The Court recalls that the circumstances of the present case include a nearly twenty years history of defining and challenging an interim measure and initially two final and contradictory decisions of the same court issued in a one-month period in 2013. As it is elaborated above, one, namely, the Decision [AC. No. 4864/2012] of the Court of Appeals of 2 May 2013 suspended the enforcement procedure, and considering that the continuation of the same was not requested within the time limit set by the LEP, the enforcement procedure was completed. Despite this fact, the courts continued to deal with the enforcement procedure based on the other final decision, namely the Decision [CA. No. 3662/2012] of 4 April 2013 of the Court of Appeals despite the fact that the debtor noted that there was another final decision in his favor, along all the objections and complaints. The following proceedings also resulted in another final decision, namely the Decision [AC. No. 3356/14] of 7 October 2014 of the Court of Appeals concerning the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova, which again confirmed the

enforcement of the interim measure of 1996. The Court notes that these facts include extraordinary circumstances and reflect "*judicial and justice errors*" and which meet the condition laid down in the ECTHR on the basis of which the higher courts have reasons of "*substantial and compelling character*" or to or to avoid respect for a *res judicata* decision.

108. In addition, the Court also recalls that the parties to the proceedings, according to the case file, had never continued the civil dispute over the right of servitude. The same was emphasized by the Court of Appeals, which explained that its decision is limited to reviewing the subject matter, namely the interim measure, while clarifying that the parties may continue the contested procedure regarding the right of servitude. More specifically, the Court of Appeals emphasized:

> *"However, creditors are not denied the right to continue the contested procedure with regard to the right of servitude in the renewed case (if any) or another special lawsuit to seek the exercise of this right which allegedly they are entitled to".*

109. Therefore, and having regard to the particular characteristics of the case, the allegations raised by the Applicants and the facts submitted by them, the Court, relying also on the standards set out in its case-law in similar cases and the case law of the ECtHR, does not find that the challenged decision of the Court of Appeals, namely the Decision [AC. No. 1579/2015] of 4 April 2016, is rendered in violation of the Applicant's fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

110. As to the third issue, the Court notes that the subsequent Decision of the Supreme Court, rendered following the request for protection of legality filed by the State Prosecutor, did not address the merits of the case because, according to the Supreme Court, based on the LCP, it is limited only to the examination of the violations emphasized by the Public Prosecutor in his request, while the latter has no legal support in the essential violations foreseen by the provision of Article 247 paragraph 1 a) of the LCP.

111. Furthermore in this regard, the Applicant did not substantiate that the proceedings before the Supreme Court were unfair or arbitrary, or that his fundamental rights and freedoms protected by the Constitution were violated, as a result of the challenged decisions. The Court reiterates that the interpretation of law is the task of the regular courts and is an issue of legality. No constitutional issue has been proven by the Applicant (See: case of the Constitutional Court KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility of 8 August 2016, paragraph 44; and also see 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 and Sami Lushtaku*, Resolution on Inadmissibility of 15 November 2016, paragraph 62).

112. Consequently, and having regard to the specific characteristics of the case, the allegations raised by the Applicants and the facts presented by them, the Court

relying also on the standards set out in its case-law in similar cases and the case law of the ECtHR, does not find that the challenged decision of the Supreme Court, namely the Decision [CLM. No. 11/2016] of 13 September 2016 of the Supreme Court, was rendered in violation of the Applicant's fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

113. Finally, the Court notes that the Applicant also alleges that his Referral should be dealt with as the same case with the Court Case KI70/16 (Resolution on Inadmissibility of 4 September 2017), where the Applicant is person F.K., and where a constitutional review of Judgment [Rev.nr.185 / 2015] of the Supreme Court of 28 December 2015 is required.

114. With regard to the Applicant's allegation of the connection of his Referral with case KI70/16, the Court reiterates that, despite its request, the Applicant did not clarify at all this allegation, namely he did not provide any argument that would prove the existence of the interconnection between the two cases in question. Furthermore, the Court found no connection between the Applicant's Referral and the Resolution on Inadmissibility in Case KI70/16.

Conclusion

115. The Court emphasizes on of the fundamental aspects of the rule of law is the principle of legal certainty, which presupposes respect for the principle of *res judicata*, which is the final rule of judicial decisions. The same shall be deemed irrevocable in accordance with the principle of legal certainty. Departure from this principle, according to ECtHR case law, may only be the result of "*the circumstances of a substantial and compelling character*". As elaborated above, the Court concludes that the circumstances of the specific case fall into this category of exception.

116. The Court considers that the course of the present case involves exceptional circumstances, including final decisions and contradictory to each other of the same court in the same enforcement case. Consequently, in the circumstances of the case, the annulment of all the preliminary actions taken in the enforcement case, including preliminary decisions *res judicata*, is in function of "*correcting judicial errors and errors of justice*". A departure from that principle in the circumstances of the case, is justified only when made necessary *"by circumstances of a substantial and compelling character",* as it was provided by the case law of the ECtHR.

117. Therefore, and based on the foregoing and taking into account the special characteristics of the case, the allegations raised by the Applicants and the facts presented by them, the Court also based on the standards established in its case-law and the case law of the ECtHR, does not find 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, and accordingly finds that Decision [CLM. No. 11/2016] of 13 September 2016 of the Supreme Court in conjunction with the Decision [AC. No. 1579/2015] of 4 April 2016 of the Court of Appeals, is in compliance with the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113 (7) and 116 (1) of the Constitution, Articles 47 and 48 of the Law and Rules 56 (1), 63 (1) (5) and 74 (1) of the Rules of Procedure, on 19 December 2018

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD with majority of votes that the Decision [CLM. No. 11/2016] of 13 September 2016 of the Supreme Court of Kosovo and the Decision [AC. No. 1579/2015] of 4 April 2016 of the Court of Appeals of Kosovo, is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR;

III. TO NOTIFY this Judgment to the Parties;

IV. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20.4 of the Law;

V. This Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Gresa Caka-Nimani Arta Rama- Hajrizi