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

Prishtina, on 23 April 2019
Ref. no.:AGJ1353/19

[This translation is unofficial and serves for informational purposes only]

JUDGMENT

in

Case No. KI31/18

Applicant

Municipality of Peja

Constitutional review of
Judgment E. Rev. No. 20/2017 of the Supreme Court of the Republic of Kosovo of 20 November 2017

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 the Municipality of Peja (hereinafter: the Applicant), which is represented by Virtyt Ibrahimaga, a lawyer in Prishtina.

Challenged decisions

2. The Applicant challenges Judgment E. Rev. No. 20/2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) of 20 November 2017, which rejected its revision as ungrounded and upheld the third group of decisions of the regular courts.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 32 [Right to Legal Remedies] 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).

4. The Applicant also requested the imposition of the interim measure, in order to prevent the execution of Judgment Ek. No. 587/2017 of the Basic Court in Prishtina, Department for Commercial Matters of 15 June 2017, and the judgments of the higher instances related to it.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 27 [Interim Measures], 47 [Individual Requests] and 48 [Accuracy of the Referral] 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 5 March 2018, the Applicant submitted the Referral to the Court.

8. On 6 March 2018, 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 Gresa Caka-Nimani.

9. On 8 March 2018, the Court notified the Applicant's representative about the registration of the Referral and requested him to submit a power of attorney proving that he is authorized to submit the Referral to the Court.

10. On 19 March 2018, the Applicant's representative submitted the requested power of attorney to the Court.

11. On 21 March 2018, the Court sent a copy of the Referral to the Supreme Court. On the same date, the Court sent a copy of the Referral to the Police of Kosovo and DPZ Gashi Towing Service, in the capacity of the interested parties, inviting them to submit their comments, if any, no later than 30 March 2018.

12. Within the set deadline, the Court did not receive any comments from the Police of Kosovo or the Supreme Court. Meanwhile, regarding DPZ Gashi Towing Service, the Court received an acknowledgment of receipt from the Post of Kosovo with the notification that they failed to locate the DPZ Gashi Towing Service.

13. On 30 March 2018, the Court sent a second notice to DPZ Gashi Towing Service, in the corrected address, and invited it to submit its comments, if any, no later than 12 April 2018.

14. On 6 April 2018, DPZ Gashi Towing Service submitted its comments.

15. On 27 April 2018, the Court notified the Applicant about the comments received from DPZ Gashi Towing Service and sent a copy of the received comments.

16. 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.

17. 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.

18. On 13 August 2018, DPZ Gashi Towing Service, on its own initiative, submitted additional documents to the Court.

19. On 22 August 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur, instead of Judge Snezhana Botusharova.

20. On 2 October 2018, the President of the Court appointed the new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Safet Hoxha (members).

21. On 20 November 2018, the Court notified the Basic Court in Prishtina about the registration of the Referral and requested it to submit to the Court a copy of the entire file related to the Applicant's case.

22. On 5 December 2018, the Basic Court in Prishtina submitted to the Court a copy of the requested file.

23. On 31 December 2018, the Court requested the additional information from the Applicant regarding the stage of the enforcement procedure, which was initiated by DPZ Gashi Towing Service.

24. On 9 January 2019, the Applicant notified the Court that the court case between it and DPG Gashi Towing Service was still in the enforcement procedure and that Order P. No. 197/17 of the Private Enforcement Agent of 6 September 2017 "*has still remained non-executed*". Regarding these proceedings, the Applicant submitted additional documentation to the Court.

25. On 14 February 2019, the Applicant submitted additional documents to the Court and requested "*urgent treatment of the proposal for the imposition of the interim measure*", as the Court of Appeals had rejected the Applicant's appeal which challenged the abovementioned Order of the Private Enforcement Agent that consequently made the latter enforceable.

26. On 19 February 2019, DPZ Gashi Towing Service submitted a document to the Court notifying the Court that the Applicant's appeal, which challenged the above-mentioned Order of the Private Enforcement Agent, was rejected, stating that this proves that the Applicant's allegations are ungrounded.

27. On 22 February 2019, the Court, by electronic mail, confirmed to the Applicant and DPZ Gashi Towing Service, the receipt of their notification regarding the enforcement procedure in case KI31/18, and notified them that their request was under consideration by the Court. In the same way, the Court, stating that it was not notified whether the final Order of the Private Enforcement Agent was already executed, requested both parties to notify the Court about any new developments regarding the case.

28. On 25 February 2019, the Court received additional information from the Applicant through which it was notified that the aforementioned Order of the Private Enforcement Agent has not yet been executed and is expected to be executed at the beginning of March 2019.

29. On 27 February 2019, the Judge Rapporteur recommended to the Court the approval of the interim measure. On the same date, the Court unanimously decided to approve the interim measure until 30 April 2019, without prejudice to any further decision that the Court will render with respect to the merits of the Referral.

30. On 27 February 2019, the Court received another document submitted by DPZ Gashi Towing Service which was filed by mail service on 25 February 2019.

31. On 8 April 2019, the Court received another document filed by the DPZ Gashi Towing Service, in response to the abovementioned Decision of the Court for the approval of the interim measure.

32. On 12 April 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously voted to declare the Referral admissible for consideration on merits.

33. On the same date, the Court unanimously decided to declare the Referral admissible for review of the merits and to declare that there has been no violation of Articles 24, 31 and 32 of the Constitution in conjunction with Article 6 of the ECHR.

Summary of facts

34. On 15 September 2005, the Applicant, namely the Municipality of Peja, entered into a trilateral contractual agreement with the Kosovo Police Service, now the Police of Kosovo and a private company DPZ Gashi Towing Service. The tripartite contract was a contract on provision of services (hereinafter: the Contract) and as such defined the respective obligations, rights and rewards for all three parties. The object of the tripartite contract was the provision of services by DPZ Gashi Towing Service for towage, namely withdrawal of vehicles parked illegally or accidentally and placing them in the designated parking place. The contract stipulated that this service would be required by the Police of Kosovo, in the event of a traffic accident or when for other reasons it was necessary to carry out towing of vehicles.

35. On 18 September 2007, the Applicant by Decision No. 400-8807/07, extended the tripartite contract from 15 September 2007 until "*the announcement of the tender and the selection of the most favorable beneficiary.*"

36. On 19 October 2009, the Applicant by Decision No. 466-6964/2009 extended the tripartite contract for another three months. The decision stated that this contract will continue "*for three months - until the end of the 2009 local elections and the selection of the tender beneficiary for the performance of these services* [under the Initial Contract]."

37. On 19 May 2010, DPZ Gashi Towing Service addressed the Applicant with a letter No. II-9-3658/2010, by which it requested that a public auction be announced for the sale of vehicles seized by the Kosovo Police, which were being kept in the parking lot of DPZ Gashi Towing Service. The letter in question read: *"As you are informed earlier with the same letters for the requests of the company "Gashi", once again, I ask you to take this issue more seriously and to solve the issue of vehicles confiscated by the Police and sent in our company. According to the Contract, the vehicles that are taken by the Police after 90 days, for those vehicles you are obliged to place them at a public auction. In our company we have a large number of vehicles that have been taken for offense, and stay more than 90 days in the parking lot of our company and no one is handling this problem for these vehicles".* Along with this letter, DPZ Towing Service also sent to the Applicant a list of vehicles showing the date of their confiscation and the cost of keeping them in the parking lot of the DPZ Gashi Towing Service after the expiration of 90 days.

38. On 25 May 2010, the Applicant replied to the repeated request of DPZ Gashi Towing Service and recommended as follows: "*After analyzing your request regarding the issue raised, the Municipality of Peja* [the Applicant] *namely the Director of Administration recommends that you proceed according to the provisions of Administrative Instruction no. 02/2009 of the Kosovo Police*

Article 8 (Alienation) and based on the Law on Property and Other Real Rights, namely Article 35 (Abandonment of Ownership) that the owner should explicitly state that he renounces the ownership over that thing with (court decision)."

39. On 1 July 2010, as a result of disagreements over the implementation of the Contract, DPZ Gashi Towing Service filed a claim with the Commercial District Court in Prishtina [now the Basic Court in Prishtina, Department of Commercial Affairs] (hereinafter: the Basic Court in Prishtina), against the Applicant and the Police of Kosovo (hereinafter referred jointly by the Court: the respondents).

40. By this claim, DPZ Gashi Towing Service requested that the responding parties be obliged to pay damage of € 663,450.00 plus interest and procedural costs due to non-fulfillment of the obligations arising from the Contract. The claim stated that in the parking lot of DPZ Gashi Towing Service continue to be the confiscated vehicles that prevent the development of normal business and that according to Article 4 of the contract the respondents were obliged to compensate DPZ Gashi Towing Service.

41. As to the claim filed by DPZ Gashi Towing Service, the regular courts received eight decisions in total. Three decisions were taken by the court of first instance; a decision to correct a first instance decision; two decisions at appeal level, as well as two decisions by the Supreme Court based on the revision filed. Before the Constitutional Court is challenged the final decision of the third group of decisions taken by the Supreme Court, namely Judgment E. Rev. No. 20/2017, of 20 November 2017. The details of each group of decisions, as far as relevant to the request in question, will be presented below.

The first group of regular court decisions that decided regarding the claim of DPZ Gashi Towing Service

42. On 4 April 2011, the District Commercial Court in Prishtina by Judgment, II. C. No. 265/2010, partially approved as grounded the statement of claim of DPZ Gashi Towing Service.

43. Against the abovementioned judgment, the respondents filed their complaints and requested that the first instance judgment be quashed or the case be remanded for retrial. DPZ Gashi Towing Service filed a response to the complaints of the respondents, with the proposal that they be rejected as ungrounded and the first instance judgment be upheld.

44. On 26 June 2014, the Court of Appeals rendered its Decision, Ae. No. 167/2016, through which it approved the appeals of the respondents as grounded and remanded the case for retrial to the Commercial District Court of Prishtina (now with the relevant legal amendments, the Basic Court in Prishtina).

The second group of regular court decisions that decided on statement of claim of DPZ Gashi Towing Service

45. On 11 January 2016, the Basic Court in Prishtina by Judgment, C. No. 420/2014, partly approved as grounded the statement of claim of DPZ Gashi Towing Service.

46. Against the above-mentioned Judgment, the respondents filed their appeals and requested that the first instance Judgment be quashed or the case be remanded for retrial. DPZ Gashi Towing Service submitted a response to the appeals of the respondents with the proposal that they should be rejected as ungrounded and the first instance judgment should be upheld.

47. On 8 July 2016, the Court of Appeals by Judgment, Ae. No. 54/2016, rejected the appeals of the respondents as ungrounded and upheld the Judgment [C. No. 420/2014] of the Basic Court in Prishtina.

48. Against the Judgment of the Court of Appeals, the respondents submitted their requests for revision to the Supreme Court. The first respondent, namely the Municipality of Peja filed its request for revision on the grounds of erroneous application of the substantive law and the exceeding of the claim, with the proposal that the lower court decisions be annulled and the case be remanded for retrial. The second respondent, namely the Kosovo Police, submitted its request for revision because of essential violations of the contested procedure provisions and erroneous application of the substantive law, with the proposal that the first instance decision be modified so that the statement of claim against the second respondent be rejected as ungrounded.

49. DPZ Gashi Towing Service filed a response to the request for revision of the respondents, requesting them to be rejected as ungrounded and the decisions of lower courts be upheld.

50. On 7 December 2016, the Supreme Court by Decision, Rev. E. No. 35/2016, approved the revisions of the respondents and annulled the Judgment [Ae. No. 54/2016] of the Court of Appeals and the Judgment [C. No. 420/2014] of the Basic Court in Prishtina and remanded the case for retrial to the first instance court, namely the Basic Court in Prishtina.

51. The Supreme Court considered that the revisions filed by the respondents were grounded with the reasoning that the lower instance judgments "*were taken in essential violation of the provisions of the contested procedure under Article 182.2 (n) of the Law on Contested Procedure, whereas the Judgment of the second instance [Ae. No. 54/2016] in violation of Article 194 in conjunction with Article 214.a item b) of the LCP and erroneous application of substantive law and consequently the factual situation has not been completely determined and therefore there are conditions for their modification, , therefore, for this reason, the two judgments had to be quashed and the case be remanded for retrial*".

The third group of decisions of the regular courts that decided on the statement of claim of DPZ Towing Group [challenged decisions]

52. On 15 June 2017, the Basic Court in Prishtina by its third Judgment on the same matter, Ek. No. 587/2017, fully approved the specified statement of claim

of DPZ Gashi Towing Service, where from the initial statement of claim of € 663,450.00, DPZ Gashi Towing Service requested € 392,515.00. The Basic Court in Prishtina obliged the to pay DPZ Gashi Towing Service jointly the amount of € 392,515.00 on behalf of the contractual damage arising from the Contract, together with legal interest and procedural costs.

53. The Basic Court reasoned its Judgment as follows:

> *"The full approval of the claimant's statement of claim the court previously based on the contract signed by the litigating parties of 15.09.2005, on the extension of the contracts dated 15.07.2007 and 19.10.2009, as well as in the expertise prepared by the financial expert on 22.06.2015, therefore, after analyzing these evidence has fully approved the statement of claim of the claiming party based on the provisions of Article 142 of the LOR, which explicitly provides that "General terms and conditions specified by one contracting party, either contained in a standard clause contract or being referred to by the contract, shall supplement particular agreements, as established between contracting parties in the same contract and, as a rule, shall be binding as general terms and conditions of contract must be published in a usual way. General terms and conditions shall be binding for a contracting party if they were known, or should have been known to such party at the moment of entering into contract.*
>
> *The claim of the claimant* [DPZ Gashi Towing Service] *that is specified and approved in the enacting clause of this Judgment, the court has based mainly on the final statement of the claimant, who requested its the total amount of: 392.515.00 Euros (...)on behalf of the compensation only for the days for which the vehicles have stayed and are staying in the parking lot of the claimant. for which from the moment of the signing of the contract by the litigants until today the money was not paid, this has been confirmed through the opinion and finding of the financial perspective in its written expertise. [...]*
>
> *Referring to the provisions of Article 4 of the Contract dated 15.09.2005 concluded between the litigating parties, in which case their rights and obligations are foreseen, namely in Article 4.3.4.4 and 4.5, this is by the first respondent has also announced the auction for sale of the vehicles with which also directly argues that it is under obligation to the claimant in this case DPZ Gashi Towing with its seat in Peja, therefore the court based on all these evidence as outlined above has also decided as cited in the enacting clause of this judgment by approving and obliging the respondents pursuant to Article 413 of the LOR jointly to pay the contract damage caused to the claiming party".*

54. Against the abovementioned Judgment of the Basic Court in Prishtina, the two respondents filed complaints. The first respondent, namely the Municipality of Peja, filed a complaint with a request that the first instance Judgment be quashed and the case be remanded for retrial.

55. As to the "erroneous determination of the factual situation," the Applicant submitted three main allegations. Firstly, the Applicant emphasized that the extension of the Contract, dated 19 October 2009, was not signed between the two parties and that the first instance court did not indicate by which document the contract was extended on 19 October 2009. Secondly, the Applicant emphasized that the court of first instance found that the litigating parties have signed "General Contractual Terms" but has not proven this fact. Thirdly, the Applicant emphasized that the organized auctions referred to by the first instance court did not have to do with the vehicles that are the subject of the dispute.

56. As to "essential violation of the provisions of contested procedure", the Applicant alleged that the first instance judgment is contradictory and does not contain the reasons justifying such a judgment and does not contain the decisive necessary facts. In this regard, the Applicant submitted several arguments: Firstly, it emphasized that the first instance court approved the specification of the statement of claim of the DPG Gashi Towing Service made in the final word - a part in which the accusing parties were not enabled to make statements regarding the specification of the claim. The final word is a summary of requirements and cannot contain new material or procedural requirements. Secondly, the Applicant stated that the first instance court finds that its judgment was rendered based on the expertise, but does not make the assessment of the findings of the expertise in the judgment. Thirdly, the Applicant states that the first instance court did not elaborate on the confrontation of the arguments of the litigating parties at all in its judgment nor did it described the contested and uncontested facts. Fourthly, the Applicant emphasized that the first instance court did not specify that under the terms of the contract or the law it has granted the indemnity and that the first instance court did not take into account the instructions given by the Supreme Court when it remanded the case for retrial.

57. As to the "erroneous application of the substantive law," the Applicant firstly stated that the first instance court, in spite of its arguments for erroneous interpretation of the provisions of the Contract and the substantive law, it did not show that why the allegations and arguments of the Applicant are not grounded. In this regard, the Applicant first emphasized that it had challenged the extension of the contract on 19 October 2009 because it was done on the eve of the elections by the Board of Directors of the Municipal Assembly of Peja. But that decision was never executed by the Applicant, since no annex of contract was signed by municipal officials and that DPZ Gashi Towing Service did not receive any formal letter for extension of the contract. Thus, the Applicant considered that the first instance court erroneously concluded that there was a contract between the parties after 18 September 2009. Secondly, the Applicant stated that the Court's finding that the contract which is the subject of the dispute is a form contract, within the meaning of Article 142 of the Law on Obligations, does not stand, as the Contract in question is a negotiated contract and there is no form contract with general contractual terms. Thirdly, the Applicant stated that the first instance court had not reviewed at all the argument it had submitted concerning the fact that pursuant to Article 4.5 of the Contract, DPZ Gashi Towing Service had the right

to sell the vehicles but it did not do such a thing, and that through possession has become the owner of the vehicles.

58. On 15 June 2017, the Court of Appeals by Judgment Ae. No. 201/2017, rejected the appeals of the respondents as ungrounded and upheld the Judgment of the Basic Court in Prishtina.

59. As to the factual situation and the possibility that it was incorrectly determined, as the Applicant alleged, the Court of Appeals reasoned as follows:

> *"Based on the case file it results that the claimant on 15.09.2005 had entered into a contract for vehicle towing with the respondents, which contract by the decision of the board of the respondent Municipality of Peja dated 18.09. 2007 and 19.10.2009, was extended for 3 months. The claimant as the authority performing the services* [DPZ Gashi Towing Service] *from the contract has taken over the obligation to do the towing of vehicles and their placing in the parking lot at the request of the respondents. According to Article 3.2 of the contract on the towing and storing of vehicles at the claimant's location up to 90 days, the payment shall be made by the owners of vehicles, while according to Article 3.5 of the contract, the payment for services during other days for the vehicles that are not towed during this term is to be made by the respondents, up to the amount gained from the sale of vehicles, foreseen by Article 3.2 of the contract. As for the sale of vehicles which according to Article 3.6, will be considered abandoned and will become a social property, there shall be set up a commission composed of a claimant's and respondents' representatives who will carry out the evaluation/determine the value of the cars for sale and out of the sum received the claimant shall be paid for the provided services. According to Article 3.9 of the contract, the aforementioned provisions shall not apply for the vehicles that are involved in an investigation procedure, until final resolution of the case by the competent authority.*
>
> *According to Article 2.12 of the contract, the claimant was obliged to perform the transport and storage of vehicles taken for the case investigation purposes, free of charge; whilst as regards the other vehicles, according to Article 4.3 of the contract, the claimant was entitled to ask from the respondents to have these cars sold through public auction in order to get its compensation; while according to the contract , the contracting parties within 60 days from the expiry of the term were obliged to carry out the sale of vehicles and then compensate the claimant out of that sum. If the sale could not be carried out according to the procedure foreseen by the contract, the sale could be carried out by the claimant, itself, through direct sale or sale for spare parts purposes.*

60. As to the abovementioned Applicant's allegations of essential violation of the provisions of the contested procedure, the Court of Appeals reasoned as follows:

> *"The first instance court based on the case evidence and on the aforementioned fact has found that the claimant's statement of claim is grounded and has approved the compensation amount of € 392,515.00,*

and thereby obliged the respondents to jointly compensate the claimant with this amount, with the reasoning that the claimant has performed his contractual obligation and there was created the obligation for the payment of compensation in conformity with Article 142 and 413 of the LOR.
The Court of Appeals, as a second instance court approves the legal assessment of the first instance court as regular and lawful for the reason that the challenged judgment does not contain essential violations of the provisions of the contested procedure from Article 182, para.2 , sub-items b), g), j), k), and m) of the LCP. [...]

61. As to the Applicant's allegations of erroneous application of substantive law, the Court of Appeals emphasized as follows:

"This court considers that the first instance court has correctly applied the substantive law because, based on the evidence from the case file it is not disputable that the claimant has carried out the contracted services, for which a compensation amount was approved by the first instance court. This amount is confirmed also by the opinion and conclusion of the financial expert Mr. Ali Gagica in the expertise dated 22.06.2912 which is based upon the evidence in the case file. Based on the case file it results that it is not disputable, that the respondents are the authority which have ordered the services, have drafted and signed the contract and its extensions, that they have used the services of the claimant, but oppose the claimant's statement of claim by calling upon the flaws of the contractual provisions which they have drafted themselves.
This respondents' standpoint for non-payment of services performed by the claimants is contrary to all principles of the contractual right and principles of business law moral and trust. Moreover, this is out of any legal logic because it is incomprehensible for a party to ask for exemption from the payment of contractual obligations to the other party, given that the said party has carried out its contracted services.
This position could be applied only in the cases of provision of humanitarian services namely in the cases of one-sided contracts but never in cases of business contracts wherein the purpose and the subject of contract is the performance of services for benefiting a contracted counter value. The claimant has rightfully expected to be paid the compensation for the performed services and this constitutes an "expected right according to the normal course of things" guaranteed by the positive right as well as international instruments, that the other party is obliged to fulfil."

62. As to the legality of the Contract concluded between the Applicant and DPZ Gashi Towing Service, the Court of Appeals reasoned that:

"The contract entered by the parties is a contract on the performance of services, with mutual charges and according to the law creates mutual obligations for contractual parties respectively performance of services and compensation of these services. This contract is not an aleatory contract (contract on condition), in which the obligation would be created only after the fulfilment of a certain condition. It is not disputable that

the claimant has completely abided by the contract and has carried out the contracted services and has addressed the respondents in relation to the sale of vehicles and its compensation in a manner as foreseen by the contract, but the respondents have neglected their contractual obligations and have never taken action for providing adequate compensation to the claimant in conformity with the contract, and in addition by disregarding any legal principle call upon their own shortcomings in order to avoid their obligations.

The appealing allegations of the representative of the first respondent, Municipality of Peja, that there are no contractual obligations to be paid since the Municipality has given the respondent the right to operate and gain its compensation from the vehicle owners, according to the assessment of this court is ungrounded, for the following reasons: the Claimant has performed all services solely at the request and to the interest and in the favour of the respondents, and not according to its will and interest.

The realization of the compensation from the vehicle owners is foreseen as a compensation possibility, but by Article 3 of the contract is clearly specified that in the event of impossibility of compensation from the owners of vehicles, the manner and the amount of its compensation. In the contract are determined the services for which the claimant would not be compensated hence the court of first instance had rejected the claimant's claim referring to these services, and the claimant has not sought that compensation. The services which are the subject under review in this procedure do not fall within this category. By no contract provision is determined the non-payment of the services for which the court of first instance has approved the statement of claim, on the contrary for these services in the contract are foreseen the payments and the manner of the compensation."

63. As to the Applicant's additional allegations, the Court of Appeals reasoned its Judgment as it follows:

"The Court of Appeals finds as ungrounded the appealing allegations that the claimant pursuant to the contract had to sell the vehicles, itself, in order to acquire the compensation according to the provision of Article 3.6 of the contract, according to which vehicles which are not withdrawn within 90 days will be considered to be abandoned and will become social property, because according to both, the position of the Supreme Court of Kosovo provided in the Judgment Rev. No. 191/2004, and the previous decision of the Court of Appeals on this legal matter Ae.no.215/2012, this contractual provision has been concluded contrary to Article 46 and 47 of the LOR and does not produce legal effects because the contract produces legal effects only between the contracting parties whilst it cannot create effects with regard the property rights of the owners of vehicles, namely it cannot serve as a basis for the transfer of the ownership of the vehicles in social ownership, consequently this provision has not given the legal opportunity to the claimant to sell the vehicles for the purpose of realization of compensation.

Should entering into a particular contract be prohibited to one party only, the contract shall remain valid, unless otherwise provided by law for the

specific case, while the party violating the statutory prohibition shall suffer corresponding consequences.
This court assesses that the provision of Article 3.6 of the contract entered between the claimant and the respondent is in contradiction with imperative norms and does not produce legal effect hence the claimant could not apply the Article 4.5 of the contract for the realization of compensation through direct sale of vehicles. According to Article 105 of the LOR the nullity of a contractual provision shall not imply nullity of the entire contract, if it can stand without the null provision, itself, if the contract can stand without the null provision..., therefore in conformity with this provision this court assesses that the contract between the contracting parties remains in force without this provision. Consequently, in the present case, on the basis of the provision of Article 103, paragraph 2 of the LOR the compensation of the claimant should have been carried out by the respondents, in conformity with other contractual provisions, namely according to the price foreseen in Article 3.1 and 3.2 of the Contract. [...]"

64. Against the Judgment of the Court of Appeals, both respondents filed a request for revision. The Applicant based its request for revision on the allegation of violation of the provisions of the contested procedure and erroneous determination of the factual situation.

65. More specifically, the Applicant submitted the following arguments summarized in its request for revision:

(i) The Judgment of the second and the first instance did not take into account the legal position of the Supreme Court presented in Judgment Rev. E. No. 35/2016 and did not correct the flaws in the retrial procedure;
(ii) The first and second instance courts have not clarified on what legal basis their judgments have been based, as it is not clear if the debt owed should be paid on behalf of the "*contractual debt or compensation of the damage*" which was also a remark of the Supreme Court;
(iii) The contract did not force DPZ Gashi Towing Service to maintain the vehicles over the 90-day deadline, so it is illogical why the respondents were obliged to indemnify DPZ Gashi Towing Service for maintaining the vehicles for the time after the expiration of the 90-day deadline;
(iv) The Court of Appeals goes beyond each interpretation of the first instance and decides positively on the request of the DPZ Gashi Towing Service on a completely different legal basis, without a hearing and without determining the factual situation;
(v) The Court of Appeals erroneously considers that after the abrogation of Article 3.6 of the Contract, the other provisions of the Contract remained in force in accordance with Article 103.2 of the LOR and that DPZ Gashi Towing Service should be compensated in accordance with Articles 3.1 and 3.2 of the Contract;
(vi) The Court of Appeals interprets facts which have not been established during the first instance proceedings and draws parallels between this case and other cases which it considers similar, whereas concrete evidence is missing;

(vii) The Court of Appeals as well as the first instance court does not make the interrelation of the expertise with the indemnity granted, rendering the judgment even more meaningless; and

(viii) The first and second instance courts did not enter at all the Applicant's disputes concerning the extension of the contract and there is no contracted obligation, as Article 4.5 of the Contract provides that if the respondents do not organize the auction, then the auction is organized by DPZ Gashi Towing Service.

66. On 20 November 2017, the Supreme Court by Judgment E. Rev. No. 20/2017 rejected the revision of the Applicant, namely the Municipality of Peja as the first responding party; meanwhile it approved as grounded the revision of the second responding party, namely the Police of Kosovo.

67. The Supreme Court decided that the payment of the "*contractual damage*" in the amount of € 392,515.00, already granted by the Basic Court in Prishtina, should only be paid by the Applicant and not jointly together with the Police of Kosovo.

Enforcement procedure of the decisions of regular courts

68. As the facts set out above show, based on the decisions of the regular courts, the Applicant was obliged to pay to the private company DPZ Gashi Towing Service the amount of € 392,515.00 on behalf of the contractual damage arising from the Contract, together with legal interest and procedural costs.

69. On an unspecified date, DPZ Gashi Towing Service filed a proposal for enforcement of the decisions of the third group of the regular courts, so that final payments are made under the aforementioned judgments which had already become final and enforceable.

70. On 6 September 2017, the Private Enforcement Agent by Order P. no. 197/17, approved the enforcement proposal of DPZ Gashi Towing Service.

71. On an unspecified date, the Applicant filed an objection against the abovementioned Order of the Private Enforcement Agent.

72. On 28 December 2017, the Basic Court in Peja, by Decision Ep. No. 142/2017 rejected, as ungrounded, the objection filed by the Applicant and upheld the above-mentioned Order of the Private Enforcement Agent.

73. On 10 January 2018, the Applicant filed an appeal against the aforementioned Decision.

74. On 8 January 2019, the Court of Appeals rejected the Applicant's appeal filed against the aforementioned Decision of the Basic Court in Peja and thus confirmed the Order [P. No. 197/17 of 6 September 2017] of the Private Enforcement Agent. The Court of Appeals considered that the Private Enforcement Order could be enforced and its decision reasoned as follows:

"In the present case and under these conditions, in this enforcement case, the court of first instance has correctly determined that there are no legal obstacles to carry out the enforcement, therefore rightly rejected as unfounded the objection of the debtor Municipality of Peja [Applicant], *selected by the creditor within the meaning of Article 398 of Law no. 04/L-077 on Obligational Relationships, for the fulfillment of the payment obligation to him, (which selection was not objectively opposed by this debtor), with which legal position this court agrees too, as the court of the second instance, considering the fact that the appealing allegations of the debtor are unsuccessful in having influence on rendering different decision on this enforcement case.*

In addition to the other allegations, the appealing allegations of the debtor that it cannot be allowed that the amount of compensation be paid in the account of the creditor, who is the lawyer [...] from Peja, does not have weigh because the eventual transfer of financial means in his account is a will of the creditor, which cannot be changed neither by the court nor by the debtor, and it is not understood in what way this form of payment harms the public wealth.

The second instance court is not competent nor authorized by law to assess the legality of any final judgment in the enforcement proceedings, as the debtor [the Applicant] *alleges in the appealing allegations, but it can only decide on the decision on allowing - eventually rejecting the enforcement. [...]".*

Applicant's allegations

75. The Applicant challenges the constitutionality of Judgment E. Rev. No. 20/2017 of the Supreme Court, of 20 November 2017. It alleges that this Judgment violates its right to "*equality before the law*" guaranteed by Article 24 of the Constitution; the right to "*fair and impartial trial*", namely the right to a reasoned court decision, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as well as the right to "*legal remedies*" guaranteed by Article 32 of the Constitution.

76. In light of this, the Applicant presents two types of main allegations. The first group has to do with its allegations that the factual situation has not been completely determined; and the second group has to do with its allegations that the Supreme Court failed to provide a reasoned decision, by failing to respond to some of its arguments presented in the request for revision.

Regarding the allegation of incomplete determination of factual situation

77. The Applicant alleges that "*none of the court instances did completely determined factual situation*" and that this has resulted in a violation of its constitutional rights mentioned above.

78. According to it, the regular courts have never proved the fact that the Contract of 18 September 2009 [the third extension of the Contract] was concluded within the meaning of the Law on Obligational Relationships, because the

parties never signed an annex to the Contract but that there was only an internal decision of the Applicant (Municipality of Peja), which was taken in an unlawful manner and without procurement on the eve of the elections. If the Contract is considered as an extension, the Applicant alleges, the regular courts should have justified the legal basis upon which they considered that it was extended without the legal signature of both parties.

79. Further, the Applicant alleges that it was never proven that DPZ Gashi Towing Service, as a provider of services, has indeed maintained the vehicles as it was contracted, at the contracted place and under contractual terms. In addition, the Applicant alleges that the courts did not prove the fact that the vehicles were already sold by DPZ Gashi Towing Service even though the latter at a hearing had stated how they had sold them.

80. Referring to ECtHR cases, namely *Schenk v. Switzerland* and *Garcia Ruiz v. Spain*, the Applicant states that "*the determination of factual situation is essential to a fair decision*" and "*failure to determine the factual situation will necessarily result in an erroneous court decision*". The fact that the regular courts, according to the Applicant, ignored its observations regarding undetermined factual situation, violated her right guaranteed by Articles 24 and 31 of the Constitution in conjunction with Article 6 of the ECHR.

Regarding the allegation of non-reasoning of the decision by the Supreme Court

81. Referring to previous decisions of the Constitutional Court, namely in Case KI72/12, KI138/15 and KI97/16, and in the ECtHR decision, namely *Pronina v. Romania*, the Applicant alleges that the Supreme Court violated the right to a reasoned decision, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

82. In this regard, the Applicant states that the Supreme Court ignored the procedural objections regarding the determination of factual situation presented in the request for revision and, by ignoring them, violated the right to a reasoned decision.

83. The Applicant further alleges that the specification of the claim by the DPZ Gashi Towing Service [from 663,450.00 EUR to 392,515.00 EUR] was made in contravention of the provisions of the contested procedure and the Supreme Court did not address this claim in the challenged Judgment, despite the fact that it has filed in the request for revision. In the first instance Judgment [Ek. No. 587/2017], the Basic Court in Prishtina found that the claim was specified in the final word; meanwhile, the Court of Appeals [Ae. No. 201/2017] concludes that the claim was specified through the submission of DPZ Gashi Towing Service dated 25 June 2015 and the hearing of 23 March 2017. The Applicant challenged this finding of the Court of Appeals because the specification of the claim was made in another moment and that there was no opportunity to declare about this precision. This appealing allegation has remained unaddressed by the Supreme Court according to the Applicant.

84. The Applicant also alleges that the Supreme Court did not discuss its allegation of the wrong legal basis upon which the DPZ Gashi Towing Service statement claim was approved. According to it, on one hand, the court of first instance used Article 142 of the LOR as a legal basis to approve the statement of claim, despite the fact that this article *"does not speak about the obligation of compensation of contractual or legal damage"*; on the other hand, the court of second instance approved the statement of claim *"on a completely different legal basis, namely under Articles 3.1 and 3.2 of the Contract between the parties, as well as Articles 15 and 17 of the LOR"*. the Applicant further states that the Supreme Court subsequently *"based the approval of the statement of claim on Article 4.4 of the Contract"*, while it was necessary, as the highest instance court, *"to address these contradictions regarding the legal basis for the approval of the statement of claim, in the light of ECtHR case law, namely cases: SC Unziexport S.A. v. Romania para.29 [...] and Zielinski and Pradal and Gonzalez and Others v. France [GC]"*.

85. The Applicant further alleges that the Supreme Court did not address its allegations of a violation of the substantive law, as it did not explain how it came to such interpretation of Article 4.5 of the Contract. According to the Applicant, the legal interpretation of the provisions of the Contract was the main dispute in this case and *"this interpretation was not unique by the judicial instances throughout the proceedings"*, whereas the Supreme Court, by a single fact, finds the fact of the Applicant *"without any elaboration of the factual situation and legal allegations of the parties."*

86. The Applicant also alleges that the Decision of the Basic Court in Prishtina, by which the Judgment [Ek. No. 587/2017 of 15 June 2017] of the Basic Court in Prishtina was not duly served on it and this made it impossible for the right to declare the allegations of the responding party as foreseen in Article 5 of the Law on Contested Procedure.

87. In this regard, the Applicant alleges that the adversarial principle has been violated and its allegation of a procedural violation, the Supreme Court has not addressed at all. Failure to be informed about this decision on time, but only in the enforcement procedure, denied it the right to use remedies effectively, as provided for in Article 32 of the Constitution. Such a fundamental allegation, according to it, should not have remain a flaw that is overcome (not addressed) by the Supreme Court.

88. Finally, the Applicant also alleges that the Supreme Court, by the challenged Judgment, has completely changed its legal position on the same issue as given by Decision Rev. E. No. 35/2016. In the latter, according to the Applicant, the Supreme Court decided that a party cannot be obliged for a contractual obligation if the object of the obligation is impossible, inadmissible, indefinite. Precisely on the ground that the Applicant was unable to sell the vehicles, the Supreme Court considered that *"Article 4.4 of the Contract, which contains this obligation, is null pursuant to Articles 46 and 47 of the LOR"*. The Supreme Court, according to the Applicant, *"does not enter at all the reasoning and addressing the merits of this matter"*.

Applicant's Referral

89. It follows from the Referral that the Applicant requests the Constitutional Court declare as unconstitutional the decision of the Supreme Court E. Rev. No. 20/2017, of 20 November 2017, as well as decisions of the lower judicial instances related to it.

90. In its Referral before the Court, the Applicant refers in particular to the request for interim measure. In this respect, the Applicant requests the Court to approve the interim measure, because the Judgment of the Basic Court in Prishtina [Ek. No. 587/2016 of 15 June 2017] has become a decision which may be executed and that by its execution it may be the case that *"these means can never be returned"* to the Applicant if the Referral to the Constitutional Court results to be successful.

91. Therefore, the Applicant considers that the request for interim measure is in the public interest, because in case of execution these funds will be taken from the budget of the Municipality of Peja and *"if these funds cannot be returned after the eventual execution, then the Municipality of Peja will not be able to carry out projects of public interest"*. According to the Applicant, the risk that the means are not returned is specified with the request of DPZ Gashi Towing Service that *"the funds are paid into the account of his lawyers rather than the bank account of the enterprise, a matter which is currently a part of the dispute in the enforcement procedure with the number P-197/17"*.

Comments submitted by DPZ Gashi Towing Service

92. In the capacity of the interested party, DPZ Gashi Towing Service submitted its comments to the Court, stating that the Applicant's allegations are *"ungrounded"*, *"unsubstantiated"*, *"do not contain any of the grounds defined by the Constitution of the Republic of Kosovo"* and for such reasons the Applicant's Referral is *"inadmissible."*

93. DPZ Gashi Towing Service claimed that the Applicant *"attempts to treat the Constitutional Court in a perfidious way as a fourth instance court, by trying to involve the Court in the procedure of handling and reviewing, namely by dealing with incomplete and erroneous determination of factual situation, and which is inadmissible also by the Law on the Constitutional Court and the LCP"*.

94. Further, as regards the Applicant's allegations of non-reasoning of the decision by the Supreme Court, DPZ Gashi Towing Service states that the Supreme Court was not competent to enter the review of the erroneous and incomplete determination of factual situation and as a result "*it was not obliged to provide justification for these requests, which the respondent [the Applicant] question in her request attempts to address as non-addressing their allegations and not giving the reasoning, which does not stand as an allegation*".

95. Regarding the Applicant's allegations that the courts did not establish whether the vehicles were stored under the terms of the contract and whether the vehicle parts were sold or not, DPZ Gashi Towing Service states that these

allegations are "untrue" and that this "their insinuation will be the subject matter of a special criminal proceeding" that DPZ Gashi Towing Service will open to the Applicant. Further in this regard, the interested party states that even if the allegations of the Applicant were true, the condition of the vehicles was not the subject of the dispute, but the subject of dispute were the rights and obligations of the Contract on provision of services.

96. With respect to the allegation that the parties have never signed an annex contract, where it is seen that the Applicant "*does not deny the existence of the contract*", but that there was only a decision of the Applicant for the extension of the contract and that the decision was unlawful because it was taken without procurement and on the eve of the elections, DPZ Gashi Towing Service states that this is "*an issue which neither the service provider nor the [Constitutional] Court cares about for two reasons: a) The Constitutional Court is not a court of facts or of IV instance; and b) The Service Provider had no influence either in the drafting of the decision to extend the contract nor in the adoption of such decision*".

97. Further, the DPZ Gashi Towing Service states that "*the legal aspect of the decision on the extension of the contract is the matter of the legal office of the Municipality of Peja, which has also drafted the contract and the decision for its extension as a contract type, terms of which were filed by the respondent* [the Applicant] *and who were given for signature to the provider of the services without affecting their content, and in addition this contract and this decision were the subject of review during the 9 year trial and the internal control of the respondent by legal office, procurement office and regular audit*". Finally, according to the allegations of the interested party, even if such a decision was made by the Applicant, the responsibility for an unlawful decision and misleading the service provider and to its detriment falls again in the burden of the Applicant and the competent Prosecutor's Office.

98. As to the allegations that the Court of Appeals did not address the objections and complaints [of 17 July 2017 - the third group of decisions], they do not stand because, according to DPZ Gashi Towing Service, the Court of Appeals by its Judgment [AE. No. 201/17 of 23 August 2017] with 7 pages of reasoning has addressed all appealing allegations and as such this allegation of the Applicant is ungrounded.

99. With regard to the proceedings before the Supreme Court, the interested party, namely DPZ Gashi Towing Service, states that "*the Supreme Court, within the meaning of Article 214/2 of the LCP, was not competent to deal with incomplete and erroneous determination of factual situation, which the respondent tries to qualify as a lack the reasoning*". The Supreme Court did not deal with those allegations because they are not substantial-"*although the Supreme Court has given the clarification that such remarks are not decisive and that it was not obliged to give further reasons*". It further states that the factual situation was determined 3 times in succession and the right of DPZ Gashi Towing Service "*for compensation of the damage caused*" was confirmed by the Applicant.

Additional comments submitted by DPZ Gashi Towing Service

100. On 25 February 2019, by mail service, DPZ Gashi Towing Service sent some additional comments which were submitted and received in the Court on 27 February 2019. In their comments, it was emphasized that "*The request of the debtor Municipality of Peja should be rejected as inadmissible not only for the reasons mentioned so far but also based on the case law of this Court, in which the Court has repeatedly and consistently reiterated that the interpretation of law, its application in concrete matters and the assessment of facts and circumstances are issues which divide the jurisdiction of the regular courts from constitutional jurisdiction*".

101. DPZ Gashi Towing Service further emphasized that "*this Court on the court decisions is limited only to the protection of the constitutional rights of the individual, while the problems of interpretation and enforcement of law for the selection of concrete cases do not constitute constitutional jurisdiction (see Resolution KI47- 48/15)*". Citing the case *Femetrebi v. Georgia* and the case of this Court in KI170/11, DPZ Gashi Towing Service stated that: "*The Court may assess whether the proceedings before the regular courts were fair in their entirety, were in any way unfair or arbitrary manner, and based on the principle of subsidiarity, the Court cannot take the role of the IVth instance court and does not adjudicate on the final outcome of the court decisions*".

102. Finally, DPZ Gashi Towing Service stated that "*The debtor* [the Applicant] *must have it clear that he does not have any more right though it is a legal entity - local government than another taxpayer enterprise of this state, and on the privilege of being a local authority requires more rights than the creditor who for 10 years in succession and until today are denying his legal rights by not enforcing the decision of the Supreme Court by the debtor Peja Municipality [...] in the present case to the creditor, and at all costs attempts only due to the fact that it is a local power to receive a favorable decision by the Constitutional Court and even in all instances of the regular courts could not substantiate its claims*".

Other additional comments submitted by DPZ Gashi Towing Service after the Court's Decision on interim measure

103. On 8 March 2019, after the Court's decision on interim measure, DPZ Gashi Towing Service submitted some additional comments.

104. Initially, DPZ Gashi Towing Service claimed to have been notified of the Decision on Interim Measure through the official Court website and that the Decision was not sent directly to them.

105. Regarding the Decision on Interim Measure, DPZ Gashi Towing Service stated that "*We as an interested party in this case, as a party to the proceeding in the civil dispute so far that has lasted more than 10 years, I feel very concerned about why the Constitutional Court only takes into account the public interest, while the interests of its citizens and taxpayers of this State are not appreciated by violating the equality of parties to the proceedings*".

106. DPZ Gashi Towing Service further stated that "*if for these 10 years, 3 times in the Basic Court, 2 times in the Court of Appeals and 2 times in the Supreme Court, as well as in the Enforcement Procedure 2 times, not all allegations and claims of the parties to the proceedings were not reviewed, in which the Municipality of Peja participated actively in every session, was represented by the lawyer and used all regular and extraordinary legal remedies, then the Municipality of Peja should know that the Constitutional Court cannot provide protection to the requests of the Municipality only for the fact that it is a municipal power, and should not allow the Constitutional Court to be transformed into an exit window because that State has a Constitution which protects citizens and not just the Municipality [...]*".

107. According to the DPZ Gashi Towing Service, all actions taken by the Applicant are being carried out with the purpose of delaying the proceedings, damaging them, and "*introducing the Constitutional Court in a game in a perfidious manner to turn it into the Court of IV instance, for which unlawful, ungrounded claims [...]*".

108. DPZ Gashi Towing Service also asserted that the unsubstantiated and assumed allegations that in the event of execution, the funds could not be returned immediately are presumptions and allegations prejudiced for which "*the Court should not act based on assumptions, however, regarding the interim measure we have nothing against, since we have waited for 10 years, we will wait until 30.04.2019, convinced that the Constitutional Court will render a decision which will reject the referral of the Municipality of Peja as inadmissible*".

Admissibility of the Referral

109. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and the Rules of Procedure.

110. 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.*

111. The Court also refer to paragraph 4 of Article 21 [General Principles] of the Constitution, which establish: "*Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.*"

112. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms applicable both to individuals and to legal persons (case of the Constitutional Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14; see also the cases of the Constitutional Court where the Applicants were the municipalities, for example, Case KI48/14 and KI49/14, *Applicant Municipality of Vushtrri*, Resolution on Inadmissibility of 15 March 2016; case KI149/16, Applicant of the *Municipality of Klina*, Resolution on Inadmissibility of 20 October 2017). In the present case, the Municipality of Peja, as the Applicant, aims at protecting its constitutional interests as a legal person and as a party that has been sued in a civil dispute by a private company with which it entered into a contractual relationship.

113. Therefore, the Court notes that the Applicant fulfilled the requirements established in Article 113.7 of the Constitution, as it is an authorized party that challenges the act of a public authority, that is, Judgment [Rev. No. 20/2017] of the Supreme Court, of 20 November 2017, and exhausted all legal remedies provided by law.

114. The Court further examines whether the Applicant fulfilled the admissibility requirements as further specified in the Law and the Rules of Procedure. In that 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. [...]"

115. As regards the fulfillment of these legal requirements, the Court notes that the Applicant has clearly specified the rights guaranteed by the Constitution and the ECHR, which were allegedly violated, as well as a concrete act of a public authority which has allegedly committed the alleged violations, in accordance with Article 48 of the Law. The Court also notes that the Applicant submitted the Referral within a period of four (4) months stipulated in Article 49 of the Law.

116. 1Having considered the Applicant's allegations, as well as the comments submitted by DPZ Gashi Towing Services, as interested party in this case, the Court considers that the Referral raises issues of a constitutional nature, the

deciding of which requires the review of its merits. Therefore, the Referral cannot be considered as manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure and there is no other ground provided for in Rule 39 of the Rules of Procedure on which that referral could be declared as inadmissible.

117. Therefore, the Court finds that the Referral KI31/18 should be declared admissible for review of the merits.

Merits of the Referral

118. The Court recalls that the Applicant alleges that the Supreme Court, by Judgment E. Rev. No. 20/2017, of 20 November 2017, violated its rights guaranteed by the Constitution and the ECHR, namely the rights guaranteed by Article 24 [Equality Before the Law] of the Constitution, Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR, as well as the right guaranteed by Article 32 [Right to Legal Remedies] of the Constitution.

119. In this regard, the Court notes that in its Referral, the Applicant presents two main types of allegations.

120. The first group of the Applicant's allegations relates to its claims that the factual situation was not completely determined; meanwhile, the second group of allegations relates to the fact that the Supreme Court failed to provide a reasoned decision by not responding to some of its arguments presented in the request for revision.

121. In this regard, the Court will first respond the Applicant's allegations as to the right to "*a reasoned court decision*". Secondly, the Court will respond to the Applicant's allegations as to the "*erroneous determination of factual situation*".

Regarding the allegations of a "reasoned court decision"

122. The Court recalls that the Applicant, in essence, claims a violation of the rights 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, as regards the right to a reasoned decision.

123. This allegation of the Applicant will be dealt with by the Court, referring to: (i) specific guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; and (ii) the general principles established by the case law of the ECtHR and the Constitutional Court. Subsequently, the aforementioned principles and relevant case law will be dealt with by the Court in the circumstances of the specific case so as to establish whether or not there has been violation of these constitutional guarantees.

124. 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".

125. In addition, the Court refers to Article 6.1 (Right to a fair trial) of the ECHR, which stipulates:

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 [...].

126. The Court recalls that the right to a reasoned court decision, as guaranteed by Article 6 of the ECHR, has been interpreted by the ECtHR through its case law, in accordance with which the Court, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is required to interpret the human rights and freedoms guaranteed by the Constitution. In accordance with this, as regards the interpretation of the allegations of violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECHR.

127. Based on the above mentioned ECHR case law, the Constitutional Court has also rendered a number of decisions finding a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to failure, in certain cases, of the courts in the Republic of Kosovo to meet the requirements and standards required for a reasoned court decision (See some of the Judgments of the Constitutional Court regarding the "reasoning of court decisions", KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012; KI 135/14, *IKK Classic* [No. 1], cited above, KI97/16, *IKK Classic* [No. 2], cited above, and references to those judgments). Therefore, in reviewing the current case, the Court will refer to its cases that are relevant in this regard.

(i) General principles on the right to a reasoned decision as developed by the case law of the ECtHR and the case law of the Constitutional Court

128. The Court recalls that the right to a fair hearing includes the right to a reasoned decision. The ECtHR notes that, according to its established case-law, which reflects a principle linked to the proper administration of justice, the decisions of the courts and tribunals should adequately state the reasons on which they are based (See ECtHR cases, *Tatishvili v. Russia*, no. 1509/02, Judgment of 22 February 2007, paragraph 58; *Hiro Balani v. Spain*, application no. 18064/91, Judgment of 9 December 1994, paragraph 27;

Higgins and Others v. France, ECtHR, application no. 134/1996/753/952, Judgment of 19 February 1998, paragraph 42; see also the cases of the Constitutional Court, *IKK Classic* [no. 1] and IKK Classic [no. 2] quoted above and the references to those two Judgments).

129. In addition, the ECtHR has also held that although, the authorities enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (1) of the ECHR, their courts must "*indicate with sufficient clarity the grounds on which they based their decisions*". (See *Hadjianastassiou v. Greece*, ECtHR Judgment of 16 December 1992, paragraph 33).

130. According to the ECtHR case law and that of the Constitutional Court, a basic function of a reasoned decision is to demonstrate to the parties that they have been heard. In addition, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice. (See *mutatis mutandis,* ECtHR cases, *Hirvisaari v. Finland*, no. 49684/99, paragraph 30, Judgment of 27 September 2001,; *Tatishvili v. Russia*, cited above, paragraph 58; *Suominen v. Finland*, application no. 37801/97, Judgment of 1 July 2003, paragraph 37; see also the cases of the Constitutional Court, IKK Classic [no. 1] and IKK Classic [no. 2] cited above and the references in those two Judgments).

131. 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: ECtHR cases, *Garcia Ruiz v. Spain*, [Grand Chambre] application no. 30544/96, Judgment of 21 January 1999. paragraph 29; *Hiro Balani v. Spain*, cited above, paragraph 27; *Higgins and Others v. France,* cited above, paragraph 42).

132. For example, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision. (See: ECtHR cases, *García Ruiz v. Spain,* cited above, paragraph 26; *Helle v. Finland,* application no. 20772/92, Judgment of 19 December 1997, Reports 1997-VIII, paragraphs 59 and 60). A lower court or authority in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal. [See: ECtHR case *Hirvisaari v. Finland*, application no. 49684/99, Judgment of 27 September 2001, paragraph 30); In cases where a court of third instance or appeal confirms the decisions made by lower courts - its obligation to reasons decision-making differs from cases where a court changes the decision of the lower courts.

133. However, the ECtHR has also noted that, even though the courts have a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, a domestic court is obliged to justify its activities by giving reasons for its decisions. (See: ECtHR case, *Suominen v. Finland*, application no. 37801/97, Judgment of 1 July 2003, paragraph 36).

134. Therefore, while it is not necessary for the court to deal with every point raised in argument (see also *Van de Hurk v Netherlands, cited above,* paragraph 61), the Applicants' main arguments and allegations must be addressed. (See: ECtHR case *Buzescu v. Romania*, cited above, paragraph 63; *Pronina v Ukraine*, application no. 63566/00, Judgment of 18 July 2006, paragraph 25).

135. Finally, the reasoning of the decision must state the relationship between the findings on the merits and considerations on the proposed evidence on one hand, and the legal conclusions of the court, on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them. (See cases of the Constitutional Court, No. KI72/12, *Veton Berisha and Ilfete Haziri*, cited above, paragraph 61; KI 135/14, *IKK Classic* [No. 1], cited above, para. 61; *IKK Classic* [No. 2], cited above).

(ii) The application of the principles mentioned above in the present case

136. In the present case, the Applicant, referring to earlier decisions of the Constitutional Court, namely in case KI72/12, KI138/15 and KI97/16, and in the ECtHR Decision *Pronina v. Romania* in a summarized way alleges that: the Supreme Court ignored the procedural objections regarding the determination of factual situation presented in the request for revision; the specification of the claim by the DPZ Gashi Towing Service was made in contradiction with the provisions of the contested procedure and the Supreme Court did not address this allegation; the Supreme Court has not dealt with its allegation of the erroneous legal basis upon which the DPG Gashi Towing Service's statement of claim was approved; the Supreme Court as a higher court should have "*addressed these contradictions regarding the legal basis for the approval of the statement of claim, in the light of the ECHR case law, namely the cases: S.C. Unziexport S.A. v. Romania para. 29* [...] and *Zielinski and Pradal and Gonzalez and Others v. France [GC],* the Supreme Court did not address the Applicant's allegations of a violation of the substantive law as it does not explain how it came to the interpretation of Article 4.5 of the Contract; the Supreme Court found facts "*without elaborating the factual situation and legal allegations of the parties*".

137. In this regard, the Court recalls that, in its request for revision, the Applicant had submitted the following summarized of allegations:

(i) The Judgment of the second and the first instance did not take into account the legal position of the Supreme Court presented in Judgment Rev. E. No. 35/2016 and did not correct the flaws in the retrial procedure;
(ii) The first and second instance courts have not clarified on what legal basis their judgments have been based, as it is not clear if the debt owed should be paid on behalf of the "*contractual debt or compensation of the damage*" which was also a remark of the Supreme Court;

(iii) The contract did not force DPZ Gashi Towing Service to maintain the vehicles over the 90-day deadline, so it is illogical why the respondents were obliged to indemnify DPZ Gashi Towing Service for maintaining the vehicles for the time after the expiration of the 90-day deadline;
(iv) The Court of Appeals goes beyond each interpretation of the first instance and decides positively on the request of the DPZ Gashi Towing Service on a completely different legal basis, without a hearing and without determining the factual situation;
(v) The Court of Appeals considers that after the abrogation of Article 3.6 of the Contract, the other provisions of the Contract remained in force in accordance with Article 103.2 of the LOR and that DPZ Gashi Towing Service should be compensated in accordance with Articles 3.1 and 3.2 of the Contract;
(vi) The Court of Appeals interprets facts which have not been established during the first instance proceedings and draws parallels between this case and other cases which it considers similar, whereas concrete evidence is missing;
(vii) The Court of Appeals as well as the first instance court does not make the interrelation of the expertise with the indemnity granted, rendering the judgment even more meaningless; and
(viii) The first and second instance courts did not enter at all the Applicant's disputes concerning the extension of the contract and there is no contracted obligation, as Article 4.5 of the Contract provides that if the respondents do not organize the auction, then the auction is organized by DPZ Gashi Towing Service.

138. The Court initially recalls that the Supreme Court reasoned its decision as to the legality of the Contract and provided its final opinion based on law, as to what articles are applicable and on the basis of which the Applicant is obliged to pay the indemnity granted to DPZ Gashi Towing Service. In this regard, the Court recalls the reasoning of the Supreme Court as to the Contract related to the specific requirements of the revision regarding the applicability of certain articles of the Contract:

> *"According to Article 2 of this contract, the service provider, the herein claimant* [DPZ Gashi Towing Service], *is obliged to transport the vehicles to its parking lot, and store them in a regular manner that would not change the technical conditions of the vehicle; in this contractual provision were foreseen also other obligations of the provider of services.*
>
> *Article 3 of this contract stipulates the rights and remuneration for the work performed by the claimant in the favour of the respondents, where under item 1 of this article it is foreseen that the provider of the services for every vehicle transported - towed in the urban area or in the city area will be compensated in the amount of € 25, while for the vehicles outside the urban area, the payment shall consist of 40 Euros.*
>
> *Article 4 of this contract stipulates the rights and obligations of the authority ordering the services, where no obligations are prescribed for the second respondent* [Police of Kosovo].

This Contract was concluded for a term of one year, which was extended for three more months, but the vehicles transported to the claimant's parking lot have further remained there and the claimant has not received any compensation in that respect. [...]"

139. Regarding this aspect, the Court also notes that the Supreme Court had responded to the Applicant's allegations as to the erroneous determination of the factual situation by reasoning its decision as follows:

"On the basis of the case file it results that the claimant and respondent [DPZ Gashi Towing Service] *on 15.9.2005 in Peja had concluded a contract on the performance of services, subject of which was performance of services by the claimant* [DPZ Gashi Towing Service] *as a company for towing vehicles and their transport to the certain location, respectively to the claimants base parking lot, as per the request of the respondents.*

In a such a factual situation, the Supreme Court of Kosovo approved as grounded the legal position of the first and second instance court related to the obligation of the first respondent for the payment of the disputable debt, but did not approve the joint obligation of the second respondent for the payment of this debt, since in relation to the first respondent [the Applicant], *these judgments do not contain essential violations of the provisions of the contested procedure which are called upon by the first respondent in its revision, neither does it contain other procedural violations for which pursuant to Article 215, the court takes care ex officio.*

140. Regarding the allegations of violation of the provisions of the contested procedure, the Court notes that the Supreme Court considered that: *"In the revision of the first respondent* [the Applicant], *it is only generally stated that the judgments of the aforementioned courts contain essential violations of the provisions of the contested procedure, without specifying what provisions is the respondent referring to, therefore, this Court ascertains that the statements in the revision related to essential violations of the procedural provisions are ungrounded.*

141. As to the Applicant's allegations of erroneous application of the substantive law, the Court notes that, in this respect, the Supreme Court reasoned its decision as it deemed necessary in the light of the circumstances of the case and in the correct determination of the factual situation. In this regard, the Court recalls the specific reasoning of the Supreme Court:

The subject under review at the Supreme Court were the revision claims that based on the abovementioned judgments, it does not follow what is the legal basis for the approval of the statement of claim. These allegations of the revision were rejected as ungrounded, as both courts have provided grounds on the legal basis of the statement of claim, which are admissible also for the Court of revision. [...] both courts have correctly assessed that there is an obligation to pay this determined amount of debt, because the

claimant in the capacity of the provider of services has proved with evidence that it has carried out the ordered services, which is not disputed even by the respondents. Also the value/amount of the compensation for these services is not disputed.

Furthermore, due to the fact that, pursuant to Article 4.4 of the aforementioned contract, the first respondent was obliged to perform the technical works, such as the announcement of the public auction for the sale of vehicles which are located in the claimant's parking lot, based precisely on this contractual provision results the obligation of the first respondent to pay the disputable debt, since the first respondent did not fulfill its basic contractual obligation, had it fulfilled its obligation the claimant would have acquired its compensation relating to several years long parking of vehicles in its parking lot. Solely, the first respondent, Municipality of Peja, has been responsible to announce the auction for the direct sale of vehicles, because the announcement of the auction for the sale of vehicles was their preliminary condition. For these reasons, also the Supreme Court of Kosovo considers that the obligation of the first respondent related to the payment of the debt is undisputable.

142. The Court also notes that the Supreme Court did not leave without addressing the other allegations of the Applicant, stating the following:

> *The Supreme Court finds that the other allegations of the first respondent* [the Applicant] *are ungrounded and as such they have no impact on this case to be decided in a different way in relation to the first respondent. Moreover, those allegations represent an unreasonable tendency of the first respondent for avoiding the liability for the payment of the debt to the claimant, as Article 4.4 of the contested contract, quite clearly specifies the obligation of the first respondent to carry out technical works related to the sale of vehicles, such as the announcement of the public auction for the sale of vehicles. Whereas, pursuant to Article 4.5 of the present contract, the claimant would have been entitled to directly sell these cars without a public auction or sell them for spare parts purposes, only if these vehicles could not be sold in this public auction [...] In view of aforementioned reasons and pursuant to Article 222 and 224.1 of the LCP, it was decided as in the enacting clause of this judgment".*

143. In this respect, the Court recalls that in rejecting an appeal, or as in the present case, the rejection of the request for revision as an extraordinary legal remedy, the Supreme Court may, in principle, simply approve the grounds for issuing a decision of the lower court, in this case the Court of Appeals (See ECHR case, *García Ruiz v. Spain*, cited above, paragraph 26; *Helle v. Finland*, application No. 20772/92, Judgment of 19 December 1997, Reports 1997-VIII, paragraphs 59-60).

144. Similarly, and in this same line of reasoning, the Court also recalls that the cases where a court of third instance or appeal upholds the decisions taken by the lower courts - its obligation to reason the decision-making differs from the cases when a court changes the decision-making of the lower courts. In the present case, the Supreme Court has not changed the decisions of the lower

courts as to the legality of the Contract or the fact that the contractual damage must be compensated to the interested party DPZ Gashi Towing Service. In this case, the Supreme Court has upheld the legality of the two lower instance decisions, which according to the Supreme Court, had correctly determined the factual situation and had not rendered their decisions with procedural violation or with flaws in the application of the substantive law. The Supreme Court, by the challenged decision, had only made a correction and as to the fact that the Applicant should pay alone the contractual damage and not jointly with the Police of Kosovo.

145. Thus, the Court considers essential the fact that a court that substantially changes a decision- has an obligation to give strong, convincing and detailed reasons as to why it considers that the decision of the lower courts was not the right one. On the other hand, it is also self-evident that a third instance court, such as the Supreme Court in the present case, which has already upheld the decisions of the lower instance courts which have sufficiently reasoned their decisions - is obliged to respond to key allegations of the appellants, but it is not obliged to answer any allegation which the Applicant has considered relevant and has filed in its request for revision. It would be illogical, inadequate and unnecessary burden on the regular judiciary to expect from a court, which only confirms the decisions of a lower court, to answer any argument raised repeatedly.

146. As the case law of the ECtHR and that of the Court determine, the courts have a certain margin of appreciation in the choice of arguments in a particular case and in the receipt of evidence in support of the submissions of the parties. The relevant authorities, in this case, the Supreme Court - as the authority which decision is being challenged for the insufficiency of the court reasoning - was obliged to justify its decision by giving the reasons for that decision (See case of ECtHR, *Suominen v. Finland* , application No. 37007/97, Judgment of 1 July 2003, paragraph 36). In the present case, this Court considers that, despite the fact that the Supreme Court as a third instance court, which in principle could and only has the right to confirms the decisions of the lower courts with which it agrees - it has gone further and responded to the allegations raised in the request for revision. The main test that the Court does in cases such as this one is to ascertain whether the Supreme Court has responded to the Applicant's key allegations. In this case, all the criteria of this test are met, since the Supreme Court has responded to the Applicant's key allegations - as explained above.

147. Thus, the Court considers that, despite the fact that the Supreme Court may not have responded to every point raised by the Applicant in its request for revision (see, *mutatis mutandis, Van de Hurk v. Netherlands*, cited above, paragraph 61), it addressed the Applicant's essential arguments (see, *mutatis mutandis*, the case of ECtHR, *Buzescu v. Romania*, cited above, paragraph 63, and *Pronina v. Ukraine*, Application No. 63566/00, Judgment of 18 July 2006, paragraph 25), and thus the obligation to provide a reasoned court decision, pursuant to the requirements of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, have been met.

148. In this regard, as noted above, the Supreme Court explained the factual situation and the fact that it has been correctly determined by the Court of Appeals and the Basic Court, the Supreme Court, with an exception as to who is the main debtor in the case, fully determined the fact that in the present case the procedural and substantive rights were respected and the decisions of the lower courts were based on law and a valid contract, based on which the payment of the amount determined by the Basic Court in Prishtina should also be paid.

149. In conclusion, the Court finds that, in the present case, the Applicant enjoyed the constitutional guarantees for a reasoned court decision and, consequently, the Judgment E. Rev. No. 20/2017 of the Supreme Court of 20 November 2017 does not violate its rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

As to the allegations of "erroneous determination of factual situation"

150. The Court recalls that the Applicant also alleges violation of Articles 24 [Equality Before the Law] and 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, as, according to it, the factual situation was not correctly determined by any of the regular courts and this was subsequently not corrected by the Supreme Court.

151. In this regard, the Court notes that the Applicant, in a summarized manner, alleges that "*none of the court instances has made complete determination of factual situation*" and that the regular courts have never proved the fact that the extension of the contract was concluded within the meaning of the Law on Obligational Relationships, the fact that DPZ Gashi Towing Service, as a provider of services, has really maintained vehicles as if it were contracted, has been never been established.

152. The Court notes that the Applicant based its allegations by referring to the ECtHR cases: *Schenk v. Switzerland* and *Garcia Ruiz v. Spain*, which state that "*the determination of factual situation is essential for a fair decision*" and "*non-determination of factual situation will necessarily result in an erroneous court decision*".

153. With regard to these two cited cases, the Court also agrees that the guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and, in their interpretation, the case law of the ECHR and that of the Court show that that the finding of the factual situation is essential for a fair decision and failure to complete its determination results in an erroneous judicial decision. However, in the present case, as will be explained further, it is not a case where sufficient evidence has been provided that the courts have arbitrarily rendered their decisions and have determined the factual situation inconsistent of the respective constitutional guarantees for a fair trial.

154. The Court recalls that, as regards the factual situation, initially the Basic Court in Prishtina [see paragraphs XX of this Judgment]; and subsequently the Court

of Appeals [see paragraphs XX of this Judgment] - had clearly and extensively stated their views as to the factual situation in the present case. Finally, the Supreme Court has paid particular attention to the aspects of the correct and accurate determination of the factual situation - as it has considered it to be the most correct way to apply the substantive and procedural law applicable in the circumstances of the present case.

155. The Court notes that the Supreme Court in its decision in the end states that it agrees with the way the two previous courts have determined the factual situation - apart from the aspect of which the two respondents should be responsible for paying the debt adjudicated by the Basic Court in Prishtina and upheld by the Court of Appeals. In this regard, after analyzing the manner in which the factual situation was determined and upheld, the Supreme Court stated that: *"In a such a factual situation, the Supreme Court of Kosovo approved as grounded the legal position of the first and second instance court related to the obligation of the first respondent for the payment of the disputable debt, but did not approve the joint obligation of the second respondent for the payment of this debt, since in relation to the first respondent* [the Applicant], *these judgments do not contain essential violations of the provisions of the contested procedure which are called upon by the first respondent in its revision, neither does it contain other procedural violations for which pursuant to Article 215, the court takes care ex officio".*

156. In this regard, the Court refers to its general view that, in principle, the correct and complete determination of factual situation falls under the jurisdiction of the regular courts. It is not within the jurisdiction of the Constitutional Court to interpret the determination of factual situation by regular courts - unless it is established that the regular courts have made findings and determinations of factual situation in violation of the Constitution and the constitutional principles it protects.

157. Therefore, the Court reiterates that its already established position that is not the task of this Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). The Constitutional Court may not itself assess the facts which have led the regular courts to adopt one decision rather than another, or to reject the referral on one basis or 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. It is the role of regular courts is to interpret and apply the relevant rules of procedural and substantive law (see: the ECtHR case *Perlala v. Greece*, No. 17721/04, of 22 may 2007, paragraph 25; see also the case of the Constitutional Court, for illustration, KI72/18, Applicant *Shpejtim Zymeraj*, Resolution on Inadmissibility of 22 November 2018, paragraph 40).

158. The role of the Court in this case is not to decide on whether the Supreme Court has correctly determined the facts and applied the law fairly when it rejected the Applicant's request for revision as ungrounded and found that the Applicant was responsible for reimbursing the DPZ Gashi Towing Service but to examine whether the proceedings before the Supreme Court, viewed in their

entirety, were fair (see, *mutatis mutandis*, the ECtHR case, *Donadze v. Georgia*, No. 74644/01, of 7 March 2006, paragraphs 30-31).

159. In the circumstance of the present case, the Court considers that the Applicant has not sufficiently substantiated its allegations that during the court proceedings it had not the benefit of the conduct of the proceedings based on adversarial principle; that it was not able to adduce the arguments and evidence it considered relevant to its case at the various stages of those proceedings; he it was not given the opportunity to challenge effectively the arguments and evidence presented by the responding party; that the courts have not heard and considered all its allegations, and which, viewed objectively, were relevant for the resolution of its case, and that the factual and legal reasons against the challenged decisions were examined in detail by the Basic Court in Prishtina, the Court of Appeals and the Supreme Court. Therefore, the Court considers that the proceedings, viewed in entirety, were fair (See the ECHR case *Khan v. the United Kingdom* no. 35394/97, Decision of 4 October 2000).

160. The Court further considers that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, and upheld subsequently by the Supreme Court –as the highest court for implementation of legality, cannot of itself raise an arguable claim for the violation of the right to fair and impartial trial or the right to equality before the law (See, *mutatis mutandis*, ECtHR case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).

161. In conclusion, the Court finds that, in the present case, the Applicant enjoyed the constitutional guarantees for determination of factual situation by the regular courts and, consequently, Judgment [E. Rev. No. 20/2017] of the Supreme Court of 20 November 2017 does not violate its rights guaranteed by Articles 24 and 31 of the Constitution in conjunction with Article 6 of the ECHR.

Request for interim measure

162. The Applicant, in its initial Referral submitted to the Court, requested the latter to impose an interim measure so as to prevent the execution of Judgment Ek. No. 587/2017 of the Basic Court in Prishtina, Department for Commercial Matters, of 15 June 2017, and the judgments of higher instances related thereto.

163. The reasons presented by the Applicant for the approval of the interim measure; the counter-arguments submitted by DPZ Gashi Towing Service; and the reasoning of the Court for the approval of that measure is reflected in the Decision on Interim Measure of this Court (See Case KI31/18, Decision on Interim Measure).

164. Based on the foregoing, the Court had decided to approve the Applicant's request for interim measure *"without prejudice to any further decision it will*

render regarding the merits of the referral". The interim measure was approved until 30 April 2019.

165. Given that on XX April 2019, the Court decided on the merits of the Referral and found that in the present case there has been no violation of Articles 24, 31 and 32 of the Constitution, in conjunction with Article 6 of the ECHR, the Court finds that the further extension of the interim measure is unnecessary.

166. Therefore, the Court finds that the interim measure imposed on 27 February 2019 [published on 4 March 2019] is no longer necessary because the constitutionality of the challenged Judgment [E. Rev. No. 20/2017, 20 November 2017] of the Supreme Court and of all other related decisions has been established.

Conclusion

167. The Court concluded that the Applicant enjoyed the constitutional guarantees for a reasoned court decision, and, consequently, Judgment E. Rev. No. 20/2017 of the Supreme Court, of 20 November 2017, does not violate its rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

168. The Court found that the Applicant enjoyed the constitutional guarantees regarding the determination of factual situation by the regular courts and, consequently, Judgment E. Rev. No. 20/2017 of the Supreme Court of 20 November 2017 does not violate its rights guaranteed by Articles 24 and 31 of the Constitution in conjunction with Article 6 of the ECHR.

169. The Court found that, given that the constitutionality of Judgment E. Rev. No. 20/2017 of the Supreme Court of 20 November 2017 has been established, the interim measure imposed by the Constitutional Court is repealed as unnecessary.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113 (7) and 116 (1) of the Constitution, Articles 20.2, 47 and 48 of the Law and Rules 59 (a), 66 (1) (5) dhe 76 (3) of the Rules of Procedure, on 12 April 2019, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that Judgment E. Rev. No. 20/2017 of 20 November 2017, is in compliance with Articles 24, 31 and 32 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the European Convention on Human Rights;

III. TO REPEAL the interim measure imposed by the Constitutional Court of the Republic of Kosovo on 27 February 2019;

IV. TO NOTIFY this Decision to the Parties;

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

VI. TO DECLARE that this Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Bekim Sejdiu Arta Rama-Hajrizi

[This translation is unofficial and serves for informational purposes only]