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

BULLETIN OF CASE LAW

2018

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OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

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Foreword

I have the special honor and pleasure to write, in the capacity of the President of the Court, this foreword for the 8th Bulletin of the Case Law of the Constitutional Court. The Bulletin has become a useful reference and frequently cited from those who work in the field of constitutional law and fundamental human rights and freedoms. This time we have been keen to show some of the main results of our work during 2018.

The present Bulletin edition contains a number of more special and important cases, including referrals filed by the Assembly regarding exercising of the function of the vice president of the Assembly, raising the salaries of senior state functionaries, constitutional review of the Law on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro, and the referral filed by the President of the Republic for interpretation of Article 139 of the Constitution regarding the appointment of members of the Central Election Commission.

During this year, the Court has also rendered other important decisions related to individual referrals wherein the issues of the right to fair and impartial trial, the right to interpretation and application of law in accordance with the fundamental human rights: the right to reasoned decision, the right to enforce final court decisions *res judicata* and the right of access to justice.

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

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

Finally, I would like to thank and express my special gratitude to the entire staff of the Court, whose work and support made the publication of the present Bulletin of Case Law of the Constitutional Court possible.

Arta Rama-Hajrizi

President of the Constitutional Court

KI150/16, Applicant, Mark Frrok Gjokaj, Constitutional review of Decision CLM. No. 11/2016 of the Supreme Court of the Republic of Kosovo, of 13 September 2016

KI150/16, Judgment of 19 December 2018, published on 31.12.2018

Keywords*: Individual referral, right to fair and impartial trial, res judicata, admissible referral, non-violation of constitutional rights*

On 13 September 2016, the Supreme Court of Kosovo, by Decision [CLM. No. 11/2016], rejected as ungrounded the request for protection of legality of the State Prosecutor against the Decision [AC. No. 1579/015] of 4 April 2016 of the Court of Appeals of Kosovo, which considered as completed the enforcement proceeding, due to absolute statutory limitation, and all the actions taken in this enforcement case were repealed.
The Applicant, in his Referral, alleged that Decision [AC. No. 1579/2015] of 4 April 2016 of the Court of Appeals was rendered in violation of his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution.
In essence, the Applicant alleges that the Court of Appeals exceeded the legal powers established in Article 52 of the Law on Enforcement Procedure, modifying the Decision of the Basic Court in Gjakova [PPP. No. 50/2015] of 2 April 2015, considering the enforcement procedure as completed and annulling all preliminary actions regarding Decision [C. No. 270/96], of 25 December 1996, of the Municipal Court in Gjakova, which granted the interim measure.
The Court considered that the course of the present case involved extraordinary circumstances, including final decisions and contradictory to each other, of the same court in the same enforcement case. Accordingly, in the circumstances of the present case, the annulment of all the preliminary actions taken in the enforcement case, including the previous decisions *res judicata*, is in function of "*correcting judicial errors and errors of justice*".
The deviation from their observance in the circumstances of the present case is justified and is necessary as a result of "the *circumstances of a substantive and convincing character*" as established by the ECtHR case law.
The Court found that the Applicant's Referral was admissible and, having regard to the specific characteristics of the case, the allegations raised by the Applicant and the facts presented by him, the Court, based also on the standards set out in its case law and in the case law of the ECtHR, does not find that the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated.

JUDGMENT

in

Case no. KI150/16

Applicant

Mark Frrok Gjokaj

Constitutional review of Decision CLM. No. 11/2016 of the Supreme Court of the Republic of Kosovo of 13 September 2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

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

Challenged decision

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

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

Subject matter

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

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

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

Proceedings before the Court

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

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

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

10. On 16 January 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Bekim Sejdiu.

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

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

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

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

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

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

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

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

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

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

21. On the same date, the Court voted by majority of votes, that the Referral is admissible, and that the challenged decisions, the Decision [CLM. No. 11/2016] of 13 September 2016 of the Supreme Court in conjunction with the Decision [AC. No. 1579/2015] of 4 April 2016 of the Court of Appeals are in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

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

Decisions on assigning and granting the enforcement of interim measure

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

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

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

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

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

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

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

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

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

30. On 31 May 2011, the Municipal Court in Gjakova, by the Decision [E. No. 419/97] approved the objection of the debtor M.R., and suspended the enforcement procedure assigned by the Decision [E. No. 419/97] of 3 February 1997 of the Municipal Court in Gjakova. The Municipal Court in Gjakova, *inter alia,* reasoned that it was impossible to obtain the source file and considering that from the time of the Decision 15 (fifteen) years have passed and that the enforcement of the Decision has never been realized, despite the fact that enforcement in the present case was to be considered as an urgent matter, the enforcement of the Decision on the interim measure "*has lost meaning*". Furthermore, according to the respective Decision, the

Court could not prove that the decision on the imposition of interim measure was final and enforceable.

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

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

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

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

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

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

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

36. On 11 December 2013, the debtor, namely M.R., filed an objection with the Basic Court in Gjakova against the aforementioned Decision of the Basic Court. The debtor referred to the Decision [Ac. No. 4864/2012]

of 2 May 2013, which confirmed the suspension of the enforcement procedure in the circumstances of the case.

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

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

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

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

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

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

Repeal of the Decision on interim measure

43. On 30 March 2015, the debtor M.R. filed a request with the Basic Court in Gjakova, seeking the suspension of the enforcement procedure with the private enforcement agent and to quash all procedural actions taken in the enforcement case. Among other things, the debtor M.R. referred again to the Decision [Ac. No. 4864/2012] of 2 May 2013, which confirmed the suspension of the enforcement procedure. The creditors, namely, the Applicants did not file an answer to this appeal.

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

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

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

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

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

Applicant's allegations

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

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

51. The Applicant further alleges that the Decision [AC. No. 1579/2015] of the Court of Appeals of 4 April 2016 was found to be in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, because according to the allegation, the Court of Appeals had exceeded the legal powers set forth in Article 52 of the LEP, modified the Decision [PPP. No.

50/2015] of the Basic Court of 2 April 2015 considering the enforcement procedure as completed, and annulling all preliminary actions related to the initial Decision on interim measure of 1996.

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

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

Admissibility of the Referral

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

55. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

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

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

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

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

61. Therefore, in order to find whether this Referral is compatible *rationae materiae* with the Constitution, the Court will first elaborate and then apply the principles established by the case law of the ECtHR and the case law of the Court, as to the applicability of the procedural guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in the circumstances of the present case, namely in the "*preliminary proceedings*".

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

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

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

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

65. Nevertheless, in certain cases, the ECtHR has applied Article 6 of the ECHR to such "*preliminary proceedings"* when it considered that the injunctive relief measures were determinant for the civil rights of the Applicant. (See, *inter alia*, ECtHR cases *Aerts v. Belgium*, appl. No. 25357/94, Judgment of 30 July 1998; *Boca v. Belgium*, appl. no. 50615/99, Judgment of 15 November 2012; *Micallef v. Malta,* application no. 17056/06, Judgment of 15 October 2009, paragraph 75; see also Case of the Court No. KI122/17, Applicant *Ceska Exportni Banka A.S,* Judgment of 30 April 2018, paragraph 127).

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

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

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

Case KI122/17, Applicant *Ceska Exportni Banka AS*, Judgment of 30 April 2018, paragraphs 129-131).

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

69. As regards the second requirement, the ECtHR notes that the nature of the interim measure should be scrutinised, as whenever an interim measure/injunction relief can be considered effectively to determine the civil right or obligation at stake -Article 6 will be applicable. (See the case of ECtHR *Micallef v. Malta*, application no. 17056/06, Judgment of 15 October 2009, paragraph 85).

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

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

71. Therefore, taking into account the right included in the "*preliminary proceedings*", namely the interim measure and its decisive nature for

the civil law in question, the Court finds that the circumstances of the case, based on the ECHR case law, meet the criteria for the application of the procedural safeguards embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

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

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

Relevant legal provisions

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

TITLE V
APPLICATION OF ENFORCEMENT
[...]

Article 52
Irregularities during the conduct of enforcement
1. Party or other participant in the procedure may request the court through a submission to correct irregularities caused by the enforcement body during the conduct of enforcement. The present delivery shall be done to the court within seven (7) days of alleged irregularity.
2. Upon request from paragraph 1 of this article, if the submitter has proposed this, the court shall issue a decision within three (3) days from the day of delivery of submission.

TITLE VII
POSTPONEMENT, SUSPENSION AND CONCLUSION OF THE ENFORCEMENT

[...]

Article 66
Completion of enforcement procedure

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

TITLE VIII
LEGAL REMEDIES

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

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

Article 69
Objection against decision on enforcement
1. Objections may be presented only against the decision allowing the enforcement.
2. Objections shall be filed in written in the basic court that issued the challenged enforcement, when the court is the enforcement body.
3. Objections shall be filed in written, in the basic court as provided under paragraph 5 of Article 5 of this Law when the enforcement body is a private enforcement agent.

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

[...]

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

Article 74
Enactment and enforceability of decisions in enforcement procedure

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

[...]

Article 77
Appeals against the decision on the objection

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

[...]

Article 79
Complaints against irregularities during the conduct of enforcement

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

LAW NO. 04/L-077 ON OBLIGATIONAL RELATIONSHIPS

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

Article 361
Claims determined before court or other relevant authority

1. All claims determined by a final court ruling or by a ruling by another relevant authority or through settlement before the court or another relevant authority shall become statute-barred after ten (10) years, including those for which a shorter period is stipulated by the statute of limitations.
2. All periodic claims originating from such rulings or settlement and falling due in the future shall become statute-barred after the period stipulated for the statute-barring of periodic claims.

Merits of the Referral

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

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

76. In this regard, the Court recalls that the Applicant alleges that when rendering the Decision [AC. No. 1579/2015] of 4 April 2016, the Court of Appeals exceeded its competences as provided by law, by modifying the Decision [PPP. No. 59/2015] of 2 April 2015 of the Basic Court in Gjakova. The Applicant further claims that two preliminary decisions

in the circumstances of the present case, Decision [AC. No. 3356/14] of 7 October 2014 of the Court of Appeals in conjunction with the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova, became final and consequently, *res judicata*.

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

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

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

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

80. This approach is consistent with the ECtHR case law, which has emphasized that one of the fundamental aspects of the rule of law is the principle of legal certainty, which presupposes respect for the principle of *res judicata*, which is the principle of final court decisions. (See, *inter alia*, ECtHR cases: *Ponomaryov v. Ukraine*, application no. 3236/03, Judgment of 3 April 2008, paragraph 40; *Ryabykh v. Russia*, application no. 52854/99, Judgment of 24 July 2003, paras

52 and 56; and Case KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility of 4 January 2017, paragraph 85). This principle, according to the ECtHR, provides that *"no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case"*. (See, *inter alia*, ECtHR case *Ryabykh v. Russia*, application no. 52854/99, Judgment of 24 July 2003, paragraph 52; and Case KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility of 4 January 2017, paragraph 86). According to ECtHR, *"a departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character"*. (see case of ECtHR *Ponomaryov v. Ukraine*, application no. 3236/03, Judgment of 3 April 2008, para. 40).

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

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

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

> *"According to the explanatory report to Protocol NO.7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "decision is final 'if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them".* (see case *Nikitin v. Russia*, application no. 50178/99, ECtHR, Judgment of 15 December 2004, para 37).

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

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

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

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

86. The Court first recalls that the parties to the dispute from 1996 until the final decision of the Supreme Court of 2016, which the Applicant challenges before the Court, have gone through judicial proceedings

regarding the enforcement of the Decision [C. No. 270/96] of 25 December 1996 of the Municipal Court in Gjakova, through which the request for interim measure was initially approved. Despite the fact that the same Court, by the Decision [E. No. 419/97] of 3 February 1997, had allowed the execution of this measure, it was never executed. The parties to the dispute since 2009 addressed to the regular courts by requesting, namely challenging the execution of the interim measure of 1996. The following court proceedings resulted in a number of decisions, contradictory to one another.

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

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

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

90. This was also stated in the recent Decision of the Court of Appeals, namely the Decision [AC. no. 1579/2015] of 4 April 2016, which the Applicant challenges before the Court. The Court of Appeals in its reasoning had drawn attention to the fact that the Court of Appeals by

the Decision [CA. No. 3662/2012] of 4 April 2013 upheld the Decision [C. No. 270/96] of 25 December 1996, reasoning that it was final and consequently, enforceable. Whereas, the same court, one month later, respectively, on 2 May 2013, by the Decision [AC. No. 4864/2012], upheld the Decision [E. No. 419/97] of 31 May 2011 of the Basic Court in Gjakova , confirming the suspension of the enforcement of the interim measure. In this regard, the Court of Appeals, among other things, emphasized:

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

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

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

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

result, on 7 November 2013, the Applicant addressed the Basic Court in Gjakova with a proposal for the enforcement of the above-mentioned Decision of the same court.

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

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

95. The Applicant alleges that the Decision [AC. No. 3356/14] of 7 October 2014 was *res judicata*. He also alleges that after the assignment of the enforcement by the Conclusion [P. No. 02/14] of 24 March 2015, the appeals of the debtor M.R., could only relate to the irregularities during execution of the enforcement within the meaning of Article 52 of the LEP, and that in no way through further court decisions the permissibility of enforcement could be considered, but only the irregularities in its implementation. Therefore, according to the Applicant, in rendering the Decision [AC. No. 1579/2015] of 4 April 2016, the Court of Appeals had exceeded the competencies prescribed by law, examining the admissibility of enforcement beyond the irregularities in the execution of the enforcement, and consequently, it violated the constitutional rights of the Applicant.

96. In this respect, and in the following, the Court will examine the Applicant's allegations regarding the challenged decision of the Court of Appeals, namely, the Decision [AC. No. 1579/2015] of 4 April 2016. The Court will examine three essential issues related to the Applicant's allegations of violation of his fundamental rights and freedoms: a)

whether the Decision [AC. No. 3356/14] of 7 October 2014 of the Court of Appeals in conjunction with the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova was final; b) whether the Court of Appeals through the challenged decision violated the Applicant's fundamental rights and freedoms by modifying the Decision [PPP. No. 59/2015] of the Basic Court in Gjakova of 2 April 2015 and considering the enforcement procedure as completed, and repealing all the preliminary actions taken in the enforcement cases in the circumstances of the present case; and c) whether the Decision [CLM. No. 11/2016] of 13 September 2016 of the Supreme Court resulted in a violation of the Applicant's fundamental rights and freedoms.

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

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

99. The Court notes that the Decision [Cp. No. 1281/2013] of 11 November 2013 of the Basic Court in Gjakova had assigned the execution. The objection against the Decision was rejected by the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova. An appeal was filed against this decision with the Court of Appeals, which by the

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

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

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

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

> *By Article 71 of the LEP, the reasons of the objection are foreseen, which in paragraph 1 item 1.4 of this article as a cause of the objection is foreseen "deadline by when, according to the law the enforcement may be requested, has expired".*

Whereas, by Article 379 paragraph 1 of the LOR (old), it is foreseen that "all requests that are certified by a final court decision or other competent body, by agreement before the court or before the other competent body, are statute-barred for ten years, as well as for those for which the law provides for shorter deadlines of statute of limitation", which is also foreseen by Article 361 paragraph 1 of the LOR of the Republic of Kosovo, No. 04/L-077, in force from 19.1.12.2012.

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

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

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

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

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

107. The Court recalls that the circumstances of the present case include a nearly twenty years history of defining and challenging an interim measure and initially two final and contradictory decisions of the same court issued in a one-month period in 2013. As it is elaborated above, one, namely, the Decision [AC. No. 4864/2012] of the Court of Appeals of 2 May 2013 suspended the enforcement procedure, and considering that the continuation of the same was not requested within the time limit set by the LEP, the enforcement procedure was completed. Despite this fact, the courts continued to deal with the enforcement procedure based on the other final decision, namely the Decision [CA. No. 3662/2012] of 4 April 2013 of the Court of Appeals despite the fact that the debtor noted that there was another final decision in his favor, along all the objections and complaints. The following proceedings also resulted in another final decision, namely the Decision [AC. No. 3356/14] of 7 October 2014 of the Court of Appeals concerning the Decision [CP. No. 281/13] of 21 July 2014 of the Basic Court in Gjakova, which again confirmed the enforcement of the interim measure of 1996. The Court notes that these facts include extraordinary circumstances and reflect "*judicial and justice errors*" and which meet the condition laid down in the ECTHR on the basis of which the higher courts have reasons of "*substantial and compelling character*" or to or to avoid respect for a *res judicata* decision.

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

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

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

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

111. Furthermore in this regard, the Applicant did not substantiate that the proceedings before the Supreme Court were unfair or arbitrary, or that his fundamental rights and freedoms protected by the Constitution were violated, as a result of the challenged decisions. The Court reiterates that the interpretation of law is the task of the regular courts and is an issue of legality. No constitutional issue has been proven by the Applicant (See: case of the Constitutional Court KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility of 8 August 2016, paragraph 44; and also see case KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants *Arben Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku and Sami Lushtaku*, Resolution on Inadmissibility of 15 November 2016, paragraph 62).

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

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

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

Conclusion

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

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

117. Therefore, and based on the foregoing and taking into account the special characteristics of the case, the allegations raised by the Applicants and the facts presented by them, the Court also based on

the standards established in its case-law and the case law of the ECtHR, does not find a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and accordingly finds that Decision [CLM. No. 11/2016] of 13 September 2016 of the Supreme Court in conjunction with the Decision [AC. No. 1579/2015] of 4 April 2016 of the Court of Appeals, is in compliance with the Constitution.

FOR THESE REASONS

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

DECIDES

I. TO DECLARE the Referral admissible;

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

III. TO NOTIFY this Judgment to the Parties;

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

V. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama- Hajrizi

KI47/17, Applicant Selvete Aliji, Request for constitutional review of Decision AC. No. 2812/2016 of the Court of Appeals of Kosovo of 9 December 2016

KI47/17, Judgment, violation of Article 31 of the Constitution, of 21 November 2018, published on 28.12.2018.

Keywords*: individual referral, right to fair and impartial trial, equality of arms, constitutional violation*

On 11 March 2016, according to the Applicant's allegations, the latter went to the Civil Registry Office for an extract and from the extract she learned that her marital status has changed and that "*in the central registry of civil status she is evidenced as divorced*". At the Central Registry Office of Civil Status in Prishtina, following a request for clarification, she received a copy of Judgment C. No. 280/2014, of 16 October 2015, stating that her marriage to her ex-spouse had been dissolved by judgment of the Basic Court in Prishtina.

As she did not have any knowledge about the judgment on marriage dissolution, she started a court proceeding for the repetition of the proceedings.

By Decision CN. No. 49/2016, of 13 June 2016, the individual judge rejected as inadmissible the Applicant's request for repetition of the procedure. In the reasoning of this decision it is noted that Article 88 of the Family Law provides that "*if the marriage has been dissolved or annulled by a final judgment*".

The Court of Appeals of Kosovo, on 9 December 2016, by Decision Ac. No. 2812/2016, rejected as ungrounded the Applicant's appeal, and upheld Decision CN. No. 49/2016 of the same court, rendered in the first instance.

The Applicant, before the Constitutional Court, alleges a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 of the ECHR [Right to a fair trial].

The Court, after considering the Referral, found that "the conduct of the court proceedings without the presence of the responding party (the Applicant) and rendering the judgment on the dissolution of the marriage without any notice to the Applicant, violated the guarantees of Article 31 of the Constitution and of Article 6 of the ECHR, and in this case found that there has been a violation of the right to fair and impartial trial, annulled all court decisions pertaining to the Applicant in this case and ordered the repeated proceedings, while at the same time requesting the respect for constitutional rights of the Applicant as stated in the Judgment.

JUDGMENT

in

Case No. KI47/17

Applicant

Selvete Aliji

Request for constitutional review of Decision AC. No. 2812/2016 of the Court of Appeals of Kosovo of 9 December 2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Applicant is Selvete Aliji from Gjilan (hereinafter: the Applicant), who is represented by Elmi Qerimi, a lawyer from Gjilan.

Challenged decision

2. The Applicant challenges the constitutionality of Decision AC. No. 2812/2016 of the Court of Appeals Kosovo, of 9 December 2016, which was served on him on 13 January 2017 and which rejected the request for repetition of the procedure against Decision CN. No. 49/2016, rendered by the individual judge in the Court of Appeals.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), namely Articles 22 [Direct Applicability of International Agreements and Instruments**]** and 31 [Right to Fair and Impartial Trial], in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights [ECHR].

Legal basis

4. The Referral is based on Article 113, paragraphs 1 and 7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

5. On 31 May 2018, the Court adopted in an 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 fifteen (15) 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 Constitutional Court

6. On 14 April 2017, the Applicant, by mail service, submitted the Referral to the Constitutional Court (hereinafter: the Court).

7. On 19 April 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of

Judges: Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalović (members).

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

9. 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.

10. On 21 September 2018, the President of the Court rendered the decision to replace the Review Panel and in the panel were appointed the Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani (members).

11. On 19 May 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeals.

12. On 29 November 2017, the Court requested from the Basic Court in Prishtina (hereinafter: the Basic Court) the complete case file related to the Applicant's Referral. This request was repeated two more times.

13. On 17 January 2018, the Court received the requested case file.

14. On 11 October 2018, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the admissibility of the Referral.

15. On 11 October, the Court decided to notify the third parties in the proceedings, which may have a direct interest in the adjudication of the case referred by the constitutional referral.

16. On 15 October 2018, the Court notified the person S.H. regarding the Referral, who as the ex-spouse in the proceedings before the regular courts was an opposing party to the Applicant. A copy of the Referral was sent to the person S.H. and at the same time he was notified that he could submit to the Court possible comments regarding the Referral within seven (7) days from the date of receipt of the notification.

17. On 15 October 2018, the Court notified about the Referral and sent a copy of it to the lawyer of S.H., who in the proceedings before the

regular courts represented him. The Court notified the lawyer that he can submit possible comments to the Court within seven (7) days.

18. No comment was submitted to the Court within the prescribed period of seven (7) days, either by S.H., or by his lawyer who represented him in the proceedings before the regular courts, regarding the Applicant's Referral.

19. On 19 October 2018, the notification and copy of the Referral were returned by mail service to the Court, with the explanation that S.H. was not found at the listed address.

20. On 21 November 2018, the Court unanimously decided to declare the Referral admissible and held that there has been a violation of Article 31 of the Constitution [Right to Fair and Impartial Trial] in conjunction with Article 6 [Right to a fair trial] of the ECHR.

Summary of facts of the case

21. On 22 October 2014, S.H. (ex-spouse of the Applicant) through his representative filed a lawsuit with the Basic Court for the dissolution of the marriage, on the grounds that "*the marital relations of the litigants have deteriorated and irretrievably disrupted*".

22. On 6 November 2014, the claimant's representative filed a proposal with the Basic Court for the appointment of the lawyer as a temporary legal representative for the responding party - namely the Applicant - because, according to him, her residence or address was unknown.

23. The proposal contained the concrete name of the lawyer, H.J., who was proposed to be appointed by the court as a temporary legal representative of the responding party (the Applicant).

24. On 26 March 2015, the Basic Court by Decision C. No. 2869/2014, appointed specifically the lawyer H.J., as a temporary legal representative of the Applicant.

25. On 14 April 2015, this decision was published in the daily newspaper "Epoka e Re".

26. On 15 October 2015, the Basic Court scheduled the session of the attempted reconciliation which was attended by the claimant, his lawyer and the temporary representative of the Applicant.

27. From the minutes of the hearing, it is seen that the presiding judge found that the session of the attempted reconciliation would not be held "*as the respondent is absent but have engaged her representative*". However, from the same minutes, the Court finds that the parties present in the session declared regarding the lawsuit and expressed their views on the grounds of the lawsuit.

28. On 15 October 2015, on the same date, the Basic Court held the court hearing in the presence of the claimant and representatives of the litigating parties and rendered Judgment C. No. 2860/2014, by which the marriage between the Applicant and her ex-spouse was dissolved.

29. On 6 January 2016, the judgment became final because no complaint was filed against it by any party to the proceedings.

30. On 11 March 2016, according to the Applicant's claims, she went to the Civil Status Office for an extract and from the extract obtained she learnt that her marital status had changed and that "*in the central register of civil status she is evidenced as divorced".*

31. On 18 March 2016, the Applicant went to the Office of the Central Registry of Civil Status in Prishtina and received a copy of Judgment C. No. 280/2014, of 16 October 2015, stating that her marriage with the ex-spouse was dissolved by the judgment of the Basic Court in Prishtina.

32. On 21 March 2016, the Applicant, through her legal representative, now chosen by her, submitted to the Basic Court for the Court of Appeals a proposal for repeating the procedure which was completed by a final Judgment in the Basic Court in Prishtina.

33. In the request, the Applicant stated that she was not enabled to attend the main hearing session, as she was never notified about the commencement of the court proceedings in which she would be a responding party even though "*the claimant and his representative knew where the respondent was* ", whereas although they were aware of these facts, they did not present them.

34. On 26 April 2012, the opposing party filed a response against the request for repetition of the proceedings, challenging the Applicant's arguments that the claimant knew of her place of residence and, for that reason, requested that a temporary legal representative is appointed to her.

35. On 13 June 2016, the Court of Appeals by Decision CN. No. 49/2016 rendered by the individual judge, rejected the request of the Applicant for repetition of procedure as inadmissible. The reasoning of this decision states that Article 88 of the Family Law provided that "*If marriage has been dissolved or annulled by final judgment, a decision for divorce, respectively for annulment of the marriage may not be attacked with extraordinary legal remedies, which means that in the present case the judgment became final on 06.01.2016*".

36. The Court of Appeals, beyond the procedural aspect based on which it rejected the request for repetition of the proceedings, did not give any explanation or other reasoning in respect of the proceedings conducted in the Basic Court.

37. On 8 July 2016, the Applicant, based on the legal advice given on the Decision CN. No. 49/2016 filed an appeal with the Court of Appeals, alleging the existence of essential violation of the rules of contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.

38. In her appeal, the Applicant alleged the existence of constitutional violations of her right to fair and impartial trial, in particular the violation of the principle of equality of arms, repeating the argument that she was not enabled to participate in the trial.

39. On 9 December 2016, the Court of Appeals, by Decision Ac. No. 2812/2016, rejected as ungrounded the Applicant's appeal, and upheld Decision CN. No. 49/2016 of the same court, rendered in the first instance.

40. In its decision, the Court of Appeals, *inter alia*, reasoned that *"[...] the individual judge of this court, when deciding upon the appealed decision, rightly referred to and applied the legal provision of Article 88 of the FLK when he found that the proposal to allow the repetition of the procedure completed by the final Judgment of the Basic Court in Prishtina, C-No. 2860/2014 of 15.10.2015, is inadmissible and as such it should be rejected, a position which the panel of this court supports as fair and lawful"*.

41. The Court of Appeals further reasoned that it "*took into account all the appealing allegations of the authorized representative of the respondent, referring to the violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of substantive law, for*

which the panel of this court did not find it reasonable to elaborate each one separately…".

Applicant's allegations

42. The Applicant in essence alleges that the court proceedings before the Basic Court and in her absence, without notifying her at all, but also the proceedings conducted based on her appeal in the Court of Appeals, resulted in a violation of Article 31 of the Constitution and Article 6 of the ECHR, namely her right to public and impartial trial has been violated, as well as the principle of equality of arms.

43. The Applicant alleges that she filed the allegations of the same violations also in the Court of Appeals in both cases, where apart from erroneous and incomplete determination of factual situation and erroneous application of the substantive law as legal grounds for annulment of the Judgment of the Basic Court, she also stated that both the first instance judgment and the second instance decision by the individual judge were rendered "*without complying with the international human rights standards*".

44. Further, the Applicant states that "*the respondent is not enabled to participate in the main hearing and that the contested procedure was completed without her participation, e whereas Article 6(1) of ECHR foresees that 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".*

45. In this regard, the Applicant points out that "*in 2014, she interrupted the factual cohabitation with the claimant, and the claimant was aware of where the respondent lives, to which address, because he lived together with the applicant for a long period of time, together in the same address, contacted him and told him that when the procedure for dissolution of marriage with divorce commences, the latter will be notified in this regard, because I will receive the invitation from the competent body*".

46. The Applicant also states that "*the findings of the individual judge of the Court of Appeals, in his decision are in contradiction with the provision of Article 83 of LCP, because according to this provision, the Court within a period of 7 days, when the temporary representative is appointed to the Applicant, must issue the notice, which will be published in the Official Gazette and displayed on the board of the announcement of the Court of the case, rather than the*

decisions on temporary representatives are published in the daily newspapers".

47. The Applicant requests the Court to declare her Referral admissible; to annul the challenged court decisions and to allow the repetition of the procedure, completed with the Judgment of the Basic Court in Prishtina.

Relevant legal provisions

Family Law of Kosovo - Law No. 2004/32

III. DIVORCE

Article 68 Divorce

(1) Marriage may be dissolved by divorce only upon decision of a court.
(2) One spouse or both by mutual agreement may request a divorce by filing a claim with the competent court..
(3) The right to file a claim cannot be passed on to successors but the successors of the plaintiff may continue the commenced procedure, to verify the foundation of the complaint. (4) When one of the spouses files a claim for divorce and the other spouse expressly declares not to reject the soundness of the requests in the complaint, the latest until the conclusion of the main court session, it shall be considered, that the spouses have submitted a proposal for divorce by mutual agreement.

Article 85 Determination of Facts on which the request is based

No judgment may be issued for marital disputes due to absence or judgment by concession.

Article 88 Extraordinary Remedies are not allowed

If marriage has been dissolved or annulled by final judgment, a decision for divorce, respectively for annulment of the marriage may not be attacked with extraordinary legal remedies.

Law no. 03 / L-006 on Contested Procedure

e) Judgment due to absence

Article 151

151. When the charge is not sent for answer, but it is sent only together with the invitation for the preparation session, and he doesn't come for the session until it's finished, or in the first session for the main elaboration, if the timing for the preliminary session was not determined, the court with proposal from the plaintiff or in accordance with the official task issues a decision

by which it approves the claim charge (decision due to the absence) if these conditions are met:

a) if the accused was invited regularly to the session;

b) if the accused never contested the request for charges through a preliminary pre-note;

[…]

CHAPTER XXIV
THE MAIN HEARING
1) Main hearing development
Article 423

423.4 If in the main hearing session does not come the accused even though he/she has been summoned regularly, the session will continue without him/her.

Admissibility of the Referral

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

49. 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".

50. The Court further examines whether the Applicant has met the admissibility requirements, as further specified by the Law and the Rules of Procedure. In this connection, the Court first refers to Article 48 [Accuracy of the Referral] and Article 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 of Law
[Deadlines]

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

51. Further, the Court has to examine whether the Applicant has met the admissibility requirements foreseen in Rule 39 [Admissibility Criteria] of the Rules of Procedure.

52. In this respect, the Court also refers to Rule 39 of the Rules of Procedure, which establishes:

"(1) The Court may consider a referral as admissible if:

[…]

(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions".

53. The Court finds that the Applicant is an authorized party, has exhausted legal remedies and also the Referral was filed within the legal time limit.

54. As regards the time-limit, the Court considers it necessary to point out that the Court of Appeals (Decision No. 49/2016) initially rejected the Applicant's proposal to repeat the completed procedure by the Judgment of the Basic Court. According to the advice given in this decision, the Applicant filed an appeal against it with the Court of Appeals, which was also rejected (Decision Ac. No. 2812/2016). In both cases, the Court of Appeals reasoned that, according to the legislation in force, the decision on divorce, namely on dissolution of the marriage, cannot be challenged by extraordinary legal remedies.

55. Further, the Court notes that in the present case, the Applicant presents a grounded allegation that she is a victim of a violation of her

rights guaranteed by the Constitution, not as a consequence of a single act, but as a result of a continuing situation, caused without her fault.

56. The Court refers to the case law of the ECHR, which states that in the case of a continuing situation, which causes a violation of human rights, the deadline starts to run from the beginning, every day, and only when the continuing situation is interrupted, the deadline of 6 (six) months foreseen by the ECHR to submit applications begins to run (see *mutatis mutandis, Cakir v. Cyprus*, *Varnava and Others v. Turkey*, ECtHR Judgment of 18 September 2009, *Mocanu and Others v. Romania*, ECtHR Judgment of 17 September 2014, paragraphs 263-267).

57. In the light of those considerations, the Court considers that in the present case we have to do with the allegation of violations of constitutional rights as a consequence of a continuing situation - namely not allowing the Applicant's to have a trial that respects the standards established in Article 31 of the Constitution and Article 6 of the ECHR.

58. Likewise, the Court considers that the Referral raises a constitutional claim *prima facie* justified, while it is not manifestly ill-founded.

59. Accordingly, the Court will assess the merits of the case, examining the allegations as presented in the Referral.

Assessment of the merits of Referral

60. The Court recalls that the substance of the Applicant's Referral concerns the allegation of violation of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

61. In this respect, the Court considers that the Applicant's allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR relate mainly to the violation of the right to a fair hearing, namely the two essential components of that right:

    a. Right to be present during the court hearing
    b. Principle of equality of arms

62. The Court will deal with these allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR separately in the order they are presented in the Referral:

Article 31 [Right to Fair and Impartial Trial]

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

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

Article 6 of ECHR [Right to a fair trial]

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[...]

Assessment of the Court

63. In addressing the allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR, the Court refers to its case law in similar cases as well as to the case law of the European Court of Human Rights (in accordance with the constitutional obligation which derives from Article 53 of the Constitution).

64. The Court notes that the consistent case law of the ECtHR states that the fairness of proceedings is assessed looking at the proceedings as a whole (ECHR, *Barbera, Messeque and Jabardo v. Spain*, No. 10590/83, paragraph 68). Consequently, in assessing the merits of the Applicant's allegations, the Court will also adhere to this principle (See Judgment of the Court in case KI104/16, Applicant *Miodrag Pavić*, of 4 August 2017).

65. The Court also notes that the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR must be interpreted in the light of the rule of law principle, requiring the

existence of an effective judicial way which enables the protection of civil rights (*Belesh and others v. the Czech Republic*, ECtHR Judgment of 12 November 2012, paragraph 49).

Right to be present during the court hearing

(a) General principles

66. The Court refers to the ECtHR case law which has established that, although not expressly provided for in Article 6 of the ECHR, the right to be present at the hearing is a part of the right to fair and impartial trial.

67. Moreover, according to the ECtHR case law, the right of the party to be present during the court trial is inseparably interconnected with the right to effective participation in the trial and the principle of adversarial proceedings (see *Sejdović v. Italy* GC no. 56581/00, paragraphs 81-95, ECtHR 2006-II.)

68. This is particularly important when proceedings are adversarial. The State has the obligation to give the defendant an effective and appropriate notice of the session and take measures to ensure his presence (see Case *Poitrimol v. France*, ECtHR Judgment of 23 November 1993).

69. However, the ECtHR also claims that in a non-criminal disputes, the right of a party to be present, in person, is always guaranteed in the proceedings only in cases where the personal character, lifestyle or conduct of the party is of direct relevance to the adjudication of the case (see *Muyldermans v. Belgium*, ECtHR Judgment of 23 October 1991, Application No. 12217/86). In other cases, it is sufficient for the party to be represented by a lawyer, namely a representative.

Application of the case law of the Constitutional Court and of the ECtHR in the circumstances of the present case

70. The Court recalls that in the present case, the Applicant was a party to a civil case and alleges that she did not attend the session before the first instance court and that she did not have any possibility of appeal as a result of the lack of information about the trial.

71. The Court finds that a session of the main hearing, where the facts of the case were elaborated, was held in the Basic Court in Prishtina, with the participation of the claimant and where the respondent (the

Applicant) was represented by a lawyer chosen by the court without her knowledge.

72. The Court further notes that the Applicant had no information on the content of the main trial session and that from the case file it cannot be ascertained that the Basic Court had attempted to notify the Applicant about the holding of the session.

73. From the case file of the Basic Court, it is clearly seen that none of the acknowledgments of receipt regarding the conduct of the proceedings in this case were sent in the name of the Applicant, who had the capacity of the responding party to the proceedings, but the entire official communication was made with temporary representative appointed by the court.

74. The Court further finds that the Court of Appeals rejected the Applicant's request for repetition of the procedure, and then the appeal against the decision which rejected the repetition of procedure on procedural issues, namely by invoking the inadmissibility of filing legal remedy on the legal basis and without reviewing at all the allegations raised by the Applicant, and without holding a hearing with the parties to the proceedings.

75. Therefore, the Court must now examine whether the Applicant should have had benefitted the full guarantees of a hearing session in the proceedings conducted before the Basic Court and then in the proceedings conducted upon the appeal with the Court of Appeals.

76. The Court notes that, as mentioned above, the ECtHR in its Judgment in the case *Döry v. Sweden*, [see ECtHR Judgment of 12 November 2002] clearly stated that "*in cases in which there has been an oral hearing at the first instance, or in which one has been waived at that level, there is no absolute right to an oral hearing in any appeal proceedings that are provided*".

77. In the present case, the Court considers that the Applicant did not have an oral hearing in which she participated effectively in the first instance trial, and the Applicant did not voluntarily waive this right. Regarding this right, she had complained to the higher instances of local courts and her complaints were not taken into account, namely she did not receive merit treatment. In addition, the Applicant complained, namely, raised the allegations also about the manner in which the temporary representative was appointed to her.

78. The Court also notes from the case file that the Basic Court did not try to contact the Applicant although she had the capacity of the party to the proceedings and did not give any explanation on the matter.

79. The Court, based on the interpretation of the ECtHR in case *Muyldermans v. Belgium* (ECtHR Judgment of 23 October 1991, application no. 12217/86), concludes that "*the personal character, the lifestyle or the conduct of the party have direct relevance to the adjudication of the case*" to the extent that a hearing with her presence would be necessary to fulfill the guarantees of Article 31 of the Constitution and Article 6 of the ECHR, within the meaning of the right to fair and impartial trial.

80. In these circumstances of the case, the Court finds that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, of the right to fair and impartial trial regarding the right to be present during the court hearing.

Equality of arms

81. In its case law, the ECtHR held that the principle of "equality of arms" is one of the key elements of the right to a fair trial (See case *Neumeister v. Austria*, ECtHR, Application no. 1936/63, Judgment of 27 June 1968, paragraph 2), according to which "*each party to the proceedings is to be given* a *reasonable opportunity to present his case - including evidence - under conditions that do not place him at a substantial disadvantage vis- -vis his opponent",* (see also: *Nideröst-Huber v. Switzerland,* 18 February 1997, § 23; *Kress v. France* [GC*],* no. 39594/98, § 72*,* ECHR 2001-VI; *Yvon v. France,* no. 44962/98, § 31, ECHR 2003-V; *and Gorraiz Lizarraga and Others v. Spain,* no. 62543/00, § 56, ECHR 2004-III *dhe Grozdanoski v. former Yugoslav Republic of Macedonia,* No. 21510/03, of 31 May 2007).

82. Equality of arms implies that each party to the proceedings must be afforded equal opportunities to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-a-vis the other party [See: *Dombo Beheer B.V v. the Nethereland,* ECtHR Judgment of 27 October 1993].

83. In this regard, the right to participate in the trial should not be considered as a formal right, where the parties are simply guaranteed physical presence during the civil process, but on the contrary, the procedural legislation must, first and foremost, as well as the judge afterwards during the trial, give equal opportunity to the parties to present arguments and evidence in protection of their interests.

Failure to comply with this principle does not depend on fair or unfair determination of the facts. The violation of this procedural guarantee in itself results in a violation of the right to a fair trial (see *Bulut v. Austria*, ECtHR Judgment of 22 February 1996; see also: *Komanicky v. Slovakia*, ECtHR, 4 June 2002, para 45).

Application of principles in present case

84. The Court notes that in the first instance trial before the Basic Court in Prishtina, the Applicant not only did not attend personally but there was no information about the holding of the trial. Moreover, the Applicant was not even informed about the content of the lawsuit and had no opportunity to file a response to the lawsuit.

85. The Court further notes that the temporary legal representative was appointed by the court, based on the proposal of the claimant, did not object to the lawsuit and when the judgment was rendered, he did not file an appeal at all.

86. It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the courts and that he or she is able to enjoy equality of arms, as an essential element of a fair trial (see, *inter alia, De Haes and Gijsels v. Belgium*, 24 February 1997, paragraph 53, *Reports of Judgments and Decisions 1997-I; Steel and Morris*, cited above, paragraph 59).

87. In the situation when the Applicant does not participate at all in the oral hearing of the first instance; when she is not given the opportunity to present her arguments, either directly or through her legal representative; when the arguments of the opposing party are heard and taken into account and when the party, namely the Applicant has no opportunity of challenging them, it is clear that the principle of equality of arms in the procedure was not respected.

88. Furthermore, the Court notes that the individual judge of the Court of Appeals, when rejecting the Applicant's request for repetition of the procedure, as well as the Court of Appeals, when it upheld such a decision - because under the applicable law the extraordinary legal remedies were not allowed when the judgment on the dissolution of the marriage became final – did not take at all into account the Applicant's allegations under what conditions and circumstances the first instance judgment became final and at no time had addressed the allegations of constitutional violation raised by the Applicant.

89. The Court further finds that the Court of Appeals, even though it stated that it had knowledge of the Applicant's allegations, assessed that "*it did not consider it reasonable to elaborate each of them separately…".*

90. The Court notes that the regular courts are not obliged to address all the allegations put forward by the Applicant. However, they must address the allegations that are relevant to the case under consideration, moreover if they are raised at different stages of the proceedings, as was the case with the present referral (see in this respect the case of the Constitutional Court, KI135/14, Judgment of 8 February 2016). Failure to address the serious allegations of the Applicant, irrespective of the legal basis by which the Applicant's request or the appeal against the decision of the Individual Judge was dismissed as inadmissible, renders those court decisions incompatible with the constitutional guarantees of Article 31 of the Constitution or Article 6 of the ECHR.

91. The Court emphasizes that based on Article 102 [General Principles of the Judicial System] item 3, of the Constitution *"Courts shall adjudicate based on the Constitution and the law"*. Therefore, when reviewing cases before them, the courts also have the obligation to protect the human rights and freedoms guaranteed by the Constitution.

92. In conclusion, as stated above, the Court finds that Judgment C. No. 2860/2014 of the Basic Court, as well as the decisions of the Court of Appeals, CN. no. 49/2016 and Ac. No. 2812/2016, did not respect the constitutional standards of the right to fair and impartial trial and, therefore, the Court finds that there has been a violation of Article 31 of the Constitution [Right to Fair and Impartial Trial] in conjunction with Article 6.1 of the ECHR [Right to a fair trial].

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law, and Rule 59 (1) of the Rules of Procedure, on 21 November 2018, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE invalid Judgment C. No. 2860/2014 of the Basic Court in Prishtina, of 15 October 2015, and Decisions of the Court of Appeals, CN. No. 49/2016 and Ac. No. 2812/2016;

IV. TO REMAND Judgment C. No. 2860/2014 of the Basic Court in Prishtina, of 15 October 2015, for reconsideration in conformity with the judgment of this Court;

V. TO ORDER the Basic Court in Prishtina to inform the Court in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;

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

VII. TO ORDER that this Judgment be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VIII. This Judgment is effective immediately.

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

KO84/18, Applicant: Albin Kurti and 11 other deputies of the Assembly of the Republic of Kosovo, Request for constitutional review of Decision No. 06/V-145 of the Assembly of the Republic of Kosovo regarding the proposal of the Parliamentary Group of Vetëvendosje Movement! on dismissal of Aida Dërguti from the position of Vice President of the Assembly of the Republic of Kosovo

KO84/18, Judgment rendered on 3 December 2018, published on 24 December 2018

Keywords: institutional referral, Presidency of the Assembly of the Republic of Kosovo, parliamentary groups, vice president of the Assembly,

The Referral was filed by 12 (twelve) deputies of the Assembly, based on Article 113.5 of the Constitution of the Republic of Kosovo.
The Applicants requested from the Constitutional Court the constitutional review of Decision No. 06/V145 of the Assembly of the Republic of Kosovo regarding the proposal of the Parliamentary Group of Vetëvendosje Movement! for the dismissal of Aida Dërguti from the position of Vice-President of the Assembly (hereinafter: the challenged decision), adopted by the Assembly on 4 June 2018. The Applicants also requested the imposition of interim measure, namely seeking *"suspension of exercising the function of vice president of the Assembly of Kosovo [Aida Dërguti]"*.
The Applicants alleged that the challenged decision is not in accordance with Articles 7 [Values] and 67 [Election of the President and Deputy Presidents] of the Constitution.
I. The Court initially assessed whether the submitted Referral fulfills the admissibility requirements as established in the Constitution and further specified in the Law on the Constitutional Court and in the Rules of Procedure of the Court. The Court assessed that the Referral fulfills the admissibility requirements laid down in the Constitution and further specified in the Law and foreseen in the Rules of Procedure, and raises important constitutional issues regarding the election and dismissal of the vice presidents of the Assembly. Therefore, the Court found that the Applicants' Referral is admissible.
II. Regarding the merits of the Referral, the Court, by reviewing and addressing each allegation of the Applicants, assessed and found as follows:
First, the Court considered the allegation of the submissions of the Referral that the position of vice president of the Assembly, pursuant to Article 67, paragraph 3 of the Constitution, is reserved exclusively for the three largest parliamentary groups deriving from the political parties or coalitions that have won the majority seats in the Assembly as a result of elections for the Assembly. In this regard, the Court held that the interpretation of paragraph

3 of Article 67 of the Constitution results that holding the position of the vice president of the Assembly is not directly related and does not represent the interests of the parliamentary group that has proposed for that position in the Presidency of the Assembly. Consequently, the Court found that the allegation of the Applicants, the position of the vice president of the Assembly, pursuant to Article 67, paragraph 3 of the Constitution, is reserved exclusively for the three largest parliamentary groups deriving from the votes of political parties or coalitions that have won seats in the Assembly as a result of the elections of the Assembly, is not grounded.

Secondly, regarding the procedure followed for the dismissal of the vice president of the Assembly, the Court recalled that according to paragraph 5 of Article 67 of the Constitution, it is foreseen that the vice presidents of the Assembly are dismissed by a majority of two-thirds (2/3) of the general number of deputies. In this regard, the Court found that on 4 June 2018, after discussions in the Assembly, which took place in relation to the LVV proposal for the dismissal of Aida Dërguti from the position of vice president of the Assembly, where there were 94 (ninety four) deputies present, 16 (sixteen) deputies voted for the LVV proposal, 26 (twenty-six) deputies voted against and 47 (forty seven) deputies abstained. Consequently, the LVV proposal did not receive the necessary votes under Article 67, paragraph 5, of the Constitution, for the dismissal of Aida Dërguti from the position of the vice president of the Assembly and on this case the requirements established in Article 67, paragraph 5, that Aida Dërguti be dismissed from the position of vice president have not been met.

Thirdly, the Applicants alleged that *"[r]efusal of the dismissal of the vice-president in question, which no longer represents the political power and democratic vote as the Constitution provides, is an abuse of the right to vote and violates the constitutional purpose behind the provisions governing the composition of the Presidency of the Assembly."* With regard to this allegation, the Court, referring to the constitutional provisions of the Rules of Procedure and its case law, held that the deputies are obliged to participate in the proceedings of the Assembly, including their participation in voting in accordance with the proposals submitted based on the Constitution and other related rules. However, the Court reiterated that the deputies are free to decide how they will vote in respect of proposals submitted to them and may vote for, against, or abstain, taking into account the best interest of the State in accordance with the Constitution and other rules.

In conclusion, the Court found that Decision No. 06/V-145 of the Assembly of the Republic of Kosovo regarding the proposal of the LVV Parliamentary Group regarding the dismissal of Aida Dërguti from the position of vice president of the Assembly of the Republic of Kosovo, is in compliance with Articles 7 and 67 of the Constitution.

III. Concerning the Applicants' request for the imposition of interim measure, the Court, after finding that the challenged decision is in accordance with Articles 7 [Values] and 67 [Election of the President and Vice

Presidents] of the Constitution, concluded that the Referral is without a subject of review and, as such, the request for interim measure was rejected.

JUDGMENT

in

Case No. KO84/18

Applicant

Albin Kurti and 11 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Decision No. 06/V-145 of the Assembly of the Republic of Kosovo regarding the proposal of the Parliamentary Group of Vetëvendosje Movement! on dismissal of Aida Dërguti from the position of Vice President of the Assembly of the Republic of Kosovo

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 Albin Kurti, Glauk Konjufca, Fatmire Mulhaxha-Kollçaku, Liburn Aliu, Drita Millaku, Xhelal Sveçla, Arbër Rexhaj, Fitore Pacolli, Rexhep Selimi, Arbërie Nagavci, Shemsi Syla and Sami Kurteshi (hereinafter, the Applicants), all of them deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

2. The Applicants have authorized the deputy of the Assembly, Sami Kurteshi, to represent them in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

Challenged act

3. The Applicants challenge the constitutionality of Decision No. 06/V145 of the Assembly of the Republic of Kosovo regarding the proposal of the Parliamentary Group of Vetëvendosje Movement! for the dismissal of Aida Dërguti from the position of Vice President of the Assembly (hereinafter: challenged decision), adopted by the Assembly on 4 June 2018.

Subject matter

4. The subject matter is the challenged decision, which allegedly is not in compliance with Articles 7 [Values], and 67 [Election of the President and Deputy Presidents] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

5. The Applicants further requests the Court to impose an interim measure requesting "*suspension of the exercise of the function of the Vice President of the Assembly of Kosovo [Aida Dërguti]*".

Legal basis

6. The Referral is based on paragraph 5 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution and Articles 27 [Interim Measures], 42 [Accuracy of the Referral] and 43 [Deadline] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rules 56 [Request for Interim Measures] and 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

7. On 31 May 2018, 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 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

8. On 12 June 2018, the Applicant submitted to the Court the Referral with the attached documents.

9. 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.

10. 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.

11. On 17 August 2018, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel, composed of Judges: Selvete Gërxhaliu – Krasniqi (Presiding), Radomir Laban and Nexhmi Rexhepi.

12. On 24 August 2018, the Court notified about the registration of the Referral the Applicants, the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly) and the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister).

13. The President of the Assembly was requested to notify deputies that they may submit their comments regarding the Applicants' Referral, if any, by 20 September 2018. The Secretariat of the Assembly was requested to submit to the Court the relevant documents regarding the challenged decision.

14. On 28 August 2018, the Secretariat of the Assembly submitted to the Court the following documents:

    a. Transcript of the Constitutive Session of the Assembly held on 3, 4, 10, 14, 24 August and 7 September 2017;
    b. Decision No. 06-V-003 of the Assembly on the election of 3 (three) Deputy Presidents of the Assembly of 7 September 2017;
    c. Notification on the Establishment of the New Parliamentary Group - the Group of Independent Deputies (GID), No. 06/S701Do-52, of 14 March 2018;
    d. Proposal of the Parliamentary Group of Vetevendosje Movement to dismiss the Deputy President of the Assembly, Aida Dërguti, No. 06/1108/Do-615, of 17 April 2018;

e. Transcript of the plenary session of the Assembly of the Republic of Kosovo, held on 3 May, 1 and 4 June 2018 (hereinafter: Transcript); and
f. Decision No. 06-V -14 of the Assembly of the Republic of Kosovo on non-dismissal of the Deputy President of the Assembly, Aida Dërguti, of 4 June 2018.

15. On 19 September 2018, the Court submitted to the Forum of the Venice Commission the following questions:

1) What is the procedure for dismissing the Vice President of the Assembly in your country?

a) If the vice president of the Assembly leaves the parliamentary group which proposed him for this position, will he lose automatically the position of the deputy president?

b) In this case, is it necessary for the Assembly to vote for the dismissal?

c) If the answer to question b) is positive, are deputies of the Assembly obliged to vote for such a proposal?

2) Is there any relevant case law regarding:

a) dismissal of deputy president of the Assembly? and

b) Any case law that considered that voting against a particular proposal is qualified as "abuse of the right to vote" by the deputies of the Assembly?

16. On 20 September 2018, Visar Ymeri, in a capacity of the representative of the Parliamentary Group of the Social Democratic Party (hereinafter: the SDP), submitted comments regarding the Referral.

17. On 24 September 2018, the Court notified the Applicants regarding the comments submitted by SDP and invited them to submit their comments, if any, by 1 October 2018.

18. On the same date, the Court also notified the President of the Republic of Kosovo, the President of the Assembly and the Prime Minister regarding the comments submitted by the SDP. The President of the Assembly was requested to submit copies of all comments to all the deputies of the Assembly.

19. On 1 October 2018, the Applicants submitted a response to SDP comments.

20. On 3 October 2018, the Court notified the President of the Republic of Kosovo, the President of the Assembly and the Prime Minister regarding the Applicants' response to SDP comments. The President of the Assembly was requested to submit copies of all comments to all deputies of the Assembly.

21. From 19 September to 28 October 2018, the Court received the answers to the questions posed to the Venice Commission Forum from the Constitutional/Supreme Courts of Austria, Netherland, Luxemburg, Germany, Croatia, Sweden, the Czech Republic, Bulgaria, Slovakia, South Africa, Norway, Costa Rica, Macedonia and Latvia.

22. On 3 December 2018, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

23. On the same date, the Court voted by majority that the challenged decision is in compliance with the Constitution.

Summary of facts

24. On 11 June 2017, the elections for the Assembly were held.

25. On 8 July 2017, the Central Election Commission certified the election results.

26. On 24 July 2017, the President of the Republic of Kosovo decided that the constitutive session of the Assembly is held on 3 August 2017.

27. On 3 August 2017, the Assembly held a constitutive session chaired by the oldest deputy of the Assembly.

28. According to the agenda, the Assembly established the *ad hoc* Committee for verification of the quorum and mandates (hereinafter: the *adhoc* Commission).

29. On the same date, the *ad hoc* Committee submitted the report, based on the list of certified election results, and concluded the following mandates:

    a. Democratic Party of Kosovo, Alliance for the Future of Kosovo, Initiative for Kosovo, Justice Party, Movement for Union, Albanian Democratic Christian Party of Kosovo, Conservative Party of Kosovo, Democratic Alternative of Kosovo, Republicans of Kosovo, Party of Balli, Social

Democratic Party, Balli Kombëtar of Kosovo (hereinafter: PDK, AAK and Nisma), 39 deputies;
b. "Vetëvendosje" Movement (hereinafter: LVV), 32 deputies;
c. The Democratic League of Kosovo and Alliance Kosova e Re (hereinafter: the LDK and AKR), 29 deputies;
d. Građanska Iniciativa Srpska lista, 9 deputies;
e. Kosova Demokratik Tyrk Partisi, 2 deputies;
f. Coalition "Vakat", 2 deputies;
g. Nova Demokratska Stranka, 1 deputy;
h. Samostalna Liberalna Stranka, 1 deputy;
i. Ashkali Democratic Party of Kosovo, 1 deputy;
j. Egyptian Liberal Party, 1 deputy;
k. United Party of Gorani, 1 deputy;
l. Ashkali Party for Integration, 1 deputy; and,
m. Roma United Party of Kosovo, 1 deputy.

30. The Chair continued with the agenda for the constitutive session of the Assembly, the election of the President of Assembly and the Vice Presidents, which was interrupted.

31. On 7 September 2017, after some interruptions, the constitutive session of the Assembly continued with the agenda: the election of the President and Vice-Presidents.

32. With the proposal of PDK, AAK and Nisma, Kadri Veseli was elected President of the Assembly.

33. The Assembly then continued with the election of vice-presidents, where PDK, AAK and Nisma proposed the deputy, Xhavit Haliti, LVV proposed Deputy Aida Dërguti, while LDK and AKR proposed Deputy Kujtim Shala. After the voting process, it was also found that the proposed deputies gained the necessary votes to be vice-presidents of the Assembly.

34. On the same date, the Assembly also elected a vice-president from the non-majority community: deputy Müfera Şinik, and a vice-president from the Parliamentary Group of Serbian List: the deputy Slavko Simić.

35. On 14 March 2018, 12 (twelve) deputies, including the vice president of the Assembly, Aida Dërguti, notified the President of the Assembly about the establishment of the new Parliamentary Group: the Group of Independent Deputies.

36. On 19 April 2018, the Presidency of the Assembly reviewed and decided on the agenda for the session of 3 May 2018, the proposal of the LVV Parliamentary Group for the dismissal of the deputy president of the Assembly, Aida Dërguti.

37. On 1 June 2018, the Assembly continued discussions regarding the proposal of the LVV Parliamentary Group for the dismissal of the deputy president of the Assembly, Aida Dërguti. However, due to the lack of quorum, the voting on this proposal was postponed.

38. On 4 June 2018, the Assembly voted on the proposal of the LVV Parliamentary Group to dismiss the vice president of the Assembly, Aida Dërguti. According to the transcript, there were 94 (ninety four) deputies present, 16 (sixteen) deputies voted for, 26 (twenty six) deputies voted against and 47 (forty seven) deputies abstained.

39. Consequently, the Assembly did not dismiss Aida Dërguti from the position of a deputy president of the Assembly.

Applicants' allegations

40. The Applicants allege that the challenged decision is not in compliance with Articles 7 [Values], and 67 [Election of the President and Deputy Presidents] of the Constitution.

41. The Applicants initially claim that the Constitution, in Article 64, paragraph 1, provides that, in the case of the constitution of the bodies of the Assembly, the seats should be divided in proportion to the number of votes won in the elections for the Assembly. According to them, *"[...] parties, coalitions, citizens' initiatives and independent candidates are given the number of seats equal with the number of mandates of deputies, that corresponds proportionally with the votes votes won in the elections"*.

42. The Applicants allege that *"the largest parliamentary group, under Article 67. 2 of the Constitution, should be considered the party, coalition [...] who have majority of seats in the Assembly, in terms of Article 64.1 of the Constitution, than any other party, coalition, civil initiative and independent candidates who have participated as such in the elections"*.

43. The Applicants allege that *"under Article 67, par. 3, of the Constitution, the position of the vice president of the Assembly is exclusively reseved for three largest parliamentary groups with the*

right to propose a vice president each who are elected by a majority vote, as the Preaident of the Assembly of Kosovo is elected".

44. The Applicants also explain that *"The Constitution of Kosovo, namely Article 67, para. 6, stipulates that the Presidency of the Assembly shall be established with the election of the President and Vice-Presidents. This is the legal-political formula of the constitution of the Assembly of Kosovo, which explicitly contains the definition of the three largest entities that are automatically qualified for representation in the Presidency of the Assembly with one vice-president each. The composition of the Presidency of the Assembly reflects the power of political parties emerging from the parliamentary elections through the democratic vote and consequently the power or size of the parliamentary group in the Assembly of Kosovo".*

45. The Applicants further emphasize that *"the three largest parliamentary groups that derive from the votes of political parties won during the general parliamentary elections have exclusive right to propose and to have their political representative during the entire legislature."*

46. The Applicants allege that *"the exercise of the position of vice president by the deputy [Aida Dërguti] results in complete disorder of the work of the Assembly Presidency and the absolute denial of the representation of parliamentary groups that have the highest political power in relation to the parliamentary group that has occupied the position of vice-president contrary to Article 67, par. 3,6,8, and Article 7, paragraph 1 of the Constitution. Likewise, keeping the position of vice-president by Mrs. Aida Dërguti, representing the fourth parliamentary group, has also seriously violated the equality of the parliamentary group [LVV] in relation to other parliamentary groups in the exercise of functions within the Kosovo Assembly Presidency, in violation of Article 67 para. 3, 6 and 8, and Article 7, paragraph 1, of the Constitution".*

47. The Applicants also allege that "*the purpose of Article 67, paragraph 3, which, in its content expresses, promotes the right that the three largest parliamentary groups deriving from the power of coalitions or political parties won through democratic vote are represented in all bodies of the Assembly, namely in the Presidency of the Assembly of Kosovo [...]. The opposite of this is qualified as a violation of Article 67, paragraphs 3, 6 and 8, and Article 7, par. 1 of the Constitution of Kosovo".*

48. The Applicants further allege that *"as regards the vote of the deputies for the dismissal of Mrs. Dërguti from the position of vice president, as the Constitutional Court has stated, that they "can vote as they wish", according to the Constitutional Court, the vote of the deputies should be in accordance with the constitutional provisions taking into account the purpose of the relevant provisions and not being abusive and in conflict with the principle of trust, which is also applied in the constitutional law. If the voting as an action is not a fundamental norm, but a tool for implementing and revival of the norm as a primary goal, it cannot break the norm. The refusal of the dismissal of the Vice-President in question, who no longer represents political power and democratic vote as the Constitution provides, is an abuse of the right to vote and violates the constitutional purpose behind the provisions governing the composition of the Presidency of the Assembly"*.

49. As to the request for interim measure, the Applicants allege that *"as [LVV] is ranked as a second party according to free and general democratic elections and since the parliamentary group [LVV] has been formed as the second parliamentary group based on the election result, its non-representation in the Presidency of the Assembly is causing irreparable damage for the parliamentary group itself as a bearer of the will of citizens confirmed through free democratic and general elections. Therefore, the exercise of such function by the deputy in question, who is part of the fourth parliamentary group that has not emerged or formed from the parliamentary elections, represents a lack of representation of the full will of citizens who have voted through free, democratic elections [LVV- and] based on which the parliamentary group [LVV] was established within the Assembly of Kosovo"*.

50. Finally, the Applicants request the Court to declare the Referral admissible and to declare the challenged decision unconstitutional.

Summary of comments received by SDP

51. In their response to the Applicants' Referral, the SDP states that *"The Presidency of the Assembly is an administrative body of the Assembly, a character which is also attributed based on the provisions of Article 67, paragraph 6 of the Constitution. [...] By attributing the administrative character, the legal nature of the Presidency of the Assembly is defined as a collegial body". Referring also to the provisions of the Law No. 05/L-03 on General Administrative Procedure, Article 37, the SDP states that "in this case we are dealing with a body, such as the Presidency of the Assembly,*

consisting of several persons mandated under the constitutional basis and who exercise a decision-making role on the issues, as defined by the constitutional provision, that the decision-making of this collegial body consists in ensuring the administrative functioning of the Assembly".

52. The SDP further alleges that *"although the provisions of Article 67 of the Constitution have not explicitly determined the mandate of the Presidency of the Assembly, it is implicit that the Presidency of the Assembly limits its mandate as a body of the Assembly in accordance with Article 66 of the Constitution, namely paragraph 1, which provision has determined the course of the mandate from the day of the constitutive session held within thirty days from the day of the official announcement of the election results. Even within the meaning of such a provision, as the requirement of the constitution of the Assembly is the election of the Presidency of the Assembly, the mandate of the Presidency of the Assembly is related to the mandate of the Assembly as a body rather than to the mandate of the deputies".*

53. According to SDP, "*the provisions of the Constitution have stipulated that the election of the President and Vice-Presidents of the Assembly should be made in a voting procedure where a majority of the votes of all deputies is required, representing theoretically an absolute majority. Meanwhile, for their dismissal a qualified majority is required, which means the vote of 2/3 of the total number of deputies.* Therefore, according to them, *"a constitutional requirement is the parliamentary consensus for the dismissal of any of the members of the Presidency of the Assembly [...]. Moreover, such functions should be understood in representation at the Assembly level, meaning that neither the President nor the vice-presidents are party officials, but of an Assembly body that directs the Assembly in the organizational-administrative sense".*

54. The SDP also ascertains that *"the Applicants in the Referral K084/18 attempt to interpret the mandate of Assembly members within an imperative mandate [...]. Members of the Presidency have a free mandate and this is entirely in the contemporary spirit of legal-political regulation in constitutional systems. Moreover, the termination of the system of imperative mandates, many authors, such as Pasquale Pasquino, in his essay "One and Three: Separation of Powers and the Independence of Judicare in Italian Constituion", considers that the termination of imperative mandates is one of the fundamental principles of contemporary representative government".* According to SDP, the allegations of the Applicants that *"the deputies had to vote on the motion for dismissal of the deputy*

president of the Assembly, violates the freedom of the exercise of the mandate of the deputies, a constitutional right guaranteed by Article 70, paragraph 1 of the Constitution, specified with Article 3, paragraphs 1 and 2 of the Law on the Rights and Responsibilities of the Deputies".

55. Regarding the request for interim measure, the SDP considers as "*unnecessary any comment in relation to the Applicant's proposal for interim measure, taking into account the content of the request, the subject of the request for protection and legal inability to cause any damage which would be irreparable".*

56. In the end, the SDP considers that the Applicant's Referral is manifestly ill-founded and is to be declared inadmissible.

Summary of LVV responses to SDP comments

57. In their response to SDP comments, LVV claims that *"as the representation in the Presidency of the Assembly consists of the deputies of the three largest parliamentary groups, the representation in the Presidency is of a political character, with the constitutional responsibility for the administrative functioning of the Assembly of Kosovo".* The LVV further explains that *"the replacement of the President by the Vice Presidents of the Assembly, which could be from the ranks of [LVV], has a political character in relation to the powers exercised by the President of the Assembly, and especially in the representation of the Assembly [...]. Therefore, we consider that the Presidency of the Assembly has a purely political character and exercises political-administrative functions [...]".*

58. The LVV also claims that *"that the free mandate should be interpreted within a non- political or any other influence, the termination and invalidity of the mandate of the deputies. The motion of the Parliamentary Group [LVV] was not directed at obtaining the mandate of the deputy in question [...]",* further emphasizing that *"The Parliamentary Group [LVV] and its representative role in the bodies of the Assembly, that is in the Presidency of the Assembly, is incomparable with the holding of a position by a deputy already representing a different parliamentary group, or another political entity. This makes it necessary by priority and importance to implement the constitutional provision, namely Article 67 par. 3 of the Constitution [...]".*

Summarized comments, received from the Forum of the Venice Commission

59. The Court initially notes that, from the answers received from the Forum of the Venice Commission, there are various constitutional case laws regarding the issue of the election and dismissal of the Vice Presidents of the Assembly.

60. In this regard, the Constitutional Court of Austria stated that *"The President, the Second President and the Third President are elected by all the deputies of Parliament. There are no other formal conditions for their election, although in practice, the three presidents are elected by the three largest parliamentary groups. If one of the presidents leaves the parliamentary group that has proposed him for the Presidency, he or she will not lose the position automatically, nor can he be removed from the post. In fact, such a case occurred: in 1993, the Third President of the National Council who was nominated by the third largest parliamentary group, has left the group and joined the other members of the group to form a new party, but he held his position successfully until the end of the mandate".*

61. The Supreme Court of the Netherlands clarified that *"Article 61 of the Constitution and the internal rules of Parliament, only foresee that parliamentary deputies elect the President from among them. The new President is elected after each parliamentary election and mandate ends when the new elections are held".*

62. The Constitutional Court of Luxembourg explained that: *"The relevant Luxembourg law concerning the Assembly (otherwise known as the "Chamber of Deputies") does not have any procedure for dismissing the vice-president [...].* According to them, *"the deputies who, according to Article 3 of the Constitution, represent (through the Chamber of Deputies) their state and who vote without being referred to their voters and during the vote only consider the interests of the Grand Duchy [of Luxembourg] continue to remain as deputies of the Assembly, even if during their mandate they leave the political group in which they first participated and with which party they were elected. In this case, although such a case has not yet happened in practice, a vice-president may not be dismissed unless he voluntarily does not leave this position".*

63. The Constitutional Court of Germany explained that, in the Federal Parliament of Germany, *"each parliamentary group is represented by at least one vice president; The President and vice presidents are elected by a simple majority of votes. If a candidate does not reach a majority vote, then the election is repeated. The [German]*

Constitution and the Bundestag Rules of Procedure do not foresee provisions for the dismissal of the President and Vice Presidents".

64. The Constitutional Court of Croatia stated that *"the dismissal of the vice president of Parliament can be proposed by parliamentary groups or by 40 (forty) deputies of Parliament [...]and the parliament approves by majority vote, provided that the majority of the deputies are present at the session".*

65. The Supreme Administrative Court of Sweden stated that "*the members of the Parliament elect the President and 3 (three) Vice presidents from their ranks for an electoral mandate (four years). The parliamentary groups in Parliament are candidates for different positions".* They also add that during the period until the parliamentary elections, the President and his deputies *"cannot be dismissed from office by decision of the Parliament. They may, however, resign from their position".*

66. The Czech Constitutional Court clarified that, in the Czech Republic, "*the vice president can only be dismissed with the proposal of 2/5 of all deputies [...]; 1/3 of all deputies [...] should be present during the voting and the proposal must be accepted by majority of them".* According to them, the only way to dismiss the vice president of the Assembly is if the proposal for dismissal gets the necessary number of votes foreseen above.

67. The Constitutional Court of Bulgaria clarified that "*the dismissal of the President and Vice-Presidents of the Assembly is not subject to constitutional treatment and is the exclusive competence of the Assembly itself".* This is because the issue of dismissal of vice-presidents is regulated by the Rules of Procedure of the National Assembly of Bulgaria and its possible violation cannot constitute constitutional violation. They also clarify that the Rules of Procedure of the Bulgarian National Assembly, Article 5, paragraph 2, provide that the vice presidents of the Assembly are dismissed from the positions before the expiration of the mandate when they leave the parliamentary group that nominated them, with the dismissal by that group or if the parliamentary group ceased to exist. In such cases, dismissal is made without a debate or voting.

68. The Constitutional Court of Slovakia stated that in Slovakia, if the vice president of the Assembly leaves the parliamentary party that has proposed him for that position, he or she will not lose the position of the vice president of the Assembly. They emphasize that such a case happened recently, adding that *"following the 2016 parliamentary*

elections that were followed by the formation of a four-party coalition (one of them called Sieť). One of Siet members was elected vice-president (one of the four vice presidents). Later in 2016, he came out of Sieť and joined another coalition party. However, he held the position of Vice-President [of the Assembly]".

69. The Constitutional Court of South Africa stated that in South Africa when the vice president of Parliament is no longer a member of any political party, he does not lose the position of vice-president of Parliament automatically. Unless a constitutional process is followed for his/her dismissal, it is possible for a vice-president to remain in that position even when he no longer belongs to any political party. Therefore, to dismiss a vice-president of Parliament, it is necessary that the majority of deputies vote on the proposal for dismissal. Also, according to the response of the Constitutional Court of South Africa, when a proposal is submitted for voting in the Parliament, the deputies "*have three options, (a) to vote in favor, (b) to vote against, or (c) to abstain".*

70. The Constitutional Court of Norway stated that in Norway, the Parliament elects the President and 5 (five) vice-presidents with the simple majority of the votes of the deputies of the Parliament. For the dismissal of vice presidents from the position it is necessary that the proposal for dismissal be made by 1/5 of the deputies and the proposal for dismissal to be voted by the simple majority of deputies.

71. The Constitutional Court of Costa Rica stated that the Parliament elects the Presidency at the beginning of each legislature. The President of Parliament and the Vice Presidents must meet the same conditions as the President of the Republic. They also stated that, according to their Constitution, there are no sanctions against deputies who leave the political parties that have helped them to be elected. According to them, "*it is important to note that most of these deputies exercise their mandate until the end of the legislature without becoming part of any other political group".*

72. The Constitutional Court of Macedonia explained that the only constitutional provisions concerning the vice presidents of the Parliament are those of Article 67 of the Macedonian Constitution, which stipulate that the Parliament, from the ranks of the deputies, elects the President and one or several Vice Presidents, by a majority votes of all deputies. They add that, under Article 21 of the Rules of Procedure of the Parliament, the number of vice-presidents is decided by the President of the Parliament and they are elected from the deputies belonging to the political parties represented in the

Parliament. One of the vice presidents is elected by the largest opposition party. They also clarify that the Rules of Procedure of the Parliament does not foresee provisions regarding the dismissal of vice-presidents.

73. The Constitutional Court of Latvia stated that in Latvia, the position of the vice president of the Assembly is not related to membership in the parliamentary groups. If the vice president decides to leave the parliamentary group that has proposed him for that position, there are no automatic consequences for maintaining his position. They also stated that according to their legal system, the deputies have no obligation to vote for a certain proposal and if this would happen this would be contrary to Article 28 of the Constitution of Latvia, which provides that members of the Assembly (Seimas) cannot be held liable for any judicial, administrative or disciplinary proceedings in relation to their voting.

Relevant provisions of the Constitution

"Article 7 [Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.

2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.

[...]

Article 64 [Structure of Assembly]

1. The Assembly has one hundred twenty (120) deputies elected by secret ballot on the basis of open lists. The seats in the Assembly are distributed amongst all parties, coalitions, citizens' initiatives and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly.

2. In the framework of this distribution, twenty (20) of the one hundred twenty (120) seats are guaranteed for representation of communities that are not in the majority in Kosovo, [...].
[...]

Article 65 [Competencies of the Assembly]

The Assembly of the Republic of Kosovo:
[...]
(6) elects and dismisses the President and Deputy Presidents of the Assembly;
[...].

Article 67 [Election of the President and Deputy Presidents]

1. *The Assembly of Kosovo elects the President of the Assembly and five (5) Deputy Presidents from among its deputies.*

2. *The President of the Assembly is proposed by the largest parliamentary group and is elected by a majority vote of all deputies of the Assembly*

3. *Three (3) Deputy Presidents proposed by the three largest parliamentary groups are elected by a majority vote of all deputies of the Assembly.*

4. *Two (2) Deputy Presidents represent non-majority communities in the Assembly and are elected by a majority vote of all deputies of the Assembly. One (1) Deputy President shall belong to the deputies of the Assembly holding seats reserved or guaranteed for the Serb community, and one (1) Deputy shall belong to deputies of the Assembly holding seats reserved or guaranteed for other communities that are not in the majority.*

5. *The President and Deputy Presidents of the Assembly are dismissed by a vote of two thirds (2/3) of all deputies of the Assembly.*

6. *The President and the Deputy Presidents form the Presidency of the Assembly. The Presidency is responsible for the administrative operation of the Assembly as provided in the Rules of Procedure of the Assembly.*

7. *The President of the Assembly:*

(1) represents the Assembly;
(2) sets the agenda, convenes and chairs the sessions;
(3) signs acts adopted by the Assembly;
(4) exercises other functions in accordance with this Constitution and the Rules of Procedure of the Assembly.

8. *When the President of the Assembly is absent or is unable to exercise the function, one of the Deputy Presidents will serve as President of the Assembly.*
[...]

Article 70 [Mandate of the Deputies]

1. *Deputies of the Assembly are representatives of the people and are not bound by any obligatory mandate.*
[...].

Article 74 [Exercise of Function]

Deputies of the Assembly of Kosovo shall exercise their function in best interest of the Republic of Kosovo and pursuant to the Constitution, Laws and Rules of Procedure of the Assembly.

Relevant provisions of the Rules of Procedure of the Assembly

Article 12 [Election of the President and Deputy Presidents of the Assembly]

1. *At the inaugural session of the IV term, the Assembly shall elect the President and the Deputy Presidents from among its Members. The President and the Deputy Presidents shall consist the Presidency of the Assembly.*

2. *The Chairperson of the inaugural session shall request from the largest parliamentary group to propose a candidate for the President of the Assembly. The President of the Assembly shall be elected by majority of votes of all Members of Assembly.*

3. *The Chairperson of the inaugural session shall request from three largest parliamentary groups to propose one candidate each for the Deputy Presidents of the Assembly, who are elected by the majority of votes of all Members of Assembly.*

4. *The Presidency as well as other working bodies of the Assembly shall respect the gender composition of the Assembly.*

5. *The Chairperson of the Inaugural Session shall request from the Members of Assembly holding seats guaranteed for the Serb community and the Members of Assembly holding seats guaranteed for other non-majority communities to propose one candidate each for Deputy Presidents of the Assembly. The Deputy Presidents, under this item, shall be elected by majority of votes of all Members of Assembly.*

6. *The Chairperson of the inaugural session shall announce the voting results for election of the President and the Deputy Presidents of the Assembly and shall invite the newly-elected President to take his seat.*

Article 14 [Mandate of the Presidency]

1. *The mandate of the Assembly's President and Presidency Members shall be in line with the mandate of the Assembly.*
[...]
3. *The President of the Assembly may tender his resignation to the Assembly. The President shall submit initially the resignation act to the Presidency of the Assembly. After approval of the resignation, the political party or the coalition that has appointed the previous President of the Assembly shall propose a new candidate for the President.*

4. *The same procedure shall be applied in case of resignation by any member of the Presidency.*

5. *The dismissal of the President or a member of the Presidency of the Assembly, at the proposal of the political party or parliamentary group which has appointed him/her, is done in accordance with the procedure for their appointment.*

Article 16 [Meetings of the Presidency]

1. *The President of the Assembly shall convene and chair meetings of the Presidency.*

2. *The President of the Assembly must convene a meeting of the Presidency if a parliamentary group or five (5%) percent, respectively six (6) Members of Assembly so demand.*

3. *The Presidency shall take decisions by consensus. Absent a consensus, the decisions are taken by a majority vote of those voting. In the event of a tied vote, the President's vote shall decide the matter.*

4. *The representative of the President of Republic of Kosovo and the government may take part in the meetings of the Presidency without voting right. The Secretary of the Assembly attends the meetings of the Assembly pursuant to the official duty.*

5. *The Presidency of the Assembly may invite for specific issues the leaders of parliamentary groups.*

Article 51 [Quorum and voting in the meetings of Assembly]

1. *Quorum exists when more than half of the overall number of the members of the Assembly are present.*

2. *The presence of the members of the Assembly in meetings shall be verified through the electronic system of voting, by raising hands or by roll-call. The Chairperson of the session shall decide of the manner of verification of the presence of members of the Assembly.*

3. *The decisions taken in the meetings of the Assembly are valid if more than half of the total number of Members of the Assembly were present at the time the decision was taken. The laws, decisions and other acts of the Assembly shall be considered adopted if voted for by the majority of the members present and voting. An exception is made in cases when the Constitution of the Republic of Kosovo provides for otherwise.*
4. *Voting shall be carried out in the following means:*

    a) *Open ballot, by raising hands "for", "against", and "abstain",*
    b) *Secret ballot or*
    c) *By means of a recorded vote that includes electronic voting; and*
    d) *Roll-call of each member of the Assembly.*

5. *A recorded vote shall be held when requested by the President of the Assembly or a parliamentary group and upon the decision of the Assembly. Where a recorded vote is held, each member's vote "for" or "against", or "abstention", shall be recorded by name and last name. In cases of electronic vote, the number of participants,*

number of voters and full voting result shall appear on the screen for each member separately. A member of the Assembly shall be entitled to explain his/her vote "for", "against" or "abstain" and to ask for an electronic copy of voting result.

6. In the event of an equal number of votes being cast "for" and "against" any proposal, it shall be deemed as not adopted.

7. Electronic votes of members of the Assembly shall be published within three working days from the plenary session.

Admissibility of the Referral

74. The Court first examines whether the Referral has met the admissibility requirements, established in the Constitution, and further specified in the Law and foreseen in the Rules of Procedure.

75. Initially, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

> *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".*

76. In addition, the Court also refers to Article 113.5 of the Constitution, which provides:

> *"Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed".*

77. Initially, the Court recalls that the Applicants challenge the constitutionality of the challenged decision only in relation to its content.

78. In this regard, the Court notes that the Referral was filed by 12 (twelve) deputies of the Assembly, in accordance with Article 113.5 of the Constitution. Therefore, the Applicants are an authorized party.

79. In addition, the Court takes into account Article 42 [Accuracy of the Referral] of the Law, which foresees:

> *"1. In a referral made pursuant to Article 113, Paragraph 5 of the Constitution the following information shall, inter alia, be submitted:*

1.1. names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;

1.2. provisions of the Constitution or other act or legislation relevant to this referral; and

1.3. presentation of evidence that supports the contest".

80. The Court also refers to Rule 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure, which provides:

"[...]

(2) In a referral made pursuant to this Rule, the following information shall, inter alia, be submitted:

(a) names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;

(b) provisions of the Constitution or other act or legislation relevant to this referral; and

(c) presentation of evidence that supports the contest.

(3) The applicants shall attach to the referral a copy of the contested law or decision adopted by the Assembly, the register and personal signatures of the Deputies submitting the referral and the authorization of the person representing them before the Court".

81. The Court notes that the Applicants entered the names of the deputies with signatures, presented the power of attorney for the person representing them before the Court, specified the decision they challenge and submitted their copy, referred to the relevant constitutional provisions for which they alleged that the challenged decision is not in compliance and provided evidence to substantiate their allegations. Therefore, the Court considers that the criteria set out in Article 42 of the Law and further specified in Rule 74 of the Rules of Procedure have been met.

82. With respect to the deadline of "*8 (eight) days from the date of adoption*', the Court notes that the challenged decision was adopted on 4 June 2018, while the Referral was submitted to the Court on 12 June 2018.

83. The Court recalls that, pursuant to Rule 30 (1) of the Rules of Procedure, the deadline for submitting the referral, "*when a period is expressed in days, the period is to be calculated starting from the following day after an event takes place*".

84. In the case of the present Referral, this is the day after the adoption of the challenged decision. Therefore, the Court finds that the Referral was submitted within the time-limit specified by Article 113.5 of the Constitution.

85. Consequently, the Court finds that the Applicants have respected the admissibility requirements laid down in the Constitution and further specified by the Law and foreseen by the Rules of Procedure.

86. The Court also considers that the Referral raises important constitutional issues regarding the election and dismissal of the vice presidents of the Assembly, therefore, the Applicants' Referral is admissible.

Merits of the Referral

87. The Court recalls that the Applicants allege that the challenged decision is not in compliance with Articles 7 [Values] and 67 [Election of the President and Vice Presidents] of the Constitution.

88. As to the Applicants' Referral, the Court notes that the Applicants in essence allege that the position of the Vice-President of the Assembly, pursuant to Article 67, paragraph 3, of the Constitution, is reserved exclusively for the three (3) largest parliamentary groups that emerge from political parties or coalitions that have won majority seats of the Assembly as a result of the elections for the Assembly. They add that the representation in the Presidency of the Assembly has a political character and there should be represented 3 (three) largest parliamentary groups throughout the Assembly's legislature.

89. Therefore according to them, the challenged decision for the non-dismissal of the deputy president of the Assembly, Aida Dërguti (now a part of a new parliamentary group), denies LVV as the second most-voted entity in the elections of 11 June, 2017, the position of the deputy president of the Assembly, guaranteed by Article 67, paragraph 3 of the Constitution.

90. Furthermore, according to the Applicants, given that the exclusive right to be represented in the Presidency of the Assembly belongs to 3

(three) largest parliamentary groups, the vote of the deputies on non-dismissal of the vice president, constitutes the abuse of "their right to vote".

Regarding Article 67, paragraph 3, of the Constitution

91. The Court shall first examine whether the provisions of Article 67, paragraph 3 of the Constitution and other related provisions entitle certain parliamentary groups to be represented throughout the legislature in the Assembly Presidency with the deputies belonging to the parliamentary group that has proposed them.

92. In this connection, the Court notes that Article 67, paragraph 3 of the Constitution regulates the issue of the proposal and voting of the proposal of the vice-presidents of the Assembly, stating that *" 3 (three) Vice Presidents proposed by the three largest parliamentary groups are elected by a majority vote of all deputies of the Assembly"*.

93. Under the aforementioned provision, for the election of 3 (three) vice-presidents, two conditions must be met: a) to be proposed from the three largest parliamentary groups and b) to obtain the votes of the majority of all deputies of the Assembly.

94. As to the first requirement, the Court notes that the Constitution, in Article 67, paragraph 3, clearly states that the right to nominate 3 (three) candidates for the positions of vice presidents belongs exclusively to 3 (three) largest parliamentary groups. The Court notes that the right of 3 (three) largest parliamentary groups to nominate candidates for the position of vice-president of the Assembly is essential for maintaining the foundations of an effective and meaningful democracy in the constitution of the Assembly governed by the rule of law. Therefore, the Court notes that while the right of the proposal belongs to 3 (three) major parliamentary groups, these groups are not necessarily limited to proposing candidates from their parliamentary group. The Court notes that paragraph 3 of Article 67 of the Constitution allows for a broad discretion of the candidate's proposal for the position of the vice president of the Assembly, without limiting the proposal by a certain parliamentary group.

95. Unlike the language of paragraph 3 of Article 67 which enables greater freedom of the proposal, paragraph 4 of Article 67 of the Constitution expressly stipulates that *"Two (2) Deputy Presidents represent non-majority communities in the Assembly and are elected by a majority vote of all deputies of the Assembly. One (1) Deputy President shall belong to the deputies of the Assembly holding seats reserved or*

guaranteed for the Serb community, and one (1) Deputy shall belong to deputies of the Assembly holding seats reserved or guaranteed for other communities that are not in the majority."

96. As for the second requirement, the Court recalls that, in order to be considered elected, the nominees of the parliamentary groups are not automatically elected vice presidents of the Assembly after the proposal of the parliamentary groups but are subject to the voting process in the Assembly. The proposed of parliamentary groups are elected vice presidents of the Assembly only if they receive votes of the majority of all deputies of the Assembly. Therefore, the vice presidents of the Assembly, although proposed by certain parliamentary groups, they are the elected of the Assembly in order to exercise the position of the vice-president of the Assembly, unless dismissed or lose their mandate of a deputy under the provisions of the Constitution or other related provisions of the Assembly.

97. In this regard, the Court recalls Article 67, paragraph 6 of the Constitution, which provides:

> *"The President and the Deputy Presidents form the Presidency of the Assembly. The Presidency is responsible for the administrative operation of the Assembly as provided in the Rules of Procedure of the Assembly".*

98. After the end of the voting process, the members of the Presidency of the Assembly, in a capacity as Vice-Presidents of the Assembly, do not represent the interests of the parliamentary groups that have proposed them, but above all represent the interests of the Assembly as a whole, ensuring the functioning of the Assembly and its bodies. Therefore, the Court considers that, according to paragraph 6 of Article 67 of the Constitution, the members of the Presidency of the Assembly are not representatives of parliamentary groups or political parties in this body, and in the capacity of a member of the Presidency of the Assembly are not called to protect the interests of parliamentary groups or political parties of the Assembly.

99. This, moreover, taking into account the fact that the number of the vice presidents of the Assembly is expressly defined by the Constitution and not all parliamentary groups or political parties have the right to propose candidates for vice-president of the Assembly, but this right is recognized only to 3 (three) largest parliamentary groups.

100. In addition, the Court also recalls Article 16, paragraphs 2 and 5 of the Rules of Procedure of the Assembly, which provides:

"2. The President of the Assembly must convene a meeting of the Presidency if a parliamentary group or five (5%) percent, respectively six (6) Members of Assembly so demand"

[...]

"5. The Presidency of the Assembly may invite for specific issues the leaders of parliamentary groups".

101. The Court notes that, according to the Constitution and the Rules of Procedure of the Assembly, for the certain issues that affect the interests of the parliamentary groups in the Presidency of the Assembly, all parliamentary groups are represented by the chairpersons of the parliamentary groups.

102. The Court also notes that there are different practices in the democratic countries regarding the election and dismissal of the vice presidents of the Assembly. However, in all the states that have submitted answers to the questions of the Constitutional Court addressed to the Constitutional Courts through the Venice Commission Forum, with the exception of Bulgaria where such a thing is specifically defined in the Rules of Procedure of the Assembly, the departure from a certain parliamentary group does not imply automatic dismissal from the position of the vice president. Therefore, in the practice of these countries, for the dismissal of vice-presidents of the Assembly, a special vote and a certain number of votes are required for such a dismissal to be made.

103. In addition, with regard to the allegation of the Applicants that the position of vice president of the Assembly, under Article 67, paragraph 3 of the Constitution, is reserved exclusively for (3) the three largest parliamentary groups, which emerge from the votes of political parties or coalitions that have won seats in the Assembly as a result of elections for the Assembly, the Court refers to case KO119/14, where it concluded that *"the largest parliamentary group according to Article 67 (2) of the Constitution is to be considered the party, coalition, citizens' initiatives and independent candidates that have more seats in the Assembly, in the sense of Article 64 (1) of the Constitution, than any other party, coalition, citizens' initiatives and independent candidates that participated as such in the elections"* (see Judgment in case KO119/14, Applicant *Xhavit Haliti and 29 other deputies of the Assembly of the Republic of Kosovo*, paragraph 116).

104. In this regard, the Court notes that the result of the elections for the Assembly held on 11 June 2017, the LVV, as the second largest parliamentary group, secured the right to propose a candidate for the position of vice-president of the Assembly. Based on this right, the LVV proposed Mrs. Aida Dërguti as a candidate for the position of the vice president of the Assembly, who received the necessary votes to be a member of the Presidency.

105. However, the Court considers that Article 67 paragraph 3 of the Constitution stipulates that 3 (three) largest parliamentary groups at the beginning of the legislature have the right to nominate candidates for vice-presidents of the Assembly. However, after the election of the candidates proposed for vice-presidents, the right of parliamentary groups to nominate candidates for vice-presidents arises only if any of the vice-presidents loses the mandate of the deputy under Article 70 of the Constitution or if he is dismissed in accordance with the procedure provided in Article 67, paragraph 5 of the Constitution.

106. In the light of the foregoing, the Court considers that the Applicants' allegation that the position of the Vice-President of the Assembly, pursuant to Article 67, paragraph 3, of the Constitution, is reserved exclusively for 3 (three) largest parliamentary groups deriving from the votes of political parties or coalitions that have won seats in the Assembly as a result of the elections for the Assembly, is ungrounded.

Concerning the procedure followed for the dismissal of the vice president of the Assembly

107. The Court further recalls that the dismissal of the vice presidents of the Assembly is regulated by the specific provisions of the Constitution, namely Article 67, paragraph 5 of the Constitution, which provides that *"The President and Deputy Presidents of the Assembly are dismissed by a vote of two thirds (2/3) of all deputies of the Assembly"*.

108. Accordingly, for the dismissal of the vice presidents of the Assembly it is necessary to meet the requirements of Article 67, paragraph 5 of the Constitution.

109. In this regard, the Court recalls that according to paragraph 5 of Article 67 of the Constitution, it is foreseen that the vice-presidents of the Assembly are dismissed by a majority of two-thirds (2/3) of the total number of deputies, in contrast to paragraph 3, of Article 67, which stipulates that for their election a majority vote of all deputies is required.

110. In the case of the Referral, the Court recalls that the LVV filed a proposal for dismissal of the vice president of the Assembly, Aida Dërguti.

111. On 19 April 2018, the Presidency of the Assembly considered and included this proposal on the agenda for the session.

112. The Court also recalls that after discussions of 1 June 2018, which were held regarding the LVV proposal, on 4 June 2018, the Assembly voted regarding the LVV proposal, where in the hall 94 (ninety four) deputies were present, where it was found that there is a quorum for decision-making. Of them, 16 (sixteen) deputies voted for the LVV proposal, 26 (twenty-six) deputies voted against, and 47 (forty-seven) deputies abstained.

113. In conclusion, the Court finds that, in the present case, the LVV proposal did not receive the necessary votes, and consequently the requirements for the dismissal of Aida Dërguti from the position of Vice-President of the Assembly were not met, as expressly provided for in Article 67, paragraph 5 of the Constitution.

Regarding the Applicants' allegation of "abuse of the right to vote"

114. In the following, the Court recalls again that the Applicants allege that, under Article 67 of the Constitution, the positions of Vice Presidents of the Assembly are reserved exclusively for the three (3) largest parliamentary groups, and as a consequence *"[r]efusal of the dismissal of the Vice-President in question, who no longer represents political power and democratic vote as the Constitution provides, is an abuse of the right to vote and violates the constitutional purpose"*.

115. In this connection, the Court recalls that it has found above that under Article 67, paragraph 3 of the Constitution, the representation of 3 (three) largest parliamentary groups in the Presidency of the Assembly is not guaranteed, but is guaranteed their right to nominate candidates for the position of vice-president, who are then voted by the Assembly.

116. Therefore, when voting on the proposal for the dismissal of the vice-president, Aida Dërguti, the Assembly did not act in violation of Article 67 of the Constitution.

117. Moreover, with regard to voting in the Assembly, the Court refers to paragraph 1 of Article 70 [Mandate of the Deputies] of the Constitution, which defines:

> *"1. Deputies of the Assembly are representatives of the people and are not bound by any obligatory mandate".*

118. The Court also refers to article 74 [Exercise of Function] of the Constitution, which defines:

> "*Deputies of the Assembly of Kosovo shall exercise their function in best interest of the Republic of Kosovo and pursuant to the Constitution, Laws and Rules of Procedure of the Assembly".*

119. The Court also recalls Article 3 [Free Mandate] of Law No. 03/L-111 on the Rights and Responsibilities of the Deputies (published in the Official Gazette on 20 July 2010), which provides for:

> *"1. The deputy is a representative of the citizens and during his mandate he is subject only to his conscience.*
> *2. The deputy carries out his tasks in accordance with the constitutional provisions, with Law and with the Rules of Procedure of the Assembly".*

120. The Court also refers to paragraphs 4 and 6 of Article 51 [Quorum and voting in the meetings of Assembly] of the Rules of Procedure of the Assembly that establish:

> *"4. Voting shall be carried out in the following means:*
>
> *e) Open ballot, by raising hands "for", "against", and "abstain",*
> *f) Secret ballot or*
> *g) By means of a recorded vote that includes electronic voting; and*
> *h) Roll-call of each member of the Assembly.*
>
> *[...]*
> *6. In the event of an equal number of votes being cast "for" and "against" any proposal, it shall be deemed as not adopted."*

121. In this regard, the Court also recalls its case law where it had ascertained that "*when constituting the Assembly, all Deputies have to be present and vote the way they wish, openly or secretly, to vote for, against or abstain and cannot be exempted from doing so".* (see case KO119/14, Applicants *Xhavit Haliti and 29 other Deputies ofthe*

Assembly of the Republic of Kosovo regarding constitutional review of Decision No. oS-V-001 voted by 83 Deputies of the Assembly of the Republic of Kosovo on the election of the President ofthe Assembly of the Republic of Kosovo, dated 17 July 2014, paragraph 128).

122. In the light of the foregoing, the Court considers that the deputies are obliged to participate in the works of the Assembly, including their participation in voting regarding the proposals submitted under the Constitution and other related rules. However, the Court reiterates that deputies are free to decide how they will vote on proposals submitted to them and may vote for, against, or abstain, taking into account the best interests of the State in accordance with the Constitution and other rules.

123. Therefore, the Court considers that the Applicants' allegation that the refusal to dismiss the vice-president in question, who does no longer represent the political power and democratic vote, as foreseen by the Constitution, is "*an abuse of the right to vote and violates the constitutional purpose that lies behind the provisions governing the composition of the Presidency of the Assembly*" is not grounded.

124. Finally, the Court also recalls that the Applicants allege that the Assembly, by not voting the LVV proposal to dismiss the vice-president of the Assembly, also violated Article 7 [Values] of the Constitution. With regard to this allegation, the Court notes that the Applicants did not present any evidence nor did they substantiate their allegation of violation of this Article of the Constitution.

Conclusion

125. In conclusion, the Court finds that the Applicants' allegation that the position of the Vice-President of the Assembly pursuant to Article 67, paragraph 3 of the Constitution is reserved exclusively for the three (3) largest parliamentary groups deriving from the votes of political parties or coalitions that have won seats in the Assembly as a result of the elections for the Assembly, is not grounded.

126. The Court also finds that the Applicants' allegation that the refusal of dismissal of the vice-president in question, who does not represent the political power and democratic vote as foreseen by the Constitution *"is an abuse of the right to vote and violates the constitutional purpose that lies behind the provisions governing the composition of the Presidency of the Assembly*" is not grounded.

127. Therefore, the Court finds that Decision No. 06/V-145 of the Assembly of the Republic of Kosovo regarding the proposal of the LVV Parliamentary Group for the dismissal of Aida Dërguti from the position of vice president of the Assembly of the Republic of Kosovo, is in compliance with Articles 7 [Values] and 67 [Election of the President and Vice Presidents] of the Constitution.

Request for interim measure

128. The Court recalls that the Applicants also request the Court to issue a decision on the imposition of an interim measure, namely "*suspending the exercise of the function of the vice-president of the Assembly of Kosovo [Aida Dërguti]*".

129. The Court has concluded above that the challenged decision is in compliance with Articles 7 [Values] and 67 [Election of the President and Vice Presidents] of the Constitution.

130. Therefore, in accordance with Article 27.1 [Interim Measures] of the Law and Rule 57 [Decision on Interim Measures] of the Rules of Procedure, the request for interim measure is without subject of review and, as such, is rejected.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.5 and 116.2 of the Constitution, Articles 20 and 42 of the Law and pursuant to Rule 59 (1) (a) of the Rules of Procedure, on 3 December 2018,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, by majority of votes, that Decision No. 06/V-145 of the Assembly of the Republic of Kosovo regarding the Proposal of the Parliamentary Group of Vetëvendosje Movement! for the dismissal of Aida Dërguti from the position of the vice president of the Assembly of the Republic of Kosovo, is in compliance with Articles 7 [Values] and 67 [Election of the President and Vice Presidents] of the Constitution;

III. TO REJECT, unanimously, the request for interim measure;

IV. TO NOTIFY this Judgment to the Applicants, the President of the Republic of Kosovo, the President of the Assembly of Kosovo and the Government of Kosovo;

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

VI. TO DECLARE this Judgment effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Remzije Istrefi-Peci Arta Rama-Hajrizi

KI 122/16 Applicant: Riza Dembogaj, requesting constitutional review of Decision CML. No. 6/2016 of the Supreme Court of the Republic of Kosovo of 13 September 2016

The Applicant alleges that Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court was rendered in violation of his rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, Article 49 of the Constitution, Article 54 of the Constitution in conjunction with Article 13 of the ECHR and 102 of the Constitution, because the regular courts applied the wrong law in assessing the timeliness of his claim. Accordingly, the Applicant alleged that the regular courts have manifestly erroneously applied and interpreted the law in his case.

The Applicant's employment relationship with the Kosovo Police Inspectorate was terminated in 2007. The Applicant has challenged the termination decision since 2007, initially in administrative, and subsequently in the court proceedings, which he initiated in 7 November 2007. The date of initiation of courts proceedings, namely the timelines of his appeal, became subject of review of eight regular court decisions which applied three different law, all containing different deadlines for filing appeals, to the dispute of the Applicant. Ultimately, in rejecting the request for protection of legality of the State Prosecutor, the Supreme Court concluded that the initial claim of the Applicant was out of time, however reasoning it based on the Law on IOBK of 2010, not in force when the dispute of the Applicant began.

After assessing the case in its entirety, the Court found that in the Applicant's case, the law was manifestly erroneously applied and resulted in arbitrary conclusions for the Applicant. Therefore, based on the case law of the ECHR, the Court found that the rights of the Applicant to fair and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, were violated.

JUDGMENT

in

Case No. KI122/16

Applicant

Riza Dembogaj

Constitutional review of Decision CML. No. 6/2016 of the Supreme Court of the Republic of Kosovo of 13 September 2016

CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Riza Dembogaj from village of Llabjan, Municipality of Peja (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court of the Republic of Kosovo, which rejected as ungrounded the request for protection of legality filed by the State Prosecutor against Decision [C. No. 437/2015] of 25 January 2016 of the Basic Court in Prishtina.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which, as alleged, violates the Applicant's rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR), Article 49 [Right to Work and Exercise Profession] of the Constitution, Article 54 [Protection Judicial Rights] in conjunction with Article 13 (Right to an effective remedy) of the ECHR and 102 [General Principles of the Judicial System] of the Constitution.

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 21 October 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 November 2016, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Bekim Sejdiu.

7. On 21 November 2016, the Court notified the Applicant about the registration of the Referral and requested him to submit the challenged decisions to the Court. At the same time, the Court sent a copy of the Referral to the Supreme Court.

8. On 29 November 2016, the Applicant submitted to the Court Decision [C. No. 437/15] of the Basic Court in Prishtina and a submission further specifying his Referral.

9. On 26 January 2017, the Court requested the Applicant to submit all other relevant decisions.

10. On 31 January 2017, the Applicant completed the Referral and submitted to the Court the decisions of the District Court and the Court of Appeals, as well as the complaints submitted to the Independent Oversight Board of Kosovo (hereinafter: the IOBK) and the State Prosecutor's request for protection of legality to the Supreme Court.

11. On 6 February 2018, the Court sent a copy of the Referral to the IOBK, requesting clarification pertaining to the Applicant's case and to the Basic Court in Prishtina requesting the file of the case.

12. On 8 February 2018, the Basic Court in Prishtina notified the Court that upon the Applicant's appeal of 5 December 2016, the case is pending before the Court of Appeals.

13. On 9 February 2018, the IOBK submitted to the Court the complete case file.

14. On 26 February 2018, the Court requested information from the Court of Appeals regarding the status of the Applicant's case before the Court of Appeals.

15. On 2 March 2018, the Court of Appeals provided information to the Court that, upon the Applicant's appeal of 5 December 2016, this case is pending before the Court of Appeals.

16. On 7 March 2018, the Court requested the Applicant to provide information regarding the status of his complaint before the regular courts.

17. On 19 March 2018, the Applicant submitted to the Court Decision [CA. No. 4504/2016] of 9 March 2018 of the Court of Appeals.

18. On 30 May 2018, the Review Panel deliberated on the report of Judge Rapporteur and recommended to the Court the admissibility of the Referral.

Summary of facts

19. On 1 May 2007, the Applicant signed a contract for a period of three years, namely until 1 May 2010, as a Police Inspector at the Kosovo Police Inspectorate Investigation Unit, with the status of a civil servant (hereinafter: the KPI).

20. On 4 May 2007, the Applicant submitted his resignation from the Kosovo Police Service (hereinafter: KPS), where he had worked for several years before starting to work as a Police Inspector with the KPI. Based on the case file, it results that before the resignation, the Applicant was under investigation by the KPS Professional Standards Unit.

21. On 28 May 2007, the KPI informed the Applicant that he was temporarily suspended until the final investigation regarding his possible involvement in a serious disciplinary violation in the KPS. On 31 May 2007, the Applicant filed an appeal against the temporary suspension.

22. On 13 June 2007, the KPI rendered Decision No. 1306/2007 (hereinafter: the Decision) on the termination of the employment contract with the Applicant, on the grounds that the information received during the process for the verification of the past, has shown that the Applicant was under investigation by the KPS Professional Standards Unit for serious disciplinary violations.

Administrative Procedure

23. On 18 June 2007, the Applicant filed a complaint with the personnel management of the Ministry of Internal Affairs (hereinafter: the MIA), to which, according to the allegation, he has never received a reply. On the same date, the Applicant also filed an appeal with the IOBK, claiming that the termination of the employment relationship was made in violation of the applicable law.

24. On 21 June 2007, the Applicant filed a request for re-employment with the KPS, a possibility which, according to the relevant legal provisions, within a specified period of time, is allowed to the KPS members who voluntarily left the service. On 6 September 2007, his request was rejected by the KPS, on the grounds that in case of resignation during

the investigation process, based on the KPS handbook guidelines, the requests for return to service cannot be approved to the former KPS officers.

25. On 14 August 2007, the IOBK, through Decision [02/259/207] rejected the Applicant's complaint as premature and obliged the KPI to consider the Applicant's complaint submitted to the personnel management and to render a decision on the merits of the case. The reasoning of the IOBK decision was based on the provisions of UNMIK Regulation 2001/36 on the Civil Service of Kosovo (hereinafter: Regulation 2001/36).

26. On 24 August 2007, the Applicant once again addressed the personnel management at the MIA, also filing an additional request for reconsideration of the decision with the IOBK.

27. On 29 August 2007, considering that the Applicant, according to the allegation, had never received a reply to the complaint made to the MIA, he again addressed the IOBK with a complaint, claiming that the termination of the employment relationship with KPI, was done in violation of the applicable law.

28. On 6 November 2007, as the MIA has not yet responded to the complaint, the Applicant submitted another complain to the IOBK. According to the Applicant, he never received a response to his complaint from the IOBK.

The First Set of Proceedings before the Courts

29. On 7 December 2007, the Applicant filed a claim with the Municipal Court in Prishtina, alleging that the termination of his employment relationship with the KPI, violated Regulation 2001/36 and the relevant administrative instructions and, consequently, that the Decision is unlawful.

30. On 9 July 2008, the Municipal Court in Prishtina, through Judgment [Cl. 520/2007] approved the Applicant's statement of claim as grounded, declaring the KPI Decision as unlawful, among others, on the grounds that the procedure for termination of the employment relationship during the probation period was not respected. The Municipal Court, through this Judgment obliged the MIA to reinstate the Applicant to the working place and to compensate the respective income for the period and in the manner determined in the said Judgment. Throughout the reasoning of the Judgment in question, the

Municipal Court was based on the provisions of the Regulation 2001/36.

31. Against this Judgment, the KPI filed an appeal with the District Court in Prishtina, alleging violation of the provisions of the contested procedure, erroneous or incomplete determination of the factual situation and the erroneous application of the substantive law, requesting that the challenged Judgment be modified and the Applicant's statement of claim be rejected as ungrounded, or that the Judgment of the Municipal Court be annulled and the case be remanded for retrial to the first instance court.

32. On 6 April 2009, according to the case file, almost two years after filing the complaint, the IOBK by Decision [02/278/07] rejected the Applicant's appeal as ungrounded and upheld the Decision of the Chief Executive of the KPI [No. 1306/2007] of 13 June 2007, as lawful. The IOBK, based on Article 11.1 of UNMIK Regulation 2008/12 amending Regulation 2001/36, among others, reasoned that the termination of the employment relationship during the probation period was conducted in accordance with the applicable legal provisions. The IOBK reasoned that the legal provisions clearly stipulate the employer's authority to terminate the employment relationship during the probation period if "*the information provided during the recruitment process is proved to be incorrect*".

33. On 12 January 2012, the District Court in Prishtina, through Judgment [Ac. No. 199/2009] approved the appeal of the KPI, annulled Judgment [C1. 520/2007] of 9 July 2008 of the Municipal Court in Prishtina and remanded the case for reconsideration to the first instance court.

34. The annulment of the Judgment of the Municipal Court, by the District Court was reasoned among others, based on the admissibility and timeliness of the claim. According to this Court, based on Article 83 of the Law on Basic Rights of Labor Relations in force (Published in "Official Gazette of SFRY", No. 60/89, 42/90 and "Official Gazette of the FRY" No. 42/92, 24/94) (hereinafter: the Labor Law), the deadline for filing a claim with the competent court was 15 days after the 30 day deadline for rendering the decision by the competent body, and consequently, the claim of the claimant, namely the Applicant, was out of time.

The Second Set of Proceedings before the Courts

35. On 30 October 2012, the Basic Court in Prishtina, through Judgment [C. No. 290/12] declared the claimant's claim, namely the Applicant, as timely, again approving the statement of claim as grounded and declaring the KPI decision as unlawful, among others, on the grounds that the procedure for termination of the employment relationship during the probation period was not respected. Through the Judgment in question, the Court obliged the KPI to reinstate the Applicant to his working place and to compensate his income for the period and in the manner determined by the Judgment in question. The reasoning of the Judgment in question, was based on the provisions of Regulation 2001/36.

36. On 27 December 2012, against Judgment [C. No. 290/12] of the Basic Court, the KPI filed an appeal alleging violation of the provisions of the contested procedure, erroneous or incomplete determination of the factual situation and erroneous application of the substantive law, requesting that the challenged Judgment be modified and the statement of claim of the claimant, namely the Applicant, be rejected as ungrounded, or that the Judgment be annulled and the matter be remanded to the first instance court for retrial.

37. On 12 February 2015, the Court of Appeals by Decision [CA. No. 1977/2013] approved the appeal of the KPI and quashed the Judgment [C. No. 290/2012] of 30 October 2012 of the Basic Court, remanding the case to the first instance court for retrial. The Court of Appeals, among others, argued that the Basic Court, in declaring unlawful the KPI decision on termination of the Applicant's employment relationship, should have also considered the Decision [02/278/07] of 6 April 2009 of the IOBK, which was issued in the meantime. In the reasoning of the Judgment in question, the Court of Appeals had specifically clarified that the provisions of Regulation 2001/36 apply in the present case.

The Third Set of Proceedings before the Courts

38. On 25 January 2016, the Basic Court in Prishtina, through Decision [C. No. 437/15] rejected the Applicant's claim as out of time. The Basic Court in Prishtina, referring to Article 83 of the Labor Law, reasoned that the Applicant had available only 15 days for filing the claim, after the 30 day deadline within which the competent body would have rendered a decision.

39. On 3 March 2016, the Applicant addressed the Basic Court with a request for return to the previous situation regarding the Decision of 25 January 2016, reasoning that his lawyer did not provide him the

documents on time and consequently, he missed the deadline to challenge the Decision of 25 January 2016 to the Court of Appeals.

40. On 07 March 2016, the Basic Court in Prishtina, through Decision [C. No. 437/15] rejected the Applicant's request for return to the previous situation. This Decision was then challenged by the Applicant before the Court of Appeals.

41. On 9 March 2018, the Court of Appeals dismissed as inadmissible the Applicant's appeal against the Decision [C. No. 437/15] of 7 March 2016, which rejected the Applicant's request for return to the previous situation.

The Request for Protection of Legality

42. On 12 April 2016, the State Prosecutor of Kosovo, at the request of the Applicant, filed a request for protection of legality [KMLC. No. 20/2016] against Judgment [C. No. 437/15] of 25 January 2016 of the Basic Court in Prishtina, arguing that the Basic Court applied the wrong law on its Judgment. According to the State Prosecutor, if the correct law was applied, Regulation 2001/36 instead of the Labor Law, the Applicant's appeal would have been declared as timely and the merits of his statement of claim would have been considered.

43. On 13 September 2016, the Supreme Court, through Decision [CML. No. 6/2016] rejected as ungrounded the request for protection of legality of the State Prosecutor. The Supreme Court justified its Decision on the fact that the initial claim of the Applicant was submitted to the Municipal Court in Prishtina after the deadline. However, the Supreme Court noted that in the concrete case, it is not the Labor Law that is applicable, but rather Regulation 2001/36 and the Law no. 03/L-192 on the Independent Oversight Board for the Kosovo Civil Service of 2010 (hereinafter: the Law on the IOBK).

Applicant's allegations

44. The Applicant alleges that Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court was rendered in violation of his 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, Article 49 [Right to Work and Exercise Profession] of the Constitution, Article 54 [Judicial Protection of Rights] in conjunction with Article 13 (Right to an effective remedy) of the ECHR and 102 [General Principles of the Judicial System] of the Constitution.

45. The Applicant alleges that the regular courts applied the wrong law in his case. According to his allegations, the application of the wrong law resulted in declaring his statement of claim as out of time, and consequently he was prevented from receiving a final answer from the courts on the merits of his case. In this regard, the Applicant alleges that his rights to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, have been violated.

46. The Applicant also alleges that by applying the wrong law pertaining to the timeliness of his statement of claim, the regular courts have prevented him from the judicial protection of rights guaranteed by Article 54 of the Constitution. In addition, the Applicant alleges that the regular courts have acted in violation of Article 102 of the Constitution, failing to decide based on the applicable law as required by the Constitution.

47. Finally, the Applicant also maintains that the alleged unlawful termination of his employment relationship, violates his rights guaranteed by Article 49 of the Constitution.

48. The Applicant requests the Court to annul Decision [CML 06/2016] of 13 September 2016 of the Supreme Court and to remand the case for retrial.

Assessment of the admissibility of the Referral

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

50. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes:

> *1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.*

51. The Court also examines whether the Applicant has met the admissibility requirements as defined by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority."

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

Article 48
[Accuracy of Referral]

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

Article 49
[Deadlines]

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

52. Regarding the fulfillment of these requirements, the Court notes that the Applicant submitted the referral in a capacity of an authorized party, challenging an act of a public authority, namely the Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court, after exhaustion of all legal remedies provided by law. The Applicant has also clarified the rights and fundamental freedoms, which have allegedly been violated, in accordance with Article 48 of the Law and filed a referral in accordance with the deadlines stipulated in Article 49 of the Law.

53. Finally, the Court finds that this referral is not manifestly ill-founded in accordance with Rule 36 (1) (d) of the Rules of Procedure. The Court

further states that it is not inadmissible on any other ground. Therefore it must be declared admissible. (see the ECtHR case *Alimuçaj v. Albania*, application No. 20134/05, Judgment of 9 July 2012, paragraph 144; see also Case KI97/16, Applicant *IKK Classic*, Judgment of 9 January 2018, paragraph 38).

Relevant Legal Provisions

LAW ON BASIC RIGHTS OF LABOR RELATIONS
(Published in "Official Gazette of SFRY", No. 60/89, 42/90 and "Official Gazette of the FRY" No. 42/92, 24/94)

Article 83

(...)

"The employee who is not satisfied with the final decision of the competent authority within the organization or if this authority does not render a decision within 30 days from the day of the submission of the request of the appeal, has the right to request the protection of his rights before the competent court within the subsequent 15 days."

(...)

REGULATION NO. 2001/36 UNMIK/REG/2001/36 of 22 DECEMBER 2001 ON THE KOSOVO CIVIL SERVICE

Section 11
Appeals

(...)
"(d) That in each appeal brought before it, the Board shall within ninety (90) days of the end of the appeal proceedings issue a written decision setting forth its determination and the legal and factual basis therefor."

(...)

LAW NO.03/L –192 ON INDEPENDENT OVERSIGHT BOARD FOR CIVIL SERVICE OF KOSOVO OF 16 AUGUST 2008

Article 12

Appeals

"1. A civil servant who is unsatisfied by a decision of an employing authority in alleged breach of the rules and principles set out in Law on Civil Service in the Republic of Kosovo, shall have the right to appeal to the Board."

(...)

"3.4. That in each appeal brought before it, the Board shall within sixty (60) days of the end of the appeal proceedings issue a written decision setting forth its determination and the legal and factual basis therein."

(...)

Article 14
The right to appeal

"The aggrieved party, alleging that a decision rendered by the Board is unlawful, may appeal the Board's decision by initiating an administrative dispute before the competent court within thirty (30) days from the day of the service of decision. Initiation of an administrative dispute shall not stay the execution of the Board's decision."

Merits of the Referral

54. The Court recalls that the Applicant alleges that the Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court was rendered in violation of his rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, Article 49 of the Constitution, Article 54 of the Constitution in conjunction with Article 13 of the ECHR and 102 of the Constitution, because the regular courts applied the wrong law in assessing the timeliness of his claim. Accordingly, the Applicant alleges that the regular courts have manifestly erroneously applied and interpreted the law in his case, thus violating his rights to a fair and impartial trial as guaranteed by the Constitution.

55. In that regard, the Court first notes that the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and its application, has been widely interpreted by the European Court of Human Rights (hereinafter: the ECtHR) through its case law, in accordance with which the Court, based on Article 53 [Interpretation of the Human Rights Provisions] of the

Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Accordingly, as it pertains to the interpretation of the allegations for a violation of the right to fair and impartial trial as a result of the alleged "manifestly erroneous application and interpretation of law", the Court will refer to the ECtHR case law.

56. As a general rule, the allegations for erroneous interpretation of the provisions of the law allegedly committed by the regular courts relate to the scope of legality and as such, do not fall within the jurisdiction of the Court and therefore, in principle, cannot be considered by the Court. (See Case No. KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 36).

57. The Court has consistently reiterated that it is not its role to deal with errors of facts or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that lead a regular court to issue one decision instead of another. If it were different, the Court would act as a "*fourth instance court*", which would result in exceeding the limitations provided for by its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See case *Garcia Ruiz v. Spain*, ECtHR, no. 30544/96, of 21 January 1999, paragraph 28; and see also cases: KI70/11, Applicants: *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011; and KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 37).

58. This stance has been consistently held by the Court, following the case-law of the ECtHR, which clearly maintains that it is not the role of this Court to review the conclusions of the regular courts in respect of the factual situation and application of the substantive law. (see ECtHR, *Pronina v. Russia*, Decision on admissibility of 30 June 2005, application no. 65167/01; KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 38).

59. The Court, however, notes that the case-law of the ECtHR also provides for the circumstances under which exceptions from this position must be made. The ECtHR reiterated that while it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation, the role of the Court is to verify whether the effects of such interpretation are compatible with the Convention. (See the ECtHR cases, *Miragall Escolano and Others v.*

Spain, No. 38366/97, paragraphs 33-39; and *Koshoglu v. Bulgaria*, No. 48191/99, Judgment of 10 May 2007, paragraph 50). Therefore, even though the role of the Court is limited in terms of assessing the interpretation of the law, it must ensure and take measures where it observes that a court has applied the law in a particular case manifestly erroneously or so as to reach "arbitrary conclusions". (See the ECtHR cases *Anheuser-Busch Inc.* Judgment, paragraph 83; *Kuznetsov and Others v. Russia*, no. 184/02, of 11 January 2007, paragraphs 70-74 and 84; *Paiduraru v. Romania*, no. 63252/00, paragraph 98,; *Sovtransavto Holding v. Ukraine*, no. 48F553/99, paragraphs 79, 97 and 98; *Beyeler v. Italy* [GC], no. 33202/96, paragraph 108; *Koshoglu v. Bulgaria*, Judgment of 10 May 2007, paragraph 50; see also KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 40).

60. Among others, in case *Andelkovic v. Serbia* (Judgment of 9 April 2013, No. 1401/08, paragraph 24), the ECtHR reiterated again that it will not question the interpretation of law by the courts, unless, it is evidently arbitrary or the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasoned. In this case, the ECtHR maintains:

> *"The Court reiterates at the outset that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, among many authorities, Brualla Gómez de la Torre v. Spain, 19 December 1997, § 31, Reports of Judgments and Decisions 1997-VIII). That being so, the Court will not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness (see, mutatis mutandis, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008), in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or a denial of justice (see, mutatis mutandis, Farbera and Harlanova v. Latvia (dec.), no 57313/00, 6 September 2001, and, albeit in the context of Article 1 of Protocol No. 1, Beyeler v. Italy [GC], no. 33202/96, § 108, ECHR 2000-I)".*

61. Accordingly, based on the case law of the Court and the case law of the ECtHR, it is the role of the regular courts to assess the facts and the evidence they have administered. (see ECtHR Judgment, *Thomas v. United Kingdom*, 10 May 2005, application no. 19354/02). The role of the Court is to examine whether there has been a violation of constitutional rights (right to a fair trial, right of access to court, right

to an effective remedy, etc.), and whether the manner in which the regular courts have applied the law was otherwise arbitrary or discriminatory. (See, for example, ECtHR cases *Koshoglu v. Bulgaria*, Judgment of 10 May 2007, No. 48191/99; *AnheuserBusch Inc. v. Portugal*, Judgment of 11 January 2007, No. 73049/01; *Kuznetsov and Others v. Russia*, Judgment of 11 January 2007, No. 184/02; *Khamidov v. Russia*, Judgment of 15 November 2007, No. 72118/01; *Andelkovic v. Serbia*, Judgment of 9 April 2013, No. 1401/08; *Dulaurens v. France*, Judgment of 21March 2000, No. 34553/97; see also case KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 41).

62. As it pertains the application of the principles established by the ECtHR on the manifestly erroneous application or interpretation of the law into the present case, the Court initially recalls that the Applicant alleges that the regular courts had in fact applied the wrong law in his case regarding the assessment of the timeliness of the statement of claim, thus, preventing the examination of his case on merits. The Applicant continuously alleged before the regular courts that Regulation 2001/36 and the relevant administrative instructions in force in 2007, namely at the time of termination of his employment relationship, apply into the context of his dispute. The application of the Labor Law and the Law on the IOBK of 2010 resulted, according to the allegation, in the manifestly erroneous interpretation that his statement of claim is out of time. According to the Applicant, the manifestly erroneous application of the law resulted in a violation of his rights to fair and impartial trial as guaranteed by the Constitution.

63. In this regard, the Court recalls that the Applicant's dispute started in 2007, when his employment relationship with the IPK was terminated. The Applicant used to work in the KPS for several years, from where he resigned after being employed with the KPI. The KPI terminated his employment relationship during the probation period because during the process of verifying his past, it turned out that the Applicant had not declared the fact that during the previous KPS employment, he had been under investigation. Upon termination of the employment relationship by the KPI, the Applicant filed a request for reinstatement to the KPS, a request that was rejected. The Applicant in fact throughout the court proceedings does not challenge any decision regarding his relation with the KPS, but with the KPI. The Decision [No. 1306/2007] of 13 June 2007 of the KPI, is the Decision that the Applicant has challenged since 2007, initially in administrative, and subsequently in the court proceedings.

64. In this regard, the Court recalls that the IOBK, through Decision [02/259/207] of 14 August 2007, initially rejected the Applicant's request as premature. The second request with the IOBK was filed by the Applicant on 29 August 2007. The Applicant did not receive a response from the IOBK, and therefore, on 7 November 2007, filed the claim and initiated court proceedings. These two dates, the date of filing a request with the IOBK on 29 August 2007 and the date of filing a claim with the Municipal Court in Prishtina on 7 November 2007, were a subject of continuous assessment before the regular courts in terms of the timeliness of the Applicant's claim, through the application of three different laws by the regular courts, Regulation 2001/36 in force in 2007, the Labor Law, and the Law on IOBK of 2010. All three determine different timeframes for the initiation of the court proceedings in labor disputes.

65. The Court notes that the three laws set different deadlines for initiating the court proceedings in labor disputes: a) Article 83 of the Law on Labor, establishes that: "*an employee who is not satisfied with the final decision of the competent authority in the organization or if that body does not make a decision within 30 days from the day of filing the claim or appeal, has the right to seek protection of his rights before the competent court within 15 next few days*"; b) Article 11.2, item (d) of the Regulation in 2001/36 establishes that "*the Board shall within ninety (90) days of the end of the appeal proceedings issue a written decision setting forth its determination and the legal and factual basis therefore*" , an appeal against which with the competent court should be filed within 30 days; while c) the Law on IOBK of 2010 stipulates that the Board must decide within 60 days (12.3.4), an appeal against which to the competent court should be filed within 30 days (Article 14).

66. The Court also recalls that the regular courts applied the three different laws in a total of eight court decisions in Applicant's case. Four Municipal Court, namely the Basic Court, three of which relate to his statement of claim, while the fourth only with the request for return to the previous situation. The first three apply two different laws in assessing the timeliness of the Applicant's statement of claim. Judgments [Cl.520/2007] of 9 July 2008 and [C. No. 290/12] of 30 October 2012, which declared his statement of claim as timely and subsequently examined the merits of the case, apply the Regulation 2001/36, while the other, the Decision [C. No. 437/15] of 25 January 2016, declared the request as out of time by applying the Labor Law.

67. The Applicant also has three decisions of the District Court and Court of Appeals, two of which deal with his case, while the third one only

the appeal against the rejection to return to the previous situation. The first two, the Judgment [Ac. No. 199/2009] of 12 January 2012 and Decision [Ca. No. 1977/2013] of 12 February 2015, respectively, apply two different laws, the first one the Labor Law, while the second, Regulation 2001/36.

68. Finally, the Supreme Court also rejected the request for protection of legality of the State Prosecutor on the grounds that the initial claim was out of time, while specifically noting that the Labor Law does not apply in this specific dispute, but rather Regulation 2001/36. However, in assessing the timeliness of the initial claim, the Supreme Court applies a third law, namely the Law on the IOBK of 2010, a law not in force at the time of the dispute.

69. Specifically, the Supreme Court in its Decision specifically clarifies that in the present case the Labor Law does not apply, but Regulation 2001/36. However, the Supreme Court also refers to the Law of the IOBK of 2010. The Supreme Court states that:

> "*The Supreme Court of Kosovo found that the Basic Court in Prishtina decided correctly when it dismissed the claimant's claim as out of time, however, in this case the Regulation on Civil Service of Kosovo No. 2001/36 and the Administrative Directive for the implementation of the Regulation No. 2003/2 should be applied, under which the claimant had the status of a civil servant. Therefore, the procedure for the protection of the employment rights of civil servants is implemented based on this law and the Law on the Independent Oversight Board for Civil Service of Kosovo (No. 03/L-192) which was in force at the time when the employment contract was terminated to the claimant*".

70. However, in calculating the time limits based on which the Supreme Court rejects the request for protection of legality of the State Prosecutor, supporting the conclusion of the Basic Court that the Applicant's claim was out of time, the Supreme Court does not apply the provisions of Regulation 2001/36, which it maintains itself is applicable in the case of the Application, but it rather applies the Law on the IOBK of 2010, thus not in force at the time of the dispute in 2007, the deadlines for filing the claim of which, differ from those established in Regulation 2001/36. The Supreme Court maintains:

> *"The claimant, as a civil servant, should have filed an appeal with the Independent Oversight Board for the Civil Service of Kosovo within the time limit of 30 days from the day when the employing authority should have rendered a decision concerning his appeal,*

pursuant to Article 12.2 of the Law on Independent Oversight Board for Civil Service of Kosovo (Law No. 03/L- 192). In each appeal brought before it, the Board shall within 60 days issue a decision (Article 12.3.4). This was also determined by Administrative Instruction No. 2005/02 on Rules and Procedures of Appeals in the IOBK. The claimant filed an appeal with the Personnel Manager of the MIA on 18.06.2007, while on 29.08.2007 he filed an appeal with the IOBK, whereas he filed a claim with the Court on 07.12.2007, and that the deadline for filing a claim was 30.11.2007. Based on this, it results that the claim was filed after the legal time limit".

71. Finally, in responding to the State Prosecutor's allegations for the application of the deadlines established through Regulation 2001/36 in the present case, the Supreme Court continues to apply the time limits of the Law on IOBK of 2010. The Supreme Court reasoned as it follows:

"The allegations of the State Prosecutor in the request for protection of legality that in the present case, Regulation No. 31/2006 must be applied and that the time limit expired on 29.12.2007 whereas the claim was filed on 07.12.2007, are ungrounded because as it was stated above, the claimant filed the claim after the time limit of 90 days and the IOBK should have decided within the time limit of 60 days and not 90 days as alleged by the State Prosecutor in his request".

72. In this regard, the Court recalls that in rejecting the request for protection of legality of the State Prosecutor, the Supreme Court had concluded that not the Labor Law, but Regulation 2001/36 applies in the specific case. While in the reasoning the rejection of the request, it applied the time limits of the Law on the IOBK of 2010, resulting in a different outcome pertaining to the deadline of the Applicant's initial claim, than it would have been the case if Regulation 2001/36 was applied.

73. In this respect, the Court notes that in its reasoning the Supreme Court applies a law that entered into force in 2010, namely the Law on the IOBK, into a dispute of 2007, despite the fact that it itself recognizes that Regulation 2001/36 is applicable. The Court has already noted that the deadlines for filing a claim as established in both laws are different. It also notes that the provisions of the Law on IOBK were not applicable at the time when the Applicant filed the initial claim in 2007.

74. The Court thus notes that Supreme Court has manifestly erroneously applied the law resulting into arbitrary conclusions for the Applicant. Furthermore, the Supreme Court has not provided any reasons for the application of the Law on IOBK of 2010 into the circumstances of the specific case.

75. In addition, the Court refers to the ECtHR case-law, and specifically to the Case of *Barac and Others v. Montenegro* (ECtHR Judgment of 13 December 2011, paragraph 32), which maintained that "*no fair trial could be considered to have been held where the reason given in the relevant domestic decision was not envisaged by the domestic legislation and, therefore, was not a legally valid one*". (See also, *mutatis mutandis*, *De Moor v. Belgium*, 23 June 1994, paragraph 55, Series A no. 292-A; and *Dulaurans v. France*, no. 34553/97, paragraphs 33-39, 21 March 2000).

76. Therefore, the Court must conclude that the Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court, which rejected as ungrounded the request for protection of legality filed by the State Prosecutor against the Decision [C. No. 437/2015] of 25 January 2016 of the Basic Court in Prishtina, did not meet the criteria of a "*fair trial*" as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to manifestly erroneous or arbitrary application law.

77. In this regard, the Court emphasizes that this conclusion exclusively concerns the challenged Decision of the Supreme Court from the point of view of the application of the adequate law into the circumstances of the Applicant's case and in no way prejudices the outcome of the merits of the his case.

78. Finally, the Court considers that it is not necessary to examine the Applicant's allegations in relation to Article 54 of the Constitution in conjunction with Article 13 of the ECHR and Articles 49 and 102 of the Constitution, after finding a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Conclusion

79. In conclusion, based on the case law of the ECHR, the Court finds that, taking into account that in the circumstances of the present case, the reasoning of the Supreme Court Decision, resulted into arbitrary conclusions for the Applicant, the rights of the Applicant to fair and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, were violated.

80. In sum, pursuant to Rule 74 (1) of the Rules of Procedure, Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court is declared invalid and the matter is remanded to the Supreme Court for reconsideration.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113 (7) and 116 (1) of the Constitution, Articles 47 and 48 of the Law and Rules 56 (1), 63 (1) (5) and 74 (1) of the Rules of Procedure, on 30 May 2018, by majority

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE invalid Decision CML. No. 6/2016 of the Supreme Court of 13 September 2016;

IV. TO REMAND the Decision CML. No. 6/2016 of the Supreme Court of 13 September 2016 for reconsideration, in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court to inform the Court, in accordance with Rule 63 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;

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

VII. TO NOTIFY this Judgment to the Parties;

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

IX. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI 115/16 Applicant: Branko Ljumović, Ranko Ljumović and Anica Vukićević-Ljumović, requesting constitutional review of

Judgment AC-II-12-0126 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 21 April 2016

KI 115/16, Judgment of 29 May 2018, published on 19 June 2018

Key words: *individual referral, property dispute, Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, an admissible referral, the Applicants' right to fair and impartial trial was violated, the Applicants' right to a reasoned court decision was denied.*

The Applicant challenge Judgment [AC-II-12-126] from 21 April 2016 of Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: Appellate Panel) in connection with Judgment Judgment [C. No. 2021/2007] from 29 July 2010 of the Municipal Court in Prishtina.

Appellate Panel by Judgment [AC-II-12-126] approved the Privatization Agency of Kosovo appeal and annulled Judgment [C. No. 2021/2007] of the Municipal Court in Prishtina, which confirmed property rights of applicant.

The applicants claim that their rights have been violated, guaranteed by a) Article 24 of the Constitution, because, according to their claims, the Appeals Panel placed them in an unequal position not respecting their own judicial practice; b) Article 31 of the Constitution, since the judgment of the Appeals Panel was not reasoned in relation to the main allegations of the applicants, and additionally, by the expiration of the deadline for appeal, the judgment of the Municipal Court became the final judgment *res judicata*; and c) Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the European Convention on Human Rights, since, according to the claims, from the moment of the validity of the judgment of the Municipal Court, they acquired "legitimate expectations" of property rights, defined on the basis of the case law of the European Court of Human Rights.

Based on the case law of the European Court of Human Rights and after considering the allegations of the applicants, the Court found that the Appeals Panel, without reasoning the basic requests of the applicants regarding the timeliness of the appeal of the Privatization Agency of Kosovo, the result of which annulled the judgment of the Municipal Court, violated the applicants' right on for a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 (1) of the European Convention on Human Rights. As a result of this violation, applicants were deprived of the right to a reasoned court decision.

JUDGMENT

in

Case No. KI115/16

Applicants

Branko Ljumović, Ranko Ljumović and Anica Vukićević-Ljumović

Constitutional review of Judgment AC-II-12-0126 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 21 April 2016

CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Branko Ljumović, Ranko Ljumović and Anica Vukićević Ljumović (hereinafter: the Applicants), who are represented by Visar Vehapi, a lawyer from Prishtina.

Challenged decision

2. The Applicants challenge the Judgment [AC-II-12-126] of 21 April 2016 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel) in conjunction with the Judgment [C. No. 2021/2007] of 29 July 2010 of the Municipal Court in Prishtina.

3. The challenged Judgment was served on the Applicants on 17 May 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment which allegedly violated the Applicants' rights guaranteed by Article 3 [Equality Before the Law], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 1 of Protocol 1 to the European Convention on Human Rights (hereinafter: the ECHR) and Article 53 [Interpretation of the Human Rights Provisions] of the Constitution.

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 17 September 2016, the Applicants submitted the Referral through mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 19 October 2016, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Selvete Gërxhaliu-Krasniqi.

8. On 9 November 2016, the Court notified the Applicants and the Appellate Panel about the registration of the Referral.

9. On 29 May 2018, the Review Panel deliberated on the report of Judge Rapporteur and recommended to the Court the admissibility of the Referral.

Summary of facts

10. On 2 February 1959, the mother of the Applicants signed a Sale-purchase Agreement [No.Vr.570/60] with the Agricultural Cooperative "Orlović" (hereinafter: the Agricultural Cooperative) for the sale of immovable property. The Contract was certified in the District Court in Prishtina on 02 March 1960. The Applicants allege that the amount set in the Contract in question has never been compensated.

11. On 14 August 2007, the Applicants filed a complaint with the Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters (hereinafter: the SCSC), whereas on 17 September 2007, the Applicants also filed a claim with the Municipal Court in Prishtina.

12. Through the respective claims, the Applicants requested to certify that the Contract for the Sale-purchase of immovable property be declared null and void and to oblige the Socially Owned Enterprise AIC "Kosova Export" in Fushë Kosovë (hereinafter: "Kosova Export"), as a legal successor of the Agricultural Cooperative, to return to the claimants, namely the Applicants, the ownership of disputed immovable property.

13. On 20 November 2007, the SCSC through Decision [SCC-07-0322] referred the Applicants' claim to the Municipal Court in Prishtina. The abovementioned Decision, among others, stated that any appeal against the Decision or the Judgment of the Municipal Court, must be filed with the SCSC.

14. On 29 July 2010, the Municipal Court in Prishtina through Judgment [C. No.2021/2007] approved the Applicants' statement of claim, declaring the Sale-purchase Contract [No.Vr.570/60] between the Applicants and Agricultural Combine null, because according to the Judgment, it has not been confirmed that the agreed price in the Sale-purchase Contract was paid, obliging the respondent "Kosova Export" to compensate the Applicants in the manner provided by this Judgment. Through the Legal Advice, the Judgment of the Municipal Court instructed the parties that against the Judgment in question, the appeal is allowed within 60 days.

15. On 18 November 2010, the Privatization Agency of Kosovo (hereinafter: the PAK), acting as an administrator of "Kosova Export" submitted an appeal to the Appellate Panel of the SCSC against Judgment [C. No. 2021/2007] of the Municipal Court in Prishtina, invoking essential violations of the contested procedure, erroneous

determination of factual situation, and a violation of the substantive law.

16. On 26 November 2010, the Socially Owned Enterprise "Ratar" (hereinafter: "Ratar") also filed an appeal against the Judgment [C. No. 2021/2007] of the Municipal Court, requesting that the appealed Judgment be annulled and the case be remanded for retrial, or to modify the appealed Judgment and to reject the statement of claim.

17. On 20 September 2011, the Applicants filed a request with the Appellate Panel, challenging the legitimacy of "Ratar", as a procedural party, reasoning that only the PAK has legitimacy to represent the socially owned enterprises in court proceedings. The same allegation was filed by the Applicants through the submission of 22 July 2013.

18. Through the letter of 22 July 2013, the Applicants also challenged the legal deadline within which the PAK appeal was filed against Judgment [C. No. 2021/2007] of 29 July 2010 of the Basic Court. The Applicants argued that pursuant to UNMIK Regulation No. 2008/4 on Amending UNMIK Regulation No. 2002/13 on the Establishment of Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters (hereinafter: Regulation 2008/4), the PAK appeal against the Judgment of the Basic Court was out of time.

19. On 27 May 2014, the Applicants filed a proposal with the Appellate Panel for the approval of a preliminary injunction, thereby preventing the PAK from undertaking any activity regarding the disputed properties. On 25 September 2014, the Appellate Panel dismissed the claim of the Applicants regarding the preliminary injunction.

20. On 18 February 2016, the PAK appeal of 18 November 2010 and the Ratar appeal of 26 November 2010, were served on the Applicants for comments within 21 days. The Applicants did not submit any comments to the Appellate Panel within this time limit.

21. On 31 March 2016, the Applicants once again addressed the Appellate Panel challenging the procedural legitimacy of "Ratar" in the proceedings, and reiterating the allegations pertaining to the deadline of the PAK's appeal against the Judgment of the Basic Court, basing their arguments, apart from the Regulation 2008/4, also on the case law of the Appellate Panel.

22. On 21 April 2016, the Appellate Panel through Judgment [AC-II-12-126] approved the PAK appeal and annulled Judgment [C. No. 2021/2007] of the Municipal Court in Prishtina.

23. The Appellate Panel based the reasoning of its Judgment in the following paragraph:

> *"The first instance court approved the legal remedy that does not exist as a matter of law. From this claim it is clear that the respondent is not the owner of immovable property that had been the subject of the contract of 1959. The allegation of a different property other than the original one is legally impossible. In such cases - when the contract is revoked, annulled or terminated and the respondent is not the owner of the original subject of available contract, there is only monetary compensation. Thus, the appealed decision is erroneous and needs to be quashed and the claim to be rejected as ungrounded"*

Applicant's allegations

24. The Applicants allege violations of their rights guaranteed by Article 3 [Equality Before the Law], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 1 of Protocol 1 to the European Convention on Human Rights (hereinafter: the ECHR) and Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

25. The Applicants allege that Judgment [C. No. 2021/2007] of 29 July 2010 of the Municipal Court of Prishtina had become final with the expiry of the legal deadline for an appeal, as established in Regulation 2008/4, and accordingly, the decision was *res judicata*. In this regard, the Applicants allege that the PAK's appeal against the Judgment of the Municipal Court was filed with the Appellate Panel out of the 30-day deadline set forth in the Regulation 2008/4 and that the Appellate Panel, by approving this appeal as timely, violated their constitutional rights to equality before the law, and fair and impartial trial as guaranteed by Articles 24 and 31 of the Constitution.

26. As to the specific allegations for violation of Article 24 of the Constitution, the Applicants emphasize that by approving the PAK appeal as timely, the Appellate Panel acted in contravention with its own case law pertaining to the deadline of the appeals and thus put the Applicant in a different position under the same circumstances. In this regard, the Applicants refer to the decisions of the Appellate Panel of the SCSC [ASC-10-0012] of 29 April 2010; [ASC-10-005] of 17 August

2010; [ASC-10-0040] of 17 August 2010; [SCA-09-0096] and [AC-2-II-12-0120] of 20 June 2013. The Applicants allege that this case law of the Appellate Panel was also confirmed by the Resolution of the Constitutional Court in Case KI145/13 (Resolution of Inadmissibility of 8 May 2014).

27. As to the specific allegations for a violation of Article 31 of the Constitution, the Applicants allege violation of the principle of legal certainty, arguing that the Judgment of the Municipal Court had become final and that the appeal filed against it, was out of time. In this regard, the Applicants refer to the case law of the European Court of Human Rights (hereinafter: the ECtHR) in cases *Stere and Others v. Romania; Bronowski v. Poland; Sovtransavto Holding v, Ukraine; and Ryabykh v. Russia*. The Applicants also allege a violation of the right to a reasoned decision, stating, *inter alia*, that the Judgment of the Appellate Panel had not addressed any of their allegations, in particular those dealing with the deadline of the PAK appeal.

28. The Applicants also allege a violation of the rights guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 to the ECHR. They allege that after the Judgment of the Municipal Court became final, the right to property was confirmed to them. The Judgment in question became, according to the allegation, *res judicata*, and consequently, the Applicants, apart from confirming the ownership, had also acquired the "*legitimate expectations*" defined on the basis of the ECtHR case law. In this regard, the Applicants refer to cases *Sporrong and Lonnroth v. Sweden; Sovtransavto Holding v. Ukraine; Slivenko v. Latvia; and Beyeler v. Italy*.

29. Finally, the Applicants request the Court to find that the challenged Judgment was rendered in violation of Articles 3, 22, 24, 31, 46 and 53 of the Constitution; to declare invalid the Judgment [AC-II-12-0126] of 21 April 2016 of the Appellate Panel; and to uphold the Judgment [C. No. 2021/2007] of 29 July 2010 of the Municipal Court in Prishtina as *res judicata*.

Assessment of the Admissibility of Referral

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

31. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which 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."*

32. The Court also examines whether the Applicant met the admissibility criteria as further specified in the Law. In this regard, the Court refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which foresee:

Article 47
[Individual Requests]

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

Article 48
[Accuracy of Referral]

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

Article 49
[Deadlines]

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

33. Regarding the fulfillment of these requirements, the Court finds that the Applicants submitted the Referral in a capacity of an authorized party, challenging an act of a public authority, namely Judgment [AC-II-12-126] of 21 April 2016 of the Appellate Panel of the SCSC, after having exhausted all legal remedies provided by the law. The Applicants also clarified the rights and fundamental freedoms, which allegedly have been violated in accordance with Article 48 of the Law, and submitted the Referral within the deadlines foreseen in Article 49 of the Law.

34. The Court finally notes that this Referral is not manifestly ill-founded in accordance with Rule 36 (1) (d) of the Rules of Procedure. The Court further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible. (see also Case of ECtHR *Alimuçaj v. Albania*, application no. 20134/05, Judgment of 9 July 2012 at paragraph 144; see also, Case KI97/16, Applicant *IKK Classic*, Judgment of 9 January 2018, paragraph 38).

Relevant Legal Provisions

UNMIK /Regulation / 2008/4
5 February 2008

AMENDING UNMIK REGULATION NO. 2002/13 ON THE ESTABLISHMENT OF A SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS
[...]

Article 9 - Judgments, Decisions and Appeal

"Article 9.5
A Judgment or Decision of a trial panel shall be served on the parties within thirty (30) days of adoption. Within thirty days from the receipt thereof, a party may appeal to the appellate panel for a review of such Judgment or Decision."

[...]

UNMIK /ADMINISTRATIVE DIRECTION /2008/6
11 July 2008

AMENDING AND REPLACING UNMIK ADMINISTRATIVE DIRECTION NO. 2006/17, IMPLEMENTING UNMIK REGULATION NO. 2002/13 ON

THE ESTABLISHMENT OF A SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS

[...]

Section 59
Filing of Appeal

"59.1 An appeal shall be filed with the Special Chamber within two months of the service of the Judgment on the party appealing."

Merits of the Referral

35. The Court recalls that the Applicants challenge the Judgment of the Appellate Panel, which annulled the Judgment of the Municipal Court, through which the Applicants' property rights over the disputed properties were initially confirmed. The Court also notes that the essential issue in the circumstances of the present case is the deadline of the PAK appeal against the Judgment of the Municipal Court.

36. In this regard, the Court notes that the Judgment of the Municipal Court was rendered on 29 July 2010. According to the case file, it results that it was received by the PAK on 30 September 2010. The Judgment in question through the Legal Advice had instructed the parties that any an appeal against this decision should be submitted to the Appellate Panel within 60 days. On the other hand, the UNMIK Regulation 2008/4 stipulates that the deadline of the appeal is 30 days from the receipt of the decision of the party, while Administrative Direction 2008/6 determines that the deadline for the appeal is 60 days. PAK submitted the appeal on 18 November 2010, respectively more than one month after the receipt of the Judgment of the Municipal Court.

37. The difference in deadlines for submitting appeals to the Appellate Panel, as defined by Regulation 2008/4 and Administrative Direction 2008/6, in fact constitutes the essence of the Applicants' allegations. The latter allege that the Appellate Panel had accepted the PAK appeal despite the fact that the 30-day deadline set by the Regulation had expired, and moreover, according to the allegation, contrary to the established case law of the Appellate Panel, in addition to not addressing nor reasoning the claimants' continuing claims pertaining to the expiry of the deadline of the PAK appeal.

38. In this regard, the Applicants allege that their rights guaranteed by a) Article 24 of the Constitution were violated because, according to the allegation, the Appellate Panel placed them in an unequal position by acting against its own case law: b) Article 31 of the Constitution because the Judgment of the Appellate Panel was not reasoned pertaining to the essential allegations of the Applicants and moreover that, with the expiry of the legal time limit for appeal, the Judgment of the Municipal Court was *res judicata*; and c) Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 to the ECHR, because according to the allegation, based on the final Judgment of the Municipal Court, they had also acquired the "*legitimate expectations*" related to their property rights, as defined on the basis of the ECtHR case law.

39. In addressing the Applicants' allegations, the Court refers to the case law of the ECtHR in accordance with which the Court must, based on Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, interpret the fundamental rights and freedoms guaranteed by the Constitution. In this regard, the Court will first address the Applicants' allegations as to the violation of the right to a reasoned court decision and specifically as to the lack of reasoning pertaining to the timeliness of the PAK appeal in the light of the case law of the SCSC.

40. In this respect, the Court recalls that the right to a fair hearing includes the right to a reasoned decision. The ECtHR notes that, according to its 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: *Tatishvili v. Russia*, ECtHR Judgment, application no. 1509/02, of 22 February 2007, paragraph 58).

41. 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; see also, case of the Court KI97/16, Applicant: "*IKK Classic"*, Judgment of 9 January 2018, paragraph 45).

42. According to the ECtHR, a 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: *Hirvisaari v. Finland*, no. 49684/99, 27 September 2001, paragraph 30; *Tatishvili v. Russia*, ECtHR Judgment of 22 February 2007, paragraph 58; case of the Court KI97/16, Applicant "*IKK Classic"*, Judgment of 9 January 2018, paragraph 46; and KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017, paragraph 40).

43. However, although the ECtHR maintains that Article 6 of ECHR obliges the courts to give reasons for their judgments, it has also held that this cannot be understood as requiring a detailed answer to every argument. (See: the ECtHR cases, *Van de Hurk v. the Netherlands,* Judgment of 19 April 1994, para. 61; *Higgins and Others v. France,* ECtHR, no. 134/1996/753/952, Judgment of 19 February 1998, paragraph 42; and case of the Court KI97/16, Applicant "*IKK Classic"*, Judgment of 9 January 2018, paragraph 47).

44. 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 vs Spain*, application no. 30544/96, Judgment of 21 January 1999. paragraph 29; *Hiro Balani v. Spain*, Judgment of 9 December 1994, paragraph 27; *Higgins and Others v. France, Ibidem*, paragraph 42; see also: case of the Court KI97/16, Applicant "*IKK Classic"*, Judgment of 9 January 2018, paragraph 48; and KI22/16, Applicant: *Naser Husaj*, Judgment of 9 June 2017, paragraph 44).

45. 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*, Judgment of 21 January 1999, paragraph 26, and *Helle v. Finland,* Judgment of 19 December 1997, paragraph 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; and the case of the Court KI97/16, Applicant "*IKK Classic"*, Judgment of 9 January 2018, paragraph 49).

46. 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; and case of the Court KI97/16, Applicant: "*IKK Classic",* Judgment of 9 January 2018, paragraph 50).

47. Therefore, while it is not necessary for the court to deal with every point raised in argument (see also *Van de Hurk v Netherlands*, *Ibidem,* paragraph 61), the Applicants' main arguments must be addressed. (See: ECtHR cases *Buzescu v. Romania*, application no. 61302/00, Judgment of 24 May 2005, paragraph 63; *Pronina v Ukraine*, application no. 63566/00, Judgment of 18 July 2006, paragraph 25). Likewise, giving a reason for a decision that is not a good reason in law will not meet criteria of Article 6 of the Convention. (See case of the Court KI97/16, Applicant "*IKK Classic",* Judgment of 9 February 2016, paragraph 51).

48. In addition, the Court also refers to its own case law where it considers that 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 KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; and KI97/16, Applicant: "*IKK Classic",* Judgment of 9 February 2016, paragraph 52).

49. In this regard, the Court notes that the challenged Judgment of the Appellate Panel did not address the essential allegations of the Applicants regarding the timeliness of the PAK appeal against the Judgment of the Municipal Court. The Applicants had consistently claimed that the PAK appeal was not timely and that it's acceptance by the Appellate Panel was in contradiction not only with Regulation 2008/6, but also with its own case law.

50. More specifically, the Court notes that the Applicants repeatedly raised the following essential arguments to the Appellate Panel: a) that the PAK claim was out of time because Regulation 2008/6 clearly defines that the deadline of the appeal with the Appellate Panel was 30 days, while PAK submitted the appeal after this deadline, based on the Legal Advice given by the Judgment of the Municipal Court and Administrative Direction 2008/6; and that b) the case-law of the Appellate Panel has consistently applied Regulation 2008/6, as a higher legal act than the Administrative Direction 2008/6, in calculating the deadlines for the appeals. The Appellate Panel, in its Judgment, failed to address nor reason any of these allegations.

51. In fact, the Appellate Panel, by approving the appeal of the respondent, namely the PAK, as grounded and annulling the Judgment of the Municipal Court, based its reasoning only in the following paragraph:

> *"The first instance court approved the legal remedy which does not exist as a matter of law. From this claim it is clear that the respondent is not the owner of the immovable property that had been the subject of the contract of 1959. The allegation of a different property instead of the original one is legally impossible. In such cases - when the contract is revoked, annulled, or terminated and the respondent is not the owner of the available original subject of the contract is only monetary compensation. Therefore, the appealed decision is erroneous and must be annulled and the claim be rejected as ungrounded".*

52. The reasoning of the Appellate Panel in fact, fails to address the issue of admissibility of the PAK's appeal and the Applicants' allegations that it was out of time. The Court reiterates, referring to the consistent case law of the ECtHR as elaborated above, that while the courts are not required to give a detailed answer to all arguments, the essential arguments of the Applicants must be addressed. The determination whether the essential arguments are addressed or not, depends on the nature of the decision and must be determined in the light of the circumstances of the case.

53. In the circumstances of the present case, the Court considers that the allegations pertaining to the timeliness of the PAK appeal against the Judgment of the Municipal Court based on the applicable legislation and the case-law of the Appellate Panel are essential allegations and arguments of the Applicants, which must be addressed and reasoned by the Appellate Panel.

54. Therefore, the Court considers that the failure of the Appellate Panel to provide reasoning pertaining to the essential allegations of the Applicants constitutes a breach of the Applicants' right to be heard and the right to a reasoned decision, as a component of the right to a fair and impartial trial. (See also Constitutional Court Judgment KI97/16, paragraph 64).

55. Accordingly, in the light of the above observations and taking into account the proceedings as a whole, the Court considers that Judgment [AC-II-12-0126] of 21 April 2016 of the Appellate Panel does not meet the requirements of "a fair trial" as required by Article 31 of

the Constitution in conjunction with Article 6 (1) of the ECHR. (See ECtHR case *Grădinar v. Moldova,* application no. 7170/02, Judgment of 8 April 2008, paragraph 115).

56. The Court emphasizes that this conclusion exclusively concerns the challenged Judgment of the Appellate Panel from the perspective of the lack of reasoning related to the essential allegations of the Applicants, and in no way prejudices the outcome of the merits of the case. (See: also Judgment of the Court in case No. KI97/16, paragraph 68).

57. Finally, the Court recalls that the Applicants also allege a violation of the principle of legal certainty by claiming that the Judgment of the Municipal Court has become *res judicata* upon the alleged expiry of the deadline of the appeal and request the from the Court to uphold the Judgment [C. No. 2021/2007] of 29 July 2010 of the Municipal Court in Prishtina as *res judicata*. In addition, the Applicants allege that the Judgment of the Appellate Panel was rendered in violation of their rights guaranteed by Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol 1 to the ECHR. In building these allegations, the Applicants refer to a number of ECtHR cases.

58. In this regard, the Court notes that both of these allegations essentially relate to the interpretation and reasoning of the Appellate Panel as to the timeliness of the appeals. Consequently, having in mind that the Court found a violation of the right to a reasoned court decision, declaring the Judgment of the Appellate Panel invalid and remanding the case to the Appellate Panel for reconsideration in compliance with this Judgment, the Court considers that it is not necessary to review these allegations.

Conclusion

59. In conclusion, the Court finds that the Appellate Panel by failing to reason the essential allegations of the Applicants on the timeliness of the appeal, as a results of which it annulled the Judgment of the Municipal Court, it violated the right of the Applicants to fair and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR. As a result of this violation, the Applicants were deprived of their right to a reasoned court decision.

60. In sum, pursuant to Rule 74 (1) of the Rules of Procedure, Judgment [AC-II-12-0126] of 21 April 2016 of the Appellate Panel of the SCSC is

declared invalid and the case is remanded to the Supreme Court for reconsideration.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113 (7) and 116 (1) of the Constitution, Articles 47 and 48 of the Law and Rules 56 (1), 63 (1) (5) and 74 (1) of the Rules of Procedure, on 29 May 2018, by majority

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE invalid Judgment AC-II-12-0126 of 21 April 2016 of the Appellate Panel of the Special Chamber of the Supreme Court;

IV. TO REMAND Judgment AC-II-12-0126 of 21 April 2016 for reconsideration to the Appellate Panel of the Special Chamber of the Supreme Court, in conformity with the Judgment of this Court;

V. TO ORDER the Supreme Court to inform the Court, in accordance with Rule 63 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;

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

VII. TO NOTIFY this Judgment to the Parties;

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

IX. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI 62/17, Applicant: Emine Simnica, Constitutional review of Decision PN. II. no. 1/17 of the Supreme Court of Kosovo, of 31 January 2017, concerning Decision PML. no. 300/16 of the Supreme Court, of 12 December 2016

KI 62/17, Judgment of 29 May 2018, published on 18 June 2018

Key words: *individual referral, right to fair and impartial trial, right to access the court*

Basic Prosecution in Prishtina brought an indictment against the Applicant. The Basic Court in Prishtina rendered a judgment whereby it found the Applicant guilty of having committed a criminal offence.

The State Prosecutor filed an appeal with the Court of Appeals against the decision of the Basic Court. The Court of Appeals rendered a judgment whereby it granted the appeal of the State Prosecutor and modified the judgment of the first-instance court.

The Applicant filed a request for protection of legality with the Supreme Court against the judgment of the Court of Appeals The Supreme Court rendered a decision whereby it rejected the request for protection of legality of the Applicant's legal representative as inadmissible without verifying her authorization.

The Applicant filed a request for annulling the previous decision of the Supreme Court against the decision of the Supreme Court alleging that in its previous decision the Supreme Court had not fulfilled its obligation assigned to it by law and had, therefore, violated her rights on access to the court.

The Court considers that given the circumstances, the Applicant's right to access a court and the principle of fair and impartial trial had been violated, as foreseen by Article 31 of the Constitution and Article 6 of ECHR.

JUDGMENT

in

Case No. KI62/17

Applicant

Emine Simnica

Constitutional review of Decision PN. II. No. 1/17 of the Supreme Court of Kosovo of 30 January 2017 related to the Decision PML. No. 300/16 of the Supreme Court of 12 December 2016

CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President

Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Emine Simnica from Prishtina (hereinafter: the Applicant), represented by lawyers Abit Asllani and Teuta Zhinipotoku.

Challenged decision

2. The Applicant challenges Decision PN. II. No. 1/17 of the Supreme Court of 30January 2017, related to the Decision PML. No. 300/16 of the Supreme Court of 12 December 2016.

3. The challenged decision was served on the Applicant on 7 February 2017.

Subject matter

4. The subject matter is the constitutional review of the abovementioned decision of the Supreme Court, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 16 [Supremacy of the Constitution], Article 19 [Applicability of International Law], Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law], Article 30 [Rights of the Accused] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

6. On 31 May 2017, the Applicant submitted the Referral to the Constitutional Court (hereinafter: the Curt).

7. On 1 June 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

8. On 13 June 2017, the Court notified the Applicant and the Supreme Court about the registration of the Referral. By it was requested from the Applicant to complete the Referral by submitting the completed referral form.

9. On 18 July 2017, the Applicant submitted the complete the Referral to the Court.

10. On 30 August 2017, the Court requested the Supreme Court and the Basic Court in Prishtina to submit a copy of the acknowledgment on receipt by which the Supreme Court requested the Applicant to submit a power of attorney for a legal representative.

11. On 13 September 2017, the Court again requested the Supreme Court and the Basic Court in Prishtina to submit the previously requested documents.

12. On 14 November 2017, taking into account the fact that the Court did not receive any reply to the previous requests, the Court requested the Supreme Court and the Basic Court to submit a complete file of the case under Decision [PN. II. No. 1/17] of the Supreme Court of 30 January 2017 and Decision [PML. No. 300/16] of the Supreme Court of 12 December 2016**.**

13. On 18 December 2017, the Supreme Court replied: *"We inform you that this case has been decided and it was submitted to the Basic Court in Prishtina on 02.02.2017. Therefore, you can request the case file from the Basic Court in Prishtina".*

14. On 25 January 2018, taking into account the reply of the Supreme Court and the fact that the Court did not receive a reply to the previous requests made to the Basic Court, the Court again requested the Basic Court to submit the complete file of the said case.

15. On 9 February 2018, the Basic Court submitted a complete file of the said case.

16. On 29 May 2018, the Review Panel deliberated on the report of Judge Rapporteur and recommended to the Court the admissibility of the Referral.

Summary of facts

17. On 18 September 2015, the Basic Prosecution Office in Prishtina filed an indictment [PP.I.br.572/2015] against the Applicant on suspicion of having committed the criminal offense of fraud in the distribution of medicine at the University Hospital Clinical Centre of Prishtina (hereinafter: UHCC) to the detriment of the budget of Kosovo.

18. On 30 May 2016, the Basic Court in Prishtina Judgment PKR. No. 353/2015 following the Applicant's guilty plea, found the Applicant guilty of the commission of the criminal offense. By this Judgment the Applicant was imposed a suspended sentence, and the court also obliged the Applicant to compensate the material damage caused by the committed criminal offense.

19. After that, the Applicant paid the compensation which he had been ordered to pay, by way of pecuniary damage to the amount of 27,527.00 Euros to the budget of the Republic of Kosovo - Ministry of Health.

20. The Applicant, the state prosecutor, and the UHCC, in the capacity of the injured party, filed the appeals with the Court of Appeals against Judgment PKR. No. 535/2015 of the Basic Court of 30 May 2016.

21. On 13 July 2016, the Prosecutor proposed to the Court of Appeals: "*modification of the challenged Judgment in order to impose to the convicted person a more aggravating sentence of imprisonment.*"

22. On 29 July 2016, the Court of Appeals, rendered Judgment PAKR. No. 398/2016, approved the appeal of the state prosecutor and modified the first instance judgment regarding the decision on the imposed imprisonment sentence, so that the Applicant was imposed an effective imprisonment sentence instead of a suspended sentence.

23. The reasoning of the Judgment of the Court of Appeals, regarding the modification of the suspended sentence to an effective sentence states, *inter alia*:

> *"The circumstances, which were ascertained and assessed by the first instance court when imposing the sentence on the accused E.S., pursuant to the assessment of this court, do not have such a nature that on the accused is imposed such a lenient sentence such as the suspended sentence."*

24. On 31 August 2016, against Judgment PAKR. No. 398/2016 of the Court of Appeals, the Applicant submitted a request for protection of legality to the Supreme Court, *"due to substantial violations of the criminal procedure provisions and violations of the criminal code by proposing to the Supreme Court to annull the challenged judgments and to remand the case to the Court of the first instance for retrial or to modify it in order to impose a more mitigating sentence."*

25. On 12 December 2016, the Supreme Court (Decision PML. No. 300/2016) reject as inadmissible the request for protection of legality. In the reasoning of the decision, the Supreme Court states:

> *"from the challenged judgments it follows that the defence counsel of the convict Emine Rama - Simnica, in all stages of the criminal procedure was the lawyer Abit Asllani from Prishtina, who submitted the appeal against the Judgment of the first instance. The request for protection of legality was submitted by the lawyer Teuta Zhinipotoku from Prishtina while the case file does not contain any evidence that the defense counsel in question was authorized to use this legal remedy."*

26. On 28 December 2016, against Decision PML. No. 300/2016 of the Supreme Court, the Applicant filed a request for annulment of the decision on the grounds that *"he submitted the authorization to the Basic Court in Prishtina together with the request which is confirmed by the receipt stamp, based on Article 442, paragraph 4, of the CPCK, which foresees that if the submission is not understandable or does not contain what is necessary to act in relation to the submission, the Court summons the party to fulfill or correct it and in order to make justice and to realize the principle of justice,."*

27. On 30 January 2017, the Supreme Court [Decision PN. II. No. 1/2017], reject as inadmissible the request for the annulment of Decision PML. No. 300/2016 of the Supreme Court. In the reasoning of the decision , the Supreme Court stated:

> *"The provisions of Article 418 of the CPCK, define decisively the cases when the extraordinary legal remedies can be applied against final decisions, while in the present case the defense*

counsel of the convict submitted a request for annulling the Decision and rendering a Decision based on merit upon the request for protection of legality against the Decision of the Supreme Court of Kosovo, the request cannot be considered as an extraordinary legal remedy; therefore, as such, this Court considers that it should be dismissed as inadmissible."

Applicant's allegations

28. The Applicant alleges that in Judgment PAKR. No. 398/2016, the Court of Appeals violated her right to a fair trial because it modified the judgment of the first instance court and transferred the suspended sentence into an effective imprisonment sentence, in the absence of the Applicant. The Court of Appeals was obliged to summon the Applicant to participate in the hearing before the second instance court. The Court of Appeals did not do that and thus it also violated Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

29. The Applicant also alleges that the Supreme Court upon receipt of the request for protection of legality, was obliged under the law "*in the absence of a power of attorney or a relevant letter in the case file to address the representing party with a letter giving a short legal/court deadline to correct any possible flaw so that the proceeding continues according to the law*". However, the Supreme Court, in its decision PML. No. 300/2016, failed to respect its legal obligations and rejected the request for protection of legality with the reasoning that the alleged power of attorney was not in the case file. Thereby, the Supreme Court denied the Applicant of any access to a court because it refused her the prior possibility of correcting and supplementing her submissions.

30. At the same time, the Applicant alleges that, after rejecting her request for protection of legality, she addressed the Supreme Court with a request to "*annul its decision of 12.12.2016 and to remand the matter for decision on merits by informing the court about the legal obligations under Article 442, paragraph 4, of the applicable Criminal Procedure Code."* However, this request was also rejected by the Supreme Court, and thus the right to a fair trial and access to the court was denied to her.

31. The Applicant requests the Court to approve the Referral, and "*based on the Constitution, [...], to* ***hold*** *a violation of constitutional provisions, [...],* ***to recommend to remand*** *the case to the Court of Appeals for reconsideration and retrial [...]."*

Admissibility of Referral

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

33. 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".*

34. The Court further examines whether the Applicant fulfilled the admissibility requirements as prescribed in the Law. In that regard, the Court refers to Articles 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".*

35. Regarding the fulfillment of these requirements, the Court notes that the Applicant has filed the Referral as an individual and in the capacity of an authorized party challenging the act of a public authority, namely Decision PN. II. No. 1/17 of the Supreme Court of 31 January 2017, after exhaustion of all legal remedies. The Applicant also clarified the rights and freedoms she claims to have been violated in accordance

with Article 48 of the Law and filed the Referral in accordance with the deadlines foreseen by Article 49 of the Law.

36. However, the Court should further examine whether the requirements established in Rule 36 of the Rules of Procedure have been met.

37. Rule 36 [Admissibility Criteria], paragraph (1) (d) and (2) (d) of the Rules of Procedure provides:

> *"(1) The Court may consider a referral if:*
> *[...]*
> *d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
> *[...]*
> *d) the Applicant does not sufficiently substantiate his claim.*
> *"*

38. The Court first notes that the Applicant alleges violations of the supremacy of the Constitution, the applicability of international law, the general principles, the direct applicability of international agreements and instruments, equality before the law, the right of access to court and the right to a fair and impartial trial, as guaranteed by the Constitution.

39. The Court also notes that, in essence, the Applicant's Referral is based on a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

40. Finally, the Court notes that the Applicant has accurately clarified the alleged violations of the Constitution and the ECHR. Therefore, the Court finds that this Referral is not manifestly ill-founded within the meaning of Rule 36 (1) (d) of the Rules of Procedure. Furthermore, it notes that it is not inadmissible on any other ground. Therefore it is to be declared admissible (see: case *Alimuçaj v. Albania*, ECtHR, application No. 20134/05, judgment of 9 July 2012, para. 144).

Merits

41. The Court recalls that the Applicant's main allegation is of 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 because:

The Supreme Court without prior determination of the facts that are of importance for the continuation of the proceedings rejected the request for protection of legality of the Applicant's legal representative, because according to the assessment of the Supreme Court, the request was submitted by an unauthorized party.

42. The Court refers to the relevant provisions of the Constitution and the ECHR:

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

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

Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law."

Article 6 (Right to a fair trial) of ECHR:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[...]

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

[...]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for

legal assistance, to be given it free when the interests of justice so require.

43. The Court also reiterates that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution *„human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

44. In this regard, the Court first notes that the case law of the ECtHR constantly considers that the fairness of the proceedings is assessed based on the proceedings as a whole (see: ECtHR Judgment, *Barbera, Messeque and Jabardo v. Spain*, No. 146, paragraph 68. Therefore, in the procedure of assessing the grounds of the Applicant's allegations, the Court will adhere to these principles.

45. The Court notes that the Applicant's main allegation is a violation of Article 31 of the Constitution in conjunction with Article 6 ECHR. The Applicant alleges that the Supreme Court had a legal obligation to officially request the power of attorney from the Applicant or her legal representative. The Applicant further claims that the Supreme Court by this omission deprived her of the right to a fair trial.

46. The Applicant presented these arguments before the Supreme Court in the appeal of 28 December 2016 against the first Decision [PML. No. 300/2016] of the Supreme Court, which, the Supreme Court rejected as inadmissible [Decision PN. II. No. 1/2017].

47. In the present case, the Applicant considers that Decision PML. No. 300/2016 of the Supreme Court of 12 December 2016, violated the right to fair trial because the Supreme Court did not consider her request for protection of legality against the judgment of the Court of Appeals PAKR. br. 398/2016, with the reasoning that, *"from the challenged Judgments, it follows that the defence counsel of the convict Emine Rama - Simnica, in the all stages of the criminal procedure was the lawyer Abit Asllani from Prishtina, who submitted the appeal against the Judgment of the first instance. The request for protection of legality was submitted by the lawyer Teuta Zhinipotoku from Prishtina while the case file does not contain any evidence that the defense counsel in question was authorized to use this legal remedy."*

48. Such a stand of the Supreme Court, in the Applicant's view, is contrary to the obligations of the court provided by Article 442.4 of the CPCK, which prevented her to continue with further proceedings and by this was caused a violation of Article 31 of the Constitution in conjunction

with Article 6 of the ECHR.The Court states that in essence the Applicant alleges a violation of the right of access to the court, as the Supreme Court rejected her appeal without entering the substance of the request.

49. Accordingly, the Court will consider the Applicant's allegations regarding the right of 'access to court' as one of the principles of a fair trial under Article 31 of the Constitution and Article 6 of the ECHR.

General principles (Access to the court)

50. First of all, the Court recalls that in the case *Golder v. United Kingdom*, in paragraph 36, the ECtHR found that: "*36. (...) the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1.* Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. (see Case *Golder v. the United Kingdom*, 21 February, 1975, §§ 28-36, Series A No. 18)

51. Therefore, the ECtHR, by its legal interpretation of Article 6 of the ECHR has taken the "right of access to a court" as a principle not defined by that provision, but according to the ECtHR understanding, it is implicitly contained in the provision itself.

52. Furthermore, in the case *Kreuz v. Poland*, the ECtHR stated *"The Court reiterates that, as it has held on many occasions, Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, that provision embodies the "right to a court", the right of access, as a principle that makes in fact possible to benefit from the further guarantees laid down in paragraph 1 of Article 6.* (see ECtHR judgment: *Kreuz v. Poland*, Application No. 2824/95 of 20 April 1998 § 52)

53. Also in the judgment *Lesjak v. Croatia* (2010), the European Court reiterated what constitutes a definitive access to a court or a right of access to a court*: "35. The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. The right of access, namely the right to institute proceedings before a court in civil matters, constitutes one aspect of this "right to a court"* (see, notably, *Golder v. the United Kingdom*, 21 February 1975, §§ 28-

36, Series A no. 18). For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act interfering with his or her rights (...).(...) (see ECtHR judgment *Lesjak v. Croatia* application No. 25904/06 of 18 February 2010)

54. Furthermore, the Court recalls that the ECtHR has found that the right of access to court also applies in criminal cases (see ECtHR Judgment of 13 May 2001, Krombach v France, no. 29731/96, paragraph 96).

55. Therefore, in accordance with ECtHR case law, the right of access to a court means not only the right to initiate proceedings before a court, but, in order for the right of access to a court to be effective, the individual must also have a clear and real possibility of challenging the decision which violates his/her rights. In other words, the right of access to a court is not exhausted only in the right to institute proceedings before the court, but its meaning is much wider as it includes the right to "resolution" of the dispute by the competent court.

56. The Court further states the right of access to a court is not absolute, but it can be subject to limitations, since by its very nature it calls for regulation by the state, which enjoys a certain margin of appreciation in this regard.

57. The Court recalls the reasoning of the European Commission on Human Rights *(*Report of 05 April 1995, *Société Levages Prestations Services v. France* , no. 21920/93, paragraph 40): *"[...] the Commission considers that the decision of the [Supreme Court] which led in this case to the inadmissibility the appeal on points of law, had disproportionate and inequitable repercussions on the applicant's right of access to a court of and has denied [him] in practice the possibility of exercising the remedy that was open to him in [domestic] law."*

58. In other words, any limitations on the right of access to a court must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the "right to a court" is impaired. Such limitations will not be compatible if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see cases: *Sotiris and Nikos Koutras, ATTEE v. Greece (2000), § 15; Běleš and Others v. the Czech Republic* (2002), § 61*).*

59. Thus, based on the decisions of the European Commission on Human Rights and the ECtHR case law, the Court considers that the

limitations will not comply with Article 6 para. 1. If*: a)* they do not pursue a legitimate aim; and *b)* if there is not a reasonable relationship of proportionality between the means employed and the aim sought (see European Court, *Stubbings and Others v United Kingdom*, judgment of 22 October 1996, Report of judgments and decisions 1996 - IV, paragraph 50; and, *mutatis mutandis, Lončar v. Bosnia and Herzegovina*, Application No. 15835/08, judgment of 25 February 1996 2014, paragraph 37).

Application of these principles and guarantees in the present case

60. The Court notes that the Applicant in the present case had access to the courts, as well as to the Supreme Court, but only until the moment of filing the request for protection of legality against the judgment of the Court of Appeals.

61. However, the mere fact that the Applicant had the legal possibility to file this request with the Supreme Court does not necessarily lead by itself to the fulfillment of the right of access to a court arising from Article 31 of the Constitution and Article 6 of the ECHR. Therefore, it remains to be determined whether the decision of the Supreme Court rejecting the Applicant's request for protection of legality on the grounds that her legal representative was not authorized, without prior verification, effectively denied the Applicant "the right of access to a court" from the standpoint of the principle of the rule of law in a democratic society, as well as the guarantees provided by Article 31 of the Constitution and Article 6 of the ECHR.

62. In this respect, the Court emphasizes that "the right to appeal" is not defined or implied in Article 6 of the ECHR, but if the appeal was allowed by law and if it was filed, and the court in that case, in this case the Supreme Court, was informed about this, and it was called upon to determine the facts that are essential to the continuation of proceedings in a procedural sense, then according to the ECtHR case law, the first paragraph of Article 6 of the ECHR is applicable (see ECtHR *Delcourt v. Belgium*, of 17 January 1970, Series A p.11-14).

63. The Court notes that the main reason for the rejection of the Applicant's appeal by the Supreme Court is that the Applicant had a representative before the Basic Court and the Court of Appeals, while the request for protection of legality before the Supreme Court was submitted by another representative for whom, according to the Supreme Court, there was no power of attorney in the case file.

64. In that regard, the Court notes that according to case law of the ECtHR, a principle of a fair trial implies the right of the party to defend himself in person or through a representative, chosen by him and that this right is closely linked to the right to a fair trial (see ECtHR Judgment of 25 April 1983 *Pakelli v. Germany*, No. 64, paragraph 31).

65. In that regard, the Court notes that the Applicant's representative on 28 December 2016 filed again a request with the Supreme Court in which she submitted the challenged power of attorney and stated *"if the Supreme Court has any doubts or ambiguities regarding the status of the Applicant's representative and the first request for the protection of legality, it should have, pursuant to Article 442 para. 4 of the CPCK, sought clarification or supplement of the Applicant's request within a certain deadline. "*

66. The Court recalls that Article 442.4 of the CPCK provides that:

> *[...]*
> *4. Unless otherwise provided for in the present Code, when a submission has been filed which is incomprehensible or does not contain everything necessary for it to be acted upon, the court shall summon the person making the submission to correct or supplement the submission; and if he or she does not do so within a specified period of time, the court shall reject the submission.*

67. However, the Court notes that responding to the Applicant's request of 28 December 2016, the Supreme Court in Decision [PN. II. No. 1/2017] of 31 January 2017 stated:

> *"The provisions of Article 418 of the CPCK, define decisively the cases when the extraordinary legal remedies can be applied against final decisions, while in the present case the defense counsel of the convict submitted a request for annulling the Decision and issuing a Decision based on merit upon the request for protection of legality against the Decision of the Supreme Court of Kosovo, the request cannot be considered as an extraordinary legal remedy; therefore, as such, this Court considers that it should be dismissed as inadmissible."*

68. In this regard, the Court notes that in its Decision [PN. II. No. 1/2017] of 30 January 2017, the Supreme Court did not take into account the Applicant's request for annulment of the Supreme Court's decision of 12 December 2016, but merely dealt with the procedural question, *whether the Applicant's request of 28 December 2016, is in accordance with the relevant legal provisions*, namely whether the Applicant had the right to use the request for annulment of the

Supreme Court's decision of 12 December 2016 as an extraordinary legal remedy.

69. However, the Court notes that the very substance of the Applicant's request for the annulment of the Decision of the Supreme Court of 12 December 2016, related to the fact that the Supreme Court rejected the request for protection of legality without previously summoning the Applicant to correct or supplement the submission as required by the legal provision of Article 442.4 of the CPCK, *the court shall summon the person making the submission to correct or supplement the submission; and if he or she does not do so within a specified period of time, the court shall reject the submission.*

70. The Court recalls that the Applicant explicitly claims that, pursuant to Article 442.4 of the CPCK, the Supreme Court had to request the supplement and clarification of her submissions, and not to summarily reject the appeal by Decision [PML. No. 300/2016] without a previous determination of procedural requirements that would allow for consideration the essence of the request for protection of legality.

71. In this regard, the Court considers that Article 442.4 of the CPCK is neither vague nor ambiguous as to the procedural steps that the Supreme Court should take. On the contrary, Article 442.4 of the CPCK clearly and directly states what procedural steps the Supreme Court should take in relation to the Applicant's appeal, as well as what actions the party must take within the prescribed time limit.

72. However, the Supreme Court rendered a decision summarily rejecting the Applicant's request on procedural grounds without allowing the Applicant to clarify the identity of her legal representative. Thereby, the Supreme Court restricted the Applicant’s access to court.

73. The Court considers that the Supreme Court has the right to render a decision, in accordance with its jurisdiction, but only after the Applicant, in accordance with the applicable provision of Article 442.4 of the CPCK, is given the opportunity to remove in due course all the doubts and uncertainties that the Supreme Court had in relation to the status of her legal representative.

74. Moreover, the Court notes that the Supreme Court in its second decision did not give any explanation as to the reasons for not applying Article 442.4 of the CPCK, and why her right of access to the court was limited to such an extent that it prevented her completely to pursue the remedy of protection of legality.

75. Such limitations of the Supreme Court could not lead to a legitimate aim that would allow for a decision on merits to be rendered in the present case, by which results that there is no reasonable relationship of proportionality between the means used by the Supreme Court and the aim pursued, which would lead to a final decision on the dispute of the case.

76. The Court considers that in such circumstances the Applicant has been deprived of her right of access to a court as a principle of a fair and impartial trial pursuant to Article 31 of the Constitution and Article 6 of the ECHR.

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

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law, and Rule 56.1 of the Rules of Procedure, in the session held on 29 May 2018, by majority

DECIDES

I. TO DECLARE the Referral admissible for consideration in merits;

II. TO HOLD that the Decision of the Supreme Court [PML. No. 300/2016] of 12 December 2016, is in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE INVALID the Decision of the Supreme Court [PML. No. 300/2016] of 12 December 2016, in conjunction with the Decision of the Supreme Court [PN. II. No. 1/2017] of 30 January 2017;

IV. TO REMAND the case to the Supreme Court for reconsideration in conformity with the Judgment of this Court;

V. TO ORDER the Supreme Court to inform the Court, in accordance with Rule 63 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;

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

VII. TO NOTIFY this Decision to the Parties;

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

IX. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI 69/16 Applicant: Nora Dukagjini-Salihu, Constitutional review of Judgment Rev. No. 295/2015 of the Supreme Court of Kosovo of 09 December 2015

KI69/16, Judgment of 30 May 2018, published on 13 June 2018

Key words*: individual referral, constitutional review of the challenged decision of the Supreme Court, Referral admissible.*

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

This case concerns a Labor dispute initiated before the Independent Oversight Board of Kosovo in order to establishment of an employment relationship in the position of a specialist of orthodontics at the Health House in Prishtina.

Afterwards, the court proceedings went through all the stages of regular procedure.

This judicial dispute was finally decided on by the decision of the Supreme Court which rejected the Applicant's request for revision as inadmissible.

The Applicant alleges that the Supreme Court denied him the right to fair and impartial trial, guaranteed by Articl 31 of the Constitution of the Republic of Kosovo, and Article 6 of the European Convention on Human Rights.

The Court notes that the Applicant did not demonstrate that the relevant proceedings had been, in any way, unfair or arbitrary. In fact, the Applicant did not substantiate with evidence his allegation that his rights and freedoms guaranteed by the Constitution and ECHR were violated by the challenged decisions.

Therefore, the Court considers that the interpretation and application of the law given in the Supreme Court has failed to adequately reason it's decision regarding the relationship between the Applicant's employment status and the relevant applicable legislation, as required by the right to a fair trial.

The Court further considers that, in these circumstances, the Applicant has been deprived of her right to fair and impartial trial under Article 31 of the Constitution and Article 6 of the ECHR, and to be reinstated in her employment position as a dentist in the Health House of Prishtina.

JUDGMENT

in

Case No. KI69/16

Applicant

Nora Dukagjini-Salihu

Constitutional review of Judgment Rev. No. 295/2015 of the Supreme Court of Kosovo of 09 December 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Nora Dukagjini-Salihu from Prishtina (hereinafter: the Applicant), and she is represented by Petrit Prekazi, a lawyer practicing in Prishtina.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 295/2015 of the Supreme Court of Kosovo of 09 December 2015, which was served on her on 21 January 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment, which allegedly has violated the Applicant's rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 49 [Right to Work and Exercise Profession] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6.1 (Right to a fair trial) of the European Convention of Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

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

6. On 11 May 2016, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

7. On 2 June 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo and the Municipality of Prishtina.

8. On 30 May 2018, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral and the finding of a violation of the Constitution.

Summary of facts

9. On 10 July 1990, the management body of the Health House of Prishtina decided (Decision No. 160) that the Applicant had acquired the quality of an employee for an indefinite period as a dentist at the Health House in Prishtina (now Main Family Medicine Centre, hereinafter: MFMC).

10. On 01 January 2000, the Department of Health and Social Welfare of the Joint Interim Administrative Structure (JIAS-DHSW) adopted Administrative Instruction (Health) 17/2000, which regulated the establishment of a central board for the training of medical specialists.

11. Administrative Instruction (Health) 17/2000 stipulated under point E [General Administrative Arrangements], *inter alia*, that,

> *"6. Doctors who have successfully completed their specialist training and are registered as licensed specialist must apply by public competition for posts within Kosovo's public health service. They will not be able to stay in their training posts nor automatically be offered posts in their training institution.*
>
> *7. […] When doctors accept an offer of specialist training from the Department of Health and Social Welfare they must end any commitment to a previous employer and no agreement in respect of future work shall be binding."*

12. On 17 January 2001, by Decision (Ref. No. 893/2000), the JIAS-DHSW agreed to allow the Applicant to pursue a specialization in orthodontics, financed by the JIAS-DHSW, under the terms of Administrative Instruction (Health) 17/2000.

13. On 02 April 2001, the Applicant and the JIAS-DHSW signed an "Employment Contract of Specialists". This contract stipulated, *inter alia*, that the Applicant would take up a training position at the University Clinical Centre of Prishtina, that the employment contract would run from 10 January 2001 to 10 January 2005, and that she would be paid a monthly salary of 360 Deutsch Marks.

14. The employment contract also stipulated that,

> *"It is required that after successful completion of professional training and registration as a licensed doctor to work full working hours for five uninterrupted years for the Public Health Service of Kosovo or to return all salaries earned as a trainee specialist."*

15. Following the completion of her specialization training, the Applicant apparently met with the Director-General of the Health House of Prishtina, the Permanent Secretary of the Ministry of Health and the Director of the Health Directorate of the Municipality of Prishtina, to

request a position as a specialist. Allegedly, the Applicant was informed by all these officials that there were no positions available.

16. On 04 May 2005, together with a number of other doctors who had completed their specialization training, the Applicant addressed a letter to the Director-General of the Health House of Prishtina requesting reinstatement to her previous position as a non-specialist dentist, and compensation for lost salaries.

17. It appears that the Director-General of the Health House of Prishtina did not respond to this letter.

18. On 12 May 2006, the Minister of Health rendered a Decision (No. 20-03-2006) which suspended the implementation of items 9 and 10 of the Agreement on financing of postgraduate studies (specialization) and the obligations taken by trainee specialists after the completion of specialization. According to this decision, the specialists are exempted from the obligation to continue to work for another five years in the health sector in Kosovo. The decision in question was taken on the grounds that, "*budget cuts hamper the implementation of item 9 and item 10.*"

Request for a new position as specialist

19. On an unspecified date, the Applicant filed an appeal with the Independent Oversight Board of Kosovo (hereinafter: IOBK) in which she requested the establishment of an employment relationship in the position of a specialist of orthodontics at the Health House in Prishtina.

20. On 13 July 2006, the IOBK (by Decision A. No. 02/117/2005) rejected as ungrounded the appeal of the Applicant for the establishment of an employment relationship in the position of specialist in orthodontics in the Health House in Prishtina.

21. The IOBK reasoned that the employment contract on specialization as signed between the Applicant and the Ministry of Health obliged the Applicant to continue to work for a period of five years in the public health service, but did not contain any reciprocal obligation on the Ministry of Health to provide the Applicant with an employment position. The IOBK considered that the lack of a reciprocal obligation for the Ministry of Health to provide a job was the reason for the Ministry of Health to suspend the obligation on the Applicant to continue to work for another five years in the public health service.

Request for reinstatement in the old position as dentist

22. The Applicant filed a claim with the Basic Court in Prishtina in which she challenged decision A. No. 02/117/2005, of the IOBK of 13 July 2006, and also requested that the respondent MFMC be ordered to reinstate her to her previous work assignment as a dentist, with all the rights arising from employment, starting from 04 January 2005.

23. On 29 August 2014, the Basic Court in Prishtina (Judgment C. No. 73/10) approved the request of the Applicant as grounded because the Applicant had a legitimate expectation that she would be provided with an employment position at the end of her specialization, due to the contractual obligation to continue to work for another five years in the public health service. The Basic Court ordered:

> *"The Responding party – MCFM, which falls under the management of the Municipality of Prishtina-Directorate for Health, is obliged to reinstate claimant [the Applicant] to her previous work and work duties (dentist), with all the rights that derive from the employment relationship, starting from 04 January 2005."*

24. Furthermore, the Basic Court considered that the Administrative Instruction (Health) 17/2000 did not apply in the Applicant's case, because her employment in the civil service of Kosovo dating from 10 July 1990 had not been terminated in compliance with the applicable law, namely UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo, and UNMIK Administrative Instruction No. 2003/2 on the Application of UNMIK Regulation No. 2001/36, Article 35.

25. Both the MFMC and the Municipality of Prishtina filed Appeals against Judgment C. No. 73/2010 of the Basic Court in Prishtina.

26. On 7 April 2015, the Court of Appeals of Kosovo, by Judgment Ac. No. 4391/2014, rejected the appeals as ungrounded. The Court of Appeals assessed the reasoning of the Basic Court to be fair and justified on the basis of the relevant legal provisions.

27. Based on Judgment Ac. No. 4391/2014 of the Court of Appeals, the Applicant initiated enforcement proceedings with the Basic Court in Prishtina.

28. On 19 May 2015, the Basic Court in Prishtina, by Decision No.1087/2015, approved the Applicant's proposal for enforcement and ordered:

> *"ENFORCEMENT IS IMPOSED on the Debtor – Municipality of Prishtina, Municipal Directorate of Health in Prishtina, so the Debtor is obliged to reinstate [the Applicant] [...] in the workplace and work duties as Dentist within MFMC, and pay her 478.00 EUR on behalf of the contested proceeding costs within a time limit of 7 days starting from the date when this Decision is received."*

29. The Municipality of Prishtina filed an objection with the Basic Court in Prishtina against the decision allowing the enforcement.

30. On 13 July 2015, the Basic Court in Prishtina, by Decision E. no. 1087/2015, rejected "*the objection of the debtor – Municipality of Prishtina, Municipal Directorate of Health in Prishtina, filed against Decision E. No. 1087/15 on allowing the enforcement, of 19 May 2015, is REJECTED as ungrounded."*

31. Against the Decision of the Basic Court, which rejected the objection as ungrounded, the Municipality of Prishtina filed an appeal with the Court of Appeals.

32. On 10 December 2015, the Court of Appeals, by Decision Ac. No. 3084/15, rejected "*the appeal of the representative of the debtor – Municipality of Prishtina, Municipal Directorate of Health in Prishtina - is REJECTED as ungrounded, whereas Decision E. No. 1087/2015 of the Basic Court in Prishtina, of 13 July 2015 is UPHELD."*

33. Simultaneously with the enforcement proceedings, the Municipality of Prishtina filed a request for revision with the Supreme Court of Kosovo against the Judgment of the Court of Appeals of Kosovo (Ac. No. 4391/2014) of 7 April 2015.

34. On 9 December 2015, the Supreme Court of Kosovo, by Judgment Rev. No. 295/2015, approved the request for revision and rejected as unfounded the statement of claim of the Applicant to be reinstated in her workplace.

35. The Supreme Court assessed that the lower instance courts,

> "[…] *have completely ascertained the factual situation, however they have erroneously applied the substantive law, when they found that the statement of claim of the claimant is grounded. This is due to the reason that pursuant to Administrative Instruction No. 17/2000 of the Department of Health and Social Welfare, under item D, item 6, it is foreseen that doctors who have successfully completed their specialization training and are registered as specialists with a work permit, should apply for job positions at the Public Health Services in Kosovo. They may not remain in their training posts, and posts in the training institutions may not be offered to them automatically, whereas by item 7, it was determined that the system of sponsoring trainings by various institutions shall end when doctors accept the offer for specialization training from the Department of Health and Social Welfare; they should stop every attempt for employment with the previous employer and no contract should be established which creates a future obligation."*

36. The Supreme Court further reasoned that,

> "*The allegation of the respondent mentioned in the revision that the lower instance courts* have *erroneously applied the substantive law was considered by this court as grounded, as pursuant to the Instruction mentioned above, it results that the respondent was entitled to request from the specialized persons to work with the respondent, however it was not obliged to secure them a job position automatically following the completion of the specialization, whereas the specialized persons should have applied for the job positions in accordance with the completed specialization."*

Applicant's allegations

37. The Applicant claims that she should have been reinstated in her job as a dentist, because UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo, and UNMIK Administrative Instruction No. 2003/2 on the Application of UNMIK Regulation No. 2001/36, should have been applied to her case, because she had a permanent employment contract as a dentist. She considers that the Administrative Instruction (Health) 17/2000, which regulated the financing of her studies for specialization as an orthodontist, should not have been applied.

38. The Applicant alleges that, because the Supreme Court applied the Administrative Instruction (Health) 17/2000, instead of UNMIK

Regulation No. 2001/36 on the Civil Service of Kosovo, and UNMIK Administrative Instruction No. 2003/2 on the Application of UNMIK Regulation No. 2001/36, the Supreme Court violated her right to equal treatment before the law as guaranteed by Article 24 [Equality Before the Law] of the Constitution. The Applicant alleges that, thereby, the Supreme Court gave an unfair advantage to the Municipality of Prishtina, and disadvantaged the Applicant.

39. Furthermore, the Applicant alleges that she has been denied her right to a fair and impartial trial, as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and by Article 6.1 (Right to a fair trial) of the ECHR, because the Supreme Court did not provide proper reasoning in its Judgment.

40. The Applicant alleges that the Supreme Court not only incorrectly failed to apply the relevant law on civil service, but also incorrectly referred to the decision of the Ministry of Health (No. 20-03-2006) of 12 May 2006, which suspended the implementation of items 9 and 10 of the Agreement on financing of postgraduate studies (specialization) and the obligations taken by them after the completion of specialization. The Applicant alleges that this decision was taken more than one year after she had completed her studies for specialization, and, therefore, this decision of the Ministry of Health should not have been applied to her request for reinstatement in her previous position as a dentist.

41. The Applicant alleges that the Supreme Court did not provide proper reasoning to justify its Judgment, in violation of her right to a reasoned decision. The Applicant refers to the case law of the Constitutional Court, namely cases KI120/10 of 29 January 2013, and KI189/13 of 12 March 2013, as regards the failure of the Supreme Court to provide the proper reasoning in the Judgment rendered in relation to these cases.

42. In addition, the Applicant alleges that she "*has been deprived unfairly from benefiting from the final form which is in her favor. Therefore, non-application of the final Judgment Ac. No. 3084/15 of the Court of Appeals of Kosovo, of 10 December 2015 and the unreasonable delay of the resolution of this legal matter by the Employer – Main Family Medicine Center under the management of the Department of Health before the Municipality of Prishtina, according to the Applicant, constitutes a violation of Article 31 of the provisions of the Constitution, as well as of Article 6 of the European Convention on Human Rights.*"

43. The Applicant alleges that, because the Supreme Court has prevented the employer to reinstate the Applicant to her workplace, this is a denial of the Applicant's right to work and exercise a profession, in violation of Article 49 [Right to Work and Exercise Profession] of the Constitution.

44. Furthermore, the Applicant alleges that by denying her right to reinstatement to her previous employment as a dentist, the Supreme Court has denied her right to judicial protection of her rights, in violation of Article 54 [Judicial Protection of Rights] of the Constitution.

45. The Applicant proposes that the Constitutional Court finds that there has been a violation of her constitutional rights and declares the Judgment Rev. No. 295/2015 of the Supreme Court of 9 December 2015 to be invalid.

Assessment of the admissibility of Referral

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

47. 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.*

48. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

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

49. The Court considers that the Applicant is an authorized party, has exhausted the available legal remedies and has submitted the Referral in due time.

50. However, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides:

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

51. In addition, the Court refers to paragraphs (1)(d) and (2)(d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresee:

> *(1) The Court may consider a referral if:*
> *[...]*
> *(d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
> *[...]*
> *d) the Applicant does not sufficiently substantiate his claim.*

52. In that respect, the Court recalls that the Applicant claims that the Supreme Court violated her right to a fair trial by not applying the correct law when reasoning its decision. The Applicant alleges that the failure of the Supreme Court to properly reason its decision, and the fact that the Supreme Court reversed the previous decisions of the Basic Court and Court of Appeals ordering the Applicant to be reinstated in her previous employment as a dentist, violated her right to a fair trial, as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and by Article 6.1 (Right to a fair trial) of the ECHR.

53. The Applicant alleged that the Supreme Court, *"[...] refers exclusively to Administrative Instruction No. 17/2000, on the basis of which the employment relationship of the Applicant is terminated by the employer. This sub-legal act cannot be applied in the case of the Applicant due to the fact that her employment relationship in the period of conclusion of the contract for specialization, is regulated by UNMIK Regulation No. 2001/36 on the Kosovo Civil Service."*

54. The Court notes that the Applicant has precisely clarified what rights have allegedly been violated by the challenged Judgment of the Supreme Court.

55. In sum, the Court considers that the Applicant is an authorized party, has exhausted all effective legal remedies provided by law, has submitted the Referral in due time, and has accurately clarified the alleged violation of her constitutional rights.

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

Merits of the referral

57. The Court recalls that the Applicant claims a violation of her right to a fair and impartial trial as guaranteed by Article 31 (2) of the Constitution and Article 6 (1) of the ECHR.

58. The Court recalls Article 31 (2) of the Constitution, which provides that,

> *"2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law."*

59. The Court also recalls Article 6 (1) of the ECHR, which in its relevant parts, provides that,

> *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]."*

60. The Court is mindful of Article 53 [Interpretation of Human Rights Provisions] of the Constitution which stipulates that, *"human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."*

61. In that connection, the Court reiterates the jurisprudence of the ECtHR which held, mutatis *mutandis*, that *"its jurisdiction to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable."* See ECtHR case *Anheuser-Busch Inc. v. Portugal*, Application No. 73049/01, Judgment of 11 January 2007, para. 83.

62. The Court also recalls that *"[…] the [ECtHR] will not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness (see, mutatis mutandis, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008), in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or a denial of justice (see, mutatis mutandis, Farbers and Harlanova v. Latvia (dec.), no 57313/00 6 September 2001, and, albeit in the context of Article 1 of Protocol No. 1, Beyeler v. Italy [GC], no. 33202/96, para. 108, ECHR 2000-I)."* See ECtHR case Andjelković v. Serbia, Application No. 1401/08, Judgment of 9 April 2013, para. 24.

63. In light of the above, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. See, *mutatis mutandis*, ECtHR case *García Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, para. 28; and Case No. KI93/16, *Maliq Maliqi and Skender Maliqi*, Judgment of the Constitutional Court of 23 November 2017

64. The Court recalls that the Applicant's primary complaint concerns the application of a sub-legal act by the Supreme Court in its decision on revision, rather than applying the relevant primary legislation, namely, the UNMIK Regulation No. 2001/36 on the Kosovo Civil

Service. The Applicant alleges that she had a permanent contract as a civil servant and that this contract was never terminated.

65. Furthermore, the Applicant alleges that in 2001, by signing the employment contract on specialization, she had accepted an obligation to work for a period of five years in the public health service of Kosovo following her training as a specialist, whereas in 2006 the Ministry of Health had retroactively terminated this obligation by its Decision No. 20-03-2006.

66. The Applicant alleges that by failing to apply the UNMIK Regulation No. 2001/36 on the Kosovo Civil Service, and disregarding the fact that the Applicant's employment as a civil servant had never been lawfully terminated, as well as by not taking into account the retroactive termination of the obligation to work in the public health service for a further five years, the Supreme Court had not properly reasoned its decision and had manifestly misinterpreted the law with arbitrary results for the Applicant.

67. The Court recalls that the Basic Court considered that the Administrative Instruction (Health) 17/2000 did not apply in the Applicant's case, because her employment in the civil service of Kosovo dating from 10 July 1990 had not been terminated in compliance with the applicable law, namely UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo, and UNMIK Administrative Instruction No. 2003/2 on the Application of UNMIK Regulation No. 2001/36, Article 35. The Court of Appeals upheld this interpretation.

68. The Court notes that the Supreme Court accepted that the lower courts had correctly determined the factual situation, but determined that they had applied the wrong law. The Supreme Court reasoned that,

> *"This is due to the reason that pursuant to Administrative Instruction No. 17/2000 of the Department of Health and Social Welfare, under item D, item 6, it is foreseen that doctors who have successfully completed their specialization training and are registered as specialists with a work permit, should compete for job positions at the Public Health Services in Kosovo. They may not remain in their training posts, and posts in the training institutions may not be offered to them automatically, whereas by item 7, it was determined that the system of sponsoring trainings by various institutions shall end when doctors accept the offer for specialization training from the Department of Health and Social Welfare; they should complete every attempt of the previous employer for employment and no contract should be concluded which creates a future obligation."*

69. The Court notes that, in accepting the determination of the factual situation by the lower instance courts, the Supreme Court had accepted that the Applicant had *"acquired the status of an employee for an unspecified period of time at the House of Health in Prishtina as a dentist."*

70. However, in providing its reasoning, the Supreme Court did not address the main question raised by the Applicant, which had been accepted by the Basic Court and the Court of Appeals, namely whether or not the Applicant's permanent contract as a civil servant had, in fact, ever been lawfully terminated.

71. The Court reiterates that the role of the Constitutional Court is to ensure compliance with the fundamental rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as "fourth instance court". (See ECtHR case *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

72. In other words, the complete determination of the factual situation and the correct application of the law is within the full jurisdiction of the regular courts (matter of legality).

73. The Court also recalls that, according to the case law of the European Court of Human Rights (hereinafter: ECtHR), the right to a fair hearing includes the right to a reasoned decision.

74. According to its established case-law, the ECtHR considers that based on the principles of the proper administration of justice, the decisions of courts and tribunals should adequately state the reasons on which they are based. (See Tatishvili v Russia, ECtHR, application no. 1509/02, Judgment of 22 February 2007, paragraph 58; Hiro Balani v. Spain, ECtHR, application no. 18064/91, Judgment of 9 December 1994, prg 27; Higgins and Others v. France, ECtHR, application no. 134/1996/753/952, Judgment of 19 February 1998, para. 42).

75. However, in the present Referral, the Court considers that the reasoning provided by the Supreme Court has failed to clarify why the UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo, and UNMIK Administrative Instruction No. 2003/2 on the Application of UNMIK Regulation No. 2001/36, did not apply to the Applicant's case.

76. Furthermore, the Court considers that the Supreme Court failed to explain why the Administrative Instruction (Health) 17/2000 applied, instead the UNMIK Regulation, and how this Administrative Instruction and the "Employment Contract of Specialists" signed by the Applicant effectively constituted a lawful termination of her permanent civil service contract.

77. The Court reiterates that the right to obtain a court decision in conformity with the law includes the obligation for the courts to provide reasons for their rulings with reasonable grounds at both procedural and substantive level. (See case *IKK Classic*, Judgment of 9 February 2016, paragraph 54).

78. In these circumstances, the Court considers that the Supreme Court has failed to adequately reason it's decision regarding the relationship between the Applicant's employment status and the relevant applicable legislation, as required by the right to a fair trial.

79. The Court further considers that, in these circumstances, the Applicant has been deprived of her right to fair and impartial trial under Article 31 of the Constitution and Article 6 of the ECHR, and to be reinstated in her employment position as a dentist in the Health House of Prishtina.

80. Therefore, the Court finds that there has been a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the ECHR.

81. The Court recalls that the Applicant also alleges that, by determining that the Administrative Instruction (Health) 17/2000 applied to the Applicant's case, the Supreme Court unfairly favoured the opposing party to the disadvantage of the Applicant. The Applicant alleged that this constituted a violation of her right to equality before the law, as protected by Article 24 of the Constitution.

82. The Court recalls that the Applicant also alleges that by refusing the Applicant's access to her previous place of employment, the regular courts have violated her right to work as protected by Article 49 of the Constitution.

83. Having found a violation of the Applicant's right to a fair and impartial trial under Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Court does not consider it necessary to examine the Applicant's further allegations in relation to Articles 24 [Equality Before the Law] and 49 [Right to Work and Exercise Profession] of the Constitution.

Conclusion

84. The Court finds that that there has been a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the ECHR.

85. Having found a violation of the Applicant's right to a fair and impartial trial under Article 31 of the Constitution, the Court does not consider it necessary to examine the Applicant's further allegations in relation to Articles 24 and 49 of the Constitution.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (7) of the Constitution, Article 20 of the Law, and Rule 56 (1) of the Rules of Procedure, in the session held on 30 May 2018,

DECIDES

I. TO DECLARE by majority the Referral admissible;

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

III. TO HOLD by majority that it is not necessary to examine whether there has been a violation of Articles 24 and 49 of the Constitution of the Republic of Kosovo;

IV. TO DECLARE by majority invalid the Judgment Rev. No. No. 295/2015 of the Supreme Court of Kosovo of 09 December 2015;

V. TO REMAND the Judgment Rev. No. 295/2015 to the Supreme Court of Kosovo of 09m December 2015 for reconsideration in conformity with this Judgment of the Constitutional Court;

VI. TO ORDER the Supreme Court to inform the Court, in accordance with Rule 63(5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;

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

VIII. TO NOTIFY this Judgment to the parties;

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

X. TO DECLARE this Judgment effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Arta Rama-Hajrizi

KO12/18, Applicants: Albulena Haxhiu and 30 other deputies of the Assembly of the Republic of Kosovo, Constitutional Review of Decision No. 04/20 of the Government of the Republic of Kosovo, of 20 December 2017

KO12/18, Judgment adopted on 29 May 2018, published on 11 June 2018

Keywords: abstract control, institutional referral, separation of powers, constitutional powers, budget implications, conflict of interest, equality before the law

The Applicants submitted the Referral to the Constitutional Court for a constitutional review of Decision No. 04/20 of the Government. The Applicants allege that the decision mentioned above is not in compliance

with Articles 3 [Equality Before the Law], 4 [Form of Government and Separation of Power], 7 [Values], 65 [Competencies of the Assembly], 92 [General Principles] and 93 [Competencies of the Government] of the Constitution of the Republic of Kosovo.

The Constitutional Court declared the Referral admissible for review after finding that the issues raised in the Referral are of such a complexity that their determination should depend on the consideration of the merits and that the Referral cannot be considered as manifestly ill-founded within the meaning of Rule 36 (1) (d) of the Rules of Procedure.

After reviewing the Applicants' allegations and arguments, the Constitutional Court emphasized: (i) it has not been proven that the decision for increase of wages constitutes issues at the constitutional level; (ii) based on the presented arguments, it does not result that the exercise of the constitutional powers for the approval and execution of the state budget has been violated or made impossible to the Assembly; (iii) as far as the conflict of interest is concerned, it is not within the function of the Court to assess the allegations of contravention of the challenged decision with the Law on Prevention of Conflict of Interest in the Exercise of Public Function, because that issue falls under the jurisdiction of other bodies determined by the Constitution; and (iv) as regards the violations of Articles 3 [Equality Before the Law] and 7 [Values] of the Constitution, the Applicants have not provided convincing facts that the salaries foreseen in the challenged Decision treat similar positions or situations differently and whether this change in treatment does not have any objective and reasonable justification. The Court further added that it is not within its scope to assess or replace public policies determined by the legislative or executive body. The principle of separation of powers obliges the Constitutional Court to respect the determination of policies by the respective constitutional bodies. Basic policy-making decisions on the governance of the country should be taken by the constitutional bodies with democratic legitimacy, namely by the Assembly and the Government. Those bodies - due to their nature and democratic legitimacy - are in a better position than the Constitutional Court to determine and advance the budget, economic and social policies of the country.

In this regard, the Constitutional Court considered that the Applicants did not submit convincing evidence to support their allegations that the challenged decision of the Government produced constitutional effects in respect of violating the constitutional powers of the Assembly or violating any constitutional provision, as the Applicants allege. However, the Court noted that the sub-legal acts of the Government must comply with the Constitution and the laws. Furthermore, the Court emphasized that, in accordance with the executive nature of its constitutional powers, the Government is obliged to execute the state budget approved by the Assembly.

Therefore, it is the obligation of the Government to support the implementation of the challenged decision in the budget allocations set out in the Budget of 2018 and in the relevant laws.

Finally, the Constitutional Court, pursuant to Article 113.2 (1) and 116.2 of the Constitution, Articles 27 (1), 29 and 30 of the Law and in accordance with Rules 29, 54, 55 and 56 (1) of the Rules of Procedure, found that Decision No. 20/14 of the Government of the Republic of Kosovo of 20 December 2017 is not in contradiction with the alleged Articles of the Constitution.

JUDGMENT

in

Case no. KO12/18

Applicant

Albulena Haxhiu and 30 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of the Decision of the Government of the Republic of Kosovo, no. 04/20, of 20 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicants

1. The Referral is submitted by: Albulena Haxhiu, Glauk Konjufca, Visar Ymeri, Donika Kadaj-Bujupi, Shqipe Pantina, Albin Kurti, Besa Baftiu, Rexhep Selimi, Ismail Kurteshi, Dardan Sejdiu, Faton Topalli, Driton Çaushi, Arbërie Nagavci, Fatmire Mulhaxha-Kollqaku, Saranda Bogujevci, Sami Kurteshi, Adem Mikullovci, Dukagjin Gorani, Fitore Pacolli-Dalipi, Sali Zyba, Shemsi Syla, Xhelal Sveqla, Liburn Aliu, Drita

Millaku, Sali Salihu, Arbër Rexhaj, Valon Ramadani, Ali Lajqi, Korab Sejdiu, Ilir Deda and Vjosa Osmani-Sadriu (hereinafter: Applicants), all of them Deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

2. The Applicants have authorized Ms. Albulena Haxhiu to represent them before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

The challenged act

3. The Applicants are challenging the constitutionality of the Decision of the Government of the Republic of Kosovo (hereinafter: the Government), No. 04/20, of 20 December 2017.

Subject matter

4. The subject matter of the Referral is constitutional review of Decision No. 04/20 of Government, which according to the Applicants is not in compliance with Articles: 3 [Equality Before the Law], 4 [Form of the Government and Separation of Power], 7 [Values], 65 [Competences of the Assembly], 92 [General Principles] and 93 [Competences of the Government] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

5. The Applicants also request from the Court to impose the interim measure "*by which Decision No. 04/20, of 20 December 2017 of the Government of the Republic of Kosovo would not be implemented until a decision on the merits of matter is rendered.*"

Legal basis

6. The Referral is based on Articles 113.2 (1) and 116.2 of the Constitution, Articles 27, 29 and 30 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 29, 54 and 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 29 January 2018, Ms. Albulena Haxhiu on behalf of Applicants submitted the Referral and the power of attorney to the Court.

8. On 30 January 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of

Judges: Snezhana Botusharova (presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

9. On 30 January 2018, the Court notified the Applicants about the registration of the Referral.

10. On 30 January 2018, the Referral was communicated to the Office of Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister), and informed that it can submit its comments regarding this Referral. The Referral was also communicated to the President of the Assembly of the Republic of Kosovo with instruction to give the opportunity to all the deputies of the Assembly to submit their comments.

11. On 31 January 2018, the Applicants submitted their identification card numbers and a copy of the Decision of the Anticorruption Agency on the contested Decision.

12. On 6 February 2018, the Government informed that has rendered a decision on temporary suspension of the contested Decision until the Court renders a final decision on this matter.

13. On 9 February 2018, the Office of the Prime Minister submitted to the Court the comments on allegations raised in the Referral.

14. On 13 February 2018, comments of the Prime Minister were communicated to the Applicants and the President of the Assembly, with instruction that these comments be communicated to all the deputies of the Assembly.

15. On 15 February 2018, Applicants submitted their comments regarding the comments of the Office of the Prime Minister.

16. On 16 February 2018, the Court requested from the Ministry of Finances additional clarification regarding the matter of budgetary implications of the contested decision of the Government, reflecting and reviewing those implications on the budget for 2018 and if there was similar practice in the past.

17. On 27 February 2018, Ministry of Finances submitted its clarifications on questions of the Court from 16 February 2018.

18. On 26 April 2018 the Court sent to the members of the Venice Commission Forum a request with a number of questions for purposes of a comparative analysis regarding the Referral under consideration.

19. On the same date, the clarifications of the Ministry of Finance were communicated to the Applicants. In addition, the comments of the Government on Referral KO12/18; the reply of the Applicants on the comments of the Government and the clarifications of the Ministry of Finance were communicated to the following committees of the Assembly for comments, if they had any: the Committee on Budget and Finances, the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and the Oversight of the Anti-Corruption Agency, and the Committee for the Oversight of Public Finances.

20. The above mentioned Committees have not submitted any comments to the Court within the set deadline.

21. On 3 May 2018 the Applicants submitted their comments on the clarifications of the Ministry of Finance.

22. Between 2 and 23 May 2018, the Court received the answers to the questions raised through the Venice Commission Forum, submitted by the Constitutional Courts of: Czech Republic, Austria, Macedonia, Moldova, Bosnia and Herzegovina, Sweden, Latvia, Slovakia, Slovenia, Germany, Croatia and Luxemburg.

23. On 29 May 2018, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

24. On the same day, Judge Almiro Rodrigues and Gresa Caka-Nimani stated that they will submit dissenting opinions in accordance with the Rule 57 (2) of the Rules of Procedures.

Summary of facts

25. On 20 December 2017, the Government of the Republic of Kosovo rendered Decision No. 04/20 on changing and raising gross salaries of senior state functionaries and their subordinates, as follows: Prime Minister and Deputy Prime Minister, Minister and Deputy Minister, Chief of Staff who is also the Senior Political Advisor of the Prime Minister, Deputy Chief of staff of the Prime Minister who is also a Political Advisor of the Prime Minister, Chief of Cabinet of the Prime Minister who is also the Political Advisor of the Prime Minister, Political Advisor of the Prime Minister, Senior Political Advisor of the Deputy Prime Minister, Senior Political Advisor of the Minister, Advisor of the Minister, Chief of Protocol of the Prime Minister, Chief

of the Unit for Security of the Prime Minister, Senior Protocol Official, Senior Assistant of the Prime Minister, Official, Assistant, Security Official, Driver, Bodyguard of the Prime Minister, Senior Official and Senior Assistant of the Deputy Prime Minister, Senior Official and Senior Assistant of the Minister, Official, Assistant, Security Official, Driver, Bodyguard of the Minister, Secretary General in the Office of the Prime Minister, Director of the Legal Office and the Director of the Coordinating Secretariat of the Government, Coordinators and Heads of Divisions in the Legal Office, Coordinating Secretariat of the Government, Office for Public Communication, Coordinator for European Integrations and the Chief of the Office of the Secretary of the Office of the Prime Minister, Senior Officials in the Legal Office, Coordinating Secretariat of the Government, Office for Communication with Public, Officials, Managers, and Executive Officials in the Office of the Secretary General, Legal Office, Coordinating Secretariat of the Government and the Office for Communication with Public.

26. Decision of the Government No. 04/20 entered into force on the day it was signed and it had a retroactive effect, as of 1 December 2017.

27. On 22 December 2017, the Assembly adopted the Law No. 06/L-020 on the Budget of the Republic of Kosovo for 2018 (hereinafter: the Law on Budget for 2018).

28. On 29 January 2018, the Anticorruption Agency issued an Opinion regarding the Decision, assessing whether the challenged decision of the Government is in contradiction with provisions of the Law on Prevention of conflict of interest in discharge of public functions (Nr. 04/L-051).

29. The abovementioned opinion of the Anticorruption Agency in its main part determines:

> *"Decision Nr. 04/20 of Government, of 20.12.2017, cannot be considered a conflict of interest for all those who are beneficiaries of this decision. Conflict of interest occurred with senior officials who by their vote have influenced the decision to be in their interest for personal gain.*
>
> *Consequently, the Anti-Corruption Agency did not deal with this case in terms of the competence of the Government of the Republic of Kosovo, the right or not to increase salaries for that sector, but the issue we dealt with was only in terms of the procedure and the*

manner the Decision was taken, thus, considering as a conflict of interest only the part that voted, adopted and signed […]".

Applicants' allegations

30. The Applicants allege that the challenged decision violates Articles: 3 [Equality before the Law], 4 [Form of the Government and the Separation of Power], 7 [Values], 65 [Competences of the Assembly], 92 [General Principles] and 93 [Competences of the Government] of the Constitution.

31. The Applicants emphasize that *"Setting of salaries of state functionaries, who are paid by the budget of Kosovo, their reduction or increase in any case, is competence of the Assembly of the Republic of Kosovo, which is prima facie exercised through the approval of the Law on Budget […]"* alleging that based on Article 65 of the Constitution, *"the approval of the Budget of the Republic of Kosovo is exclusive competence of the Assembly. Such competence of the Assembly cannot be separated, limited or alienated by any Decision of the Government."*

32. The Applicants claim that *"the Constitution of Kosovo, in chapter XII, numerically defines the independent constitutional institutions, which are guaranteed to have financial independence that includes setting of salaries of officials of the relevant independent institution. The Government is not one of them and it has specific character and function, which is supervised by the Assembly and it does not have constitutional financial independence."*

33. In connection to the foregoing, the Applicants allege that *"the change of salaries of senior state functionaries is planning, which shall be stipulated in the planning of the Budget of Kosovo for the relevant year, which is compiled by the Government and is sent to the Assembly for approval. The importance of this interpretation position becomes more important in cases when the Government decides upon the salaries of its members […]. No Government may have the competence for compensating itself in individual terms of salary without passing through the parliamentary decision making."*

34. The Applicants also claim that this increase of salaries "*directly affects the Budget of Kosovo by surpassing the allocated budget for salaries of functionaries of these institutions, pursuant to the Law on Budget [for 2018], and consequently, it violates the competence of the Assembly*". Applicants add that "*no norm or budget code exists neither in the Law on Budget of the Republic of Kosovo for 2017, nor*

the one for 2018", that stipulates such increase of salaries of the government cabinet.

35. With regards to the competencies of Government the Applicants allege that *"Article 93.5 of the Constitution [...] defines that the Government of Kosovo has competence to propose the budget of the Republic of Kosovo. This means that the Government is competent only for proposing the allocation of the budget of Kosovo and budget allocations from the budget of Kosovo. [...] Therefore, based on Article 65.5 and 93.3 of the Constitution, the Prime Minister Haradinaj, by the challenged decision violated the constitutional provisions by acting outside of competencies provided by the Constitution for this institution."*

36. Moreover, the Applicants allege that change in salaries constitutes *"conflict of interest as a forbidden standard in functioning of the Government pursuant to the principle of integrity in a democratic society."*

37. Referring to the Article 92.4 of the Constitution, the Applicants claim that *"within the meaning of its executive function, Article 92.4 repeats the role of the Government as an authority that renders its decisions in accordance with the procedure and substantial obligations defined by the Constitution and relevant laws*." Applicants allege that Article 92.4 of the Constitution authorizes the Government to interfere in the legislative process by proposing draft laws to Assembly for adoption, but *"the Assembly of Kosovo is not in any way bound by the proposal of Government and it's in discretion of this organ whether a draft law is going to be adopted or not*."

38. The Applicants claim that Article 93.4 of the Constitution authorizes the Government to issue by-laws and decisions in order to implement laws adopted by the Assembly. According to the Applicants: *"the authorization to issue bylaws, however, is limited to the following conditions: a) the by-law shall regulate a legal area that is regulated by the Law issued by the Assembly; b) the by-law shall not violate any limitation established by the relevant Law; c) the by-law shall follow the purpose and objectives of the Law, and the relevant by-law shall be in absolute compliance with the Constitution; and d) the by-law shall have concretization character of abstract norms of the relevant Law."*

39. With regards to the allegation on violation of Article 4 [Form of the Government and Separation of Power] of the Constitution, the Applicants quote case KO98/11 of the Constitutional Court,

explaining, inter alia, that *"The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of the separation of powers and the checks and balances among them. The separation of powers is one of the bases that guarantees the democratic functioning of a State. The essence of the independence and effective functioning of these branches is the immunity provided to the persons embodying these powers."*

40. In this aspect, the Applicants allege that *"based on the fact that the Assembly of Kosovo is a body, which has exclusive competence in approving the budget of Kosovo and in supervising and controlling the work of the Government, we can conclude that the Government, by increasing the salaries partially and not in sectorial manner, intervened in the work of the Assembly by violating constitutional and legal provisions, which derive from the constitutional principles and standards that are grounds of the democratic Republic of Kosovo. This happens because such decision-making leads to constitutional noncompliance because it allows the members of the Government to make decisions with the only purpose of personal gain."*

41. With regards to the allegations on violation of Article 3 [Equality before the law] and Article 7 [Values] of the Constitution, the Applicants allege that by this challenged Decision of the Government, "*the senior functionaries of the Government and their subordinates have a more favorable salary than any other salary of any citizen in Kosovo, which would not be in compliance with the constitutional principles established by Article 3 and 7 of the Constitution."*

42. The Applicants also refer to Judgment KO119/10, which specified that *"since the proposed pensions to be paid to the deputies are clearly disproportionate with the average pensions in the country and they will be paid from the general budget of [...] Kosovo without a contribution from the Deputies, it appears that the present legislation creates discrimination against the members of the general public and all other pensioners in Kosovo and infringes against the principles of equality and social justice enshrined in the Constitution [...]."*

43. The Applicants emphasize that Article 7 [Values] of the Constitution lists the "*principles of freedom, democracy and equality as the fundamental values on which the constitutional order of the Republic of Kosovo is based.*" According to the Applicants, *"In the present case we are dealing with an abuse of freedom by the Government in exercising public authorization, whereby it was intervened in the budget allocations guaranteed by Law on Budget for 2018, which is*

established and managed by the will of citizens of Kosovo through the representatives elected in the Assembly [...]. Also, the principle of democracy emphasizes the Decision of majority by respecting the rights of the minority. Respecting this principle and giving life to it is done by the approval of the Assembly. Any other intervention in this process or after the conclusion of the process of approval of this Law, which is not done with the will of majority and constitutional means, represents, violation of the principle of democracy, which is a basic principle of the constitutional order of Kosovo."

44. Regarding the request for interim measure, the Applicants request from the Court to impose the interim measure suspending the implementation of the challenged Decision of the Government until a decision based on the merits of matter is rendered, because, "*if this unconstitutional situation lasts, the budget of the Republic of Kosovo will suffer high unplanned monetary loses."*

45. At the end, the Applicants request from the Court to declare the Referral admissible, to hold that there has been a violation of Article 3 [Equality before the Law], Article 4 [Form of Governance and Power Sharing], Article 7 [Values], Article 65 [Competencies of the Assembly], Article 92 [General Principles] and Article 93 [Government Competencies] of the Constitution, and to annul the challenged Decision.

Comments submitted by the Office of the Prime Minister

46. The comments of the Office of Prime Minister regarding the allegations raised in the Referral contain responses describing the nature of the challenged Decision of the Government, the budget reasoning of the challenged decision of the Government and the inexistence of conflict of interest of the Government regarding the challenged decision.

47. Regarding the nature of the challenged Decision of the Government, the response of the Office of the Prime Minister can be summarized as follows: (i) Based on Article 93 (4) [Government Competencies] of the Constitution, the Government, among other things, has competencies to make decisions as undisputable constitutional competence, *ex lege*; (ii) Based on Article 92 (2) (3) and (4) [General Principles], Government decisions have executive title because the constitutional nature of Government power is executive; (iii) Kosovo still has no law on the Government, but based on Article 99 [Proceedings] of the Constitution, the Government has adopted the Rules of Procedure of the Government of the Republic of Kosovo no. 09/2011; (iv) The Rules

of Procedure of the Government has provided that any issue that relate to the work of the Government and that have not been specifically covered in this Regulation shall be regulated by a decision or other act of the Government; (v) the challenged decision of the Government is a collective legal act, adopted by the vote of the entire cabinet after ascertaining the required quorum; and (vi) if the Government's decisions were to be endlessly challenged, the legal certainty of the government decision-making would be infringed upon.

48. Regarding the budget reasoning of the challenged Decision of the Government, the response of the Office of the Prime Minister can be summarized as follows: (i) The challenged Decision of the Government was rendered two days before the Law on Budget of the Republic of Kosovo and is foreseen in budget planning and may be reviewed, which implies that the challenged decision of the Government falls outside the *ratione materiae* jurisdiction of the Court because it is not a matter of conflict of competencies between the Executive and the Legislature; (ii) in case KO118/13, the Court listed a range of arguments whereby, among other things, held: "*...that the Government and they alone may determine the national budget...*" (iii) based on the relevant provisions of the Law on Public Financial Management, the budget of the Republic of Kosovo may be revised and that the budget added for budgetary organizations covers salary supplements until its review; iv) The Law on the Budget of the Republic of Kosovo for 2018 specifically provides for increasing the budget for the category of wages and salaries in the affected budgetary organizations (Office of the Prime Minister, Ministries, Kosovo Judicial Council, Kosovo Prosecutorial Council, etc.), which confirms that the challenged decision of the Government is foreseen and covered by the category of wages and salaries.

49. Regarding the inexistence of conflict of interest in rendering the challenged Decision of the Government, the response of the Office of the Prime Minister, in the relevant part, is the following: *"In order to make such decisions, the Government shall have a quorum as determined in Article 15 of the Rules of Procedure No. 09/2011. Furthermore, in absence of Law on wages of top officials, how to determine wages of deputies of the Assembly, the Government, the President and members of independent institutions? By dragging parallel with other institutions, would the conflict of interest situation be avoided if the law on wages, including wages of deputies of the Assembly, was approved by the assembly, since the deputies could have "conflict of interest" as they would vote on their wages? When promulgating the law adopted by the Assembly, which is done by the President, pursuant to its mandate granted by the*

Constitution, in which would have been determined also the wage of the President would it then present a conflict of interest? Furthermore, are government decisions that have been taken earlier for increase of wages in conflict of interest (see previous government decisions on increase of wages in the public sector and decisions in setting minimum wage in the private sector)? These questions are posed in order to come to a legal conclusion that by no interpretation shall be alleged that the Government, when voting for such a decision, can be in a situation of the conflict of interest due to constitutional and legal reasons."

Counter-response of the Applicants

50. In their counter-response of 15 February 2018, the Applicants mainly addressed these issues: (i) the *ratione materiae* jurisdiction of the Court in the present case; (ii) non-compliance with the Law on Budget for 2018 and the Law on Public Financial Management by the Government when rendering the challenged Decision; and (iii) the interpretation of the competences of the Government and the Assembly, as elaborated by the Court in case no. KO118/13.

51. Regarding the *ratione materiae* jurisdiction of the Court, the Applicants maintained that the allegations of the Prime Minister on the inadmissibility of the Referral are unfounded, because they aim to limit the Constitutional Court's control over the actions of the Government and, moreover, are contrary to the 'principles established' by the Court in case no.KO73/16, regarding the legal effects produced by the decisions of the Government regardless of their denomination.

52. Regarding the non-compliance with the Law on Budget for 2018 and the Law on Public Financial Management, the Applicants alleged that the Government has not yet submitted to this date a draft-law to the Assembly to reflect the amendments to the Law on Budget for year 2018. The Applicants added that the Government's reference to the Law on Public Financial Management is incorrect, given the fact that the challenged Decision of the Government was not a decision of the Minister of Finance, and it was not taken into consideration the impact of the challenged Decision of the Government, respectively whether that Decision exceeds the limits allowed by the Law on Public Financial Management.

53. Regarding the competences of the Government and the Assembly, as elaborated by the Court in case No. KO118/13, the Applicants maintained that the Court under no circumstances alleged that the

Government and they alone may determine the budget until the final cycle of approval. They added that the phrase 'determination of the national budget' refers to addressing the draft-law on the budget, which is then adopted by the Assembly in an unlimited form and in accordance with the votes of the deputies exercising this exclusive competence.

The responses of the Ministry of Finance regarding the questions of the Court

54. With regard to the question of the Court whether the budgetary implications of the challenged Decision have been reflected on the draft budget for year 2018, submitted by the Government to the Assembly [...] on 10 October 2018, the Ministry of Finances explained that "*The Ministry of Finance acting in accordance with the legal provisions of the Law on Public Financial Management and Accountability has defined the legal time limits for the preparation of the budget for the following year, therefore, pursuant to Article 22 of this law, the government approves the budget and submits it to the Assembly of the Republic of Kosovo no later than on October 31 and on the basis of this legal basis, the government sent it to the Assembly within the legal deadline in late October in accordance with and including the increase of the salary bill as set forth by Article 22c of the Law No. 05 / L-063 on Amending and Supplementing the Law No. 03 / L-048 on Public Financial Management and Accountability amended and supplemented by Laws No. 03 / L-221, No. 04 / L - 11 6 and No. 04 / L.-194.*"

55. Regarding the question as to whether the budgetary implications of the challenged decision have been reflected on the Budget for year 2018, adopted by the Assembly on 22 December 2017, the Ministry of Finance clarified: "*During the time when the challenged Decision dated 20 December 2017, was taken, the budget as a part of Law 06 / L-20 has been in the final approval stage at the Assembly of the Republic of Kosovo in the second reading. Therefore, the challenged decision is of implementing nature [...] the challenged Decision will be again incorporated within the budget at later stages.*"

56. Regarding the question as to whether the state budget adopted by the Assembly is affected or infringed by the challenged Decision, the Ministry of Finances explained that the challenged decision "*... never infringes the state budget because it is very small compared to the budget possibilities we have with the 2018 Budget. In this part, we emphasize that in the category of wages and salaries, there is a budget increase for 2018 compared to the budget of 2017. There is a*

sufficient increase of funds also in the macro fiscal framework for the 2018 budget, which is presented in the Assembly of the Republic of Kosovo as part of the draft budget in the textual section in the category of wages and salaries and it has been justified that the increase of expenditures for this category reflects the raise of wages and the coverage of the sub budgetary positions in the previous years."

57. Regarding the questions as to whether is it necessary to review the state budget in order to cover the expenditures for implementation of the challenged Decision, and if yes, how will it be done, and how the Decision can be implemented in case of non-approval of the Government's proposal for review of budget by the Assembly, the Ministry of Finances stated that *"[...] the budget will not be reviewed only to cover the expenditures of the the challenged Decision], if the state institutions do not have any other demands, because this amount of expenditures foreseen by the the challenged Decision is coverable as we stated above, [...] If the budget review is not approved, the decision will be applied within the meaning of the legal basis provided by Article 15, paragraph 3 of Law No. 06 / L-20 on State Budget for 2018."*

58. Regarding the question of the Court whether have been similar cases in the past and, if yes, how it was proceeded, the Ministry of Finances stated that: *"since 2004 onwards, there has been increase of salaries by administrative decisions of the Government. In the Republic of Kosovo, we do not have a law on wages and as a consequence, the issue of wages has always been regulated through administrative decisions of the Government [...] the amount of funds envisaged by these decisions were then regulated within the state budget at different stages, by applying the law or by revising the Budget."*

Counter-response of the Applicants on the clarifications of the Ministry of Finance

59. With respect to the response of the Ministry of Finance to the questions put by the Court, the Applicants emphasize that the matter "*submitted by our part and which ended up in the form of questions at the Ministry of Finance is not a matter of legality. It absolutely concerns the constitutionality of the decision of the Government of Kosovo, as it essentially affects the constitutional powers of the Assembly of the Republic of Kosovo; therefore, ratione materiae leads to Government's powers being ultra vires exerted to the detriment of the Assembly of the Republic*". The Applicants state that "*the response of the Ministry of Finance does not under any*

circumstance and case provide any figure-based evidence for the compatibility of the decision with the Law on Budget […]"

60. According to the Applicants, "*the Ministry naturally accepts that the challenged decision is not reflected in the Law on Budget, and reasons – on these grounds– that "the challenged decision is of an implementation nature". It is exactly this ground that ultimately renders the viewpoint that the Ministry of Finance provided as answers to these questions controversial. How can the challenged decision be, at the same time, "a decision to increase salaries" while these salaries, according to the Ministry, have already been increased by the Law on Budget?"*

61. The Applicants also state that "*we are in support of increase of salaries in the sector of rule of law, but this should be done adhering to the premises of the judiciary independence and essential and decisive role of the Assembly of the Republic of Kosovo, based on an entirely reasoned and performance-based scheme […]."*

Main comments received from the Venice Commission Forum

62. The Court notes that the answers received from the Venice Commission Forum show that among the states that responded there are different constitutional practices on the issue of the acts of the Government that may be submitted for review to the Constitutional Court and the authorized parties to initiate such review. The Court also notes that the salaries of the civil servants in those states are regulated by laws, namely by special normative acts.

63. In this regard, the Constitutional Court of Austria stated that in Austria administrative regulations are subject of review by the Constitutional Court and "*the constitutional term "administrative regulations" (Verordnungen) also extends to acts of Government that are normative and general in nature. The acts of Government that may be challenged [before the Constitutional Court] are not specifically enumerated; consequently, where an act of Government is challenged before the Constitutional Court, the Court has to examine as a preliminary issue whether the act in question is an administrative regulation within the meaning of Article 139 of the Federal Constitutional Act"*. As to the parties that may challenge acts of the Government, they include: *ex officio* if the Constitutional Court has to apply a regulation in a concrete case; at the request of another court if it has to apply the regulation in a pending case; individuals when they are directly affected by the regulation; at the request of the Federal Government (in case of a regulation issued by a Land

authority). With respect to the salaries of the public servants, in Austria they are regulated by a law adopted by the Parliament (namely the Federal Act on the Salaries of the Federal Officials).

64. The Constitutional Court of the Czech Republic stated that it has jurisdiction to annul statutes or individual provisions thereof if they are in conflict with the Constitution. According to them "*The Constitutional Court of Czech Republic interpreted this provision in a way that provides for a review of legal acts which fulfill material conditions for being "legal enactments", not necessarily formal ones (i. e. being labelled "legal acts")*. As regards the authorized parties to challenge the acts of the Government, they include among others, a group of at least 25 Deputies or a group of at least 10 Senators. Salaries of public servants in Czech Republic are governed by different laws, special laws, which include the Labour Act or the Civil Service Act, Act on Salaries of State Officials, Act on Salaries of Prosecutors.

65. The Constitutional Court of Macedonia stated that their Constitution does not provide an exhaustive list of the acts of the Government that can be submitted for constitutional assessment before the Constitutional Court. The Constitution uses the term "other regulations" which has been interpreted by the Constitutional Court as comprising the by-law adopted by the Government or the ministries. As regards the authorized parties to challenge the acts of the Government, any natural or legal person may request from the Constitutional Court to review laws or bylaws, without having the obligation to prove his/her legal interest in the proceedings. Salaries of public servants in Macedonia as well are regulated by special laws including the Law on the Salaries of Elected or Appointed Officials, the Law on the Salaries of Judges, the Law on Administrative Servants which regulates the salaries of the civil servants.

66. The Constitutional Court of Bosnia and Herzegovina clarified that their Constitution, in addition to the acts that are specifically enumerated in the Constitution, when the constitutionality of other general acts is challenged, including the decisions of the Government, it assesses each case individually whether such acts raised constitutional issues or conflict among constitutional institutions, and depending on that, the Court assesses their constitutionality. As to the authorized parties to refer a conflict among institutions and entities, before the Constitutional Court, they include: members of the Presidency, the Chair of the Council of Ministers, the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, or by one-fourth of the members of either chamber of the Parliamentary Assembly.

67. Constitutional Court of Croatia explained that the local or central government acts that may be challenged before the Constitutional Court of Croatia are determined on each case individually and that Constitution of Croatia and the Law on the Constitutional Court of Croatia does not provide for an exhaustive list of the government acts that may be challenged. Salaries of civil servants, judges, prosecutors and other officials are regulated by the relevant laws for the respective categories.

68. The Constitutional Court of Slovenia explained that it has the power to review all acts of government that are of a general nature, i.e. they produce legal effects for an indefinite number of individuals. There is no exhaustive list, but it is understandable that the regulations and other general acts issued for the purpose of exercising public authority may be challenged. Whereas, salaries of public officials are regulated by relevant laws.

69. The Federal Constitutional Court of Germany explained that, in principle, all acts of the Federal Government may be subject to constitutional control. There is no exhaustive list that explicitly defines which acts of the Federal Government may be subject to constitutional control. Salaries of state officials at federal level and individual "lands" are regulated by the relevant laws. The Federal Government and the "lands" governments have the competence to issue regulations regarding the details of the payroll system.

70. The Constitutional Court of Slovakia explained that there are several laws regulating salaries of state officials and civil servants. Those laws regulate the salaries of the deputies of the Assembly, the members of the Government, the judges of the Constitutional Court, the President of the Judicial Council, the chairman and deputy chairman of the Office of the Auditor General, the General Prosecutor and regular court judges. In general, salaries of state officials and civil servants are regulated by the relevant laws issued by the Parliament. Within the framework of these laws, the relevant authorities may issue their own regulations or may conclude collective labor agreements.

71. The Latvian Constitutional Court explained that the Law on the Constitutional Court establishes the distinction between acts of general application and administrative acts. The latter apply to an individual situation. In principle, all government acts may be challenged, but there is no exhaustive list that explicitly defines which government acts may be challenged. Salaries of state officials are regulated by relevant laws such as the Law on Remuneration of

Officials and Employees of State and Local Government Authorities, the Law on Judicial Power the Office of the Prosecutor Law, the Constitutional Court Law.

72. The Supreme Administrative Court of Sweden, explained that salaries of parliamentarians and ministers are regulated by the relevant laws and are determined by two separate authorities under the Parliament. For judges, prosecutors and civil servants individualized setting of salary applies. Therefore, the remuneration for these categories is negotiated with the employer.

73. The Constitutional Court of Moldova explained that the decisions, orders and decrees of the Government may be challenged before the Constitutional Court of Moldova. Salaries of state officials, civil servants, judges and prosecutors are regulated by the relevant laws for those categories.

Relevant constitutional provisions

Article 3 [Equality Before the Law]

1. The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.

2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.

Article 4 [Form of Government and Separation of Power]

1. Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution.
2. The Assembly of the Republic of Kosovo exercises the legislative power.
[...]
3. The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentarian control.

4. The judicial power is unique and independent and is exercised by courts.
[...]

Article 7 [Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.
[...]

Article 65 [Competencies of the Assembly]

Assembly of the Republic of Kosovo:

(1) adopts laws, resolutions and other general acts;
[...]
(5) approves the budget of the Republic of Kosovo;
[...]
(8) elects the Government and expresses no confidence in it;
(9) oversees the work of the Government and other public institutions that
report to the Assembly in accordance with the Constitution and the law;
[...]

Article 92 [General Principles]

1. The Government consists of the Prime Minister, deputy prime minister(s) and ministers.
2. The Government of Kosovo exercises the executive power in compliance with the Constitution and the law.
3. The Government implements laws and other acts adopted by the Assembly of Kosovo and exercises other activities within the scope of responsibilities set forth by the Constitution and the law.
4. The Government makes decisions in accordance with this Constitution and the laws, proposes draft laws, proposes amendments to existing laws or other acts and may give its opinion on draft laws that are not proposed by it.

Article 93 [Competencies of the Government]

The Government has the following competencies:
[...]
(3) proposes draft laws and other acts to the Assembly;
(4) makes decisions and issues legal acts or regulations necessary for the implementation of laws;
(5) proposes the budget of the Republic of Kosovo;
[...]
(11) exercises other executive functions not assigned to other central or local level bodies.

Admissibility of Referral

74. The Court first examines whether the Referral meets the admissibility requirements, as laid down in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.

75. The Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which provides: *"The Constitutional Court decides only on matters referred to the court in a legal manner by* authorized *parties."*

76. Further, the Court refers to paragraphs 2 (1), 3 (1), and 5 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which provide as follows:

"2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;

3. The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court:

(1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;
[...]

5. Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest

the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed."

77. In this respect, the Court refers to Articles 29 [Accuracy of the Referral] and 30 [Deadlines] of the Law which provide:

Article 29

Accuracy of the Referral

1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall
be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, the Government or the Ombudsperson.

2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution.

3. A referral shall specify the objections put forward against the constitutionality of the contested act.

Article 30
Deadlines

A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force.

78. Furthermore, the Court refers to paragraph (1) (d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure which specify:

(1) The Court may consider a referral if:
[...]
(d) the referral is prima facie justified or not manifestly ill-founded.

79. In connection with the foregoing, paragraph 2 (1) of Article 113 is the main point of reference in assessing what acts of the Government may be challenged before the Constitutional Court by the deputies, in that it expressly mentions: decrees of the Prime Minister and regulations of the Government.

80. Paragraph 3 (1), of Article 113, enables constitutional review of other acts of the Government, if they are related to allegations pertaining to the conflict of competences between the Government and the Assembly.

81. Outside the context of the conflict of constitutional competences of the Assembly of Kosovo, the President of the Republic of Kosovo and Government of Kosovo, the Constitution provides the possibility of filing with the Constitutional Court only of referrals concerning the compatibility with the Constitution: of laws, decrees of the President and the Prime Minister, and of regulations of the Government.

82. The Court emphasizes that, unlike this restriction that is self-determined by the Constitution as to the possibility of contesting with the Constitutional Court of acts of the President and of the Government, paragraph 5, of Article 113, provides that 10 or more deputies can contest the constitutionality of any law or decision adopted by the Assembly.

83. Thus, the Constitution distinguishes between the possibility to contest with the Constitutional Court the constitutionality of acts of the President and the Government, on the one hand, and acts of the Assembly, on the other hand.

84. However, the Court recalls its case-law when it found that, exceptionally, the Constitutional Court may conduct a constitutional review of other acts of the Government and the Prime Minister, in addition to regulations and decrees, only if they raise important constitutional matters.

85. Thus, the Court refers to Case No. KO73/16 (Applicant *The Ombudsperson*, Judgment of 8 December 2016, paragraph 52). In that case, the Court held that "*In assessing the merits of this Referral the Court will not take a stand on the disputed legal nature of the challenged Administrative Circular. The gist of the Referral is whether the challenged Administrative Circular allegedly violated the respective provisions of the Constitution […]. The mandate of the Court is to assess the constitutionality of the requests related to the Administrative Circular and not to assess its legality or whether it is supported by good public policy.*"

86. Further, the Court found that "*the Administrative Circular [no. 01/2016] issued by the Ministry of Public Administration of Kosovo, regardless of its name, is of a mandatory nature and indeed touches upon the constitutional status of the independent institutions" (*See,

the Constitutional Court of the Republic of Kosovo: Case No. KO73/16, Applicant *The Ombudsperson,* Judgment of 8 December 2016, paragraph 58*).*

87. The Court reiterates that the Applicants in their Referral refer to "*the principles established by the Constitutional Court in Case KO73/16 regarding the legal effects produced by the decisions of the Government, regardless of their name.*"

88. Therefore, the Court underlines that the decisions of the Government may be admitted for constitutional review by the Constitutional Court, only when it is substantiated that they raise important constitutional matters.

89. In the present case, the Court notes that the essential issue, over which the Applicants and the Government submit opposing allegations, concerns the relationship between the decision of the Government to raise the salaries and the Law on Budget for 2018. In other words, whether the Government, by the decision in question, has violated the constitutional competence of the Assembly to adopt the state budget and to control its spending, and whether the Government have exceeded their constitutional competences.

90. In this regard, the Court considers that the decision concerned raises important constitutional matters that deal with the exercise of the constitutional competences by the Assembly and the Government.

91. Therefore, the Court finds that the issues raised in the Referral are of such complexity, so their determination should depend on the review of the merits of the Referral. Therefore, the Referral cannot be considered as manifestly ill-founded within the meaning of Rule 36 (1) (d) of the Rules, and no other basis has been established to declare it inadmissible (see, for example, Case A and B v. Norway [DHM], Appeals No. 24130/11 and 29758/11, Judgment of 25 November 2016, paragraph 55 and also see, *mutatis mutandis*, the Constitutional Court of the Republic of Kosovo: Case No. KO73 / 16, Applicant Ombudsman, judgment of 8 December 2016, paragraph 49). Accordingly, the Court declares the Referral is admissible to review on the merits.

Merits of the Referral

92. The Court reiterates that the essence of the Applicants' Referral concerns the allegation that through the challenged decision to raise the salaries, the Government have exceeded their constitutional

authorizations, thereby infringing upon the constitutional competences of the Assembly regarding the adoption of the state budget and control of its spending.

93. The Applicants claim that the Decision "*directly affects the Budget of Kosovo by surpassing the allocated budget means for salaries of public functionaries of these institutions, pursuant to the Law on Budget [for year 2018], and consequently, it violates the competence of the Assembly"*. The Applicants in addition state that "*no norm or budget code exists neither in the Law on Budget of the Republic of Kosovo for 2017, nor the one for 2018",* which provides for such a salary raise for the Governing Cabinet. Considering that *"Article 93.5 of the Constitution defines that the Government of Kosovo has competence to propose the budget of the Republic of Kosovo. This means that the Government is competent only for proposing the allocation of the budget of Kosovo and budget allocations from the budget of Kosovo."* Consequently, according to the Applicants, through the challenged decision, the Government surpassed their constitutional authorizations by infringing upon the exclusive competence of the Assembly to approve the budget and to oversee and control the Government.

94. The Government, in their comments, argue that "*the challenged decision of the Government was issued two days before the Law on the Budget of the Republic of Kosovo and is foreseen in the budgetary planning and it can be reviewed […]"*. In this line of argument, the Government submit that "*Law No. 06/L-020 on Budget of the Republic of Kosovo for 2018 specifically provides for a budget increase in the category of wages and allowances for the affected Budgetary Organizations (The Office of the Prime Minister, Ministries, Kosovo Judicial Council, Kosovo Prosecutorial Council, etc.) which confirms that the challenged Decision of the Government was foreseen and is covered by the category wages and allowances*." The Government also argues that "*based on the relevant provisions of the Law on Public Finances Management, the budget of the Republic of Kosovo may be reviewed and that the added budget for the budgetary organizations covers the additions to the salaries until the review*."

95. The Court also refers to the replies of the Ministry of Finance which argues that, in accordance with the Law on Public Finances Management and Accountability, "*The Government approves the Budget and submits it to the Assembly […] not later on 31 October and, on this legal basis, the Government have sent it to the Assembly within the legal time limit [at the end of October 2017], including the*

increase of the bill of salaries [...]". Further, the Ministry of Finance underlines that "*the challenged decision is of implementing nature [...] and it is still incorporated within the budget at later stages.*" Furthermore, the Ministry of Finance emphasizes that the challenged decision "*never infringes upon the state budget [...]*" and that *"from year 2004 and onwards there have been salary raises through administrative decisions of the Government. In the Republic of Kosovo we do not have a law on salaries and as a consequence salaries were always determined and regulated through administrative decisions of the Government [...] the sum of funds foreseen by these decisions were subsequently regulated within the state budget at different stages, by applying the Law or by reviewing the Budget."*

96. The Court notes that the opposing arguments of the parties, in essence, relate to procedural aspects of the adoption and the implementation of the state budget in relation to the competence and procedure for increasing the salaries in the public sector.

97. With respect to the competences of the Government and the Assembly, the Court initially emphasizes that neither party questions the constitutionally guaranteed competence of the Assembly to adopt the state budget and to exercise its oversight function over the Government.

98. Further, the Court underlines the essential fact that the Republic of Kosovo does not have yet a law or other special act regulating comprehensively the issue of the salaries in the public sector.

99. The Court draws its attention to the responses received from member countries of the Venice Commission Forum, where it is made clear that in those countries the issue of salaries in the public sector is regulated by law, namely by special normative acts.

100. The Court notes that, as clarified in the responses of the Ministry of Finance, as a result of the legal vacuum due to the absence of a law on salaries, the practice established in the Republic of Kosovo since 2004 is to increase salaries by administrative decisions of the Government; these decisions having been included in the budget, by decision of the Assembly, at different stages.

101. The Court wishes to emphasize that in order to avoid such situations whereby the Government makes decisions in a legal vacuum, it is necessary that the issue of salaries in the public sector be regulated

comprehensively through an act, namely a special law (as is the practice in the countries of Venice Commission Forum).

102. Furthermore, the Court considers that in accordance with the executive nature of the Government's competences, the functioning of the Government is closely related to the process of the adoption and implementation of the state budget.

103. In that regard, the Court notes that one of the main constitutional functions of the Government, as provided in Article 92.3, is the implementation of laws and other acts adopted by the Assembly of Kosovo.

104. The Court clarifies that the state institutions shall exercise their authorizations based on the Constitution and the Law. The Assembly is the institution that has the responsibility to exercise the legislative power, whereas the Government exercise the executive power based on the Constitution and the laws adopted by the Assembly (See, the Constitutional Court of the Republic of Kosovo: Case No. KO73/16, Applicant *The Ombudsperson,* Judgment of 8 December 2016, paragraph 61).

105. As to the main allegation of the Applicants that the Government through the challenged decision infringed upon the competences of the Assembly, the Court recalls that on 22 December 2017 the Assembly adopted the Law on Budget for Year 2018 thereby exercising its constitutional function as regards the adoption of the state budget.

106. In addition, the Court notes the argument of the Ministry of Finance that, within the frame of their competences, the Government was the proposer of the draft-budget for year 2018, which was approved by the Assembly.

107. The Court also notes that the respective committees of the Assembly, namely the Committee on Budget and Finances, the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and the Oversight of the Anti-Corruption Agency, and the Committee for the Oversight of Public Finances did not submit to the Court any comment regarding various allegations and arguments raised in this Referral.

108. In this respect, the Court notes that it is not its role to make hypothetical assessments regarding the way how the state budget is implemented by the Government, including the implementation of the challenged decision.

109. The Court also wishes to emphasize that, in accordance with its previous position (see case KO73/16), the allegations submitted to the Court on the incompliance of different acts of the Government with relevant laws should be argued at the constitutional level.

110. The Court considers that the Applicants did not prove how the Government has violated Constitutional competencies of the Assembly regarding the approval of the state budget, or any other constitutional competence. Consequently, in the concrete case, the Court is not convinced that the decision to raise the salaries constitutes a matter of the constitutional level.

111. In the light of the allegations and arguments presented above, the Court considers that the Assembly was not infringed upon or prevented from exercising its constitutional competences regarding the approval and implementation of the state budget.

112. However the Court also notes that the sublegal acts of Government should be in compliance with the Constitution and the laws. Moreover, the Court emphasizes that, in compliance with the executive nature of its constitutional powers, the Government is obliged to implement the state budget approved by the Assembly. Therefore, it is the obligation of the Government to support the implementation of the challenged decision in the budget allocations determined in the Budget for 2018 and in the relevant laws.

113. As regards the Applicants' allegation about the conflict of interest, the Court notes that, in analogy with its decision in Case no. KO73/16, it is not the task of the Constitutional Court to assess the legality aspects of the Government acts, or whether they are supported by good public policy. Thus, the Court underlines that it is not within its function to assess the allegations of the incompliance of the challenged decision with the Law on Prevention of Conflict of Interest in Discharge of Public Functions (about which the Anti-corruption Agency has given its assessment).

114. With regard to the allegations on violation of Article 3 [Equality before the Law] and Article 7 [Values] of the Constitution, because by the challenged Decision of the Government, "*the senior functionaries of the Government and their subordinates have a more favorable salary than any other salary of any citizen in Kosovo*", the Court considers that this allegation is not supported by convincing arguments. Furthermore, the Court considers that the analogy of this decision with Case No. KO119/10 does not hold [Judgment dated 8 December 2011, Constitutional review of Article 14 paragraph 1.6, Article 22,

Article 24, Article 25 and Article 27 of the Law on the Rights and Obligations of the Deputy, No. 03/L111, of 4 June 2010]. This is so because in Case KO119/10 the Court did not assess the salaries of the deputies but their supplementary pensions, for which the Court considered that it created discrimination against other members of the society and pensioners in Kosovo, because the deputies would benefit substantial pensions from the state budget without their contribution, which was not the case with other members of the society.

115. In this connection, the Court recalls that a treatment is discriminatory if an individual is treated differently than others in similar position or situations and if such difference in treatments has no objective or reasonable justification. The Court reiterates that a different treatment must pursue a legitimate aim in order for it to be justified and it must have a reasonable relationship of proportionality between the means employed and the aim sought to be realized. (See ECtHR Case *Marckx v. Belgium*, Application no. 6833/74, Judgment of 13 June 1979, paragraph 33).

116. In this regard, the Court considers that the difference in salaries in itself does not create unequal treatment for the purposes of Article 3 and 7 of the Constitution. Consequently, the Applicants have not presented any convincing facts that the salaries foreseen by the Challenged Decision treat differently similar positions or situations and whether such difference in treatment does not have an objective and reasonable justification.

Conclusion

117. The Court wishes to emphasize that it is not within its scope to assess or substitute for the public policies set by the legislative or executive body. The principle of the separation of powers requires from the Court to respect the setting of the policies by the respective constitutional bodies. Key decisions in policy-making for the governance of a country must be made by the constitutional bodies who have democratic legitimation, namely by the Assembly and the Government. Such bodies - due to their nature and the democratic legitimation – have the duty to set and advance budgetary, economic and social policies of the country (see, ECtHR *mutatis mutandis*, *Dubska and Krejzova v. Czech Republic* [GC], § 175).

118. The Court considers that the constitutional bodies are obliged to respect the competences of one-another during the exercise of their constitutional functions. Unclear situations as regards the exercise of the competences, as is the case under consideration, can be avoided in

the future by the adoption of the respective laws on the Government and on the salaries of state functionaries.

119. In conclusion, the Court considers that the Applicants have not presented convincing evidence to substantiate their allegations that the challenged decision has produced constitutional effects in terms of infringing upon the constitutional competences of the Assembly or violating any constitutional provision.

The request for an interim measure

120. The Court recalls that the Applicants also request the Court to issue a decision imposing an interim measure, namely prohibiting the execution of the challenged decision until the Court decides the case, because "*if this unconstitutional situation lasts, the budget of the Republic of Kosovo will suffer high unplanned monetary loses.*"

121. The Court recalls that, on 6 February 2018, the Government informed that they issued a decision on temporary suspension of the challenged decision of the Government until the Court makes a final decision on the matter.

122. Considering that the challenged Decision was suspended by the Government, the Court considers that is not necessary to review the request for interim measure.

123. Therefore, in accordance with Article 27 (1) of the Law and Rule 55 (4) of the Rules of Procedure, the Applicants' request for an interim measure is rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113.2 (1) and 116.2 of the Constitution, Articles 27 (1), 29 and 30 of the Law and in accordance with Rules 29, 54, 55 and 56 (1) of the Rules of Procedure, on 29 May 2018

DECIDES

I. TO DECLARE unanimously the Referral admissible for review on the merits;

II. TO HOLD by majority that the Decision of the Government of the Republic of Kosovo no.20/14, of 20 December 2017, is not in contradiction with Articles 3 [Equality Before the Law], 4 [Form of the Government and Separation of Power], 7 [Values], 65 [Competences of the Assembly], 92 [General Principles] and 93 [Competences of the Government] of the Constitution;

III. TO REJECT the request for the interim measure;

IV. TO NOTIFY this Judgment to the parties;

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

VI. TO DECLARE this Judgment effective immediately.

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

JOINT DISSENTING OPINION

of Judges Almiro Rodrigues and Gresa Caka-Nimani

in

Case no. KO12/18

Applicant

Albulena Haxhiu and 30 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of the Decision no. 04/20 of the Government of the Republic of Kosovo, of 20 December 2017

We respect the decision of the Majority of Judges (hereinafter: the Majority) of the Constitutional Court of the Republic of Kosovo (hereinafter: the Court). However, always with all respect, we cannot agree with it for the reasons that will follow.

The Scope of the Referral

1. The Applicants maintain that the Decision no. 04/20 of 20 December 2017 (hereinafter: the challenged Decision) of the Government of the Republic of Kosovo (hereinafter: the Government) is not in compliance with Articles: 3 [Equality Before the Law]; 4 [Form of the Government and Separation of Power]; 7 [Values]; 65 [Competences of the Assembly]; 92 [General Principles]; and 93 [Competences of the Government] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

2. The Applicants' Referral primarily concerns the allegation that, through issuing the challenged Decision, the Government has exceeded its authority as provided by Articles 92 and 93 of the Constitution, thereby infringing upon the competencies of the Assembly as provided by Article 65 of the Constitution. In this respect, the Applicants also argue that Article 4 of the Constitution has been violated.

3. The Majority decided to declare this Referral admissible and to hold that the challenged Decision is not in contradiction with Articles 3 [Equality Before the Law]; 4 [Form of the Government and Separation of Power]; 7 [Values]; 65 [Competences of the Assembly]; 92 [General Principles] and 93 [Competences of the Government] of the Constitution.

The facts of the case

4. The Government issued the challenged Decision on 20 December 2017. The Decision took effect on the date of the signature and was to be implemented retroactively as of 1 December 2017.[1]

5. The challenged Decision increased the salaries of a specific list of Government positions, including: a) the Prime Minister, Deputy Prime Ministers, Ministers and their deputies; b) a number of political appointees related to these positions; and c) a number of civil servants employed in the Office of Prime Minister. While not enumerated specifically, the challenged Decision produces the same effects for all prosecutors and judges, including the judges of the Constitutional Court, as per the proportions set forth in the Law on Courts, the Law on State Prosecutor and the Law on Constitutional Court.[2]

6. Two days later, on 22 December 2017, the Assembly of the Republic of Kosovo (hereinafter: the Assembly) adopted Law No. 06/L-020 on the Budget of the Republic of Kosovo for Year 2018 (hereinafter: the Law on 2018 Budget).

7. On 29 January 2018, 31 deputies of the Assembly submitted a referral to the Court, challenging the compatibility of the challenged Decision with the Constitution.

Preliminary Observations

8. The Majority, in holding that the challenged Decision is not in contradiction with the abovementioned constitutional provisions, has essentially maintained that "*the Court is not convinced that the decision to raise the salaries constitutes a matter of the constitutional level*" (paragraph 110 of the Judgment) and that "*the Applicants have not presented convincing evidence to substantiate their allegations that the challenged decision has produced constitutional effects in terms of infringing upon the constitutional competences of the Assembly or violating any constitutional provision*" (paragraph 119 of the Judgment). We disagree.

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[1] Decision Nr. 04/20 of the Government of the Republic of Kosovo dated 20 December 2017.

[2] Law No.03/L-199 on Courts; Law No.03/L-225 for the State Prosecutor and Law No. 03/L-121 on Constitutional Court.

9. The gist of the question before the Court is not whether a Government decision "*raising salaries*" is compatible with the Constitution; but rather whether a Government decision with no "authorization in law" or not "implementing a law", as in the circumstances of the present case, is compatible with the Government's authority to make decisions as defined in Article 92 and 93 of the Constitution. We maintain this is matter of constitutionality.

10. Further, we maintain that in issuing the challenged Decision, in the circumstances of this case, the Government has exceeded the limits of its authority in exercising the executive function as determined by Article 92 and 93 of the Constitution, because of two essential arguments. The challenged Decision a) neither "implements a law" as required by Articles 92.3, 92.4 and 93.4 of the Constitution; nor b) is a "proposal" as required by Articles 92.4 and 93.5. Consequently, the challenged Decision has resulted into the infringement of the competences of the Assembly to adopt the budget as determined by Article 65.5 of the Constitution. Finally, we maintain that Article 4 of the Constitution on the Form of Government and Separation of Powers has also be affected as a) the exceeding of the Government's authority and the corresponding infringement of the legislative power, has affected the balance between the executive and legislative as determined by this Article and b) the challenged Decision produces effects for an independent branch of government, the judiciary, bypassing parliamentary control.

11. These are the most important allegations pertaining to the circumstances of the present case. Therefore, we will refrain from analyzing the compatibility of the challenged Decision with Articles 3 and 7 of the Constitution.

Compatibility with the Articles 92 and 93 of the Constitution

12. Article 4 of the Constitution establishes the form of government, the separation of powers among the three branches of government, and their corresponding checks and balances. In this respect, and as relevant for the circumstances of the case, the Constitution establishes that the Assembly exercises the legislative power (Article 4.2), while the Government is responsible for the "implementation of laws" and state policies and is subject to parliamentarian control (Article 4.4).

13. In further defining the authority of the Government and its corresponding limits, Article 92 of the Constitution vests the Government with the exercise of the executive power; however,

limiting it to "compliance with the Constitution and the law" (Article 92.2).[3]

14. Article 92.3 further complements Article 4 of the Constitution in defining the Government's responsibility to "implement laws" and other acts adopted by the Assembly and to exercise other activities within the scope of responsibilities set forth by the "Constitution and the law". Further, in exercising its executive authority, the competence of the Government to "make decisions" is defined in the Constitution, however the same is limited to the "accordance with the Constitution and the laws" (Article 92.4).

15. On the other hand, Article 93.4 of the Constitution specifies that the competence of the Government to "make decisions and issue legal acts or regulations" is limited to the extent "necessary for the implementation of laws".

16. Therefore, according to the Constitution, in exercising its functions, the Government is empowered to make decisions and adopt legal acts or regulations, as long as they are: a) "in compliance with the Constitution and the law"; and b) "necessary for the implementation of laws". Alternatively, the Constitution empowers the Government to propose draft laws, propose amendments to existing laws or other acts and give its opinion on draft laws that are not proposed by it (Articles 92.4 and 92.3). In light of these competencies, Article 93.5 of the Constitution specifically empowers the Government to propose to the Assembly the Budget of the Republic of Kosovo.

17. The general principles as outlined above, pertaining to the Government's authority limitations in exercising its executive functions to "compliance with the Constitution and law", will in continuation be applied to the circumstances of the present case, and therefore focus on the Government's authority to "make decisions and issue legal acts".

18. As reasoned above, the authority to "make decisions" is limited to the following constitutional requirements: a) "accordance with the Constitution and the laws" (Article 92.4); and b) "necessary for the implementation of laws" (Article 93.4). Alternatively, the Government is vested with the power to "propose" to the Assembly draft laws,

[3] In analyzing the constitutional competencies of the Government, its authority and the corresponding limitations, and the checks and balances with the other branches of government, this Opinion will be limited to the extent necessary and relevant for the circumstances of the issues raised in this Referral.

including the draft law on budget and amendments to laws (Articles 92.3, 92.4, and 93.5).

19. Therefore, in assessing the compatibility of the challenged Decision with the Constitution, two primary and essential constitutional questions must be answered: a) is the challenged Decision "necessary for the implementation of a law" as required by Article 93.4 of the Constitution?; and b) if not, is it a "proposal" to the Assembly, in the form of a draft law, or an amendment of law as required by Articles 92.4, 93.3 or 93.5 of the Constitution?.

Does the challenged Decision "implement a law"?

20. The challenged Decision was rendered on 20 December 2017 and it specifies that it has a retroactive effect from 1 December 2017. The Law on 2018 Budget was adopted by the Assembly two days later, on 22 December 2017, respectively. Therefore, the challenged Decision, in the circumstances of the present case, could have only served one of the following two purposes: a) support the implementation of the Law on 2017 Budget; or b) support the implementation of the Law on 2018 Budget. As it will be argued, none of them is the case.

21. The Government does not maintain to have issued the challenged Decision as an act to implement the Law on 2017 Budget, in force when the challenged Decision was issued. The Government maintains, albeit through contradictory arguments, that the challenged Decision is an act supporting the implementation of the Law on 2018 Budget, not in force when the challenged Decision was issued.[4]

22. In fact, the challenged Decision itself refers to no law at all. It is issued referring to Articles 92.4 and 93.4 of the Constitution, which limit the power of the Government to acting in "compliance of" and in support of the "implementation of a law".

23. The challenged Decision also refers to Regulation 09/2011[5] and Articles 4 of the Regulation 02/2011[6]. In this respect, the Government

[4] The Government of the Republic of Kosovo response to Court's request for comments pertaining to case KO12/18 of 9 February 2018 and the Ministry of Finance's response to the Court's request for comments pertaining to case KO12/18 of 20 February 2018 with reference number 01 353 of 27 February 2018.
[5] Regulation No. 09/2011 of the Rules and Procedure of the Government of the Republic of Kosovo.
[6] Regulation No.02/2011 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministers.

argues that, based on Article 99 [Procedures] of the Constitution, its decision making, the law aside, is regulated through regulations and that, in absence of a Law on Government, the Government is authorized to act based on the Government's referred to Regulations. This is correct; however, the Government referring to its regulations cannot exceed its authority as determined and limited by the Constitution and the law. Even further, the Regulations that the Government is referring to itself, also limit the scope of decision making of the Government to "compliance with the Constitution and law" and for the purpose of "implementing laws".[7]

24. In fact, on its response to the Court, the Government admits that it's challenged Decision implements no law,[8] but justifies issuing the challenged Decision due to "*absence of a law on Salaries for the Government Officials*" and based on the "*practice to date*".[9] None of the arguments stand nor justify a Government action outside the limits determined by Articles 92 and 93 of the Constitution.

25. The "*absence of a law*" or a situation of a "*legal vacuum*" as referred to by the Majority (paragraphs 100 and 101 of the Judgment), does not provide the Government with the authority to issue such a Decision, because as it has been outlined above, the Government's decisions are limited to "compliance with the Constitution and law" and are to be issued for the purpose of "implementing a law". In "*absence of law*", the Government has the authority to act based on the constitutionally assigned competencies to "propose a law or an amendment to a law" to the Assembly. The Government cannot render decisions or issue acts which do not "implement a law". Otherwise, the Government will exceed its constitutionally limited competences and infringe upon those constitutionally provided to another branch of government, the legislative one.

26. Further, the inexistence of a "*law on salaries of government officials*" does not mean that there is no legal framework in Kosovo regulating the "wages and salaries" nor that the Government is authorized to act not in compliance with the existing applicable law. The Law on Public Financial Management and Accountability and its corresponding amendments, the laws on Budget, as well as the Law on Salaries of

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[7] Regulation No.02/2011 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministers, Article 4 on the Government.

[8] The Government of the Republic of Kosovo response to the Court's request for comments pertaining to case KO12/18 of 9 February 2018.

[9] The Government of the Republic of Kosovo response to Court's request for comments pertaining to case KO12/18 of 9 February 2018.

Civil Servants, affected through the challenged Decision, among others, all regulate matters pertaining to "wages and salaries" covered through the state budget, including the possibilities of adjustments and the corresponding limitations throughout a fiscal year. [10]

27. Finally, the "*practice to date*" is not argument. First, as mentioned above, the essence of the question before the court is not necessarily whether the Government can make "decisions raising salaries", but rather whether the Government can make decisions that do not "implement a law" or do not have "authorization in law". Second, the fact that there might have been a practice based on which the salaries of government officials might have been raised through Government decisions or acts "implementing" or not the applicable laws, does not necessarily mean that it is or isn't "in compliance with the Constitution and the law". The Court has not assessed the compatibility of such decisions with the Constitution.

28. In this respect, and for the reasons stated above, we disagree as to the reasoning of the Majority in the Judgment (paragraphs 98 and 100 of the Judgement), which endorse the "*absence of a law*" and the "*practice to date*" as arguments to justify the compatibility of the challenged Decision with the Constitution.

29. Furthermore, in reviewing the constitutionality of similar government decisions, other Constitutional Courts have reached the same conclusions.[11] Among others, the Constitutional Court of the Republic of Lithuania maintained that the Government is obliged to "*act in compliance with the Assembly adopted laws*". It specifically

[10] Law No. 03/L-048 on Public Financial Management and Accountability of 3 June 2008 (Article 30 on Adjustments to Appropriations of a Budget Organization); Law No. 05/L-063 on Amending and Supplementing the Law No. 03/L-048 on Public Financial Management and Accountability, amended and supplement by Laws 03/L-221, No. 04/L-116 and No. 04/L-194 (Article 22C on the Ceiling on Budget Increase for Wages and Salaries); Law No. 06/L-020 on the Budget of the Republic of Kosovo (Article 15 on Transfer of allocated budget amounts); Law No. 03/L-147 on Salaries of Civil Servants of 25 June 2010 (Article 8 on Calculation of the Basic Salary).

[11] Among others: the Constitutional Court of Moldova (Decision 21/2004) emphasized that, based on its Constitution, the Government issues acts for the "implementation of laws". According to this Decision, the Decree nr. 782-37 which did not contain any legal basis and did not refer to a law or a legal provision it implements, was declared unconstitutional, as the Government went beyond its constitutional limits. Similarly, the Constitutional Court of Estonia (Decision 3-4-1-5-2000), in relation to the constitutional review of a regulation of the Government, emphasized that the Government is authorized to issue regulations as long as the law provides it with the competence to do so.

maintained that "*The Government,..., while passing resolutions, may not act ultra vires; it must observe the Constitution and laws. Should the Government fail to observe laws, the constitutional principle of a state under the rule of law, which implies the hierarchy of legal acts, as well as Item 2 of Article 94 of the Constitution whereby the Government, inter alia, shall execute laws, would be denied.*" In addition, "*This is also applicable to the Government which does not enjoy any discretion to decide on non-application of provisions of a certain law, which regulates corresponding relations, unless non-application of a certain provision of the law is expressis verbis provided for in laws*".[12]

30. Therefore, we conclude that the challenged Decision has not been issued to "implement any law" as required by Articles 92.3 and 93.4 of the Constitution. The argument put forward by the Government, and accepted by the Majority, that the challenged Decision has been issued in "*absence of a law*" and based on the "*practice to date*", leads itself to the conclusion that in issuing the challenged Decision the Government has acted outside the limits set forth in the respective Articles of the Constitution.

31. The following paragraphs will analyze whether the Government, in issuing the challenged Decision, has acted in compliance with the alternative, namely it's competencies to "propose" a law, an amendment to a law or to "propose" the budget to the Assembly for adoption as foreseen in the Articles 92.4, 93.3 and 93.5 of the Constitution, respectively.

Does the challenged Decision qualify as a "proposal"?

32. The challenged Decision does not fall within the category of a "proposal of law or an amendment to law" as determined by Articles 92.4 and 93.3 of the Constitution. This is not the case, nor do either the Applicants or the Government maintain this. Therefore, it has to be analyzed whether the challenged Decision is a "proposal" within the meaning of Article 93.3 of the Constitution, which authorizes the Government to "propose a budget" to the Assembly.

33. We maintain this is not the case and in this respect, we will elaborate on the following three essential issues: a) retroactivity of the challenged Decision; b) the timing of it's issuance; and c) its purpose.

[12] The Constitutional Court of the Republic of Lithuania, Decision nr. 70/06 of 23 May 2007, paragraph 16.

34. First, the very fact that the challenged Decision has a retroactive effect goes against any potential arguments that the challenged Decision could qualify as a "proposal" for the purposes of the Law on 2018 Budget.

35. Second, the Government had already approved and submitted to the Assembly for adoption the proposed budget for 2018 by 31 October 2017, as required by the Law on Public Financial Management and Accountability.[13] The Ministry of Finance's response submitted to Court notes the same: "*the Government approves the Budget and submits it to the Assembly of the Republic of Kosovo until 31 October, and on the grounds of this legal basis, the Government has submitted the [draft law] to the Assembly by the end of October*"[14]. The challenged Decision was taken subsequently.

36. Third, the Government maintains that the challenged Decision is, at least partially, incorporated into the Government's proposal for the Law on 2018 Budget either "*in the form of the budgetary preparation*" or "*in the process of reviewing the budget*" and that "*it can be incorporated within the budget in later stages*".[15] The Applicants maintain that this is not the case, as "*the Ministry of Finance under no circumstance provides evidence for the compatibility of the [challenged] Decision with the Law on Budget*".[16]

37. In this respect, the Government's statements fall under two separate categories. The first one, "*either in the form of the budgetary preparation"* pertains to the pre-submission to the Assembly phase; while the second, *"in the process of reviewing the budget*" and that "*incorporated within the budget in later stages*", pertains to the post Assembly adoption phase. Only the first category is relevant on whether the challenged Decision qualifies as a "proposal" in the circumstances of the present case.

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[13] Law No. 03/L-048 on Public Financial Management and Accountability, Article 22 on Submission to the Assembly of the Proposed Kosovo Budget and Proposed Appropriations Law.

[14] Ministry of Finance's response to the Court's request for comments pertaining to case KO12/18 of 20 February 2018 with reference number 01 353 of 27 February 2018.

[15] The Government of the Republic of Kosovo response to Court's request for comments pertaining to case KO12/18 of 9 February 2018 and the Ministry of Finance's response to the Court's request for comments pertaining to case KO12/18 of 20 February 2018 with reference number 01 353 of 27 February 2018.

[16] Response of the Applicants to the Court's request of 26 April 2018 for comments on the Response of the Ministry of Finance of 27 February 2018.

38. The second category pertains to the implementation of the Law after the Assembly adoption and thus reflects modalities that can either be accommodated through "proposed" amendments to the Law, or decisions which "implement" the same Law. Therefore, the arguments pertaining to solutions as to the modalities for "*budgetary incorporation mechanisms in the process of reviewing the 2018 budget*" or "*incorporation during later stages*", including through the Minister of Finance references to the mechanisms foreseen in Article 15 of the Law on 2018 Budget, or the Government's response to the Court references to Article 25 of the Law on Management of Public Finances and Accountability, are not relevant. As maintained in this Opinion, the challenged Decision is not an act "implementing the Law on 2018 Budget".

39. As it pertains to the first category, that the challenged Decision was incorporated into the 2018 budget proposal, we note that the Government does not argue in any way that the "increase" proposed and thus adopted by the Assembly is compatible with the "increase" foreseen through the challenged Decision.[17] Further, these arguments do not explain nor justify the purpose nor the rationale for rendering the challenged Decision.

40. Finally, the competence of the Government, as per Article 93 of the Constitution to "propose" the budget, does not only entail the act of "proposing", but it entails a process. This process is clearly established through the Law on Public Financial Management and Accountability[18]. The latter requires the Government to prepare and adopt a proposed budget and submit it to the Assembly by October 31. Once the Government submits the "proposal" for a budget, another process starts – that of the Assembly review and subsequently "adoption" of the Government proposed budget.

41. The challenged Decision was rendered in between a Government approved and submitted budget proposal for 2018 and the Assembly adoption of the same. In this respect, the challenged Decision does neither quality as a "proposal" for the 2018 budget purposes, because

[17] The Ministry of Finance's response to the Court's request for comments pertaining to case KO12/18 of 20 February 2018 with reference number 01 353 of 27 February 2018, maintains that the Budget for 2018 increases the salary bill as set forth by Article 22c (Ceiling on budget increase for wages and salaries) of the Law No. 05 / L-063 on Amending and Supplementing the Law No. 03 / L-048 on Public Financial Management and Accountability amended and supplemented by Laws No. 03 / L-221, No. 04 / L - 11 6 and No. 04 / L.-194.

[18] Law no. 03/L-048 on the Management of Public Finances and Accountability, Part IV on Preparation and Contents of the Proposed Kosovo Budget.

the same was already submitted, nor as a "proposed" amendment for the 2018 budget or a decision "implementing" aspects of the same, as it was not yet adopted by the Assembly. [19]

42. In sum, and for the reasons stated above, we conclude that the challenged Decision is not a "proposal" within the meaning of Articles 92.4, 93.3 and 93.5 of the Constitution, respectively.

43. Accordingly, it has to be concluded that the challenged Decision neither qualifies as a "proposal" for the Law on 2018 Budget nor as a decision or an act that "implements" the Law on 2018 Budget. Thus, in issuing the challenged Decision, the Government has exceeded the limits of its authority and acted in contradiction with Articles 92.4 and 93.4 of the Constitution. Having reached this conclusion, we will not analyze other aspects of the "compliance with the Constitution and the law" of the challenged Decision.

44. Importantly, the Majority (paragraph 110 of the Judgment) has maintained that a "*decision to increase salaries*" does not constitute a matter at the constitutional level. We respectfully disagree.

45. As mentioned above, the gist of the question before the Court is not whether a Government decision "*raising salaries*" is compatible with the Constitution; but rather whether a Government decision with no "authorization in law" or not "implementing a law", as in the circumstances of the present case, is compatible with the Constitution.

46. In addition, as outlined above, Articles 4.4, 92 and 93 of the Constitution limit the authority to the Government in exercising its executive functions to the "compliance with the Constitution and the law"; to "implementing laws"; and making decisions "necessary for the implementation of laws".

47. Further, the duty to comply with the "Constitution and the law" is the most essential premise of the rule of law principle enshrined in Articles 3 [Equality before the law] and 7 [Values] of the Constitution.

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[19] The Law on Budget 2018 (Article 15) and the Law on Public Financial Management as amended, establish a process for the budget implementation which clearly sets forth the authorizations and the limits of the Government to modify or adjust the budget as well as the circumstances under which Assembly authorization is required (Article 30).

48. In this respect, the Venice Commission on its Rule of Law Checklist for 2016[20] enumerates the "Compliance with the Law" and the "Duty to Implement the Law" as two essential rule of law principles. As it pertains to the first, the Venice Commission maintains that: "*A basic requirement of the Rule of Law is that the powers of the public authorities are defined by law. In so far as legality addresses the actions of public officials, it also requires that they have authorisation to act and that they subsequently act within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law*."[21] While as it pertains to the second, the Venice Commission maintains that: "*The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced. The duty to implement the law is threefold, since it implies obedience to the law by individuals, the duty reasonably to enforce the law by the State and the duty of public officials to act within the limits of their conferred powers*."[22]

Compatibility with the Articles 65 and 4 of the Constitution

49. Having concluded that the challenged Decision is not compatible with Article 92 and 93 of the Constitution, we maintain that the challenged Decision also infringes upon the competencies of the Assembly to "adopt" the budget, as outlined in Article 65.5 of the Constitution.

50. Article 93.5 of the Constitution authorizes the Government to propose the budget to the Assembly. On the other hand, Article 65.5 of the Constitution vests the Assembly with the competence to adopt the same. In this respect, we agree with the Majority's reasoning (paragraphs 105 and 106), which maintain that "*on 22 December 2017 the Assembly adopted the Law on Budget for Year 2018 thereby exercising its constitutional function as regards the adoption of the state budget*" and "*the Government was the proposer of the draft-budget for year 2018, which was approved by the Assembly*". This stands. However, these conclusions pertain to the compatibility with the Constitution of the Law on 2018 Budget, which is not challenged before the Court. The question is whether, in issuing the challenged Decision, the Government infringed the Assembly's competence to "adopt" the proposed budget for 2018.

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[20] The European Commission for Democracy Through Law (Venice Commission) Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).
[21] The Venice Commission Rule of Law Checklist, paragraph 45.
[22] The Venice Commission Rule of Law Checklist, paragraph 53.

51. In this respect, it has to be noted that the Assembly "adoption" competence does not only entail the act of "adoption", but also the process. The process of adoption of the Government's proposed budget begins with the submission of the Government's proposed budget to the Assembly. The Assembly has processed and adopted the Government proposed budget of 31 October 2017. The financial implications of the challenged Decision, issued two days before Assembly adoption of the Law on 2018 Budget, have not been subject to neither parliamentary review nor approval. This is particularly relevant pertaining to the effects that the challenged Decision has on the judicial branch.

52. As noted above, while the challenged Decision specifically enumerated the Government Officials benefiting from an "increase" of salaries, the same Decision also "increases" the salaries of all judges, prosecutors and Constitutional Court Judges, as per the proportions set by Article 29 of the Law on Courts, Article 21 of the Law on State Prosecutor and Article 15 of the Law on Constitutional Court. Accordingly, the salaries of a separate and independent branch of government have been significantly affected through a decision of the executive branch, without the participation of the legislative branch.

53. A decision only of the Government, not subject to parliamentary control and affecting an entire independent branch of government, affects the principle of the separation of powers and the corresponding checks and balances.

54. In this respect, we recall that Article 4 of the Constitution establishes that: *"Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution"*. The principle of separation of power, is the most essential principle in establishing the form of government and the relationships among its three branches of government. It entails that the three branches of the government must be independent in the exercise of their constitutional functions and must also limit and balance the powers and the competencies of each other.

55. In defining the separation of powers, the Constitution specifically vests the Assembly with the authority to exercise the legislative power (Article 4.2); the Government with the responsibility for the "implementation of laws" and state policies (Article 4.4); and it specifically refers to the independence of the judicial branch as well as the independence of the Constitutional Court (Articles 4.5 and 4.6, respectively). In defining the checks and balances, this Article of the

Constitution specifically subjects the Government's exercise of the executive function to parliamentary control (Article 4.4).

56. It must also be noted that while the principle of separation of power establishes for the independence of the three branches of government, the principle of the check and balances establishes their interdependence. The three branches of government cannot operate in isolation from each other. Their interdependence, constitutional provisions aside, is also defined through the principles of cooperation, coordination, checking and balancing. The three powers rely on one another to provide the totality of public services necessary in a democratic society.[23]

57. In this respect, we recall an interpretation of the Constitutional Court of Slovenia, which maintains: "*The separation of state power into legislative, executive, and judicial branches of power does not entail a relation of superiority or subordination, but a relation of the constraint and cooperation of equal branches of power such that each functions within the frameworks of its own position and its own competence. A starting point of the regulation of mechanisms of checks and balances between branches of power must be the constitutional equality of legislative, executive, and judicial powers. The relations between them must be set in a manner such that the relative independence and integrity of an individual branch of power in performing its function are not endangered*".[24] The Constitutional Court of Slovenia goes further: "*The contemporary understanding of the principle of the separation of powers entails that authorities which perform fundamental functions of state power are in their functioning relatively independent and autonomous in relation to other authorities such that none of them prevails. There exists a sophisticated system of mutual supervision, constraints, control, intertwined dependence, and balance*".[25]

58. We note that remuneration[26] aspects affecting the judicial branch, among others, stand at the core of safeguards ensuring the

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[23] See, among others, the Council of Europe, Consultative Council of European Judges (CCJE) Opinion No. 18 (2015), "The position of the judiciary and its relation with the other powers of state in a modern democracy" of 16 October 2015.
[24] The Constitutional Court of the Republic of Slovenia, Decision U-I-159/08 of 11 December 2009, paragraph 24.
[25] The Constitutional Court of the Republic of Slovenia, Decision U-I-159/08 of 11 December 2009, paragraph 23.
[26] This could entail increases, decreases or other issues related to financial compensation of the judicial branch.

independence and the impartiality of the judicial branch.[27] Taking into account that the independence of the judicial branch is enshrined in the Constitution, a discussion on the remuneration of the judicial branch, cannot bypass the principle of separation of powers. Other Constitutional Courts have reviewed the constitutionality of government decisions, regulations and even Assembly laws, impacting remuneration aspects of the judicial branch and have reached essentially similar conclusions.[28]

59. The Constitutional Court of the Republic of Croatia declared unconstitutional a provision of an Assembly adopted law, specifically authorizing the Government to make decisions on the calculations of the salaries of Judges.[29] The Constitutional Court of Croatia maintained: "*it seems that the legislator, in the part which relates to the determination of the basis for the calculation of judicial salaries, has neglected the fundamental postulates stemming from the principle of separation of powers, separately and together with the constitutional requirement of independence of the judiciary as regards the relations between the judiciary and political executive*". The Croatian Court went further*: "To grant the political executive (the Government) the competence to directly influence the determination of judicial salaries means a priori that relations between the two branches of state power (executive power, that is the political executive, and judicial power) are laid on foundations which are objectively unacceptable in a democratic society based on the principle of separation of powers and the rule of law, all in the light of the constitutional requirement that the judiciary must be independent*." The Croatian Constitutional Court concluded: "*Accordingly, a requirement stems from the Constitution that all elements of judicial salaries must be regulated by the legislator in its law enacted in a democratic parliamentary procedure in a manner which respects the essence of the guarantee of stability of judicial*

[27] The Council of Europe, the European Charter on the Statute for Judges and Explanatory Memorandum, Strasbourg, 8 - 10 July 1998.

[28] The Constitutional Court of the Republic of Croatia, through Decision Nr.U-I-4039/2009; U-I-25427/2009; U-I-195/2010, of 18 July 2014; the Constitutional Court of Lithuania, Case No. 3/95, of 6 December 1995, maintains that a Government Resolution affecting the salaries of a number of high judicial official was in contradiction with the Lithuanian Constitution. A similar position was maintained by the Constitutional Court of Latvia, through Decision No. 2016-31-01, of 26 October 2017; the Constitutional Court of Slovenia through Decisions U-I-159/08 dated 11 December 2009 and Decision U-I-15/14 dated 26 march 2015; and Constitutional Court of Moldova through Judgment No.15/2017.

[29] Constitutional Court of the Republic of Croatia, through Decision Nr.U-I-4039/2009; U-I-25427/2009; U-I-195/2010 of 18 July 2014, 9.1, paragraph 5.

office, that is a proper, qualified and impartial administration of justice, where all elements of judicial salaries must be commensurate with the dignity of a judge's profession and with his or her burden of responsibility".

60. Moreover, the main comments received from the Venice Commission Forum (paragraphs 62 to 73 of the Judgment) go in the direction of stating that *"issue of salaries in public sector is regulated by law"* (paragraph 99 of the Judgment). Relevant laws means adopted by the Parliaments; not by the Governments. It is up to the Government to implement these laws. Further, the remuneration of the judicial branch, as an essential aspect of the independence of the judiciary, must be regulated through the legislative branch through a democratic parliamentary procedure. Contrary to these principles, the challenged Decision affects the judicial branch bypassing parliamentary control.

61. Therefore, and without addressing other allegations and/or aspects that the Referral raises, the challenged Decision has not been issued in compliance with Articles 92 and 93 of the Constitution, consequently infringing upon the competencies of the Assembly outlined in Article 65.5 of the Constitution, and as a result affecting the balance and the separation of powers determined by Article 4 of the Constitution.

62. Finally, without adressing each paragraph in the reasoning of the Majority, we will specifically note the disagreement with the conclusions of the Judgment.

63. We disagree with the conclusion of the Majority (paragraph 117 of the Judgment) stating that "*it is not within its scope to asses or substitute for the public policies set by the legislative or executive body*", as this is not the matter before the Court.

64. We also disagree with the conclusion of the Majority (paragraph 118 of the Judgment) stating that the circumstances of the case represent "*unclear situations as regards the exercise of the competences*" and that such situations "*can be avoided in the future by the adoption of the respective laws on the Government and on the salaries of state functionaries*". We have maintained that, in the circumstances of the present case, the situation is not unclear and that the Constitution does not authorize the Government to act outside its authority to "act in compliance with the Constitution and the law"; "to implement laws"; or to "propose laws".

65. Finally and therefore, for the reasons stated in this Opinion, we disagree with the conclusion of the Majority (paragraph 119 of the Judgment) which states that "*it has not been determined that the challenged decision has produced constitutional effects in terms of infringing upon the constitutional competences of the Assembly or violating any constitutional provision*".

Conclusion

66. We conclude that the Decision no. 04/20 of the Government of the Republic of Kosovo, of 20 December 2017, is not compatible with Articles 92 and 93 of the Constitution, either because it does not "implement a law" or it is not a "proposal".

67. We further conclude that consequently the Decision no. 04/20 of the Government of the Republic of Kosovo, of 20 December 2017, infringed upon the competencies of the Assembly enshrined in Article 65.5 of the Constitution, and so affecting the balance and separation of powers determined by Article 4 of the Constitution.

Respectfully Submitted,

Judge Almiro Rodrigues **Judge Gresa Caka-Nimani**

Cases No. KI146/17, KI147/17, KI148/17, KI149/17 and KI150/17, Applicants: Isni Thaçi, Zeqir Demaku, Fadil Demaku, Nexhat Demaku, and Jahir Demaku, Constitutional review of Judgment PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo of 19 July 2017

KI146/17, KI147/17, KI148/17, KI149/17 and KI150/17, Judgment of 30 May 2018, published on 8 June 2018

Key words: *Individual referral, criminal charge, composition of the trial panel, right to a fair trial - right to a reasoned decision*

The Applicants were found guilty by the Basic Court in Mitrovica (Judgment P58/14) for committing the criminal offenses sanctioned by Article 152 [War Crimes in Serious Violation of Article 3 Common to the Geneva Conventions] in conjunction with Article 31 [Co-perpetration] of the Criminal Code of the Republic of Kosovo (CCRK). The Applicants filed an appeal against the Judgment of the Basic Court challenging, among other, the composition of the trial panel of the Basic Court and the testimonies of expert witnesses. The Court of Appeals, (Judgment PAKR No. 456/15), rejected the appeals of the parties and confirmed the Judgment of the Basic Court. The Applicants filed a request for protection of legality-against the judgment of the Court of Appeals-with the Supreme Court of Kosovo, claiming, among others that, the trial panel of the Basic Court was composed in violation of rules applicable for assigning judges in the trial panels.

The request for protection of legality was rejected by the Supreme Court, through Judgment Pml. KZZ. No. 322/2016, as ungrounded. The Supreme Court reasoned its decision regarding the Applicants allegations for violation of the rules for assigning judges in trial panels, stating that, based on the EULEX Guidelines, the President of EULEX judges has full discretion to assign judges to the panels, regardless of any specific rules contained in the Guidelines. The Supreme Court, held that even if there has been a violation of the EULEX internal regulation then it would be a matter of discretion within the EULEX administrative/disciplinary authorities.

The Applicants alleged, before the Constitutional Court that by rejecting their request for protection of legality as ungrounded, the Supreme Court violated their rights guaranteed by Articles, 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the European Convention on Human Rights. In this regard, they alleged that the Supreme Court did not properly address the question of assignment of judges in the trial panel of the Basic Court, because it was done in violation of the rules for assigning judges in trial panels.

In addressing the allegations of the Applicants with regard to the composition of the trial panel of the Basic Court, the Constitutional Court noted that according to the case law of the European Court of Human Rights, the right to a fair hearing includes the right to a reasoned decision. In this regard, the Constitutional Court noted that the reasoning of the Supreme Court, when addressing the allegation of the Applicants with regard to the assigning of judges in the trial panel of the Basic Court was mainly limited to a possible violation of the CPC and did not consider other applicable norms relevant for assigning the judges in the trial panels, namely the principles provided for by Law no. 03/l-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo and the legislation deriving therefrom . The Constitutional Court also noted that, according to its case law, all judges, including the EULEX judges, have an obligation to apply laws duly adopted by the Assembly of the Republic of Kosovo and consequently, the legislation deriving therefrom.

Thus, the Constitutional Court found that, by failing to provide a thorough assessment and justification, as to whether or not the entire body of applicable legal provisions was complied with, including the principle of pre-determined objective criteria and procedural safeguards, when assigning judges in the trial panel of the Applicants' case in the Basic Court, the Supreme Court (Judgment, PML. KZZ. No. 322/2016 of 19 July 2017), violated the Applicants' right to a reasoned decision, and thereby violated the Applicants' right to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR..

Thus, in accordance with the Rule 74(1) of the Rules, the Judgment of the Supreme Court, PML. KZZ. No. 322/2016 of 19 July 2017, is declared invalid and the case is remanded to the Supreme Court for reconsideration.

Judgment

In

Cases No. KI146/17, KI147/17, KI148/17, KI149/17 and KI150/17

Applicants

Isni Thaçi, Zeqir Demaku, Fadil Demaku, Nexhat Demaku, and Jahir Demaku

Constitutional review of Judgment PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo of 19 July 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral KI146/17 was submitted by Isni Thaçi from Prishtina, represented by Artan Qerkini, the Law Firm "Sejdiu & Qerkini" L.l.c.; Referral KI147/17 was submitted by Zeqir Demaku from Gllogoc, represented by Bajram Tmava, lawyer from Prishtina; Referral KI148/17 was submitted by Fadil Demaku from Gllogoc; Referral KI149/17 was submitted by Nexhat Demaku from Gllogoc; and Referral KI150/17 was submitted by Jahir Demaku from Gllogoc, represented by Mexhid Syla, lawyer from Prishtina (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge Judgment PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 19 July 2017.

3. The Applicants Isni Thaci (KI146/17), Zeqir Demaku (KI147/17) and Jahir Demaku (KI150/17) were served with the challenged Judgment on 22 August 2017, while Applicants Fadil Demaku (KI148/17) and Nexhat Demaku (KI149/17), were served with challenged Judgment on 19 August 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which has allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

5. The Applicant Jahir Demaku (KI150/17) also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely to "*suspend the execution of the Judgment of the Supreme Court of Kosovo*" PML. KZZ. No. 322/2016 of 19 July 2017.

Legal basis

6. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing of the Referrals], 27 [Interim Measures] and 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 8 December 2017, the Applicant Isni Thaçi submitted the Referral (KI146/17) to the Court.

8. On 11 December 2017, the Applicants Zeqir Demaku (KI147/17), Fadil Demaku (KI148/17) and Nexhat Demaku (KI149/17) submitted the Referrals to the Court.

9. On 12 December 2017, the Applicant Jahir Demaku (KI150/17) submitted the Referral to the Court.

10. On 15 December 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur in respect of the Referral KI146/17 and the Review Panel composed of Judges Altay Suroy (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.

11. On the same date, pursuant to Rule 37.1 of the Rules of Procedure, the President of the Court ordered the joinder of Referrals KI147/17, KI148/17, KI149/17 and KI150/17, with Referral KI146/17. By this order, it was decided that the Judge Rapporteur and the composition of the Review Panel be the same as that decided by the President on the appointment of the Judge Rapporteur and the Review Panel in Case KI146 /17.

12. On 19 December 2017, the Court notified the Applicants about the registration and joinder of the Referrals and requested the representatives of the Applicants Zeqir Demaku (KI147/17) and Jahir Demaku (KI150/17) to submit to the Court the power of attorney to represent the abovementioned Applicants before the Court.

13. On 20 December 2017, the Court sent a copy of the Referrals to the Supreme Court and requested from the Basic Court in Mitrovica (hereinafter: the Basic Court) to submit the acknowledgment of receipt indicating the date on which the Applicants were served with the challenged decision of the Supreme Court.

14. On 22 December 2017, the representatives of the Applicants Zeqir Demaku (KI147/17) and Jahir Demaku (KI150/17) submitted to the Court the requested powers of attorney on 19 December 2017.

15. On 5 January 2018, the Basic Court submitted to the Court the acknowledgment of receipts indicating the date on which the Applicants had received the challenged decision, as requested by the Court on 20 December 2017.

16. On 22 February 2018, the Court requested from the Applicants to inform the Court if they have used any other legal remedy to challenge the Judgment of the PML. KZZ. No. 322/2016 of the Supreme Court.

17. On 26 February 2018, the Applicants Isni Thaçi, Fadil Demaku and Nexhat Demaku, informed the Court that the they have filed requests for Review of Criminal Procedure regarding the Judgment of the Basic Court P.nr.58/14 and attached the above requests.

18. On 28 February 2018, the Applicant Jahir Demaku informed the Court that besides the Referral to Court, no other legal remedy has been used

to challenge the Judgment of the PML. KZZ. No. 322/2016 of the Supreme Court.

19. On 6 March 2018, the Court requested from EULEX to submit to the Court the modalities/rules/guidelines for Case Allocation for EULEX Judges (hereinafter, the Guidelines on Case Allocation) issued pursuant to the Law no. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo of 3 June 2008.

20. On 14 March 2018, the Applicants Isni Thaçi, Fadil Demaku and Nexhat Demaku, informed the Court that the requests for Review of Criminal Procedure regarding the Judgment of the Basic Court P.nr.58/14 was rejected by the Basic Court. They also informed that Court that they do not intend to appeal against that decision.

21. On 26 March 2018, EULEX submitted the Guidelines on Case Allocation to the Court.

22. On 30 May 2018, the Review Panel considered the Report of the Judge Rapporteur and, by majority, made a recommendation to the full Court to declare the Referral admissible and to assess the substance of the Referral.

23. On the same day, the Court approved by majority the admissibility of the Referral. Judges, Almiro Rodrigues and Snezhana Botusharova voted against the admissibility.

24. On the same day, the Court voted by majority to find a violation. Judge Gresa Caka-Nimani has a concurring opinion. Judges Almiro Rodrigues and Snezhana Botusharova voted against the finding of violation.

25. The Judgment may be complemented by dissenting and concurring opinions.

Summary of facts

26. On 8 November 2013, the EULEX Prosecutor of the Special Prosecution Office of the Republic of Kosovo (SPRK Prosecutor) filed an Indictment (No. PPS88/11) against the Applicants and some other persons on the grounded suspicion that 1998 they had committed the criminal offenses sanctioned by Article 152 [War Crimes in Serious Violation of Article 3 Common to the Geneva Conventions] in

conjunction with Article 31 [Co-perpetration] of the Criminal Code of the Republic of Kosovo (CCRK).

27. On 27 May 2015, the Basic Court rendered Judgment (P58/14), which found the Applicants guilty of the above-mentioned criminal offenses, and sentenced them as follows: Isni Thaçi, Zeqir Demaku and Jahir Demaku with 7 (seven) years of imprisonment each, while Fadil Demaku and Nexhat Demaku with 3 (three) years of impressment each.

28. The Applicants filed an appeal against the Judgment of the Basic Court (P58/14) of 27 May 2015, on the grounds of essential violations of the criminal procedure provisions, violation of criminal law, incomplete and erroneous determination of factual situation and decision on criminal sanction. The Applicants challenged, *inter alia*, the composition of the trial panel of the Basic Court and the testimonies of expert witnesses C. B. and M.G., namely the failure to appear in the Court of expert M.G.

29. The appeal was also filed by the SPRK Prosecutor, because of the decision on the criminal sanction, requesting to increase the punishment adequately to all Applicants.

30. On 14 September 2016, the Court of Appeals through Judgment (PAKR No. 456/15) rejected the appeals of the SPRK Prosecutor and of the Applicants and upheld the Judgment of the Basic Court (P58/14). The Court of Appeals *ex officio* modified the Judgment of the Basic Court regarding the Applicants Isni Thaci, Zeqir Demaku and Jahir Demaku considering the criminal offense for which they were convicted as the criminal offense in continuation. In addition, the Court of Appeals modified the sentences imposed by the Basic Court in relation to Isni Thaqi from 7 (seven) years to 6 (six) years and 6 (six) months and for Applicants Zeqir Demaku and Jahir Demaku from 7 (seven) years to 6 (six) years for each.

31. In relation to the evidence of the experts, the Court of Appeals reasoned, *inter alia*, that the testimony of the expert C. B. in the Basic Court is entirely reliable with respect to all the injuries relating to witness A. As to the allegation that the expert M. G. did not give any testimony before the Basic Court, the Court of Appeals noted that he was only involved as an expert to conduct the examination of the intimate parts of the witness by a person of the same gender, and that after the examination he described his observations including the photos, while their assessment has been provided by expert C. B.

32. Also, as regards the allegation where the Applicant alleges that the regular courts took the testimonies of witnesses A. and K. contrary to the principle *in dubio pro reo*, the Court of Appeals had reasoned that witness A. had no symptoms of any mental illness. Therefore there was no doubt regarding his testimony. According to the Court of Appeals, the unique appearance of acute psychosis does not reduce the overall credibility of the witness A. Furthermore, the Court of Appeals concluded that the statement of witness A. was fully supported by the statement of witness K. as well as the testimony of the expert C.B.

33. The Applicants filed requests for protection of legality with the Supreme Court against the Judgment of the Basic Court (P58/14) and Judgment of the Court of Appeals (PAKR No. 456/15), on the grounds of essential violations of the provisions of the criminal procedure and violations of the criminal law. The Applicants alleged, among others that, the trial panel of the Basic Court was composed in violation of EULEX rules; two members of the trial panel had conflict of interest, consequently based on this, the applicants proposed taking new evidence – testimony of witnesses M.S; the testimonies of expert witnesses C. B. and M.G., where not properly taken, namely stating the failure to appear in the Court of expert M.G.; and, the declaration of witness B. as a "hostile witness" was in violation of Criminal Procedure Code (hereinafter, the CPC)

34. On 19 July 2017, the Supreme Court, through Judgment (Pml. KZZ. No. 322/2016), rejected as ungrounded the requests for protection of the legality of the Applicants against the Judgment of the Basic Court and the Judgment of the Court of Appeals.

35. Firstly, on the Applicants' objections on the application of the rules on the selection of the trial panel in the Basic Court, the Supreme Court reasoned as follows:

> *"[…]*
> *The Panel agrees with the Court of Appeals Judgement that there has not been a roster for assignment of EULEX judges to the cases at the relevant time. According to the guidelines for case allocation for EULEX judges in criminal cases in district courts, applicable at the time of the appointment of Judge [A.A.G], [her appointment] was not based on a specific schedule. The Guidelines merely clarify the structure of EULEX Judges in district courts and prescribe the general principles that are applicable regarding case allocation. Moreover, Judge [A.A.G] was assigned to the case pursuant to the decision dated on 29*

May 2014 by the acting president of EULEX judges, who at that time was authorized to take this decision. In addition, EULEX Judge [A.A.G] was a legitimately appointed EULEX judge at the level of the first instance at the time.
[...]
Therefore, the Panel is of the opinion that the appointment of a Judge [A. A.G.] cannot be qualified as a violation of Article 384 (1.1) or Article 384 (1.2) of the CPC. The Panel notes that even if there has been a violation of the EULEX internal regulation (while the alleged violations do not constitute a violation of the relevant law - as is the request in question that the CPC has been violated) then it would be a matter of discretion within the EULEX disciplinary/administrative authorities [...].

36. Secondly, the Supreme Court reasoned its decision regarding the request for new evidence to prove that the conflict of interest between the judges of the Basic Court and the issue of testimony of expert M.G., *inter alia*, as follows *"none of the [...] provisions of [the Criminal Procedure Code of Kosovo] include any procedural possibility under which the Supreme Court may hold an open hearing with the parties present or hold a hearing in order to gather new evidence"*.

37. Thirdly, with regard to declaring witness B as a "hostile witness", the Supreme Court held that: *[...] Although the CPC does not recognize as such the terminology of a 'hostile witness', CPC in Article 123 (2) provides for the possibility of questioning witnesses if the witness has given a different testimony from the testimony given during the interview in the pre-trial procedure, which constitutes an essentially approximation to the concept of "hostile witness"*.

38. On 18 October 2017, the Applicants Fadil Demaku and Nexhat Demaku filed the Request for Review of Criminal Procedure with the Basic Court in Mitrovica.

39. On 21 November 2017, the Applicant Isni Thaçi filed the Request for Review of Criminal Procedure with the Basic Court in Mitrovica.

40. The Applicants Fadil Demaku, Nexhat Demaku and Isni Thaçi, in their requests for Review of Criminal Procedure, requested from the Basic Court pursuant to Article 423 (1.13) of the CPC, among others, to allow taking of new evidence, namely the testimony of M.S. and email correspondences between the EULEX judges and personnel which would reveal that the composition of trial panel of the Basic Court was irregular and which would prove that the trial panel of the Basic Court was bias.

41. On 12 February 2018, the Basic Court rejected as unfounded the Request for Review of Criminal Procedure regarding the Judgment of the Basic Court P.nr.58/14 filed by the Applicants Isni Thaçi, Fadil Demaku and Nexhat Demaku. With regard to the allegations of the applicants on the composition of the panel, the Basic Court found that those allegations *"have been raised with the Court of Appeals and the Supreme Court"*. Therefore, the Basic Court concluded that those allegations do not constitute new elements for the purpose of Article 423 of CPC, to allow review of the criminal procedure.

Applicant's allegations

42. The Applicants claim a violation of their individual rights, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR.

Allegations of Applicant Isni Thaçi (KI146/17)

43. The Applicant Isni Thaçi complains at the outset that *"[A]ppointment of [A. A. G.] in the trial panel of this case was done contrary to the procedures, policies and rules for [assigning the members] of trial panels. [...] According to the applicable list, she was not the next EULEX judge on the list to be assigned to this case. Contrary to this list, she was chosen by [presiding judge D. S.] as a member of the panel because she was his girlfriend and because he wanted her to advance in her career, thus he enabled her to adjudicate a war crime case. [A. A.G.] thereafter joined a higher instance court in Kosovo*."

44. The Applicant Isni Thaçi, furthermore, alleges that *"The relationship between the two judges [D. S.] and [A. A. G] constitutes conflict of interest about which the defence did not have any knowledge."* The Applicant learned about this conflict of interest only *"in November 2016 [when] the defence [of the Applicant] received a number of emails from EULEX employees that reflect irregularities in the formation of the trial panel [and] reflect the bias of this body. For these reasons [...] it was requested through a request for protection of legality that the President of the Assembly of EULEX Judges [M.S.] be heard in the capacity of a witness",* but this, according to the Applicant, was not allowed by the Court.

45. The Applicant Isni Thaçi, also emphasizes that *"[a]lthough the allegations of irregularities in the formation of the trial panel and its bias were quiet serious and documented with material evidence, the Supreme Court rejected to deal with this problem because according*

to it this [Supreme] Court has no duty to gather evidence in the procedure upon the request for protection of legality", adding that based on the right to fair and impartial trial*, "both the appointment of judges and the formation of trial panels should be done to guarantee the independence of the judicial system."*

46. The Applicant Isni Thaçi also alleges that in his case the principle of equality of arms has also been violated because *"Forensic Medicine Experts [C. B.] and [M.G.] jointly examined witness A regarding the injuries alleged by him. In the [regular courts] only expert [C. B.] was heard. Although the defence had insisted that the expert [M. G.], who had drafted the expertise together with the expert [C.B.], be called to the trial, a deaf ear was turned to this request of defence*".

47. Regarding this allegation, the Applicant Isni Thaçi explains that *"the statement of the expert [M.G.] is considered and was read in the main trial without meeting the legal conditions […]. Also, by this action article 341.3 of the CPC was also violated because the party that did not propose the expert was not given the opportunity to make the expert's cross-examination regarding the report, analysis, education, experience, or basis of his expertise".*

48. The Applicant Isni Thaqi (KI146/17) also claims that witness B was declared a "hostile witness" without a legal basis since CPC does not recognize the institute of a "hostile witness". Article 2 of the CPC stipulates that "*A criminal sanction may be imposed on a person who has committed a criminal offence only by a competent, independent and impartial court in proceedings initiated and conducted in accordance with the [CPC]"*, whereas, *"the [Supreme] Court's finding that it should be allowed the witness B is considered as a "hostile witness" is not grounded based on Article 6 of the [ECHR], because the [ECHR] does not protect the rights of state authorities, as it is in fact the State Prosecution, but protects human rights in relation to the state authorities".*

Allegations of Applicants Zeqir Demaku (KI147/17), Fadil Demaku (148/17) and Nexhat Demaku (KI149/17)

49. The Applicants Zeqir Demaku, Fadil Demaku and Nexhat Demaku allege that the "Supreme *Court did not at all take into consideration the request of defense counsels to hear as a witness the judge [M. S.] within the meaning of paragraph 4 of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. […] The ECHR establishes that the right to a fair hearing guaranteed to the individual through Article 31 of the Constitution and Article 6 of the ECHR includes the*

right to have a reasoned decision." According to the applicant Zeqir Demaku, Fadil Demaku and Nexhat Demaku, the reasoning requires *"explanations with convincing and well-constructed reasons for the decision taken in each individual case which should include both, the legal criteria and the factual elements in support of the decision. The Supreme Court did not reasoned its decision and this constitutes an arbitrary decision that violates the right of the party to fair and impartial trial".*

50. The Applicants Zeqir Demaku, Fadil Demaku and Nexhat Demaku allege that the Supreme Court also *"abused the witness immunity by not initiating any immunity removal procedure, according to the request of [M. S.] to be treated as a witness, with the sole purpose of shedding light on the truth. This constitutes a violation of the equality of arms because, as stated by the International Criminal Tribunal for the former Yugoslavia, the functional immunity of a state official does not include immunity against the obligation to testify what the official has seen or heard in the exercise of his official functions".*

51. The Applicants Zeqir Demaku, Fadil Demaku and Nexhat Demaku also emphasize that *"[...] the principle of impartiality has been violated by the fact that the composition of the trial panel was such that [...] there were two members who had a pure conflict of interest",* emphasizing further that *"the impartiality of a court under Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR must be determined according to a subjective test, namely based on personal conviction and conduct of a judge in a particular case and also according to the objective test, i.e. whether the judge has provided sufficient guarantees to exclude any legitimate doubts in this respect".*

52. They also allege violation of internal rules of EULEX when assigning judges in the trial panel, without having a predetermined schedule impacts directly constitutional rights of the applicants namely the right to fair and impartial trial. They emphasis that *"no court in Europe, including the ECtHR would allow such arbitrariness - assigning judges in the panels without having a schedule for such assignments".*

53. The Applicants Zeqir Demaku, Fadil Demaku and Nexhat Demaku further allege that *"due to the written nature of the procedure neither the Applicant nor the lawyer could have been aware of the conflict of interest until they had received the decision of the Supreme Court. Therefore, it cannot be concluded that the right to determine the rights by an "impartial tribunal" has been waived".*

54. The Applicants Zeqir Demaku, Fadil Demaku and Nexhat Demaku allege that *"[...] the correspondence that was disclosed between EULEX officials, also broadcasted on RTK in several shows, shows that [CPC] or [CCRK] have been violated to the detriment of [the Applicants]. This correspondence also includes insulting words like "Albanians are animals." In addition, the e-mail content also reveals two [presiding judge's statement]: "If I will adjudicate the Drenica case, and find the latter guilty I will be able to find a good job in the European Union bodies ",* or even the statement *"If the Drenica II case is adjudicated then the negotiations with Serbia will continue without problems"*.

Allegations of Applicant Jahir Demaku (KI150/17)

55. The Applicant Jahir Demaku alleging a violation of Article 31 of the Constitution and Article 6 of the ECHR emphasizes that *"the request of the presiding judge for the appointment of [A. A.G] as a member of the trial panel intended to enable the presiding judge to accomplish his purposes as stated outside the main trial, [...] that "if he convicts these accused, he may find a job wherever he wants in Europe", and other statements that make it clear that the latter has prejudiced the case and it was previously determined that the accused in this criminal case should be found guilty under any condition regardless of whether there is evidence or not"*.

56. The Applicant Jahir Demaku also alleges that *"the intentions of the Presiding Judge, Judge [D. S.] were proved by his actions during the trial, by declaring as hostile witnesses in violation of the law all witnesses who did not testify in favor of the indictment, by assessing the evidence unilaterally and to the detriment of [the Applicants], by entirely ignoring the principle in dubio pro reo, or in case of suspicion in favor of the accused, by trusting witnesses A. and K., despite the finding that "it was clear that those witnesses A. and K. did not have experience in providing an accurate and well-structured version of the events, therefore their statements contain stagnations and gaps attributed by the panel to the limited witness reporting capabilities"*.

57. The Applicant Jahir Demaku alleges that the Supreme Court *"rejected, without giving any reason, to question [...] [M. S.], which allegation was primary and was emphasized during the proceedings before the Kosovo regular court, abused the witness's immunity by not initiating any immunity removal procedure at his request [M. S.] to be treated as a witness, with the sole purpose of shedding light on the truth"*.

58. The Applicant Jahir Demaku also emphasizes that *"the principle of impartiality was violated by the fact that the composition of the trial panel was such that in its composition there were two members who had a pure conflict of interest"*. In addition, the Applicant Jahir Demaku also alleges that the *"violation of internal rules of EULEX, [during assignment of judges in the trial panels] had a direct impact on the constitutional rights of fair and impartial trial"* of the Applicants.

59. The Applicant Jahir Demaku in relation to the request for imposition of interim measure emphasizes that *"[d]eprivation of liberty such as the case with Mr. Jahir Demaku may result in the permanent and irreparable consequences on the applicant because during his detention on remand and now while serving his sentence, he is experiencing a serious mental and psychological condition, especially after being informed of the irregularities that are manifested in the court proceeding against him"*. According to him, *"the words said by the presiding judge for the Drenica II, case where the Applicant is one of the convicts, constitutes a violation of Article 23 (Human Dignity) of the Constitution of Kosovo, according to this article "human dignity is inviolable and is the basis of all human rights and fundamental freedoms"*.

60. Finally, all Applicants request the Court to declare their referrals admissible, to hold that their right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR has been violated, and to annul the Judgment of the Supreme Court.

Assessment of the admissibility of Referral

61. The Court first examines whether the Referrals have fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

62. 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"*.

63. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

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

64. Regarding the foregoing, the Court finds that the Applicants filed the referrals as authorized parties, submitted the Referrals within the time limits specified in Article 49 of the Law and after exhaustion of all legal remedies provided by law.

65. In addition, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides that:

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

66. In addition, the Court refers to paragraph (1) (d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which provide:

> *(2) "The Court may consider a referral if:*
> *[...]*
> *(d) the referral is prima facie justified or not manifestly ill-founded.*

67. Regarding the fulfillment of this requirement, the Court notes that the Applicants have accurately specified what rights, guaranteed by the Constitution and the ECHR have been violated to their detriment, by the alleged unconstitutionality of judicial proceedings.

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

Merits of the Referral

69. The Court recalls that the Applicants allege that the challenged decision violated their right to a fair and impartial trial, particularly as regards to the assignment of the judges in the trial panel of the Basic Court and the reasoning of the decisions.

All Applicants allege that:

i) The Supreme Court did not properly address the issue of the composition of the trial panel at the Basic Court, because it was assigned in contradiction with the rules for assigning EULEX judges to the trial panels, thus violating their right to a fair and impartial trial;

ii) The Supreme Court refused to take the testimony of [M.S.] regarding the irregularities in the composition of the trial panel of the Basic Court and did not justify its decision in this regard and did not address the issue of a conflict of interest between the panel members of the Basic Court.

The Applicant Isni Thaçi and Jahir Demaku

iii) The regular courts declared Witness B. as a "hostile witness" in violation of the law and gave trust to the witnesses A. and K., contrary to the principle *in dubio pro reo*, although the court found that witnesses A. and K. had no experience in delivering an accurate and well-structured version of the events.

The Applicant Isni Thaçi, alleges that:

iv) The forensic expert, M.G., was not questioned during the court procedure, thus violating the principle of equality of arms and contradictoriness of the proceedings.

70. In this regard the Court refers to the provisions of Article 31 of the Constitution and Article 6 of the ECHR, which establish:

"Article 31 [Right to Fair and Impartial Trial]

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

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]"

Article 6 (Right to a fair trial)

1. *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*
[...]"

71. The Court also refers to the provisions of relevant legislation:

Criminal Procedure Code

Article 384 [Substantial Violation of the Provisions of Criminal Procedure]

1. There is a substantial violation of the provisions of criminal procedure if:

1.1. the court was not constituted in accordance with the law or [...];

Article 432 [Grounds for filing a request for protection of legality]

1. A request for protection of legality against a final judicial decision or against judicial proceedings which preceded the rendering of that decision may, after the proceedings have been completed in a final form, be filed in the following instances:

[...]

1.2. on the ground of a substantial violation of the provisions of criminal procedure provided for in Article 384, paragraph 1, of the present Code; or

1.3. on the ground of another violation of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision.

2. A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon.

[...]

Law No. 03/l-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo of 3 June 2008

Article 2 [General authority of EULEX judges]

[…]
2.6 Upon consultation with the Head of the Justice Component, the President of the Assembly of the EULEX Judges and the Chief EULEX Prosecutor will propose, respectively, to the Assembly of the EULEX Judges and to the Assembly of the EULEX Prosecutors, modalities on case selection and case allocation based on pre-determined objective criteria and procedural safeguards that will be consistent with the applicable law. These modalities that will be endorsed by the Assembly of the EULEX Judges and of the EULEX Prosecutors will ensure the respect of the independence and the impartiality of the EULEX judges and the autonomy of the EULEX Prosecutors in the discharge of their functions.

Article 3 [Jurisdiction and competences of EULEX judges for criminal proceedings]

[…]
3.2 The President of the Assembly of EULEX Judges will assign any EULEX judge to the respective stage of the criminal proceeding investigated or prosecuted by the SPRK, according to the modalities on
case selection and case allocation developed by the Assembly of the EULEX Judges and in compliance with this law.

Guidelines for case allocation for EULEX judges in criminal cases in district courts

[…]
II. 1. Legal background
Case allocation of the EULEX judges will be carried out in accordance with the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law No. 03/L-053), hereinafter LoJ.

These guidelines are to elaborate the prescriptions on case allocation provided by the aforementioned law.

II. 2. Principles

• Transparency

Case allocation must be transparent to actors and non-actors in the justice system.

• Objectivity

Everyone should know in advance where and by which judge s/he will be tried (Judges do not select cases).

• Flexibility

The specific wording conditions and the number of EULEX judges and legal disqualifications pursuant to PCPCK must be taken into account.

• Sustainability

Case allocation system should be an example of a good justice administration to which local judges could (should) adhere in order to achieve the goals of an independent, transparent and efficient justice administration.

• Equality of the workload of judges"

[…]

III.3. Case allocation system

[…]

3.1. Within the section cases will be allocated to the judges following the numeral system where every third case coming to the section will be allocated to judge A, every third case to judge B and every third case to judge C (no 1 to judge A, no 2 to judge B, no 3 to judge C, no 4 to judge A and so forth). For exceptional reasons (for instance quality and complexity of the case and number of cases entrusted to each judge), the selecting judge can allocate the selected cases in another way than mentioned before.

[…]

5.3. EULEX judges are deployed to the Supreme Court or to one or more District Courts. Deployment of EULEX judges to more than one District Court will respond to the necessity of substitution in exceptional cases. In these cases the EULEX judge will have his main sit in a district Court and will act as natural substitute of another EULEX judge in another District Court.

[…]

5.5. On call/duty system will be established for urgent situations between the courts linked above in order to ensure that a judge is available for urgent situations. The term of the on call duty is one week at the time including weekends. The proposal of the rotation system shall be forwarded by the Heads of the War Crimes Sections of the respective District Courts to the President of the Assembly of EULEX Judges no less than one month before.

[…]"

i) Composition of the Trial Panel of the Basic Court

72. The Court will initially address the allegation (*i)* that the Supreme Court did not properly address the issue of the assignment of judges in the trial panel of the Basic Court, because this was done in violation of the rules for assigning EULEX judges in trial panels.

73. The Court reiterates that, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."*

Right to a reasoned decision

74. The Court recalls that, according to the case law of the European Court of Human Rights (hereinafter: ECtHR), the right to a fair hearing includes the right to a reasoned decision.

75. According to its established case-law, the ECtHR considers that based on the principles of the proper administration of justice, the decisions of courts and tribunals should adequately state the reasons on which they are based. (See *Tatishvili v Russia*; ECtHR, application no. 1509/02, Judgment of 22 February 2007, paragraph 58; *Hiro Balani v. Spain*, ECtHR, application no. 18064/91, Judgment of 9 December 1994, prg 27; *Higgins and Others v. France*, ECtHR, application no. 134/1996/753/952, Judgment of 19 February 1998, para. 42, *Papon v France,* ECtHR, application no. 54210/00, Judgment of 7 June 2001).

76. In addition, the ECtHR has held that 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, but the courts must "*indicate with sufficient clarity the grounds on which they based their decisions*". (See *Hadjianastassiou v. Greece*, ECtHR, application no. 12945/87, Judgment of 16 December 1992, paragraph 33).

77. According to the ECtHR case law, an essential function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, 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, *Hirvisaari v. Finland*, ECtHR, application no. 49684/99, para. 30, 27 September 2001; see also, *Tatishvili v. Russia*, ECtHR, application no. 1509/02, Judgment of 22 February 2007, paragraph 58).

78. Although the courts are not obliged to address all claims submitted by the Applicants - they must however - address claims that are central to their cases and which are raised in all stages of the proceedings (see case *IKK Classic*, Judgment of 9 February 2016, paragraph 53).

79. The Court reiterates that the right to obtain a court decision in conformity with the law includes the obligation for the courts to provide reasons for their rulings with reasonable grounds at both procedural and substantive level. (See case *IKK Classic*, Judgment of 9 February 2016, paragraph 54).

80. The extent to which this duty to give reasons applies, according to the ECtHR case law, may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. (*García Ruiz v Spain*, [GC], application no. 30544/96, Judgment of 21 January 1999. prg 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, para. 27; *Higgins and Others v. France*, ECtHR, application no. 134/1996/753/952, Judgment of 19 February 1998, paragraph 42).

81. The Court reiterates that the justification of the decision must state the relationship between the findings on the merits and considerations on the proposed evidence on the 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. (Constitutional Court Case No. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; see also Case No. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58).

Application of the above standards in the case of the Applicants

82. The Court recalls that under Article 384, paragraph 1.1 of the CPC there is a substantial violation of the provisions of criminal procedure if, among others, the court was not constituted in accordance with the law.

83. The Court also recalls that according to Article 2.6 of the Law no. 03/l-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX

Judges and Prosecutors in Kosovo of 3 June 2008 (applicable on the time when the trial panel was composed), the Assembly of EULEX Judges and EULEX Prosecutors will endorse the modalities on case selection and case allocation based on pre-determined objective criteria and procedural safeguards that will be consistent with the applicable law and which will ensure the respect for the independence and the impartiality of the EULEX judges and the autonomy of the EULEX Prosecutors in the discharge of their functions.

84. In this regard, the Guidelines for Case Allocation for EULEX judges in criminal cases in district courts (hereinafter: the Guidelines) issued pursuant to the Law No.03/l-053, elaborate the principles that will guide the allocation of EULEX judges to criminal cases, including the principles of transparency, objectivity, flexibility, sustainability and equality of the workload of judges.

85. In addition, the Court notes that the Guidelines issued pursuant to the Law No. 03/L0053, in sub-rule 3.1, foresee specific rules on how cases will be divided within sections - following a numerical system where every third case coming to the section will be allocated to judge A, B and C respectively.

86. The Court also recalls that the Guidelines allow that for exceptional reasons the selecting judge can allocate the specific cases in a different way than according to the numerical system mentioned above, however, that carries with it a duty to justify the exceptional reasons, such as complexity of the case and number of cases entrusted to each judge. The Guidelines also foresee how judges assigned to one district court can substitute in another district court in case it is necessary based on the priority list of courts as well as the 'on call/duty system' for urgent situations based on a rotation system that must be set not less than one month before.

87. In this regard, the Court recalls that the Supreme Court, when addressing the issue raised by the Applicants, regarding the implementation of the internal rules and schedule of EULEX for assigning judges to the cases, reasoned that *"there has not been a roster for assignment of EULEX judges to the cases at the relevant time. According to the Guidelines for Case Allocation for EULEX judges [...] the appointment of Judge [A.A.G], was not based on a specific schedule. The Guidelines merely clarify the structure of EULEX Judges in district courts and prescribe the general principles that are applicable regarding case allocation. Moreover, Judge [A.A.G] was assigned to the case pursuant to the decision dated on 29 May 2014 by the acting president of EULEX judges, who at that time*

was authorized to take this decision. In addition, EULEX Judge [A.A.G] was a legitimately appointed EULEX judge at the level of the first instance at the time. [...] Therefore, the Panel is of the opinion that the appointment of a Judge [A. A.G.] cannot be qualified as a violation of Article 384 (1.1) or Article 384 (1.2) of the CPC. The Panel notes that even if there has been a violation of the EULEX internal regulation (while the alleged violations do not constitute a violation of the relevant law - as is the request in question that the CPC has been violated) then it would be a matter of discretion within the EULEX disciplinary/administrative authorities."

88. In this respect, the Court reiterates that it is not its task to consider whether the Supreme Court correctly interpreted the applicable law (legality) but to assess whether the Supreme Court infringed individual rights and freedoms protected by the Constitution (constitutionality) (see, for example, Case No. KI72/14, Applicant *Besa Qirezi,* Judgment of 4 February 2015, para.65).

89. Moreover, on this point, as a general rule, the establishment of the facts of the case and the interpretation of the law are a matter solely for the regular courts whose findings and conclusions in this regard are binding on the Court. However, where a decision of a regular court is clearly arbitrary, the Court can and must call it into question. (See *Sisojeva and Others v. Latvia,* [GC], application no. 60654/00, Judgment of 15 January 2007, para. 89. See also case *IKK Classic*, Judgment of 9 February 2016, paragraph 47).

90. The Court notes that the Supreme Court dismissed the arguments of the Applicants for violation of the rules for assigning judges in trial panels, stating that the President of EULEX judges is authorized by law to assign judges in such cases. The Supreme Court, in its reasoning, also stated that even if there was a violation of EULEX rules on assignment of the judges in criminal cases, since there is no violation of provisions of the CPC on the composition of trial panels, there is no violation of the Applicants' rights.

91. Thus, the Court notes that the reasoning of the Supreme Court was mainly limited to a possible violation of the CPC and did not consider other applicable norms relevant for assigning the judges in the trial panels, as requested by the Applicants. In addition, the Court notes that in its reasoning the Supreme Court did not explain why the CPC had not been violated.

92. Consequently, the Court considers that the Supreme Court reasoned that a failure to follow the Guidelines for assigning the cases to EULEX

judges does not impact the Applicants' rights as long as the alleged violations do not constitute a violation of the CPC itself.

93. The Court notes that the Supreme Court based this conclusion on the consideration that *"[…] even if there has been a violation of the EULEX internal regulation […] then it would be a matter of discretion within the EULEX disciplinary/administrative authorities […]."*

94. As such, the Court understands that, ultimately, the Supreme Court considered that the EULEX Guidelines were an internal matter of EULEX and, therefore, were not a part of the legislative framework of Kosovo. Nevertheless, according to Court's case law, all judges, including the EULEX judges, have an obligation to apply laws duly adopted by the Assembly of the Republic of Kosovo and consequently, the legislation deriving from it (see, *mutatis mutandis*, Case No. KI25/10, Applicant: *Kosovo Privatization Agency,* Judgment of 31 March 2011, para. 61 and 62).

95. Furthermore, the Court notes that the Supreme Court reasoned that, based on the EULEX Guidelines, the President of EULEX judges has full discretion to assign judges to the panels, regardless of any specific rules contained in the Guidelines.

96. As such, the Court understands that the Supreme Court considered that the Guidelines only contain general principles which do not restrict the discretionary authority of the President of EULEX judges in appointing judges to specific trial panels.

97. However, the Court recalls that the Law no. 03/l-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo specifies that case allocation and appointment of judges shall be based on *"pre-determined objective criteria and procedural safeguards."*

98. In these circumstances, the Court finds that, by failing to take into account the entire body of rules applicable to the appointment of judges to trial panels, the Supreme Court has failed to reason its decision regarding the appointment of judges to trial panels based on *"pre-determined objective criteria and procedural safeguards,"* as foreseen in Law no. 03/l-053.

99. In particular, the Court finds that the Supreme Court has failed in its duty to sufficiently link the applicable rules to the facts of the case, as

required by the right to a reasoned decision under the right to a fair trial.

100. The Court considers that, if the Supreme Court had addressed the Applicants' allegations regarding the composition of the trial panel, based on relevant legislation pertaining to assigning the judges in the trial panels and in the light of *"pre-determined objective criteria and procedural safeguards,"* as required by the Law no. 03/l-053 and other relevant norms, that would be in compliance with the proper administration of justice.

101. It is not the Court's role to examine to what extent the allegations of the applicants in the procedures in the regular courts are reasonable. However, the procedural fairness requires that the essential allegations that parties raise should be answered properly by the regular courts in compliance with the requirements for a fair trial (see, *mutatis mutandis*, Constitutional Court Case No. KI22/16, *Naser Husaj*, Judgment of 9 June 2017, para. 47). What is at stake is the confidence which the courts in a democratic society must inspire in the public (see, *Volkov v. Ukraine*, par. 106, ECtHR Judgment of 2013 and see De Cubber v. Belgium, 26 October 1984, para. 26, Series Ano. 86).

102. Therefore, the Court finds that the Supreme Court violated the Applicants' right to a reasoned decision, because of the failure to provide a thorough assessment and justification, as to whether or not the entire body of applicable legal provisions was complied with when assigning judges in the trial panel of the Applicants' case.

103. Consequently, the Court concludes that there has been a violation of the right to a fair trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

104. The Court notes that this conclusion refers to the alleged Constitutional violation. Therefore, the Court confirms that the findings contained in this Judgment do not prejudge the outcome of proceedings in respect of the Applicants' case or with respect to their guilt or innocence.

105. As to the other allegations of the Applicant, the Court considers that they predominantly raise questions of legality and not of constitutionality and that the Supreme Court has provided detailed reasoning on all of these questions in its Judgment.

Request for interim measure

106. The Court recalls that the Applicant Jahir Demaku (KI150/17) also requests the Court to render a decision on the imposition of interim measure, namely the prohibition on the execution of the Judgment of the Supreme Court.

107. Given that the Court has found a violation of the Applicant's rights as protected by Article 31 of the Constitution and Article 6 of the ECHR, it does not consider it necessary to consider the Applicant's request for granting of interim measures.

Conclusion

108. In conclusion, the Court finds that by failing to provide a thorough assessment and justification, as to whether or not the entire body of applicable legal provisions was complied with when assigning judges in the trial panel of the Applicants' case in the Basic Court, the Supreme Court Judgment, PML. KZZ. No. 322/2016 of 19 July 2017, violated the Applicants' right to a reasoned decision, and thereby violated the Applicants' right to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

109. In accordance with the Rule 74(1) of the Rules, the Judgment of the Supreme Court, PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo of 19 July 2017, is declared invalid and the case is remanded to the Supreme Court for reconsideration.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law, and Rule 56.1 of the Rules of Procedure, in the session held on 30 May 2018 by majority

DECIDES

I. TO DECLARE the Referral admissible for assessment of merits;

II. TO HOLD that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution and paragraph 1 of Article 6 [Right to a Fair Trial] of the European Convention on Human Rights;

III. TO DECLARE invalid the Judgment PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo of 19 July 2017;

IV. TO REMAND the Judgment of the Supreme Court for reconsideration in conformity with the judgment of this Court;

V. TO ORDER the Supreme Court to inform the Court, within six months of the publication of this Judgment, in accordance with Rule 63 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;

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

VII. TO ORDER that this Judgment be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VIII. TO DECLARE this Judgment effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

Joint Dissenting Opinion
of
Judges Almiro Rodrigues and Snezhana Botusharova

Cases No. KI146/17, KI147/17, KI148/17, KI149/17 and KI150/17

Applicants

Isni Thaçi, Zeqir Demaku, Fadil Demaku, Nexhat Demaku, and Jahir Demaku

Constitutional review of
Judgment PML. KZZ. No. 322/2016 of the Supreme Court of Kosovo of 19 July 2017

1. We respect the decision of the Majority of Judges of the Constitutional Court (hereinafter, the Majority). However, we cannot agree with it for the reasons that follow.

2. Firstly, the Majority has not correctly presented and assessed the scope of the referral.

3. Secondly, the Majority found that the Supreme Court failed *"to provide a thorough assessment and justification, as to whether or not the entire body of applicable legal provisions was complied with when assigning judges in the trial panel of the Applicants' case"* (para 102 of the Judgment). That conclusion is based on lack of a thorough reading and consideration of all the decisions of the regular courts and their reasoning, dealing with the case of the Applicants, namely Judgment PML. KZZ. No 322/2016 of the Supreme Court of Kosovo of 19 July 2017, Judgment PAKP No. 456/15 of the Court of Appeals of 14 September 2016, and Judgment P58/14 of the Basic Court.

4. Thirdly, the Majority did not take into consideration the entire criminal process vis-à-vis the Applicants and did not correctly follow the reasoning of the three judicial instances, concerning the composition of the first instance court, namely the Basic Court.

5. Fourthly, if the facts and the legal reasoning in the judgments of the three instances are taken as presented and proved, the Constitutional Court would have concluded that the Referral is inadmissible. Moreover, the conclusion that the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, was violated, particularly because of an unreasoned decision

by the Supreme Court, is unsubstantiated by the Majority. The careful reading of the Judgments of the three instances, and particularly that of the Supreme Court, proves that the entire legal bases for determining the composition of the Basic Court was considered and respected. In particular, the Supreme Court took into account the EULEX *"Guidelines for case allocation for EULEX judges in criminal cases in district courts"* in force at the time of forming the composition of the Basic Court, the Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges, and the Criminal Procedure Code (hereinafter, CPC).

6. Based on the above considerations, detailed arguments and reasoning follow hereunder.

The Scope of the Referral

7. The Applicants allege that the Judgment of the Supreme Court violated Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution) and Article 6 (Right to a fair trial) of the European Convention on Human Rights and Fundamental Freedoms (hereinafter, the ECHR).

8. Specifically, the Applicants claim that the Trial Panel of the Basic Court (No. P58/14 of 27 May 2015) was not composed in accordance with law, because one of the judges in the Trial Panel composition had not been assigned in accordance with the applicable rules.

9. The Majority found that the Judgment of the Supreme Court has not sufficiently reasoned the Applicants' allegations concerning the composition of the Trial Panel at the Basic Court and the assignment of the challenged judge.

10. However, the Basic Court, the Court of Appeals and the Supreme Court have extensively and comprehensibly reasoned their decisions on the allegation concerning the composition of the Trial Panel of the Basic Court and the assignment of the judges to this Trial Panel.

Preliminary Observation

11. At the outset, the Basic Court noted that *"no issue was raised by the parties regarding the composition of the trial-panel"*. Therefore, it concluded that *"according to Article 382 Paragraph 4 of the CPCRK they waived the right to challenge the composition"*. The Court of Appeals also noted that "*the objection was not raised during the first instance procedure, although there were no obstacles to do so.*

Pursuant to Article 382 paragraph 6 of the CPC it is thus belated". The Supreme Court further noted that *"the objections in relation to the appointment of EULEX Judge [A.A.G.] to the Basic Court panel are all made after the main trial. According to the time limits set in the article 41(2) CPC the allegations are thus belated".*

12. Despite the fact that the objections on the composition of the Trial Panel were considered *"belated",* the instances went further on in thoroughly explaining why they considered that the composition of the Trial Panel followed the applicable legal provisions.

13. Therefore, the instances went further on with unnecessary explanation, as the *"belated"* objection would not need further reasoning. Thus the question cannot be a lack of reasoning. In the end, the Majority bases all of its analysis and decision on an *obiter dictum*.

The reasoning of the Basic Court

14. The Basic Court in Mitrovica (Judgment P58/14 of 27 May 2015) addressed the allegation regarding the composition of the Trial Panel.

15. In fact, the Basic Court, under item *"III. Competence of the court and panel composition"* of its Judgment, stated as follows:

"14. No issue was raised by the parties regarding the composition of the trial-panel. Therefore it is presumed that according to Article 382 Paragraph 4 of the CPCRK they waived the right to challenge the composition".

The reasoning of the Court of Appeals

16. The Court of Appeals (Judgment PAKR Nr 456/15) addressed the allegation regarding the composition of the Trial Panel at the Basic Court.

17. In fact, the Court of Appeals, under item *"2. The Trial Panel Composition"* of its Judgment, reasoned as follows:

"The Panel notes that the issue was never mentioned before the appeals were filed. The allocation of judges to the courts is not a secret, such as the legal grounds for their assignment to the cases. The objection was not raised during the first instance procedure, although there were no obstacles to do so. Pursuant to Article 382 paragraph 6 of the CPC it is thus belated.

[…]

In contrast to the allegations, no roster for assignment of EULEX judges was kept in 2013. Also, the assignment of the panel member to the case at hand was performed in an official way by the acting President of EULEX Judges, who was authorized for such a decision. The appellants have emphasized the phone call between the presiding trial judge and the acting President of EULEX Judges few minutes before the assignment decision was signed. The content of such a phone call is not, and cannot be known, so the clear conclusion that the particular judge was requested – as a panel member – cannot be reached. The e-mail exchange as referred in the complaints does not include such a request either. In consequence there are no grounds to conclude that the panel assignment violated the rules and could have eroded the trial panel´s impartiality. In addition the Panel does not observe any irregularities in the work of the Trial Panel mirrored in the record of the trial sessions".

The reasoning of the Supreme Court

18. The Applicants filed with the Supreme Court a request for protection of legality. They repeated their allegations regarding the improper composition of the Trial Panel at the Basic Court and also alleged that the Court of Appeals had failed to properly address their complaints about the composition of the Trial Panel at the Basic Court.

19. In fact, the Supreme Court (Judgment PML.KZZ no. 322/2016 of 19 July 2017) addressed and reasoned the Applicants' allegations regarding the composition of the Trial Panel at the Basic Court as follows:

"137. At the outset, the [Supreme Court] notes that the objections in relation to the appointment of EULEX Judge [A.A.G.] to the Basic Court panel are all made after the main trial. According to the time limits set in the article 41(2) CPC the allegations are thus belated.

138. Additionally, these allegations are based on a television report of Koha Vision and anonymous emails, allegedly sent from EULEX employees. As elaborated above under the heading "Procedural requests", the [Supreme Court] has decided that new evidence cannot be accepted in the third instance procedure. As an obiter dictum*, the [Supreme Court] notes that this new evidence would be intrinsically unreliable (emails originating from an unknown author). As a result of these findings only, the [Supreme Court]*

cannot accept the allegations on what preceded the assignment of EULEX Judge [A.A.G.] to the case or the content of the discussions before the Court of Appeals. Only for this reason, the allegations are unfounded.

139. For the purpose of clarifying some of the legal issues raised in the requests, the [Supreme Court] will however proceed and make some general remarks concerning the appointment of EULEX Judge [A.A.G.] to the Basic Court panel. The main argument raised by the defense is that the internal roster of EULEX was thereby not followed and that the Basic Court Panel for this reason was not composed according to law pursuant to article 384 (1.1) CPC […].

140. The [Supreme Court] agrees with the Court of Appeals Judgment that there has not been a roster for assignment of EULEX judges to the cases at the relevant time. According to the "Guidelines for case allocation for EULEX judges in criminal cases in district courts" *applicable at the time of the appointment of Judge [A.A.G.], no specific roster was upheld. The Guidelines merely clarify the structure of EULEX Judges in district courts and prescribe the general principles that are applicable regarding case allocation. Moreover, Judge [A.A.G.] was assigned to the case pursuant to the decision dated on 29 May 2014 by the acting president of EULEX judges, who at that time was authorized to take this decision. In addition, EULEX Judge [A.A.G.] was a legitimately appointed EULEX judge at the level of the first instance at the time.*

[…]

142. Therefore, the [Supreme Court] is of the opinion that Judge [A.A.G.]'s appointment could not be qualified either as a violation of article 384(1.1) or article 384(1.2) CPC. In passing, the [Supreme Court] notes that even if there were violations of internal EULEX regulations, if at all (as much as the alleged breaches do not amount to a violation of a law relevant to the case – as is the claim at hand that the CPC was breached), it would be an issue within the discretion of the relevant EULEX administrative/disciplinary authorities, as already mentioned above paragraph 121".

Assessment of the reasoning of the regular courts

20. All three levels of the regular courts reasoned the question of the composition of the Trial Panel of the Basic Court.

21. The allegations concerning the assignment of judge [A.A.G.] were first raised before the Court of Appeals. Despite the fact that the Court of Appeals considered that these allegations had been introduced out of time, the Court of Appeals nevertheless reasoned why the composition was in accordance with law.

22. The Court of Appeals based its reasoning on the fact that there was no roster of EULEX judges at the time, that the Acting-President of EULEX Judges was authorized to assign judges to the Trial Panel, and that the allegations that Judge [A.A.G.] was specifically requested to be assigned outside the scope of the applicable Rules could not be confirmed. The Court of Appeals considered that *"[...] there are no grounds to conclude that the panel assignment violated the rules and could have eroded the trial panel´s impartiality"*.

23. In their request for protection of legality, the Applicants repeated their allegations about the composition of the trial Panel and the improper assignment of judge [A.A.G.].

24. Despite the fact that the Supreme Court also considered that these allegations had been introduced out of time, the Supreme Court nevertheless reasoned why the composition was in accordance with law.

25. On the allegations concerning the composition of the Trial Panel and assignment of judge [A.A.G.], the Supreme Court confirmed the reasoning provided by the Court of Appeals, separating the allegations into two issues.

26. On the first issue, namely the allegation that Judge [A.A.G.] was specifically requested to be assigned outside the scope of the applicable Rules, the Supreme Court confirmed the reasoning of the Court of Appeals that (a) there had been no roster of EULEX judges at the time, (b) that such a roster was not required by the *"Guidelines for case allocation for EULEX judges in criminal cases in district courts"* applicable at the time, (c) that the assignment had been made by the Acting-President of EULEX judges within his scope of authority, and, in addition, the Supreme Court reasoned (d) that "*EULEX Judge [A.A.G.] was a legitimately appointed EULEX judge at the level of the first instance at the time"*.

27. On the second issue, regarding the assignment of judge [A.A.G.], namely that judge [A.A.G.] could not be reassigned from the mobile unit in Mitrovica to the Trial Panel in Mitrovica, the Supreme Court reasoned that such reassignments between departments of the same

jurisdiction were authorized under the Law No. 03/L-199 on Courts, as well as under the EULEX *"Guidelines for case allocation for EULEX judges in criminal cases in district courts*," and that the power to make such reassignments in the case of EULEX rested with the Acting-President of EULEX judges.

28. The reasoning of the three instances of the regular courts are consistent with one another and addressed the allegations of the Applicants in generous and increasing detail at each successive new level of court.

29. Furthermore, the fact that both the Court of Appeals and the Supreme Court addressed the Applicants' allegations concerning the assignment of EULEX judge [A.A.G.] to the Trial Panel despite the fact that both courts considered that these allegations had been introduced outside of the legal deadlines.

30. The Applicants specifically alleged that the assignment of judge [A.A.G.] was in violation of Articles 384(1.1) and 384(1.2) the Code of Criminal Procedure (CPC); but the Supreme Court further assessed the circumstances of the case and concluded that the composition of the Trial Panel was in compliance with those provisions of the CPC.

31. Moreover, the Supreme Court also found that the procedure followed for the assignment of judge [A.A.G.] to the Trial Panel was in compliance with the Law No. 03/L-199 on Courts, as well as with the EULEX *"Guidelines for case allocation for EULEX judges in criminal cases in district courts*" applicable at the relevant time.

32. Notwithstanding, as an *obiter dictum,* the Supreme Court noted that *"even if there were violations of internal EULEX regulations, if at all (as much as the alleged breaches do not amount to a violation of a law relevant to the case – as is the claim at hand that the CPC was breached), it would be an issue within the discretion of the relevant EULEX administrative/disciplinary authorities".*

33. The Supreme Court took into account that the situation could be seen into two aspects: the criminal procedure (*as much as the alleged breaches (…) amount to a violation of a law relevant to the case)* and the disciplinary procedure *(as much as the alleged breaches do not amount to a violation of a law relevant to the case)*. In relation to the criminal procedure, the Supreme Court concluded that there was no violation; in relation to the disciplinary procedure, "*it would be an issue within the discretion of the relevant EULEX administrative/disciplinary authorities".*

34. The Supreme Court reasoned the allegation on the composition of the Trial Panel taking into account the Criminal Procedure Code, the Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, and the Guidelines for case allocation for EULEX judges in criminal cases in district courts

35. It means that the Majority is incorrect when saying that the Supreme Court failed *"to take into account the entire body of rules applicable to the appointment of judges to trial panels"* (para. 98).

36. Moreover, that also means that the Supreme Court, "*if there were violations of internal EULEX regulations (…)",* found itself incompetent to assess them in as much as "*the alleged breaches do not amount to a violation of a law relevant to the case". "If at all",* they would fall *"within the discretion of the relevant EULEX administrative/disciplinary authorities"*.

37. Furthermore, neither the Supreme Court nor the Constitutional Court have jurisdictional competence to decide on EULEX internal regulations, which do not amount to a violation of a law relevant to the case at stake and which stays only in the administrative/disciplinary domain.

38. Therefore, it was not possible to conclude, as the Majority did (under para. 94), that *"the Supreme Court considered that the EULEX Guidelines were an internal matter of EULEX and, therefore, were not part of the legislative frame work of Kosovo"*.

39. On the contrary, the Supreme Court considered the EULEX Guidelines in as much as they could *"amount to a violation of a law relevant to the case*"; but not in as much as they could amount only to an internal regulation *"within the discretion of the relevant EULEX administrative/disciplinary authorities"*.

40. In sum, as explained in the abovementioned reasoning of the Supreme Court, the assignment of judge [A.A.G.] to the Trial Panel of the Basic Court in Mitrovica at that time was based on the following considerations:

    (a) there had been no roster of EULEX judges at the time;
    (b) such a roster was not required by the *"Guidelines for case allocation for EULEX judges in criminal cases in district courts"* applicable at the time;

(c) the assignment had been made by the Acting-President of EULEX Judges within his scope of authority; and
(d) EULEX Judge [A.A.G.] was a legitimately appointed EULEX judge at the level of the first instance at the time.

41. In these circumstances, the regular courts respected and applied all available norms and rules applicable to the composition of the Trial Panel and the assignment of judges to the Trial Panel in this case.

42. Moreover, the Supreme Court, based on the Criminal Procedure Code, found no violation of the Applicants' rights or of the invoked provisions of the Criminal Procedure Code, either in the composition of the Trial Panel or in the assignment of the judges to this Trial Panel.

Conclusion

43. In conclusion, the Majority did not take into consideration the reasoning given by the Basic Court, the Court of Appeals, and further developed and detailed by the Supreme Court, when assessing the Applicants' allegations regarding the composition of the Trial Panel and the assignment of EULEX judge [A.A.G.] to this Trial Panel.

44. Thus, the Majority has not correctly interpreted the facts of this Referral and has not taken into consideration the consistent and coherent reasoning of the Basic Court, the Court of Appeals and the Supreme Court.

45. The reasoning of the Supreme Court is thoroughly explained and justified. It is not clearly arbitrary, as the Majority states, in order for the Constitutional Court to be allowed to call into question its constitutionality.

46. Therefore, there has been no violation of the Applicants' right to a fair and impartial trial under Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a Fair Trial] of the European Convention on Human Rights as a consequence of a lack of a reasoned decision.

47. In sum, the Referral should have been declared inadmissible as manifestly ill-founded on a constitutional basis under Article 48 of the Law and Rule 36(1)(d) and 36(2)(b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

48. Moreover, the issues raised and discussed by the Majority in the Judgment fall within the scope of legality and do not rise to the level of an issue of constitutionality.

Respectfully submitted,

Almiro Rodrigues

Judge

Snezhana Botusharova

Judge

KO45/18, Applicants: Glauk Konjufca and 11 other deputies of the Assembly of the Republic of Kosovo, Constitutional Review of Law No. 06/L-060 on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro

KO45/18, Judgment of 18 April 2018, published on 30 April 2018

Keywords: *abstract control, institutional referral, international agreements, ratification, demarcation, admissible, ratione materiae.*

The Applicants submitted the Referral to the Court for constitutional review of Law No. 06/L-060 on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro. They alleged that the procedure followed for the adoption as well as the substance of the Law on Ratification of the Demarcation are in violation of Articles 1 [Definition of State], 2 [Sovereignty], 4 [Form of Government and Separation of Powers], 18 [Ratification of International Agreements], 125 [General Principles], 126 [Kosovo Security Force], 127 [Kosovo Security Council], 128 [Kosovo Police] and 129 [Kosovo Intelligence Agency] of the Constitution of the Republic of Kosovo.

The Court declared the Referral admissible because the Applicants were authorized parties under Article 113.5 of the Constitution, had submitted the Referral within the deadline of 8 (eight) days as required by Article 113.5 of the Constitution, and had complied with the criteria given in Article 42 of the Law on the Constitutional Court.

After considering the allegations of the Applicants, based upon its established case-law, the Court recalled that the Law on Ratification of the Demarcation and the International Agreement on Demarcation are two separate legal acts. The Court recalled that it is competent under the Constitution to review the "Law" for compatibility with the Constitution, both in its substance and as regards the procedure followed for its adoption. However, the Court recalled that it is not competent to review the substance of the "International Agreement" for compatibility with the Constitution.

The Court held, unanimously, that the Law No. 06/L-060 on Ratification of the Agreement and the procedure for its adoption were not in contradiction with the Constitution. The Court also unanimously rejected the Applicants' request to review the International Agreement on Demarcation of the State Border between the Republic of Kosovo and Montenegro as being incompatible *ratione materiae* with the Constitution and thus outside of the scope of the Court's jurisdiction.

JUDGMENT

in

Case No. KO45/18

Applicants

Glauk Konjufca and
11 other deputies of the Assembly of the Republic of Kosovo

Constitutional Review of Law No. 06/L-060 on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicants

1. The referral is submitted by Glauk Konjufca, Albin Kurti, Rexhep Selimi, Liburn Aliu, Albulena Haxhiu, Xhelal Sveçla, Arbërie Nagavci, Fitore Pacolli, Shemsi Syla, Ismajl Kurteshi, Valon Ramadani, Salih Zyba (hereinafter, the Applicants), all of them Deputies of the Assembly of the Republic of Kosovo (hereinafter, the Assembly).The Applicants have authorized Glauk Konjufca to represent them in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

Challenged Law

2. The Applicants challenge the constitutionality of Law No. 06/L-060 on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro (hereinafter, the Law on

Ratification of the Demarcation), adopted by the Assembly on 21 March 2018.

Subject matter

3. The subject matter is the assessment of the constitutionality of the challenged Law on Ratification of Demarcation, which allegedly is in violation of Articles 1 [Definition of State], 2 [Sovereignty], 4 [Form of Government and Separation of Powers], 18 [Ratification of International Agreements], 125 [General Principles], 126 [Kosovo Security Force], 127 [Kosovo Security Council], 128 [Kosovo Police] and 129 [Kosovo Intelligence Agency] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

Legal basis

4. The Referral is based on paragraph 5 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 42 [Accuracy of the Referral] and 43 [Deadline] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 36 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Court

5. On 29 March 2018, the Applicants submitted to the Court the Referral with numerous documents attached.

6. On 29 March 2018, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

7. On 29 March 2018, the Referral was communicated to: the Applicants; the President of the Republic of Kosovo; the President of the Assembly of the Republic of Kosovo (hereinafter, the President of the Assembly) the Prime Minister of the Republic of Kosovo (hereinafter, the Prime Minister); and the Secretariat of the Assembly of the Republic of Kosovo (hereinafter, the Secretariat).

8. In the Letter to the President of the Republic of Kosovo was noted that Article 45 paragraph 2 of the Law on the Constitutional Court specifies that the challenged Law cannot be promulgated until the final decision of the Constitutional Court on the matter raised. The President of the Assembly was asked to facilitate the distribution of the Referral to all

Deputies of the Assembly and if anyone had comments to submit them by 6 April 2018. The Prime Minister also was given the opportunity to submit comments by 6 April 2018. The Secretariat of the Assembly was asked particularly to submit to the Court any documents that might be relevant to the case.

9. On 3 April 2018, the Secretariat presented to the Court the following documents:

a. Draft-Law on No. 06/L-060 on Ratification of the Agreement on State Border between the Republic of Kosovo and Montenegro of 20 February 2018;

b. Request of the Prime Minister (22 February 2018) to the Assembly to hold an extraordinary session for deliberation of the draft Law on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro of 20 February 2018;

c. Report of the Functional Committee on Foreign Affairs, Diaspora and Strategic Investment of 21 February 2018;

d. Invitation and agenda for the extraordinary plenary session of the Assembly of 22 February 2018;

e. Report with amendments of the Functional Committee on Foreign Affairs, Diaspora and Strategic Investment of 21 March 2018;

f. Resolution of the Assembly No. 06-V-090, of 21 March 2018 on adoption of Law No. 06/L-060 on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro;

g. Law No. 06/L-060 on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro.

10. The Secretariat did not comment on the allegations raised in the Referral, but added that, if there were any comments by the Deputies, the Court would be informed in due time.

11. On 6 April 2018, the Applicants submitted a document with additional clarifications as per the substantive and procedural allegations raised in their Referral.

12. No comments were submitted by the Prime Minister or the Deputies of the Assembly within the prescribed deadline.

13. On 18 April 2018, the Review Panel considered the Report of the Judge Rapporteur and, by unanimity, made a recommendation to the Court to declare the Referral admissible and to assess the merits of the Referral.

Summary of facts

14. On 21 March 2012, the Government adopted Decision No.12/67 on Appointment of Members of the State Commission for Demarcation and Maintenance of the State Border (hereinafter, the Demarcation Commission).

15. On 26 March 2013, the Demarcation Commission of Kosovo and the Demarcation Commission of Montenegro adopted a Regulation of Joint Work, regarding the demarcation of the state border between Kosovo and Montenegro.

16. On 17 July 2013, the Government adopted Decision No. 03/14, by which it approved the Rules of Procedure of the Demarcation Commission.

17. On 8 May 2015, the Government adopted Decision No. 05/28 on the extension of the mandate of the Members of the Demarcation Commission.

18. On 25 June 2015, the Assembly adopted Resolution No. 05-R-03 on the Demarcation of the Border between Kosovo and Montenegro. The Resolution, inter alia, required the border with Montenegro to be determined based on the *"administrative lines foreseen by the legislation in force for administrative boundaries of SFRY, the administrative borders of the territory of Kosovo of 1974 and the current Constitution"*. In addition, it demanded from the Prime Minister of the Republic of Kosovo to undertake actions that ensure that the Demarcation Commission makes available all discussions and proposals of the Demarcation Commission of Montenegro, and that the Government *"reports to the Assembly prior to the adoption of the inter-border [Agreement] between Kosovo and Montenegro"*.

19. On 5 August 2015, the Government adopted Decision No. 01/43, which approved in principle the initiative for an Agreement on the State Border between the Republic of Kosovo and Montenegro. The

Decision obliged the Ministry of Foreign Affairs to undertake actions to sign the agreement in accordance with Law No.04/L-052 on International Agreements.

20. On 20 August 2015, the President of the Republic of Kosovo, upon the request of the Government, authorized the Minister of Foreign Affairs and the Minister of Internal Affairs to undertake actions to sign the Agreement on the State Border between the Republic of Kosovo and Montenegro.

21. On 26 August 2015, the respective ministers of Foreign Affairs and the ministers of Internal Affairs of both countries signed the Agreement for the State Border between the Republic of Kosovo and Montenegro. This agreement was drafted based on the joint work of the Demarcation Commission of the Republic of Kosovo and the Demarcation Commission of Montenegro.

22. On 22 September 2017, after the parliamentary elections of 11 June 2017, the new Government decided (Decision No. 01/04) to appoint new Members of the Demarcation Commission, and thus dismissing the Members of the previous Demarcation Commission.

23. On 3 October 2017, the Government decided (Decision No. 01/06) to authorize the new Demarcation Commission to assess the work of the previous one.

24. On 4 December 2017, the Demarcation Commission presented to the Government the Report on Assessment of the Work of the previous Demarcation Commission, pointing out errors allegedly committed by it.

25. On 4 December 2017, the Government approved (Decision No. 02/17) the draft Law on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro (hereinafter, the Draft of the Law on Ratification of the Demarcation), as well as the Report of the Demarcation Commission stated above. In accordance with this Decision, the General Secretary of the Office of the Prime Minister proceeded the Draft of the Law on Ratification of the Demarcation for review and adoption by the Assembly.

26. On 5 December 2017, the draft Law on Ratification of the Demarcation was submitted by the President of the Assembly to the Deputies of the Assembly. The Committee on Foreign Affairs, Diaspora and Strategic Investment (hereinafter, the Committee of Foreign Affairs) was

charged to review the Draft of the Law on Ratification of the Demarcation and to present a Report with Recommendations.

27. On 16 February 2018, the President of the Republic of Kosovo and the President of Montenegro signed a joint Declaration. It provided that the Republic of Kosovo and Montenegro shall establish a joint Working Group to determine the border in accordance with the Draft of the Law on Ratification of the Demarcation, to assess it, and correct possible errors in certain parts of the state border between Kosovo and Montenegro.

28. On 20 February 2018, the Prime Minister requested an extraordinary session of the Assembly to be held on 22 February 2018, at 11:00 hrs., concerning the draft of the Law on the Ratification of the Demarcation.

29. On 21 February 2018, based on the request of the Prime Minister, the Presidency of the Assembly decided that the extraordinary session shall be held on 22 February 2018, at 11:00 hrs. However, due to the lack of quorum, the session was postponed.

30. On 27 February 2018, the Presidency of the Assembly decided that the continuation of the postponed extraordinary session shall be held on 28 February 2018, at 10:00 hrs. However, due to the lack of quorum, the session was again postponed.

31. On 15 March 2018, the Presidency of the Assembly decided that the continuation of the extraordinary session on the draft of the Law on Ratification of the Demarcation shall be held on 20 March 2018. Accordingly, the discussion began at 16:00 hrs. and continued until 01:00 hrs of 21 March 2018, when the Assembly voted to postpone the voting on the draft Law on Ratification of the Demarcation and to continue the session on 21 March 2018, at 11:00 hrs.

32. On 21 March 2018, the Committee of Foreign Affairs recommended to the Assembly to adopt the draft of the Law on Ratification of the Demarcation and proposed one Amendment:

"Article 3 of the draft Law is amended as follows:

Article 3

1. *Integral part of this law are:*

1.1. The Agreement on the State Border between the Republic of Kosovo and Montenegro, signed in Vienna, on 26 August 2015;

1.2. Joint statement of the President of the Republic of Kosovo H.E. Hashim Thaçi and the President of Montenegro H.E. Filip Vujanović signed on 16.02.2018.

1.3. Official records of the State Commission for demarcation of the State Border - for orientation."

33. On 21 March 2018, at 11:00 hrs., the Assembly proceeded with the voting of the draft of the Law on Ratification of the Demarcation. However, it was interrupted due to the use of a tear gas by a number of Deputies of the Assembly. Subsequently, the Presidency of the Assembly (Decisions 06/V-112 and 06/V-112) expelled from participation in the extraordinary session a number of Deputies of the Assembly *"due to throwing tear gas in the session of 21 March 2018"*, and one Deputy of the Assembly *"due to demolishing the equipment of the plenary session room"*.

34. On 21 March 2018, after several interruptions and consequent rescheduling of the extraordinary session by the Presidency of the Assembly, the President of the Assembly proceeded with the adoption of the amendments proposed by Committee of Foreign Affairs and then on the adoption of the draft of the Law on Ratification of the Demarcation in its entirety. According to the transcripts of the sessions (22, 23, and 28 February 2018 and on 20 and 21 March 2018) ninety-one (91) Deputies were present and voted. Eighty (80) Deputies voted in favor, eleven (11) Deputies voted against and there were no abstentions. The amendment of the draft of the Law on Ratification of the Demarcation was adopted in its entirety.

35. Therefore, on 21 March 2018, the Assembly adopted Law No. 06/L-060 on Ratification of the Agreement on the State Border between the Republic of Kosovo and Montenegro (the Law on Ratification of the Demarcation).

36. The Law on Ratification of the Demarcation stipulates that:

"Article 1

The Agreement on the state border between the Republic of Kosovo and Montenegro, signed in Vienna, on 26 August 2015, is ratified.

Article 2

Provisions of the Agreement on the State Border between the Republic of Kosovo and Montenegro, signed in Vienna, on 26 August 2015, if new legal facts are provided, can be changed, and amended with the approval of the parties. Provisions of this Agreement can be changed following the same procedures that were envisaged for its adoption. With the consent of parties, international arbitration can be sought for changing provisions of the Agreement.

Article 3

2. *Integral part of this law are:*

1.1. The Agreement on the State Border between the Republic of Kosovo and Montenegro, signed in Vienna, on 26 August 2015;

1.2. Joint statement of the President of the Republic of Kosovo H.E. Hashim Thaçi and the President of Montenegro H.E. Filip Vujanović signed on 16.02.2018.

1.3. Official records of the State Commission for demarcation of the State Border - for orientation.

Article 4
Entry into force

This Law shall enter into force fifteen (15) days after publication in the Official Gazette of the Republic of Kosovo."

Arguments presented by the Applicants

37. The Applicants claim that the procedure followed for the adoption as well as the substance of the Law on Ratification of the Demarcation are in violation of Articles 1 [Definition of State], 2 [Sovereignty], 4 [Form of Government and Separation of Powers], 18 [Ratification of International Agreements], 125 [General Principles], 126 [Kosovo Security Force], 127 [Kosovo Security Council], 128 [Kosovo Police], and 129 [Kosovo Intelligence Agency] of the Constitution.

Regarding the procedure followed

38. The Applicants allege that *"[t]he request for an extraordinary session filed in the Assembly [by the Prime Minister] does not meet the criteria foreseen in Article 38, paragraph 3 of the Rules of Procedure of the Assembly"* which require that the request for an extraordinary session must provide the justification on why a certain matter is considered 'urgent'. They consider that the failure to provide a justification for the request of an extraordinary session as required by Article 38 (3) of the Rules of Procedure of the Assembly also leads to a violation of Article 69 (4) of the Constitution, which foresees that the Assembly convenes an extraordinary meeting upon the request of, among others, the Prime Minister.

39. The Applicants state that from the time when the extraordinary session was requested and scheduled until the adoption of the Law on Ratification of the Demarcation passed more than one (1) month. Thus, the matter that was initially considered urgent but was not decided for more than one (1) month, did not correspond with the nature of the 'urgent matter' as foreseen in Article 69 (4) of the Constitution, in conjunction with the Article 38 (3) of the Rules of Procedure of the Assembly.

40. The Applicants consider that Law No 04/L-052 on International Agreements does not specify in any of its provisions that *"an international agreement must be ratified (in extraordinary session) as urgent"*. Thus, they consider that the ratification of an international agreement in extraordinary session is in violation of Article 18 [Ratification of International Agreements] of the Constitution, which regulates the ratification of international agreements.

41. The Applicants specify that the discussion of the Law on Ratification of the Demarcation that started on 20 March 2018 at 16:00 hrs. and continued until 21 March at 01:00 hrs. was proposed to be continued on 21 March at 11:00 hrs. This proposal was put into vote by the President of the Assembly and *"69 Deputies were present, 46 voted "For" 1 was "Against", and "Abstentions" where not counted"*. In this regard, the Applicants allege that by not verifying if all Deputies who made the quorum voted "For", "Against" or "Abstained", leads to violation of Article 69 (3) [Schedule of Sessions and Quorum] of the Constitution, in conjunction with Article 51 (3) of the Rules of Procedure of the Assembly, which requires that laws, decisions and other acts of the Assembly are considered adopted if they are voted by the majority of the Deputies present and voting.

42. The Applicants further consider that Decision 06/V-114 of the Presidency of the Assembly for expelling a number of Deputies from the extraordinary session of 21 March 2018, *"due to throwing tear gas"*, was not correct, because most of the Deputies expelled did not throw tear gas in the Session. Therefore, their removal from the session constitutes a violation of *"Articles 18 and 80 of the Constitution in conjunction with Article 21 of the Rules of Procedure of the Assembly, because they were denied the rights to express their free will*" for the matter that was discussed and decided in the Session of 21 March 2018.

Regarding the substance of the Law on Ratification of Demarcation

43. The Applicants specify that Law No. 04/L-072 on Control and Supervision of the State Border requires the Government to appoint members of the Commission of Demarcation and Maintenance of State Borders based on "international agreements". According to the Applicants, the "international agreement" mentioned in Article 40 of this Law means "Comprehensive Proposal for the Kosovo Status Settlement" (hereinafter, the Ahtisaari package). Thus, they allege that the entire process of demarcation of the state border between Kosovo and Montenegro should have been done in accordance with the Ahtisaari Package, which required the border lines to be marked in accordance with those as of 31 December 1988.

44. The Applicants complain that the Demarcation Commission did not follow the constitutional and legal history of the territorial integrity of Kosovo and accepted the proposal of the Demarcation Commission of Montenegro to determine the border line between Kosovo and Montenegro based on cadastral criterion. This criterion is in violation of the international law which does not recognize the 'cadastral criteria' as the only criteria for border demarcation. Thus, by ignoring the criteria of *'uti possidetis'* and *'effective control criteria',* the border line determined is five (5) to six (6) kilometers inside the territory of Kosovo.

45. In this regard, the Applicants allege that the Commission has exceeded its competencies by conducting the delimitation of a new border rather than conducting demarcation of the border line as it was mandated with the Law on Control and Supervision of State Border. Thus, the Commission has violated the sovereignty and territorial integrity of Kosovo, guaranteed by Article 2, paragraph 2 [Sovereignty] of the Constitution as well Articles 125 [General Principles] to 129 [Kosovo

Intelligence Agency] of the Constitution which specify the constitutional institutions which have constitutional obligations to protect the territorial borders of Kosovo.

46. The Applicants recall the Resolution of the Assembly of 25 June 2015 which required from the ex-Prime Minister Isa Mustafa to undertake measures to ensure that the Demarcation Commission reveals all the discussion and matters raised by the Demarcation Commission of Montenegro and to report before the Assembly before the conclusion of the agreement between Kosovo and Montenegro. They allege that the Government of Kosovo failed to respect the Resolution of the Assembly and also failed to dismiss the Demarcation Commission, even though the Government was informed that the Commission had exceeded its competencies.

47. Furthermore, the Applicants allege that the Report of the Demarcation Commission of 4 December 2017, which forms part of the Law on Ratification of the Demarcation, argue that the Agreement for Demarcation of the Border of 26 August 2015 violates the constitutional provision of Articles 1 [Definition of State], 2 [Sovereignty], 4 [Form of Government and Separation of Power], 125 [General Principles] and 129 [Kosovo Intelligence Agency] of the Constitution, because, instead of demarcation of the borders between Kosovo and Montenegro, it determined new borders (delimitation of borders).

48. Thus, the Deputies of the Assembly who voted for the approval of the Law on Ratification of the Demarcation violated the sovereignty and territorial integrity of Kosovo because the Law ratifying the Agreement and the Agreement itself must be in line with the constitutive elements of state sovereignty and territorial integrity. Therefore, any law, sub-legal act or agreement that violates the sovereignty and territorial integrity of the state must become null from a constitutional and international law perspective.

49. Additionally, in their clarification of 6 April 2018, the Applicants also allege that Article 3 (1 and 2) of the Law on Ratification of the Demarcation is contradictory, incomprehensible and creates confusion. In this regard, the Applicants specify that the Government *"deliberately created confusion, defrauding and disorientation of the public and especially of the Deputies of the Assembly in order to entice them with the final aim that they vote that Law"*.

Admissibility of the Referral

50. The Court first examines whether the Referral fulfills the admissibility requirements established by the Constitution and as further provided for by the Law and specified by the Rules of Procedure of the Constitutional Court (hereinafter, the Rules).

51. The Court refers to Article 113 (1) [Jurisdiction and Authorized Parties] of the Constitution, which establishes that *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties"*.

52. The Court also refers to Article 113 (5) of the Constitution, which establishes that *"Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed."*

53. In that respect, the Court recalls that the Applicants challenge the constitutionality of the Law on Ratification of the Demarcation as regards its substance and the procedure followed for its adoption.

54. The Court further recalls that the Referral was submitted by 12 Deputies of the Assembly, in accordance with Article 113 (5) of the Constitution. Therefore, the Applicants are an authorized party.

55. The Court takes into account Article 42 [Accuracy of the Referral] of the Law, which provides:

> *"1. In a referral made pursuant to Article 113, Paragraph 5 of the Constitution the following information shall, inter alia, be submitted:*
>
> *1.1. names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;*
> *1.2. provisions of the Constitution or other act or legislation relevant to this referral; and*
> *1.3. presentation of evidence that supports the contest."*

56. The Court notes that the Applicants indicated the names with the signatures of the Deputies, specified the law they contested, referred to the relevant constitutional provisions they allege have been violated and presented evidence supporting their allegations. Thus, the Court

considers that the requirements of Article 42 of the Law have been met.

57. Regarding the established deadline of *"eight (8) days from the date of adoption"*, the Court notes that the Law on Ratification of the Demarcation was adopted on 21 March 2018, while the Referral was submitted to the Court on 29 March 2018.

58. The Court recalls that, pursuant to Rule 27 of the Rules of Procedure, the deadline for submitting the Referral, "*when it is expressed in days is to be calculated starting from the day after the event takes place"*. In this case, on the next day following the approval of the Law on the Ratification of the Demarcation. Therefore, the Referral has been submitted in a timely manner.

59. The Court considers that there are no grounds to declare this Referral inadmissible. Therefore, the Referral is admissible.

Comparative analysis

60. Before assessing whether the challenged Law on the Ratification of the Demarcation is in compliance with the Constitution, the Court recalls that it has already used detailed comparative analyses in its Case No. KO95/13, *Visar Ymeri and 11 other Deputies,* Judgment of 9 September 2013.

61. The Court reiterates that Constitutions of different European countries approach the issue of constitutional review of the ratification of international agreements in various ways. These differences are a result of the various ways in which the relationship between an international agreement and the domestic legal order are defined. This definition can be understood as falling along a scale of constitutional approaches.

62. At one end of the scale, is the approach taken by the United Kingdom where international agreements are concluded by the Queen through her Minister for Foreign and Commonwealth Affairs and do not have to be ratified by the British Parliament before becoming binding on the state. Once concluded, they bind the state only in its relations with other countries and have no effect on the internal legal order of the United Kingdom. In order for the provisions of an international agreement to become effective within the domestic legal order, specific legislation must be adopted containing those provisions and defining their operation within domestic law. Once incorporated through

specific legislation, these provisions remain of an inferior legal order than the Constitution of the state.

63. At the opposite end of the scale, is the approach taken by the Netherlands. Here, following ratification by Parliament, the international agreement becomes binding on the state in its relations with other countries, and any self-executing provisions of the agreement become binding within the internal legal order. What is more, the provisions of ratified international agreements are of superior legal order even than the Constitution of the state, and domestic legislation may be reviewed by all courts for compliance with obligations deriving from such international agreements.

64. The Constitutional system of Kosovo has its own specificities that fall in between these two examples. Following the ratification by the Assembly, an international agreement becomes binding on the state in its relations with other states, and such agreements become part of the internal legal system. However, those provisions of an international agreement which are self-executable are of superior legal order to the legislation of Kosovo, while remaining of inferior legal order to the Constitution of Kosovo, as defined in Article 19 of the Constitution. Self-executing provisions of international agreements may be applied directly within the internal legal order of Kosovo, but their application remains subject to the Constitution. (See case No. KO95/13, *Visar Ymeri and 11 other Deputies,* Judgment of 9 September 2013, paragraphs 53-69).

Merits

65. The Court notes that the Applicants allege that the Law on Ratification of the Demarcation of the State Borders between the Republic of Kosovo and Montenegro is in violation of the Constitution as regards the procedure followed for its adoption and its substance.

Regarding the procedure followed for adopting the contested law

66. The Applicants complain that the procedure for adopting the contested law is in violation of:

a. Article 69 (4) [Schedule of Sessions and Quorum] of the Constitution in connection with Article 38 (3) of the Rules of Procedure, "*which require that the request for extraordinary*

session must provide the justification on why certain matter is considered urgent".

b. Article 18 [Ratification of International Agreements] of the Constitution, which regulates the question of ratification of international agreements because *"the Law No 04/L-052 on International Agreements does not specify in any of its provisions that an international agreement must be ratified (in extraordinary session) as urgent".*

c. Article 69 (3) [Schedule and Sessions and Quorum] of the Constitution, in connection with Article 51 (3) of the Rules of Procedure of the Assembly, which establishes that "*The Assembly of Kosovo has its quorum when more than one half (1/2) of all Assembly deputies are present"*. Those articles were violated because it was not verified if all Deputies who made the quorum voted "For", "Against" or "Abstained". Furthermore, the Applicants allege that the proposal of the contested law was put to a vote by the President of the Assembly and *"69 Deputies were present, 46 voted "For", 1 was "Against", and "Abstentions" were not counted".*

d. Articles 18 [Ratification of International Agreements] and 80 [Adoption of Laws] of the Constitution in conjunction with Article 21 of the Rules of Procedure of the Assembly because "*they (the Deputies) were denied the right to express their free will"*. In this respect, the Applicants further consider that Decision 06/V-114 of the Presidency of the Assembly for expelling a number of Deputies from the extraordinary session of 21 March 2018, *"due to throwing tear gas"*, was not correct, because most of the expelled Deputies did not throw tear gas in the Assembly Session.

67. However, the Court reiterates that it can only analyze the steps undertaken by the Government and the Assembly for the adoption of the contested law, on the basis of the relevant constitutional provisions, i.e. the legislative procedure and process proper.

68. In this connection, the Court notes that the competencies of the Assembly are determined in Article 65 [Competencies of the Assembly] of the Constitution, of which, for the present case, only its paragraphs 1 and 4 are relevant. They read as follows:

"The Assembly of the Republic of Kosovo:

(1) adopts laws, resolutions and other general acts;
[…]
(4) ratifies international treaties;"

69. The Assembly, pursuant to its competence under Article 65 (1) of the Constitution, voted and adopted the Law on Ratification of the Demarcation, in accordance with the requirements for the adoption of a law foreseen in paragraph 1 of Article 80 [Adoption of Laws] which establishes that *"Laws, decisions and other acts are adopted by the Assembly by a majority vote of deputies present and voting, except when otherwise provided by the Constitution"*.

70. Furthermore, the Court also refers to Article 18 (1) of the Constitution and Article 10 (2) of Law No. 04/L-052 on International Agreements, which defines the procedure for the ratification of international agreements. Paragraph 1 of Article 18 [Ratification of International Agreements] reads as follows:

"International agreements relating to the following subjects are ratified by two thirds (2/3) vote of all deputies of the Assembly:
(1) territory, peace, alliances, political and military issues;
(2) fundamental rights and freedoms;
(3) membership of the Republic of Kosovo in international organizations;
(4) the undertaking of financial obligations by the Republic of Kosovo;"

71. Thus, the ratification of an international agreement on the demarcation of the borders of the state is related to the subject of the territory of the state and, therefore, comes within the scope of Article 18 (1) of the Constitution. As such, the Agreement on the Demarcation requires a two-thirds majority vote in the Assembly for its ratification.

72. As to which authority of a State has the power to conclude international treaties, the Court refers to Article 2 (c) of the Vienna Convention on the Law of Treaties of 1969, which defines "full powers" as meaning *"[…] a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty"*.

73. In this regard, the Court notes that the reference to the 'competent authority' to conclude international agreements leaves it to the internal law of each State to determine the authority that holds the full

powers. Usually, such documents emanate from the Head of State (or somebody to whom he/she has delegated the necessary powers), the head of government or the foreign minister and bear the official emblem and, in some cases, the seal of a country.

74. In addition, the internal law of Kosovo, that regulates which institutions are authorized to conclude international agreements, is specified in Article 6 of Law No. 04/L-052 on International Agreements which reads as follows:

> *"[...]*
> *1. The President and the Prime Minister and the Minister of Foreign Affairs shall be entitled to perform all acts relating to the conclusion of the International Agreements of the Republic of Kosovo, in compliance with the Constitution of Republic of Kosovo and the Vienna Convention on the Law of Treaties.*
> *2. The head of a diplomatic mission of the Republic of Kosovo or the authorized representative of the Republic of Kosovo at an international conference, international organization or one of its bodies shall be entitled to negotiate the conclusion of an International Agreement of the Republic of Kosovo or to approve its text with the State to which he is accredited or at the international conference, international organization or one of its bodies.*
> *3. Other persons may perform acts relating to the conclusion of the International Agreements of the Republic of Kosovo only provided they possess powers granted to them based on the laws in force and according to the procedure established in Article 6 of this Law.*
> *[...]"*

75. The Court notes that, on 25 June 2015, the Assembly adopted Resolution No. 05-R-03 on Demarcation of the State Border between the Republic of Kosovo and Montenegro. In addition, it requested from the Prime-minister to undertake actions to ensure that the Demarcation Commission made available all discussions and proposals of the Demarcation Commission of Montenegro. It also requested that the Government reports before the Assembly prior to adoption of the agreement between Kosovo and Montenegro.

76. Thus, a series of actions started involving the Prime Minister, the respective Presidents of Kosovo and Montenegro, the ministers of Foreign Affairs and of Internal Affairs before the challenged the Law on Ratification of the Demarcation was presented to the Deputies of

the Assembly. Subsequently, on 21 March 2018, the Assembly voted and adopted the challenged Law on Ratification of the Demarcation.

77. In this regard, the Court refers to Article 10 of Law No. 04/L-052 on International Agreements, which, in addition of reiterating the provision of Article 18 of the Constitution, provides:

> *2. International Agreements referred to in paragraph 1 of this Article* [10 of Law No. 04/L-052] *shall be ratified by a law by two thirds (2/3) vote of all deputies of the Assembly of the Republic of Kosovo.*
> *[…]"*

78. In that respect, the Court notes that, for the purposes of the incorporation into the Kosovo legal order of the agreement, the Government is responsible to submit to the Assembly, according to the established procedure, a draft of the respective law, pursuant to Article 15 (3) of Law No. 04/L-052 on International Agreements.

79. Article 15 (3) of Law No. 04/L-052 on International Agreements reads as follows:

> *"If a law or any other legal act has to be passed for the purpose of implementation of an International Agreement of the Republic of Kosovo, the Government of the Republic of Kosovo shall submit to the Assembly according to the established procedure a draft of the appropriate law or shall adopt an appropriate decision of the Government or ensure according to its competence the passing of another legal act".*

80. In this connection, the Court notes that, on 4 December 2017, the Government, pursuant to its competences under Article 92 (4) [General Principles] of the Constitution and based on Decision No.02/17, proposed for adoption to the Assembly a Draft Law on Ratification of the Demarcation.

81. The Court refers to Article 60 of the Rules of Procedure of the Assembly which regulates the adoption of this kind of laws, which is different from other laws, and stipulates as follows:

> *"[…]*
> *1. The Assembly of the Republic of Kosovo ratifies international agreements by law, pursuant to Article 18 of the Constitution of the Republic of Kosovo.*

2. The Draft Law on ratification of international agreements shall contain the text of the international agreement, reasons for such ratification and financial statement, in cases of financial implications.
3. Proceeding a Draft Law on ratification of international agreements is special and shall be subject to only one reading.
[...]"

82. In this regard, particular attention should be paid to the wording of Article 60 (3) of the Rules, which provides that *"Proceeding a Draft Law on ratification of international agreements is special and shall be subject to only one reading"*. Other laws adopted by the Assembly require more than one reading.

Allegation on violation of Article 69 (4) of the Constitution

83. The Court recalls that the Applicants claim a violation of Article 69 (4) of the Constitution, in connection with Article 38 (3) of the Rules of Procedure, because extraordinary session needs justification on why certain matter is urgent.

84. The Court notes that Article 69 (4) of the Constitution does not require expressly nor implicitly from the political actors to provide a thorough justification in order to convene an extraordinary meeting of the Assembly. The Court is bound to assess observance of constitutional procedure, and in the concrete, the Assembly has observed constitutional provisions on approval of the Law on Ratification of the Demarcation.

85. It follows that the allegation on violation of Article 69 (4) of the Constitution is manifestly ill-founded on a constitutional basis.

Allegation on violation of Article 18 of the Constitution in conjunction with the Law No 04/L-052 on International Agreements

86. The Court also recalls that the Applicants claim a violation of Article 18 of the Constitution, because the Law No 04/L-052 on International Agreements does not provide that an international agreement must be ratified (in extraordinary session) as urgent.

87. The Court notes that Article 18 of the Constitution does not regulate the tempo of a matter to be deliberated and voted upon by the Deputies of the Assembly. Whether a matter is considered 'urgent' or not, it is left to the discretion of the political actors. (See, mutatis mutandis,

Case No. KO118/16, *Slavko Simić and 10 other deputies,* Resolution on Inadmissibility, of 31 October 2016 and Case No. KO120/16, *Slavko Simić and 10 other deputies,* Resolution on Inadmissibility, of 1 February 2017).

88. The Court notes that the Law on Ratification of International Agreements does not regulate the procedure for adoption of international agreements and particularly does not mention the "urgency" of adoption or "extraordinary session" is not relevant. This is a question of legislative priorities and management of the work of the Assembly. It is the Constitution that regulates the legislative process and procedure.

89. The Court considers that the allegation raised by the Applicants does not fall within the ambit of the procedures regulated by the Constitution. It cannot be expected each and every law dealing with specific legislative matter to preview a special procedure for its adoption. Finally, it is for the legislative body to decide.

90. Therefore, the Court concludes that the procedure and adoption of the Law on Ratification of the Demarcation is in conformity with the Constitution. In this connection, the Court underscores, in accordance with the principle of hierarchy of norms, that laws are subjected to the Constitution and not the other way around.

91. It follows, that that the Applicants' allegation on violation of Article 18 of the Constitution is manifestly ill-founded on a constitutional basis.

Allegation on violation of Article 69 (3) of the Constitution

92. The Court further recalls that the Applicants complain that Article 69 (3) of the Constitution, in connection with Article 51 (3) of the Rules of Procedure of the Assembly, was violated because it was not verified if all Deputies who made the quorum voted "For", "Against" or "Abstained".

93. The Court notes that, according to the transcript of the extraordinary plenary session of the Assembly, ninety-one Deputies were present and voted. Eighty (80) Deputies voted in favor, eleven (11) Deputies voted against, with no abstention. The Law on Ratification of the Demarcation was adopted in its entirety. Thus, the legislative procedure was conducted in accordance with Article 18 (1) of the Constitution which deals with the ratification of international agreements.

94. It follows, that the allegation on violation of Article 69 (3) of the Constitution is manifestly ill-founded on a constitutional basis.

Allegation on violation of Articles 18 of the Constitution in conjunction with Article 21 of the Rules of Procedure of the Assembly

95. The Court finally recalls that the Applicants claim a violation of Articles 18 and 80 of the Constitution in conjunction with Article 21 of the Rules of Procedure of the Assembly because the expelled Deputies were denied the right to express their free will.

96. The Court notes that those Deputies were expelled from the Assembly Session 'due to throwing tear gas'. The Court considers that "throwing gas" does not come within the ambit of constitutionalism and the rule of law. As to the assertion that the expelled Deputies did not factually throw or are not guilty of throwing tear gas, it is for the respective authorities to make the necessary investigations and conclusions based on the Rules of Procedure of the Assembly and other applicable legislation. Therefore, the Court reviews the constitutionality of a legislative procedure and its compliance with the relevant provisions of the Constitution.

97. In view of the above considerations, the Court notes that the Assembly followed the procedures prescribed in paragraphs 1 and 4 of Article 65 [Competencies of the Assembly], paragraph 1 of Article 18 [Ratification of International Agreements] of the Constitution, Article 10 [Ratification of International Agreements] of the Law on International Agreements and Rule 60 of the Rules of Procedure of the Assembly.

98. It follows, that this allegation on violation of Articles 18 of the Constitution is manifestly ill-founded on a constitutional basis.

Conclusion Regarding the procedure followed

99. Therefore, as to the part of the Referral regarding the procedural complaint for the adoption of the Law on Ratification of the Demarcation, the Court concludes that the procedure followed for the adoption of the challenged Law is compatible with the Constitution of the Republic of Kosovo.

Regarding the substance of the contested Law

100. The Applicants complain with respect to the standards used by the Commission for Demarcation and its alleged overstepping of the given constitutional mandate resulting in a violation of the Constitution.

101. In this respect, the Court reiterates that *"international agreements serve to satisfy a fundamental need of States to regulate by consent issues of common concern, and thus to bring stability into their mutual relations. Thus, International Agreements are instruments for ensuring stability, reliability and order in international relations and therefore the international agreements have always been the primary source of legal relations between the States"*. (Constitutional Court case No. KO95/13, *Visar Ymeri and 11 other Deputies,* Judgment of 9 September 2013, paragraphs 94).

102. In this connection, the Court first assesses whether it is competent under the Constitution to deal with these complaints. As said above in the comparative analysis, there are some Constitutions that empower Constitutional Courts to review the conformity of international agreements with the Constitution. For example, Albania and Bulgaria empower their respective Constitutional Courts to review the constitutionality of an international agreement prior to its ratification; while Bosnia and Herzegovina, Croatia and Macedonia have chosen not to give jurisdiction to their Constitutional Courts to review international agreements. In addition, Slovenia has adopted a mixed system whereby, during the ratification procedure, the Constitutional Court reviews the constitutionality of international agreements if expressly requested by the President, the Government or one third of the Deputies of the Parliament. (Constitutional Court case No. KO95/13, *Ibidem,* paragraphs 93-101).

103. Thus, the comparative analysis reveals that Constitutional Courts of the surveyed countries generally do not have jurisdiction to review the constitutionality of international agreements after the adoption of the ratification law by the Parliament. A few Constitutional Courts may review the constitutionality of international agreements prior to its ratification based on an explicit empowering by a Constitution.

104. The Court considers that the Law on Ratification of the Demarcation and the International Agreement on Demarcation are two separate legal acts. Each of these acts follow a different legal procedure. As to the adoption of the Law on Ratification of the Demarcation by the Assembly, the Court notes that this Law was adopted by the required two-thirds (2/3) majority and in only one reading, as constitutionally

prescribed. Therefore, the Court considers that the adoption of the Law on Ratification of the Demarcation by the Assembly was in compliance with the procedural provisions of the Constitution.

105. In addition, the Court considers that the purpose of the challenged Law is to confirm the international character of the Agreement on Demarcation of the State Borders, and to incorporate the Agreement into the legal system of the Republic of Kosovo and strengthen its statehood.

106. Regarding the substance of the International Agreement on Demarcation of the State Borders, the Court notes that no Article of the Constitution provides for a review, by the Court, of the constitutionality of the substance of international agreements.

107. In these circumstances, it follows that under the Constitution the Court has jurisdiction to review the Law on the Ratification of the Demarcation, but it is not empowered to review whether the international agreement itself is in conformity with the Constitution. (Constitutional Court case No. KO95/13, *Ibidem*, paragraph 100).

108. Therefore, the Court concludes that it is not within its jurisdiction *ratione materiae* to review the constitutionality of the International Agreement on Demarcation of the State Borders between the Republic of Kosovo and Montenegro.

109. In sum, the Court, rejects the Applicants request to review the constitutionality of the International Agreement on Demarcation of State Borders between the Republic of Kosovo and Montenegro as it does not comprise the substance of the contested Law on Ratification of the Demarcation. The Law on Ratification of the Demarcation is, in substance, a tool for the ratification of an international agreement, but the substance of the international agreement itself does not come within the ambit of constitutional review by the Court.

110. As far as the proper substance of the Law on Ratification of the Demarcation is concerned, the Applicants do not elaborate separately on its substance from the subject of ratification at stake, i.e. the International Agreement of Ratification of the State Border. The Court notes that the substance of the challenged Law is the content of the Law as such and reiterates that the International Agreement does not comprise its substance. Based on this reasoning the Court concludes that the substance of the Law on Ratification of the Demarcation does not contradict constitutional provisions and is, therefore, in conformity with the Constitution.

FOR THESE REASONS

The Constitutional Court therefore, pursuant to Article 113.5 of the Constitution, Articles 20, 42 and 43 of the Law and Rule 36 of the Rules, on 18 April 2018,

DECIDES

I. TO DECLARE unanimously the Referral admissible;

II. TO DECLARE unanimously that the procedure followed for the adoption of Law No. 06/L-060 on Ratification of the Agreement on Demarcation of the State Border between the Republic of Kosovo and Montenegro is in compliance with the Constitution;

III. TO DECLARE unanimously that the Law No. 06/L-060 on Ratification of the Agreement on Demarcation of the State Border between the Republic of Kosovo and Montenegro is not in contradiction with the Constitution;

IV. TO REJECT unanimously the Applicants' request to review the International Agreement on Demarcation of the State Border between the Republic of Kosovo and Montenegro as being incompatible *ratione materiae* with the Constitution and thus outside of the scope of the Court's jurisdiction;

V. TO DECLARE that, pursuant to Article 43 of the Law on Court, the Law on Ratification of the Agreement on Demarcation of the State Border between the Republic of Kosovo and Montenegro adopted by the Assembly of the Republic of Kosovo shall be sent to the President of the Republic of Kosovo for promulgation;

VI. TO NOTIFY this Judgment to the Applicants, the President of the Republic of Kosovo, the President of the Assembly of Kosovo and the Government of Kosovo;

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

VII. TO DECLARE this Judgment effective immediately.

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

KI122/17, Request for constitutional review of Decision Ae. No. 185/2017 of the Court of Appeals of 11 August 2017, and Decision IV. EK. C. No. 273/2016 of the Basic Court in Prishtina of 14 June 2017

KI122/17, Applicant: Česká Exportní Banka A.S.

Judgment of 18 April 2018

Keywords*: res judicata, right to fair and impartial trial, legal certainty, injunctive relief, applicability of Article 31 of the Constitution and Article 6 of the ECHR in preliminary proceedings.*

The Applicant was a foreign company, Česká Exportní Banka A.S., based in the Czech Republic, which had concluded a work contract with a local company, Compact Group L.L.C., based in the Republic of Kosovo. The contracting parties agreed that their disputes would be resolved through arbitration, before the Arbitration Court of the Czech Chamber of Commerce. The latter, upon the Applicant's request, issued an Arbitration Award by which it obliged Compact Group L.L.C. to pay the Applicant an amount of 1,364,527.00 € plus default interest. The Arbitration Award was upheld by the regular courts and was declared as enforceable decision in the Republic of Kosovo. Furthermore, the Enforcement Order issued by the Private Enforcement Agent, which required the execution of the Arbitration Award, was also upheld.

One day after the Arbitration Award was upheld as a final, binding and enforceable decision in the Republic of Kosovo, the Compact Group L.L.C. rendered the Decision for the voluntary dissolution of their company. Through this decision, the Compact Group L.L.C. declared that it did not have any unpaid obligation towards third parties. The Applicant requested the Basic Court in Pristina - Department for Commercial Matters, the annulment of the Decision on voluntary dissolution as unlawful. In addition to the requests in his main claim, the Applicant requested the Basic Court to impose an injunctive relief aimed at safeguarding the assets and means necessary for the execution of the Arbitration Award.

Regarding the Applicant's request for injunctive relief, there were four sets of first instance and appeal decisions, respectively four Basic Court decisions and four Court of Appeals decisions. Before the Constitutional Court, the fourth set of decisions is being challenged. The Applicant alleges that the fourth set of decisions violated its right to a fair trial because they overturned previous decisions which the Applicant considered to be final and binding, and, as such, res judicata.

The Applicant, in addition to the request to declare the challenged decisions invalid, it also requested that the decisions that had become final and binding be declared *res judicata* decisions. The Applicant's main argument was that the Court of Appeals had reopened by self-initiative and beyond the requests of the litigating parties, the issues which had already been confirmed by its own earlier decision.

The Constitutional Court declared the Referral admissible and found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because it considered that the Court of Appeals did not respect the principle of legal certainty and did not respect a final decision. The Court also found that the Court of Appeals ignored in entirety all the Applicant's allegations in respect of *res judicata* issues and did not respond to the Applicant's arguments in this regard. As a result of these violations, the Court found that the Applicant has been deprived of the benefit of a final and binding court decision.

Regarding the proceedings as a whole, the Court also expressed its concern that the Applicant is compelled to undertake these additional proceedings against the voluntary dissolution of the respondent company in order to realize the execution of a final and binding judicial decision regarding its Arbitration Award.

Another important point of this Judgment is that, for the first time, the Court has interpreted the applicability of Article 31 of the Constitution (and Article 6 of the ECHR) in the preliminary proceedings. Based on the ECtHR case law (*Micallef v. Malta*, Application No. 17056/06, Judgment, [GC], 15 October 2009), the Court stipulated a two-step test based on which the applicability of these guarantees should be considered on case-by-case basis.

Finally, the Court declared the Referral admissible; it held that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; it found that the fourth group of (challenged) decisions are null and void; it found that the Decision of the Court of Appeals [Ae. No. 185/2017 of 16 December 2017] is final and binding, and as such *res judicata* regarding three specific points, which must be executed.

JUDGMENT

In

Case No. KI122/17

Applicant

Česká Exportní Banka A.S.

Constitutional review of
Decision Ae. No. 185/2017 of the Court of Appeals, of 11 August 2017, and
Decision IV. EK. C. No. 273/2016 of the Basic Court in Prishtina, of 14 June 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was filed by Česka Exportní Banka A.S, with seat in Prague, the Czech Republic (hereinafter, the Applicant), represented by Dastid Pallaska, a lawyer in Prishtina.

Challenged Decisions

2. The Applicant challenges Decision Ae. No. 185/2017 of the Court of Appeals, of 11 August 2017, and Decision IV. EK. C. No. 273/2016 of the Basic Court in Prishtina - Department for Commercial Matters, of 14 June 2017.

3. The Challenged Decisions concern the Applicant's request for injunctive relief against the Compact Group LL.C. pending the outcome of its main claim in contested proceedings.

Subject Matter

4. The subject matter of the Referral is the constitutional review of the Challenged Decisions, which allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution) in conjunction with Article 6 (Right to a Fair Trial) and Article 13 (Right to an Effective Remedy) of the European Convention on Human Rights (hereinafter, the ECHR).

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 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 paragraph (1) of Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 11 October 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 12 October 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (Presiding), Ivan Čukalović and Gresa Caka Nimani.

8. On 13 October 2017, the Court informed the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeals and the Basic Court.

9. On 18 October 2017, the Applicant submitted a translation of the Referral form in the English and Serbian languages.

10. On 2 November 2017, the Court sent a copy of the Referral to the Compact Group LL.C., in its capacity of an interested party, and invited it to submit comments, if any, no later than 13 November 2017. Within the set deadline, the Compact Group LL.C. submitted their comments.

11. On 15 November 2017, the Court sent a copy of the comments submitted by the Compact Group LL.C. to the Applicant.

12. On 12 March 2018, the Review Panel considered the Report of the Judge Rapporteur and recommended to the Court the admissibility of the Referral.

13. On 18 April 2018, the Court by majority declared the referral admissible, and decided by majority to hold that there has been a violation.

Summary of facts

14. In 2010, the Applicant entered into a contractual agreement with the Compact Group LL.C.., a company based in Kosovo. The subject of the "Contract on Work" was *"[…] production, supply, assembly and putting into operation of the technology for expansion of the plant for production and filling of mineral, table and flavoured water […]."*

15. The above-mentioned contractual parties agreed that any dispute emerging between them, if not resolved amicably within 30 days, may be submitted to arbitration before the Arbitration Court attached to the Economic Chamber of the Czech Republic (hereinafter, the Arbitration Court).

A. Arbitration Proceedings

16. On 12 June 2012, in accordance with the contractual rules on disputes, the Applicant submitted a claim against the Compact Group LL.C. to the Arbitration Court.

17. On 30 January 2013, the Arbitration Court rendered an Arbitration Award in favor of the Applicant which reads as follows:

I. The Defendant [Compact Group LL.C.] *is obliged to pay the Claimant* [the Applicant] *the amount of EUR 1,364,527.00 (one million three hundred and sixty four thousand, and five hundred and twenty seven Euros) and the default interest […].*
II. The Defendant is obliged to pay a contractual penalty in the amount of […] within 3 (three) days from legal force of this arbitration award.
III. The Defendant is obliged to pay costs of the proceedings comprising of the arbitration fee in the amount of […].

18. On 13 March 2014, the Arbitration Court corrected its Arbitration Award, but only pertaining to some technical and numerical errors

which were considered to have been rightfully pointed out by the Compact Group LL.C..

B. Proceedings to recognize the Arbitration Award in Kosovo

19. On 18 June 2014, the Applicant filed a request for the recognition of the above-mentioned Arbitration Award before the Basic Court in Prishtina – Department for Commercial Matters (hereinafter, the Basic Court).

20. On 5 December 2014, the Basic Court [Decision I.C. No. 355/2014] recognized the Arbitration Award and declared it as an executable document that can be enforced in the Republic of Kosovo.

21. On 15 December 2014, the Compact Group LL.C. submitted an appeal to the Court of Appeals against the above-mentioned Decision of the Basic Court.

22. On 9 February 2015, the Court of Appeals [Decision Ae. Nr. 13/2015] rejected the appeal of the Compact Group LL.C. and confirmed the Decision [I.C. No. 355/2014] of the Basic Court.

23. On 20 March 2015, the Decision on recognition of the Arbitration Award was certified as a final, binding and enforceable decision in the Republic of Kosovo.

C. Proceedings after the recognition of the Arbitration Award

Decision on voluntary dissolution of Compact Group LL.C..

24. On 21 March 2015, following the recognition of the Arbitration Award, the shareholders of the Compact Group LL.C., issued a Decision on Voluntary Dissolution of their company which reads as follows:

"From the date of approval of this Decision the Corporation [Compact Group LL.C.] *cannot undertake any working action besides the actions that are related to the application of the voluntary dissolution procedure […].*

The Corporation does not have unpaid obligations towards third persons; however, all the natural persons and legal entities, which have credit claims against the Corporation, are informed that they shall address to the liquidator in the main office of the Corporation […] within a time limit of 30 days from the date when the notice is declared. […]."

Enforcement Order of the Arbitration Award

25. On 26 March 2015, the Applicant submitted a proposal for the enforcement of the certified Arbitration Award before a Private Enforcement Agent.

26. On the same day, the Private Enforcement Agent [Order P. No. 246/15] approved the Applicant's enforcement proposal against the Compact Group LL.C. (hereinafter, the Enforcement Order).

27. On 7 April 2015, the Compact Group LL.C. submitted an objection against the Enforcement Order before the Basic Court.

28. On 7 July 2015, the Basic Court [Decision CPK. No. 40/15] approved the objection filled by the Compact Group LL.C. thus repealing the Enforcement Order.

29. On 24 July 2015, the Applicant, through the Basic Court, submitted an appeal to the Court of Appeals against the above-mentioned Decision of the Basic Court.

30. On 13 October 2015, considering that the appeal of the Applicant had not been forwarded to the Court of Appeals for three months, the Applicant submitted an urgent request to the Basic Court to forward its appeal to the Court of Appeals so that the latter could decide on the matter.

31. On 1 March 2016, the Court of Appeals [Decision Ac. No. 3865/15] approved the appeal of the Applicant as grounded and amended the Decision [CPK. No. 40/15, of 7 July 2015] of the Basic Court. Through this Decision, the Court of Appeals rejected the objection filled by the Compact Group LL.C. as ungrounded.

32. Consequently, the Enforcement Order issued by the Private Enforcement Agent became final and binding (hereinafter, the Final Enforcement Order).

Contested proceedings against the Decision on Voluntary Dissolution of Compact Group LL.C..

33. On 30 May 2016, the Applicant requested to the Basic Court the annulment of the Decision on Voluntary Dissolution of the Compact Group LL.C. and compensation for material damage.

34. The Applicant claimed that the Decision on Voluntary Dissolution was unlawful considering that: i) it was issued based on a false declaration/statement of the Compact Group LL.C. that it did not have any financial obligations towards third parties; ii) the procedure for voluntary dissolution was not carried out in accordance with the applicable law; iii) the shareholders of the Compact Group LL.C. rendered the Decision on Voluntary Dissolution one day after the Arbitration Award was certified as a final court decision with the sole intention to impede and avoid the lawful enforcement of the Arbitration Award; and iv) the shareholders of the Compact Group LL.C. sought to impede the execution of the Arbitration Award by transferring all movable and immovable property of the Compact Group LL.C. to another Corporation, namely Adea Group LL.C..

35. Based on these allegations, the Applicant, through its claim, requested from the Basic Court the following:

a. to annul the Decision on Voluntary Dissolution as unlawful and invalid;

b. to annul all decisions and notifications of the Compact Group LL.C.. taken following the Decision on Voluntary Dissolution;

c. to oblige, on solidary basis, the Compact Group LL.C. and its shareholders as well as Adea Group LL.C. to pay the debt and material damage in the amount of EUR 1,364,527.00 as well as procedural costs.

36. Together with its claim requesting the annulment of the Decision on Voluntary Dissolution, the Applicant also requested the courts to provide it with injunctive relief (see below under item D).

37. To date, the regular courts have not decided on the claim of the Applicant requesting the annulment of the Decision on Voluntary Dissolution. All regular courts proceedings are related to the injunctive relief.

D. Regular courts proceedings regarding the Applicant's request for Injunctive Relief filed against Compact Group LL.C., the shareholders of Compact Group LL.C. and Adea Group LL.C.

38. As indicated above, together with its claim requesting the annulment of the Decision on Voluntary Dissolution, the Applicant also filed a request for injunctive relief against the Compact Group LL.C., against

the shareholders of the Compact Group LL.C., and against the newly established Adea Group LL.C..

39. Through its request for injunctive relief, the Applicant requested the Basic Court to:

a. block/freeze the bank accounts of the Compact Group LL.C.;

b. block/freeze the bank accounts of the shareholders of Compact Group LL.C.;

c. prohibit the alienation, concealment, charge with - and/or disposal of immovable and movable property of the Compact Group LL.C. and its shareholders;

d. prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C.; and

e. block/freeze the bank accounts of the newly established Adea Group LL.C.; prohibit the alienation, concealment, charge with- and/or disposal of- immovable and movable property of the Adea LL.C.; and prohibit any legal statutory changes made by Adea Group LL.C..

40. With respect to the Applicant's request for injunctive relief the regular courts rendered eight decisions in total. There were four sets of first instance and appeal decisions, respectively four Basic Court decisions and four Court of Appeals decisions. Before the Constitutional Court, the fourth set of decisions is being challenged. The Applicant alleges that the fourth set of Decisions violated its right to a fair trial because they overturned previous decisions which the Applicant considered to be final and binding, and, as such, res judicata. The details of each set of decisions will follow hereunder.

First set of decisions on Injunctive Relief

41. On 30 June 2016, the Basic Court rendered its First Decision on Injunctive Relief [I.C. No. 273/2016], by which it partly approved the Applicant's request for injunctive relief and declared null the whole proceedings regarding the voluntary dissolution of the Compact Group LL.C..

42. More specifically, the Basic Court approved the Applicant's request to:

a. block/freeze the bank accounts of the Compact Group LL.C.;

b. block/freeze the bank accounts of the shareholders of the Compact Group LL.C.;
c. prohibit the alienation, concealment, charge with - and/or disposal of- immovable and movable property of the Compact Group LL.C. and its shareholders;
d. prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C.. Due to the partial approval of the Applicant's request, the Basic Court rejected all of the Applicant's requests related to Adea Group LL.C..

43. Against the First Decision on Injunctive Relief of the Basic Court, both the Applicant and the Compact Group LL.C. filed appeals before the Court of Appeals. The Compact Group LL.C. requested to remand the matter for retrial to the first instance court due to substantial violations of the contested procedure law. The Applicant requested that, in addition to the Basic Court's approval of four out of its five requests, its fifth request, namely regarding Adea Group LL.C., be reconsidered and approved by the Court of Appeals.

44. On 16 August 2016, the Court of Appeals rendered its Decision Ae. No. 167/2016 (hereinafter, the First Decision of the Court of Appeals on Injunctive Relief), quashing entirely the First Decision on Injunctive Relief of the Basic Court and remanding the matter for retrial.

45. Therefore, the Court of Appeals rejected the Applicant's appeal entirely, while it approved the appeal of the Compact Group LL.C. as grounded. With its Decision, the Court of Appeals remanded the matter for retrial to the Basic Court because of substantial violations of the provisions of the contested procedure.

46. The Court of Appeals considered that the Basic Court failed to: i) clarify the issue of subject-matter jurisdiction relating to the annulment of the Decision on Voluntary Dissolution of the Compact Group LL.C.; ii) clarify the legitimacy of the shareholders of the Compact Group LL.C., as parties to the proceedings; iii) assess the admissibility of the Applicant's claim. According to the Court of Appeals, the Basic Court can decide on the Applicant's request on injunctive relief only after it has responded and clarified the points requested by the Court of Appeals.

47. Consequently, the Court of Appeals obliged the Basic Court to undertake the following actions in retrial:

a) to assess the court's subject-matter jurisdiction;
b) to assess the admissibility of the Applicant's claim; and

c) to assess the legitimacy of the shareholders of the Compact Group LL.C., as parties to the proceedings.

Second set of decisions on Injunctive Relief

48. On 29 September 2016, the Basic Court rendered its Second Decision on Injunctive Relief [I.C. No. 273/2016], following the Court of Appeals request for retrial. The Applicant's request for injunctive relief was again partly approved.

49. Identical to its First Decision on Injunctive Relief, the Basic Court approved the Applicant's request to:

i) block/freeze the bank accounts of the Compact Group LL.C.;
ii) block/freeze the bank accounts of the shareholders of the Compact Group LL.C..;
iii) prohibit the alienation, concealment, charge with - and/or disposal of- immovable and movable property of the Compact Group LL.C. and its shareholders;
iv) prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C..

50. The Basic Court, through its Second Decision on Injunctive Relief, once again, rejected the Applicant's requests' related to Adea Group LL.C.

51. The Basic Court assessed all three issues for which the case was remanded for retrial by the Court of Appeals in its First Decision on Injunctive Relief.

52. Firstly, in respect of (a) the court's subject-matter jurisdiction, the Basic Court considered the arguments submitted by the Applicant and the Compact Group LL.C. in the hearing of 16 September 2016 and decided that *"the subject-matter jurisdiction to decide regarding the claim of the Applicant belongs precisely to the* [Basic Court] *Department for Commercial Matters."*

53. Secondly, in respect of (b) the admissibility of the Applicant's claim, the Basic Court assessed such admissibility and concluded that the Applicant has made its claim credible and the legal conditions foreseen by Article 297.1 of the Law on Contested Procedure for the imposition of the injunctive relief have been met. More specifically, the Basic Court reasoned as follows:

"[The Applicant] *made credible the circumstance that Compact Group LL.C. remained in debt to* [the Applicant] *in the amount of EUR 1.364.527.00 defined by a Decision of foreign Arbitration, which passed the judicial procedure of recognition and declaration as executable and it won the title of executive document in enforcement procedure. Therefore, the Applicant made reliable the circumstance that the objectors of the injunctive relief, Compact Group LL.C., continuously avoided the voluntarily execution of the Arbitration Decision, it even conducted transactions with the purpose of preventing the execution* [of the Arbitration Award] *in the enforcement procedure. […]"*

54. Thirdly, in respect of (c) the legitimacy of the shareholders of the Compact Group LL.C., as parties to the proceedings, the Basic Court reasoned as follows:

"Therefore, there is a risk that without imposing such measures, the realization of the request of [the Applicant] *could become difficult or impossible. This happens due to the fact that the case files confirm that all the actions undertaken until now by the objector of the injunctive relief "Compact Group" and its shareholders created a state of insolvency at the objectors of the injunctive relief and to avoid the execution of the Decision of the arbitration. Therefore, if no limiting measures are undertaken at this stage of the procedure against the objectors of the injunctive relief, the risk of realization of the request of the proposer of the insurance will become greater, of course if the request results to be grounded. […]* [The Applicant] *made also reliable the circumstance that if the injunctive relief measures are not imposed, Compact Group [LL.C.] and its shareholders may continue with similar actions and transactions with the purpose of avoiding the obligations towards the* [Applicant] *or even to create the final situation wherein it will be impossible to execute the debt. Therefore, the Court concluded that under such situation, it is necessary to impose the injunctive relief measures, as specified in the enacting clause of this Decision."*

55. Against the Second Decision on Injunctive Relief of the Basic Court, the Compact Group LL.C. filed an appeal to the Court of Appeals proposing that the Court of Appeals reject the Applicant's request for injunctive relief as impermissible or ungrounded. The Applicant submitted a reply to the appeal of the Compact Group LL.C. requesting the confirmation of the Second Decision on Injunctive Relief of the Basic Court.

56. On 16 December 2016, the Court of Appeals rendered its Decision Ae. No. 241/2016, (hereinafter, the Second Decision of the Court of Appeals on Injunctive Relief).

57. The Court of Appeals partly approved the appeal of the Compact Group LL.C.. The Court of Appeals remanded the matter for retrial to the Basic Court in respect of only one point, namely item (ii) blocking/freezing of the bank accounts of the shareholders of Compact Group LL.C.., because the Court of Appeals considered that the Basic Court had not sufficiently reasoned why the shareholders of a Limited Liability Company should be held personally liable in this case.

58. The Court of Appeals rejected the appeal of the Compact Group LL.C. regarding the other items that were approved by the Basic Court, and upheld the following points:

i) to block/freeze the bank accounts of the Compact Group LL.C.;
iii) to prohibit the alienation, concealment, charge with - and/or disposal of- immovable and movable property of the Compact Group LL.C. and its shareholders;
iv) to prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C..

59. The Court of Appeals reasoned its Decision as follows:

"The Court of Appeals approves the legal assessment of the first instance court as regular and lawful due to the reason that the challenged Decision [I.C. No. 273/2016 of 29 September 2016 i.e. the Second Decision on Injunctive Relief of the Basic Court] *is not rendered with substantial violations of the provisions of the contested procedure [...] and also the substantive law has been correctly applied, the appealed allegations are reviewed by the Court of the second instance pursuant to the official duty and based on Article 194 of the LCP* [Law on Contested Procedure], *except in item I, paragraph 2.*
The Court of Appeals took this legal assessment because according to Article 297.1, item a) and b) of the LCP defines that: measures for injunction can be determined: a*) if the proposer of the injunction makes the existence of the request believable or of the existence of his subjective right, and b) in case there is a danger that without determining an injunction of the kind the opposing party will make it impossible or make it difficult the implementation of the request, especially with alienating of its estate, hiding it, or other way through which it will change the existing situation of goods, or in another way will negatively impact on the rights of the insurance party that proposed.*
Based on the above mentioned provisions on imposing the injunctive relief, the legal conditions pursuant to which the proposer shall make reliable the existence of the claim, namely to prove that the failure to impose such measure would make impossible or make significantly difficult for the opposing party to realize the request, especially the alienation of the

property and this would make impossible to realize his request, should be met. In the present case the proposer of the injunctive relief made reliable his request due to the fact that "Compact Group" LL.C. remained in debt to the proposer of the security in the amount of EUR 1.364.527.00, determined by the Decision of the foreign arbitration, which went through the Court procedure of recognition and declaration as executable and it won the title of the executive document in execution procedure. Further on, the claimant – proposer [the Applicant] *made reliable the existence of the request and the risk that the failure to impose the injunctive relief would make difficult or impossible the realization of his request because "Compact Group" LL.C. continuously avoided the voluntarily execution of the Decision of the arbitration, it even conducted transaction with the purpose of avoiding the execution in the execution procedure and it can continue to undertake similar actions and transaction with the purpose of avoiding the obligations towards the proposer of the insurance or even to create the final situation wherein it will be impossible to execute the debt.*
Therefore, the Court of Appeals considers that the conditions defined under Article 297.1, under item a) and b) of the LCP, for imposing the injunctive relief have been met because in the present case, the proposer made reliable the existence of the request or its subjective right and it exists the risk that if such measure is not imposed, it would cause considerable damage to the [Applicant], *which could be hardly repaired."*

Third set of decisions on Injunctive Relief

60. On 24 February 2017, the Basic Court rendered its Third Decision on Injunctive Relief [I.C. No. 273/2016], following the Court of Appeals' request for a retrial on a specific point. The Basic Court clarified that its previous decision has been annulled in relation only to the (ii) blocking/freezing of bank accounts of the shareholders of the Compact Group LL.C..

61. The Basic Court confirmed that the other measures for injunctive relief approved by the Basic Court in its Second Decision on Injunctive Relief [I.C. No. 273/2016] have been upheld by the Court of Appeals and that the rest of the decision remained unexamined.

62. The Basic Court stated that, as a result, the subject of review of this retrial procedure was only the request of the Applicant to (ii) block/freeze the bank accounts of the shareholders of the Compact Group LL.C.. It further stipulated that all the legal conditions to impose this additional injunctive relief measure existed and that, as a result, the Applicant's request is to be approved.

63. In other words, the Basic Court through its Third Decision on Injunctive Relief, in addition to re-confirming the findings of the Second Decision on Injunctive Relief of the Basic Court and those of the Second Decision on Injunctive Relief of the Court of Appeals, also approved the Applicant's request to (ii) block/ freeze the bank accounts of the shareholders of the Compact Group LL.C..

64. Against the Third Decision on Injunctive Relief of the Basic Court, the Compact Group LL.C. filed an appeal with the Court of Appeals, proposing that the Court of Appeals reject the Applicant's request for injunctive relief.

65. Specifically, the Compact Group LL.C.. submitted two grounds for appeal, namely that:

> (1) the Basic Court had not correctly ascertained whether the shareholders of the Compact Group LL.C. could be held personally liable under the law;
>
> (2) the Applicant's claim in contested proceedings was not admissible because, before submitting a claim in contested proceedings, the Applicant was required to contest the lawfulness of the Decision on Voluntary Dissolution before the Kosovo Business Registration Agency (hereinafter, KBRA), for which the Applicant had missed the deadline.

66. The Applicant submitted a reply to the appeal of the Compact Group LL.C. requesting the confirmation of the Third Decision on Injunctive Relief of the Basic Court.

67. On 30 March 2017, the Court of Appeals [Decision Ae. No. 91/2017] approved the appeal of the Compact Group LL.C. (hereinafter, the Third Decision of the Court of Appeals on Injunctive Relief) and remanded the whole matter for retrial at the Basic Court. In the words of the Court of Appeals, *"the case is returned to the court of first instance for review and reconsideration"*.

68. The Court of Appeals ordered that the adjudication at the Basic Court be conducted by another judge considering that *"despite instructions provided to the Basic Court"*, the latter had again persisted with the same position by imposing the injunctive relief against the shareholders of the Compact Group LL.C.. The Court of Appeals considered that the Third Decision on Injunctive Relief of the Basic Court contained substantial violations of the provisions of the contested procedure and as a result obliged the Basic Court to avoid

the shortcomings, namely: to evaluate the facts; to evaluate its competence to decide on the matter and the legitimacy of all parties involved; to assess the admissibility of the claim; and to decide correctly and according to the law.

Fourth set of decisions on Injunctive Relief [the Challenged Decisions]

69. On 11 May 2017, the Basic Court held a public hearing at which the Applicant and the Compact Group LL.C. were represented.

70. The Applicant submitted that the Court of Appeals had violated Article 2 of the Law on Contested Procedure, which foresees that the court must decide within the scope of the requests of the parties to the proceedings. The Court of Appeals had also exceeded the scope of its competence, because it had found violations of the law for issues that it had already decided in final instance. More specifically, the Applicant claimed that the Court of Appeals in its Second Decision on Injunctive Relief had confirmed the admissibility of the Applicant's claim and had confirmed the issue of the subject-matter jurisdiction. Furthermore, the Applicant maintained that the Court of Appeals had confirmed the injunctive relief regarding three points, which had therefore become final and binding and no longer subject to appeal.

71. According to the Applicant, the following points had been confirmed:

i) to block/freeze the bank accounts of the Compact Group LL.C.;
iii) to prohibit the alienation, concealment, charge with - and/or disposal of- immovable and movable property of the Compact Group LL.C. and its shareholders;
iv) to prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C..

72. The Compact Group LL.C. submitted that the Court of Appeals has treated its complaint *"within the allegations contained in the appeal, and that this matter* [as raised by the Applicant] *is not the subject matter of this public hearing."* More specifically, the Compact Group LL.C. submitted that the first instance court had not respected the instructions of the second instance court according to which the shareholders of a limited liability company cannot be held personally responsible for the dissolution of a company. In case it considered that the voluntary dissolution of the company was not done in conformity with the law, the Applicant should have directed its claims to the KBRA in accordance with Article 17 of the Law on Business

Organizations. If the Applicant was not satisfied with the decisions of the KBRA, then it could pursue judicial proceedings.

73. The Applicant responded stating that Article 17 of the Law on Business Organizations did not provide for any remedy against the Decision on Voluntary Dissolution, but merely allowed for appeals against the "*registration*" of the Decision on Voluntary Dissolution, and not for appeals against the Decision itself.

74. On 14 June 2017, following the conclusion of the public hearing, the Basic Court rendered its Fourth Decision on Injunctive Relief [IV. EK. C. no. 273/2016]. Through this Decision, the Basic Court rejected as premature the Applicant's request for injunctive relief because the Applicant should have first pursued administrative remedies at the KBRA challenging the actions of this Agency.

75. The Basic Court reasoned:

"[…] The Court acting in accordance with the instructions of the Court of Appeals, rendered the Decision as provided for in the enacting clause […] because:

- […] [the Applicant] *did not use all legal remedies from the moment when it was informed of the dissolution of the Compact Group LL.C. as a legal entity, respectively did not comply with Article 17 of the Law no. 02 / L-123 on Business Organizations […]. Based on the provisions of Article 17,* [the Applicant] *should have first used the legal remedies, to challenge the decision on the dissolution of the legal entity with the administrative authorities […] when they noticed that its dissolution was done illegally, or as stated by hiding its well-known obligations towards the creditors* [Compact Group LL.C.] *[…]. The proposer* [the Applicant], *after having exhausted all administrative appeal procedures before the administrative authorities, should have approached the Court in order to assess the illegality of the decision on the voluntary dissolution of the legal entity issued by the Kosovo Business Registration Agency. If such a procedure had been respected, the Court could have made a decision to invalidate or confirm entirely or partially the decision of the Kosovo Business Registration Agency, but as the claimant* [the Applicant] *did not act as authorized by Article 17 of the Law on Business Organizations, the Court considers that for the time being, the conditions for applying Article 17.5 of the that Law have not been met, therefore according to this article the claim proves to be premature. […]*
Analyzing all the above-mentioned issues, the Court finds that:
-The proposer of the injunctive relief [the Applicant] *has not met the basic condition for imposing the injunctive relief, which is the credibility of the*

claim. […] The Court also considers that there are no legal requirements for the imposition of the injunctive relief i.e. to freeze of bank accounts of the shareholders […]. Such a measure would be in full violation of the provision of Article 80 of the Law on Business Organizations. […].”

76. Against the Fourth Decision on Injunctive Relief of the Basic Court, the Applicant filed an appeal [Fourth Appeal and last appeal] with the Court of Appeals alleging essential violations of the provisions of contested procedure, incomplete and incorrect determination of the factual situation and erroneous application of the substantive law. Mainly, the Applicant alleged that the Basic Court through its Fourth Decision on Injunctive Relief *“quashed a final court decision”* [Second Decision on Injunctive Relief of the Basic Court (I.C. No. 273/2016, of 26 September 2016)] and it decided beyond *“the requests submitted by the litigants”*.

77. In particular, the Applicant alleged that the Basic Court required the Applicant to pursue a non-existent remedy, because the KBRA does not make decisions itself, but merely registers decisions taken by businesses/companies. Furthermore, the Applicant alleges that, by its Fourth Decision on Injunctive Relief, the Basic Court prejudiced the outcome of the Applicant’s main claim by deciding that he “*has not met the basic condition for imposing the injunctive relief, which is the credibility of the claim.”*

78. The Compact Group LL.C. filed a reply to the Applicant’s appeal regarding the Fourth Decision on Injunctive Relief of the Basic Court requesting from the Court of Appeals to reject the Applicant’s appeal as ungrounded and to confirm the Fourth Decision on Injunctive Relief of the Basic Court.

79. On 11 August 2017, the Court of Appeals [Decision Ae. No. 185/2017] rejected the appeal of the Applicant as ungrounded (hereinafter, the Fourth Decision of the Court of Appeals on Injunctive Relief) and confirmed the Fourth Decision on Injunctive Relief of the Basic Court.

80. The Court of Appeals reasoned that the Applicant was seeking to prejudge the outcome of its main claim by means of injunctive relief. The Court of Appeals considered that the Applicant had failed to substantiate its request for injunctive relief, because there was no evidence that either the Compact Group LL.C.. or its shareholders would *“hamper or make it difficult fulfillment of its claim, respectively that they are taking action that would change the existing state of affairs or otherwise would negatively affect the rights.”*

81. Furthermore, the Court of Appeals reasoned that *"at this stage of the procedure, there is no final outcome regarding the execution of the claim to the debtor "Compact Group" LL.C., therefore imposing of any injunctive measure against the shareholders would prejudice the main issue and would contradict the Article 80 of the Law on Business Organizations."*

82. Finally, the Court of Appeals considered the other appealing allegations of the Applicant, *"but found that the same were linked with the main issue and not with the reliability of the request for injunctive relief, which is the subject of review at this stage of procedure. Although the* [Applicant] *during the proceedings in the first instance and in its entire appeal, beyond its competencies, deals with the evaluation of the previous decisions of the Basic Court and of the Court of Appeals, in some instances using expressions which exceed the professional language and challenge the authority of the court, however the appeal allegations refer to the main issue and not to the legal requirements for imposing the injunctive relief. […]"*

Applicant's allegations

83. The Applicant requests the constitutional review of two Decisions, namely the Fourth Decision on Injunctive Relief of the Basic Court [IV. EK. C. No. 273/2016, of 14 June 2017] and the Fourth Decision on Injunctive Relief of the Court of Appeals [Ae. No. 185/2017, of 11 August 2017].

84. The Applicant also requests that the Second Decision on Injunctive Relief of the Basic Court [I.C. No. 273/2016, of 29 September 2016] and the Second Decision on Injunctive Relief of the Court of Appeals [Ae. No. 241/2016, of 16 December 2016] be confirmed as final and binding decisions and, as such, *res judicata*.

85. In this regard, the Applicant alleges that the Court of Appeals has violated its 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 well as Article 32 [Right to Legal Remedies] of the Constitution in conjunction with Article 13 (Right to an Effective Remedy) of the ECHR.

86. The Applicant also alleges that the Court of Appeals *"quashed in an unprecedented manner Decision I.C. No. 273/2016 of the Basic Court in Prishtina, Department for Commercial Matters, dated 29 September 2016* [Second Decision on Injunctive Relief of the Basic Court]*, which with respect to, inter alia, the right of the Applicant to*

submit a claim before the Basic Court [...] has been confirmed by Decision Ae. No. 241/2016 of the Court of Appeals, Department for Commercial Matters, dated 16 December 2016 and – as such – represents a final court decision."

87. With respect to the admissibility of the Referral, the Applicant states that its Referral fulfils all of the admissibility criteria and that the Court should accept this case for review on the merits pursuant to the criteria established by the Judgment of the European Court of Human Rights [hereinafter, the ECtHR] in the case of *Micallef v. Malta* (Application no. 17056/06). The Applicant argues that the Challenged Decisions affect its civil rights and, considering that that is so, the safeguards of Article 6 of the ECHR and Article 31 of the Constitution apply to this case.

88. More specifically with respect to the merits of the Referral, the Applicant claims a violation of its rights to:

a. legal certainty and respect for a final court decision;
b. be heard and to a reasoned court decision;
c. access to court;
d. impartial court; and
e. a legal remedy.

i) The right to legal certainty and respect for a final court decision

89. The Applicant claims that the Court of Appeals has overturned a final court decision on its own motion.

90. In this respect, the Applicant argues that the Second Decision on Injunctive Relief of the Basic Court was approved by the Second Decision on Injunctive Relief of the Court of Appeals.

91. By the Second Decision on Injunctive Relief, the Court of Appeals recognized the exclusive competence and subject-matter jurisdiction of the Basic Court in Prishtina – Department for Commercial Matters to review the claim and decide upon it.

92. Furthermore, the Applicant alleges that the Second Decision on Injunctive Relief of the Court of Appeals confirmed the following actions:

i) to block/freeze the bank accounts of the Compact Group LL.C.;

iii) to prohibit the alienation, concealment, charge with - and/or disposal of- immovable and movable property of the Compact Group LL.C. and its shareholders;
iv) to prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C.;

93. The Applicant argues that the afore-mentioned issues were decided by the Second Decision on Injunctive Relief which, following the confirmation of these specific points by the Second Decision of the Court of Appeals on Injunctive Relief, had obtained *"the title of a final court decision."*

94. In relation to this, the Applicant states that *"the overturning of a final court decision in this case occurred despite the fact that the respondents* [Compact Group LL.C.] *in their appeal against the Third Decision on Injunctive Relief did not raise at all the review of the above-mentioned issues that were decided upon by the Second Decision on Injunctive Relief and confirmed by the Second Decision of the Court of Appeals on Injunctive Relief."*

95. In respect of the right to legal certainty and respect for final court decisions, the Applicant refers to the following cases of the ECtHR: case of *Brumărescu v. Romania* (Application No. 28342/95) arguing that *"a final court decision cannot be reopened and/or reconsidered again;"* cases of *Okyay and others v. Turkey* (Application No. 36220/97), *Agrokompleks v. Ukraine* (Application No. 23465/03) and *Tregubenko v. Ukraine* (Application No. 61333/00) arguing that *"the principle of legal certainty represents one of the most important aspects of the rule of law"* and that the *"prohibition to reopen a final court decision extends upon courts and/or judges."*

ii) The right to be heard and right to a reasoned decision

96. The Applicant claims a violation of the right to be heard and to a reasoned decision based on the fact that *"the Challenged Decisions do not mention – much less address – the key claim of the Applicant that the Second Decision on Injunctive Relief, after being confirmed by the Second Decision of the Court of Appeals on Injunctive Relief, represented a final court decision"* with respect to the points that were decided already.

97. The Applicant argues that this essential point of appeal was clearly stipulated in the appeal that the Applicant submitted as well as is present in the Procès-Verbal of the regular court proceedings. Despite its specific appeal on the violation of the *res judicata* principle by

overturning an already final decision, the Applicant claims that the Court of Appeals completely disregarded that argument and did not address it at all in any part of its reasoning.

98. The Applicant further argues that instead of providing reasons to its appeal, the Court of Appeals through its Fourth Decision on Injunctive Relief *"reprimanded the Applicant for raising this claim stating that the Applicant does not have the "competence" to raise claims related to court decisions and stating that such claims attack the "authority of the court"."*

99. In this aspect, the Applicant argues that the *"constitutional right to a decision that is coherently reasoned represents the main procedural guarantee that protects the individuals against the arbitrariness of public authorities, including courts."* To support the allegation that its right to be heard and its right to a reasoned decision have been violated, the Applicant refers to the case-law of the ECtHR, namely the cases of *Garcia Ruiz v. Spain* (Application No. 30544/96); *Pronina v. Ukraine* (Application No. 63566/00); *Nechiporuk and Yonkalo v. Ukraine* (Application No. 42310/04); *Mala v. Ukraine* (Application No. 4436/07); *Hirvisaari v. Finland* (Application No. 49684/99); *Hadjianastassiou v. Greece* (Application No. 12945/87) as well as to the case-law of the Constitutional Court, namely cases KI72/12 and KI132/10.

100. Based on this case-law the Applicant argues, *inter alia*, that *"the principle of justice enshrined in Article 6, paragraph 1, of the ECHR, is also affected if the domestic courts ignore a specific and important point made by a party to the case";* that the courts are called upon to give detailed and convincing reasons *"for their refusal to take evidence proposed by an applicant";* that another function of the right to a reasoned decision is to demonstrate to the parties that they have been heard; and that the courts *"must give such reasons as to enable the parties to make effective use of any existing right of appeal."*

iii) The right of access to court

101. The Applicant claims that, according to the case-law of the ECtHR as established in the case *Le Compte, Van Leuven and De Meyere v. Belgium* (Applications Nos. 6878/75 and 7238/75), the right to access to court implies also the right to submit a claim to a competent court as well as receive a decision on the merits regarding a claim.

102. In connection with this, the Applicant claims that through the Challenged Decisions its right to receive a court decision on the merits

of the claim has been effectively denied by declaring the Applicant's request for injunctive relief as premature and thus asking the Applicant to *"pursue unidentified administrative procedures"* before the KBRA.

103. Furthermore on this point, the Applicant claims that the suggestion of the regular courts in the Challenged Decisions that it should file a claim against the decisions of KBRA is incomprehensible considering that such Agency does not have the legal authority to issue a decision for the voluntary dissolution of the Compact Group LL.C..

104. Lastly on this point, the Applicant argues that *"the denial of the right of access to court by the Challenged Decisions not only lacks legal support but – what is worse – it is in full contradiction with a final court decision which rejected as unfounded the claims/allegations of the opposing party* [Compact Group LL.C. LL.C.] *on the lack of exclusive subject-matter jurisdiction of the Basic Court in Prishtina […]."*

iv) The right to an impartial court

105. In relation to the right to an impartial court, the Applicant raises two claims.

106. Firstly, the Applicant claims that the Basic Court did not have the necessary procedural guarantees for preserving its impartiality due to Court of Appeals' pressure to decide the matter, in substance, as the Court of Appeals thought it was fit and right. The Applicant considers that it was *"precisely for this reason"* that the Basic Court *"surrendered itself to the afore-mentioned pressure and issued the Fourth Decision on Injunctive Relief, which was identical with the Third Decision of the Court of Appeals on Injunctive Relief and which – under the optical illusion of two-tier judicial review – was confirmed by the Fourth Decision of the Court of Appeals on Injunctive Relief."*

107. To support this argument the Applicant argues that the Court of Appeals, with its Third Decision on Injunctive Relief, provided specific decision-making instructions to the Basic Court which led to it effectively exercising the function of the Basic Court. Further on this point, the Applicant argues that *"while the Court of Appeals has hierarchical supremacy over the lower courts and on this basis it could amend the decisions of the lower courts – the Court of Appeals of Kosovo does not have the right to compel the lower courts to decide*

on the assessment of facts and/or application of material law pursuant to the convictions of the Court of Appeals of Kosovo."

108. The second claim of the Applicant has to do with the alleged reprimanding language that the Court of Appeals used to describe the Applicant's specific appeal point that a final court decision had been overturned by the Court of Appeals.

109. The Applicant claims that the Fourth Decision on Injunctive Relief of the Court of Appeals expressed *"clear indignation"* towards the Applicant only because the Applicant *"revealed the unprecedented violation"* of the Third Decision of the Court of Appeals on Injunctive Relief *"by which a final court decision was overturned."*

110. The Applicant argues that according to the case-law of the ECtHR, namely *Kyprianou v. Cyprus* (Application No. 73797/02) the ECtHR *"found that courts violate the impartiality principle every time the court decisions express personal feelings towards the actions undertaken by the parties to the case"* because reflecting feelings of indignation goes contrary to the neutral and impartial nature that a court decision should be characterized with.

v) The right to a legal remedy

111. The Applicant claims a violation of its right to an effective legal remedy considering that the absence of reasoning on the Fourth Decision on Injunctive Relief of the Basic Court prevented the Applicant from effectively exercising its right to a legal remedy.

Applicant's request to the Court

112. In the end, the Applicant requests from the Court the following:

"I. To declare the application for the review of constitutionality of Decision IV. EK. C No. 273/2016 of the Basic Court in Prishtina, Department for Commercial Matters, dated 14 June 2017 and Decision Ae. No. 185/2017 of the Court of Appeals of Kosovo, Department for Commercial Matters, dated 11 August 2017, as admissible.
II. To find that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6, paragraph 1, (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo.

III. To declare as null and void Decision IV. EK. C No. 273/2016 of the Basic Court in Prishtina - Department for Commercial Matters, dated 14 June 2017, and Decision Ae. No. 185/2017 of the Court of Appeals of Kosovo - Department for Commercial Matters, dated 11 August 2017, and to remand the case for reconsideration before the Basic Court in Prishtina - Department for Commercial Matters, in accordance with this Judgment.
IV. To affirm/confirm, as a final court decision, Decision I. C Nr. 273/2016 of the Basic Court in Prishtina, Department for Commercial Matters, dated 29 September 2016, for issues/ points that have been confirmed by Decision Ae. No. 241/2016 of the Court of Appeals of Kosovo, dated 16 December 2016. […]"

Comments submitted by the Compact Group LL.C.

113. The interested party, namely the Compact Group LL.C. recommends to the Court to declare the Referral inadmissible because: i) the arguments presented by the Applicant have to do with the field of legality and the same do not fall under the jurisdiction of the Constitutional Court; and ii) the Challenged Decisions do not constitute a final decision with respect to the merits of the case.

114. With respect to the applicability of the guarantees of Article 31 of the Constitution and Article 6 of the ECHR to the present Referral, the Compact Group LL.C. states that such applicability is *"indisputable"* as confirmed by the Applicant's reference to the ECtHR case-law of *Micallef v. Malta* (Application no. 17056/06). However, the Compact Group LL.C. considers that the content of the above-mentioned case-law is not as it was presented by the Applicant. More specifically, the Compact Group LL.C. argues that the *Micallef v. Malta* case *"enforces the principle that a party may address to the Constitutional Court in case of denial of its right to request injunctive relief with the purpose of securing the claim but does not provide the opportunity to submit the case to the Constitutional Court just because the court* [regular courts] *decides not in favour of the party who has proposed an injunctive relief."*

115. The Compact Group LL.C. considers that the Applicant's arguments that: *"[…] the Court of Appeals by the Third Decision on Injunctive Relief reopened a case which had become final and when the Court of Appeals by remanding the Second Decision on Injunctive Relief of the Basic Court […] had erroneously applied the provisions of the Law on Contested Procedure […] are legality matters and based on the function and the case-law of the Constitutional Court they are not subject of review of the Constitutional Court […]."*

116. With respect to the Compact Group LL.C. observation that Challenged Decisions do not constitute a final decision with respect to the merits of the case, the Compact Group LL.C. states: *"The decisions in question, due to their nature that deals with running of the contested procedure, cannot become final in material aspect since the subject of decision does not mean res judicata and due to this reason, the court is not bounded to such decisions. This means that the court may modify such decisions any time when the legal conditions are met and deciding differently does not mean deciding contrary to the principle 'ne bis in idem' because the case which is modified is not an adjudicated matter."*

Admissibility of the Referral

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

118. In this respect, the Court first 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."

119. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which foresees that: *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent possible."*

120. In this regard, the Court notes that the Applicant is entitled to submit a constitutional complaint, invoking fundamental rights which are valid for individuals as well as for legal persons. (See Constitutional Court case No. KI41/09, *AAB-RIINVEST University LL.C..,* Resolution on Inadmissibility of 27 January 2010, para 14).

121. The Court also refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide:

Article 48
[Accuracy of the Referral]

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

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. […]."

122. Regarding the fulfilment of those criteria, the Court notes that the Applicant has fulfilled the criteria established by Article 113 (7) of the Constitution, as it is an authorized party, contesting acts of public authorities, namely the Decision of the Court of Appeals [Ae. No. 185/2017, of 11 August 2017] and the Decision of the Basic Court [IV. EK. C. No. 273/2016, of 14 June 2017], and has exhausted all legal remedies provided for by law.

123. The Court further notes that the Applicant has accurately specified the rights, guaranteed by the Constitution and the ECHR that have allegedly been violated, in accordance with Article 48 of the Law, and has supported its allegations with specific reference to the case-law of the Constitutional Court and that of the ECtHR. Also, the Court notes that the Applicant has submitted the Referral within the four (4) month legal deadline foreseen in Article 49 of the Law.

124. In respect of applicability of Article 6 of the Convention and Article 31 of the Constitution to preliminary proceedings – as those deciding on the Applicant's request for injunctive relief, the Court observes that such application has been interpreted by the ECtHR through its case-law. The Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the human rights and fundamental freedoms guaranteed by the Constitution in harmony with the ECtHR case-law. Consequently, the Court will determine the applicability of Article 6 of the Convention in conjunction with Article 31 of the Constitution to the facts of the present Referral by relying on the case-law of the ECtHR.

(i) General principles on the applicability of Article 6 of the ECHR to preliminary proceedings

125. The Court first notes that Article 6 of the ECHR, in its civil limb, applies to proceedings determining civil rights or obligations. (See ECtHR case: *Ringeisen v. Austria,* appl. no. 2614/65, Judgment of 22 June 1972).

126. The Court further notes that preliminary proceedings, like those concerned with the granting of an interim measure/injunctive relief, are not usually considered to determine civil rights and obligations and therefore do not usually fall within the ambit of such protection. (See ECtHR cases *Wiot v. France*, appl. no. 43722/98, Judgment of 7 January 2003; *APIS a.s. v. Slovakia*, appl. no. 39754/98, Decision of 13 January 2000; *Verlagsgruppe NEWS GMBH v. Austria*, appl. no. 62763/00, Decision of 23 October 2003; *Libert v. Belgium*, appl. no. 44734/98, Decision of 8 July 2004.)

127. Nevertheless, in certain cases, the ECtHR has applied Article 6 of the ECHR to such preliminary proceedings when it considered that the injunctive relief measures were decisive for the civil rights of the Applicant. (See, *inter alia,* ECtHR cases *Aerts v. Belgium,* appl. no. 25357/94, Judgment of 30 July 1998; and *Boca v. Belgium,* appl. no. 50615/99, Judgment of 15 November 2012).

128. In 2009, however, the ECtHR purposefully altered its previous approach towards preliminary proceedings by making the following statement when answering the question as to whether there is a need for a development of the case-law:

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

129. Based on this Judgment, the Court notes that not all injunctive relief/interim measures determine civil rights or obligations and the

applicability of Article 6 of the ECHR to preliminary proceedings depends on whether certain conditions are fulfilled.

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

131. Secondly, the ECtHR points out that the nature of the interim measure/injunctive relief must be scrutinized considering that whenever such measure can be considered to effectively determine the civil right or obligation at stake – Article 6 will be applicable. (See ECtHR case *Micallef v. Malta, Ibidem*, para 85).

(ii) The application of the above referred principles to the present case

132. The Court notes that the substance of the right at stake, in the main proceedings, concerns the annulment of the Decision on Voluntary Dissolution, which is a right that has a civil law character according to the applicable legislation in the Republic of Kosovo.

133. The purpose of the injunctive relief was to secure the main claim of the Applicant, which the latter considered indispensable for the enforcement of the final Arbitration Award. As such, the Court notes that the execution of the final Arbitration Award is directly dependent on the results of the request for injunctive relief in the current contested proceedings.

134. It follows that the injunctive relief proceedings in the present case fulfils the criteria for Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, to be applicable, and no convincing reasons have been established by the Compact Group LL.C. to limit the scope of such application in any respect.

135. Therefore, the Court concludes that, in light of the facts of the present Referral, the injunctive relief sought by the Applicant can be considered to effectively determine its civil rights and in that respect the guarantees contained in Article 31 of the Constitution, in

conjunction with Article 6 of the ECHR, apply to these preliminary proceedings.

136. After having examined the Applicant's complaints and observations, as well as the observations submitted by the Compact Group LL.C. as an interested party to these proceedings, the Court considers that the Referral raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The Referral cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Rule 36 (1) (d) of the Rules of Procedures, and no other ground for declaring it inadmissible has been established. (See ECtHR case *A and B v. Norway*, [GC], applications nos. 24130/11 and 29758/11, Judgment of 15 November 2016, para 55; see also, *mutatis mutandis,* Constitutional Court case No. KI132/15, *Visoki Dečani Monastery*, Judgment of the Constitutional Court of 20 May 2016).

137. In sum, the Court determines that the Referral is admissible.

Merits of the Referral

138. Before entering the merits of the Referral, the Court notes that the following matters are not disputed before this Court:

a) The Applicant had a valid contract with the Compact Group LL.C.., which stipulated that disputes would be handled by the Court of Arbitration in the Czech Republic;
b) The Applicant brought a dispute with the Compact Group LL.C.. to the Arbitration Court and received an Arbitration Award of EUR 1,364,527.00 plus default interest;
c) This Arbitration Award is final and binding;
d) This Arbitration Award was recognized as executable in Kosovo by the regular courts in Kosovo, both in first instance and on appeal;
e) A valid Enforcement Order was issued by a Private Enforcement Agent;
f) This Enforcement Order was confirmed by the regular courts, both in first instance and on appeal, and became final and binding;
g) The Shareholders of the Compact Group LL.C.. made a Decision on Voluntary Dissolution of the Compact Group LL.C..;
h) The Applicant initiated Contested Proceedings against this Decision on Voluntary Dissolution;
i) The Applicant requested Injunctive Relief pending the outcome of the Contested Proceedings.

139. The Court notes that what is at stake for the Applicant is the availability of sufficient funds and assets for the Arbitration Award to be executed.

140. Having emphasized these points, the Court recalls that the Applicant alleges a violation of its 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; and Article 32 [Right to Legal Remedies] of the Constitution, in conjunction with Article 13 (Right to an Effective Remedy) of the ECHR.

141. In this aspect, the Applicant primarily maintains that the principle of legal certainty and respect for a final court decision have been violated by the Court of Appeals by not respecting the finality of the previous decisions of the Basic Court and Court of Appeals.

142. In addition, the Applicant maintains that its right to a reasoned decision has been violated by the Court of Appeals considering that the Applicant's essential argument, that a *res judicata* decision has been overturned, has been entirely disregarded by the Court of Appeals.

143. The Applicant also alleges a violation of its right of access to court; right to an impartial court; and the right to a legal remedy.

144. In the present case, the Court will examine the merits of the Referral, pursuant to Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR.

145. The Court recalls Article 31 [Right to Fair and Impartial Trial] of the Constitution, which provides:

"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."

146. In addition, paragraph 1 of Article 6 (Right to a fair trial) of the ECHR provides:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]"

147. The Court reiterates that the right to legal certainty and respect for a final court decision, as well as the right to a reasoned decision, are guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and that its application has been interpreted, in great detail, by the ECtHR's case-law. This Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution consistent with the decisions of the ECtHR. Consequently, the Court will assess the merits of the Referral by relying on the ECtHR case-law.

148. In this aspect, the Court observes that there is one crucial question to be answered by this Court, namely, whether the Court of Appeals has violated the Applicant's right to a fair and impartial trial in respect of legal certainty and respect for a final court decision by quashing a final and binding decision which had become *res judicata* in respect of some specific points.

(i) General principles on the right to legal certainty and respect for a final court decision as developed by the ECtHR case-law

149. The Court recalls that the right to a fair trial requires that a matter which has become *res judicata* is to be considered irreversible, in accordance with the principle of legal certainty. (See ECtHR case *Brumărescu v. Romania*, appl. no. 28342/95, Judgment of 28 October 1999).

150. The Court recalls that the ECtHR has provided a definition of the concept of *res judicata* (see ECtHR case *Nikitin v. Russia*, appl.no. 50178/99, Judgment of 15 December 2004, § 37), as follows:

"37. According to the explanatory report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "decision is final 'if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them".

151. The ECtHR has accentuated that the principle of legal certainty presupposes respect for the principle of *res judicata* (see ECtHR case *Ponomaryov v. Ukraine*, appl. no. 3236/03, Judgment of 3 April 2008, § 40). More specifically, the ECtHR maintained that:

"[…] the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which presupposes respect for the principle of res judicata that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. […] A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character."

152. The ECtHR has elaborated on the principle of legal certainty in relation to the right to a fair trial in other instances as well. (See, for example, ECtHR case *Ryabykh v. Russia,* appl. no. 52854/99, Judgment of 24 July 2003, § 52 and 56).

153. In this particular Judgment, the ECtHR emphasized the following:

"52. Legal certainty presupposes respect for the principle of res judicata (ibid., § 62), that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character. […]

56. The Court considers that the right of a litigant to a court would be equally illusory if a Contracting State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official."

154. Furthermore, the Court recalls that the ECtHR has determined that, aside from final judgments on the merits, also interim decisions can become *res judicata*. In the case of *Okyay and Others v Turkey*

(Judgment of 12 July 2005, appl. no. 36220/97, §§ 72-75), the ECtHR stated that,

"72. The Court reiterates that the execution of a judgment given by a court is to be regarded as an integral part of the "trial" for the purposes of Article 6 of the Convention (see Hornsby v. Greece, judgment of 19 March 1997, Reports 1997-II, pp. 511-12, § 40). The right of access to a court guaranteed under that Article would be rendered illusory if a Contracting State's legal system allowed a final binding judicial decision or an interlocutory order made pending the outcome of a final decision to remain inoperative to the detriment of one party. [...].
73. The Court notes that the administrative authorities failed to comply with the Aydın Administrative Court's interlocutory order of 20 June 1996 suspending the activities of the three thermal power plants (see paragraph 17 above). Furthermore, the decisions of the Supreme Administrative Court upholding the Aydın Administrative Court's judgments of 30 December 1996 were not enforced within the prescribed time-limits. On the contrary, by a decision of 3 September 1996, the Council of Ministers decided that the three thermal power plants should continue to operate despite the administrative courts' judgments. This latter decision had no legal basis and was obviously unlawful under domestic law (see paragraph 57 above). It was tantamount to circumventing the judicial decisions. In the Court's opinion, such a situation adversely affects the principle of a law-based State, founded on the rule of law and the principle of legal certainty (see Taşkın and Others, cited above, § 136).
74. In the light of the foregoing, the Court considers that the national authorities failed to comply in practice and within a reasonable time with the judgments rendered by the Aydın Administrative Court on 30 December 1996 and subsequently upheld by the Supreme Administrative Court on 3 and 6 June 1998, thus depriving Article 6 § 1 of any useful effect.
75. There has therefore been a violation of Article 6 § 1 of the Convention."

155. The Constitutional Court, based on the case-law of the ECtHR, has also elaborated on the issue of *res judicata*. In its Judgment of 17 December 2010 in Case No. KI 08/09, *Independent Union of Workers of IMK Steel Factory Ferizaj*, the Court stated in paragraphs 61 and 62:

"61. In this connection, the Court stresses that the right to institute proceedings before a court in civil matters, as secured by Article 31 of the Kosovo Constitution and Article 6, in conjunction with Article 13 of the European Convention of Human Rights (ECHR), would be illusory, if the Kosovo legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that these Articles prescribe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the

implementation of judicial decisions. To construe the above Articles, as being concerned exclusively with access to a court and the conduct and efficiency of proceedings, would be likely to lead to situations incompatible with the principle of the rule of law which the Kosovo authorities are obliged to respect (see, mutatis mutandis, ECtHR Judgment in Romashov v. Ukraine, Application No. 67534/01, Judgment of 25 July 2004).

62. The rule of law is one of the fundamental principles of a democratic society and presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata. *No party is entitled to seek for a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (see, mutatis mutandis, Sovtransavto Holding v. Ukraine, no. 48553/99, § 72, ECHR 2002-VII). Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law. […].”*

156. Furthermore, in its Judgment of 12 February 2016 in Case No. KI 132/15, *Visoki Dečani Monastery*, the Court stated in paragraphs 95-97:

“95. In these circumstances, the Court considers that the Applicant had a legitimate expectation that its case had been decided in final instance by the Ownership Panel and that it could not be re-opened before the Appellate Panel. As such, the Applicant should have been able to benefit from the Judgments of the Ownership Panel and to see them executed.

96. Based on these considerations and its previous case law, as well as that of the ECtHR, the Court concludes that the Judgments of the Ownership Panel of 27 December 2012 (No. SCC08-0226 and No. SCC08-0227) had become res judicata on the basis of the earlier final and binding decision of the Appellate Panel of 24 July 2010 regarding the authorized parties.

97. By using the appeal procedure to overturn these Judgments of the Ownership Panel and to refer the original property dispute back to the regular courts, the Court finds that by its Decisions of 12 July 2015 (Nos. AC-I-13-0008 and AC-I-13-0009) the Appellate Panel infringed the principle of legal certainty and denied the Applicant a fair and impartial hearing on its rights and obligations within the meaning of Article 31, paragraph 2, of the Constitution and of Article 6, paragraph 1, of the ECHR.”

157. In this regard, the Court observes that its own case-law, as well as the case-law of the ECtHR referred to above, clearly and explicitly state

that the right to a fair trial under Article 6 of the ECHR and Article 31 of the Constitution includes the principle of legal certainty, which encompasses the principle that final judicial decisions which have become *res judicata* must be respected and cannot be re-opened or become subject to appeals.

158. Furthermore, the Court observes that the principle of *res judicata* not only applies to final judicial decisions, but also to interim decisions pending the outcome of a definite decision.

(ii) Application of the above referred principles to the present case

159. In this Referral the central question is whether or not the Court of Appeals had overturned one of its own previous decisions on the same matter.

160. In this respect, the Court recalls that the Basic Court, with its Second Decision on Injunctive Relief [I.C. No. 273/2016, of 29 September 2016] approved the Applicant's request for injunctive relief on the following points:

a. block/freeze the bank accounts of the Compact Group LL.C.;
b. block/freeze the bank accounts of the shareholders of the Compact Group LL.C..;
c. prohibit the alienation, concealment, charge with - and/or disposal of- immovable and movable property of the Compact Group LL.C. and its shareholders; and
d. prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C..

161. The Court then recalls that the Court of Appeals, with its Second Decision on Injunctive Relief [Ae. No. 241/2016, of 16 December 2016], returned the matter for retrial only pertaining to the item (ii) on blocking/freezing the bank accounts of the shareholders of the Compact Group LL.C.. With regard to this point, the Court of Appeals instructed the Basic Court to explain how and why the shareholders of a Limited Liability Company were nevertheless personally liable in this particular case. The Court of Appeals rejected the appeal of the Compact Group LL.C. on all other points.

162. Consequently, the Court notes that the Court of Appeals thus upheld the three other points contained in the Second Decision on Injunctive Relief [Ae. No. 241/2016, of 16 December 2016] of the Basic Court, namely:

a. to block/freeze the bank accounts of the Compact Group LL.C..;

iii) to prohibit the alienation, concealment, charge with- and/or disposal of- immovable and movable property of the Compact Group LL.C. and its shareholders; and

iv) to prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C..

163. The Court also recalls the reasoning provided by the Court of Appeals in its Second Decision, which reads:

"*The Court of Appeals approves the legal assessment of the first instance court as regular and lawful due to the reason that the challenged Decision* [I.C. No. 273/2016 of 29 September 2016 i.e. the Second Decision on Injunctive Relief of the Basic Court] *is not rendered with substantial violations of the provisions of the contested procedure […] and also the substantive law has been correctly applied, the appealed allegations are reviewed by the Court of the second instance pursuant to the official duty and based on Article 194 of the LCP, except in item I, paragraph 2.*

[…]

Therefore, the Court of Appeals considers that the conditions defined under Article 297.1, under item a) and b) of the LCP, for imposing the injunctive relief have been met because in the present case, the [Applicant] *made reliable the existence of the request or its subjective right and it exists the risk that if such measure is not imposed, it would cause considerable damage to the* [Applicant], *which could be hardly repaired.*
The challenged Decision should have been quashed [the Item] *of the enacting clause which obliged the Commercial Banks in Kosovo to freeze the bank accounts of the objector of the injunctive relief, "Compact Group" LL.C. and its shareholders S.SH, F.SH and F.SH, up to the amount of EUR 1.364.527.00 because this paragraph is incomprehensible and cannot be executed because no reasons have been provided why the shareholders shall respond regarding the debts or obligations of the company only due to the reason that they are the shareholders. […]*"

164. In other words, the Court of Appeals determined that the Basic Court had correctly applied the relevant law, that the Applicant's main claim was not inadmissible, and that the imposition of injunctive relief was justified by the potential damage which would be caused to the Applicant.

165. Furthermore, the Court notes that the Court of Appeals only remanded for retrial only one point, namely item (ii) blocking/freezing of the bank accounts of the shareholders of the Compact Group LL.C..

166. In these circumstances, the Court considers that the Applicant had a legitimate expectation that its case, with respect to the specific measures of injunctive relief upheld by the Court of Appeals as being in compliance with the law, had been decided in final instance by the Court of Appeals and that it could not be re-opened by the Court of Appeals itself. As such, the Applicant should have been able to benefit from those decisions and see them executed.

167. Furthermore, the Court notes that in its Third Decision on Injunctive Relief the Court of Appeals decided that the Basic Court in its Third Decision on Injunctive Relief had committed substantial violations of the provisions of the contested procedure and rejected the case in its entirety, despite having explicitly stated in its Second Decision on Injunctive Relief that *"[…] the legal assessment of the first instance court as regular and lawful [and] is not rendered with substantial violations of the provisions of the contested procedure […] and also the substantive law has been correctly applied."*

168. The Court also notes that in its submissions to the Court of Appeals in both the Third and Fourth appeals on Injunctive Relief the Applicant explicitly raised the issue of the finality of the points upheld by the Court of Appeals in its Second Decision on Injunctive Relief, namely that the Basic Court in its Second Decision on Injunctive Relief had decided on the Applicant's request for injunctive relief in full accordance with the law, and that the following measures must be applied:

i) to block/freeze the bank accounts of the Compact Group LL.C.;
iii) to prohibit the alienation, concealment, charge with - and/or disposal of- immovable and movable property of the Compact Group LL.C. and its shareholders;
iv) to prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C..

169. The Court notes that, in both its Third and Fourth decisions on Injunctive Relief, the Court of Appeals did not address the Applicant's arguments regarding the finality of the Court of Appeals' Second Decision on Injunctive Relief. Instead of addressing the Applicant's arguments, the Court of Appeals' rendered its Third and Fourth decisions on Injunctive Relief on the basis of entirely new arguments

that bore no relationship to either the Applicant's arguments, or those of the Compact Group LL.C..

170. Indeed, the Compact Group LL.C. did not contest the finality of the measures upheld by the Court of Appeals in its Second Decision on Injunctive Relief, but merely contested the issue of the liability and responsibility of the shareholders of the Compact Group LL.C.. It was precisely the issue of the liability of the shareholders which was the only point remanded by the Court of Appeals in its Second Decision on Injunctive Relief.

171. Based on these considerations and its previous case law, as well as that of the ECtHR, the Court concludes that the Second Decision on Injunctive Relief [I.C. No. 273/2016, of 29 September 2016] of the Basic Court and the Second Decision on Injunctive Relief [Ae. No. 241/2016, of 16 December 2016] of the Court of Appeals had become *res judicata* on the points that were confirmed and approved by the Court of Appeals itself.

172. By using the appeal procedure to overturn these Decisions on its own motion, without being asked by the Compact Group LL.C., the Court of Appeals infringed the principle of legal certainty and denied the Applicant a fair and impartial hearing on its rights and obligations within the meaning of Article 31, paragraph 2, of the Constitution and of Article 6, paragraph 1, of the ECHR.

173. The Court concludes that there has been a violation of the Applicant's right to a fair and impartial hearing as protected by Article 31, paragraph 2, of the Constitution in conjunction with Article 6, paragraph 1, of the ECHR.

174. In addition, the Court is concerned that the Applicant is compelled to undertake these additional proceedings against the voluntary dissolution of the respondent company in order to realize the execution of a final and binding judicial decision regarding its Arbitration Award. The execution of final and binding judicial decisions is an integral part of the guarantee of a fair trial as protected by Article 31 of the Constitution and Article 6.1 of the ECHR, as has been repeated by this Court in its case law (see also, *inter alia*, ECtHR case: *Hornsby v Greece*, appl. no. 18357/91, Judgment of 19 March 1997). The economic development of Kosovo is dependent upon the effective protection of the rule of law and the enforcement of judicial decisions, such as in the case of the Applicant as presented here.

Conclusions

175. In conclusion, the Court finds that by not respecting the principle of legal certainty and respect for a final court decision, in addition to not addressing the Applicant's allegation regarding *res judicata* matters, the Court of Appeals has violated the Applicant's right to a fair and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6, paragraph 1, of the ECHR. As a result of these violations, the Applicant has been deprived of the benefit of a final and binding court decision.

176. Regarding the proceedings as a whole, the Court is concerned that the Applicant is compelled to undertake these additional proceedings against the voluntary dissolution of the respondent company in order to realize the execution of a final and binding judicial decision regarding its Arbitration Award.

177. In accordance with Rule 74 (1) of the Rules, the following Decisions are declared invalid:

a. Decision of the Court of Appeals Ae. No. 185/2017, of 11 August 2017;
b. Decision of the Basic Court IV. EK. C. No. 273/2016, of 14 June 2017.

178. In accordance with Rule 74 (1) of the Rules, the Decision of the Court of Appeals Ae. No. 241/2016, of 16 December 2016, is declared final and binding in respect of the following points, which are to be executed:

(i) to block/freeze the bank accounts of the Compact Group LL.C.;

(ii) to prohibit the alienation, concealment, charge with - and/or disposal of- immovable and movable property of the Compact Group LL.C. and its shareholders;

(iii) to prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C..

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, pursuant to Article 113 (7) of the Constitution, Article 20 of the Law and Rule 56 (1) of the Rules of Procedure, in the session held on 18 April 2018, by majority

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been violation of Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the European Convention on Human Rights;

III. TO HOLD that it is not necessary to examine whether there has been a violation of Article 32 of the Constitution of the Republic of Kosovo in conjunction with Article 13 of the European Convention on Human Rights;

IV. TO HOLD that the following Decisions are invalid, and therefore null and void:

a. Decision of the Court of Appeals Ae. No. 185/2017, of 11 August 2017;
b. Decision of the Basic Court IV. EK. C. No. 273/2016, of 14 June 2017;

V. TO HOLD that the Decision of the Court of Appeals Ae. No. 241/2016, of 16 December 2016, is final and binding and, as such, is *res judicata,* in respect of the following points, which are to be executed:

a. to block/freeze the bank accounts of the Compact Group LL.C.;
b. to prohibit the alienation, concealment, charge with - and/or disposal of- immovable and movable property of the Compact Group LL.C. and its shareholders;
c. to prohibit any legal statutory changes made by the shareholders of the Compact Group LL.C.;

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

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

VIII. TO NOTIFY this Decision to the Parties;

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

X. TO DECLARE this Decision effective immediately.

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

In accordance with Article 112 [General Principles] of the Constitution of the Republic of Kosovo, Article 11.1.4 of the Law on Constitutional Court of the Republic of Kosovo and Rule 61 [Correction of Judgments and Decisions] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, the Constitutional Court of the Republic of Kosovo (hereinafter, the Court), issues the following Rectification Order for the purpose of rectifying a clerical error in the published Judgment in case KI122/17 of 18 April 2018.

RECTIFICATION ORDER

of a clerical error in the Judgment in case KI122/17 of 18 April 2018

1. On 18 April 2018, the Court by majority declared the Referral admissible, and decided by majority to hold that there has been a violation.

2. On 02 May 2018, the Judgment KI122/17 was served on the interested party, the Compact Group LL.C., through postal services.

3. On 08 May 2018, the interested party, Compact Group LL.C., represented by "Sejdiu & Qerkini" based in Prishtina, submitted a request for rectification of a clerical error in Judgment KI 122/17 of 18 April 2018.

4. The interested party submitted its request for rectification of a clerical error within two weeks of the service of the Judgment KI122 as foreseen by Rule 61 (1) of the Rules of Procedure.

5. The interested party alleged that the Operative Part of the Court's Judgment contained a clerical error in item V. under (b). Specifically, the interested party claimed that there was a discrepancy between the Judgment of the Constitutional Court and the Enacting Clause of the Decision of the Basic Court in Prishtina - Department for Economic Matters (I.C. No. 273/2016, of 29 September 2016), as upheld by the Court of Appeals (Ae. No. 241/2016, of 16 December 2016) which the Constitutional Court declared final and binding.

6. The interested party requested that the Court rectify item b, under paragraph V, of the Operative Part of the Judgment in KI 122/17 so that it becomes identical to the Enacting Clause of the upheld Decision of the Basic Court.

7. The Enacting Clause of the Decision of the Court of Appeals (Ae. No. 241/2016, of 16 December 2016), states:

"I. Decision I.C. No. 273/2016, of the Basic Court in Prishtina - Department for Economic Matters, of 29 September 2016, is QUASHED by the partial approval of the appeal in item I, paragraph 2, of the enacting clause, and the case is returned to the Court of the first instance for re-trial and re-consideration regarding this item.

II. The appeal of the objector of the proposal of the injunctive relief regarding the other part of the enacting clause is REJECTED while item I, paragraph 1, 3 and 4 of the enacting clause of Decision I.C. No. 273/2016, of the Basic Court in Prishtina - Department for Economic Matters, of 29 September 2016, is UPHELD.

III. The other part of the challenged Decision remains unexamined."

8. The Enacting Clause of the Decision of the Basic Court in Prishtina – Department for Economic Matters (I.C. No. 273/2016, of 29 September 2016), as referred to by the Enacting Clause of the Court of Appeals given above, states:

"I. The proposal of the proposer of injunctive relief Çeska Exportni Banka A.S., with business registration number 63078333, headquartered in Prague, Vodiçkova 34/701, Czech Republic, is partly approved regarding the objectors of the injunctive relief: "Compact Group" LL.C. and its shareholders S. Sh., F.Sh. and F. Sh., and it is decided as following:

- Commercial Banks in Kosovo: Pro Credit Bank; Raiffeisen Bank: Economic Bank; TEB Bank; National Trade Bank; NLB Prishtina and Bank for Business are obliged to block the bank accounts of the objector of the injunctive relief "Compact Group" LL.C., and its shareholders S. Sh., F. Sh. and F. Sh., up to the amount of EUR 1.364.527.00;

- The objector of the injunctive relief "Compact Group" LL.C., its managing bodies and its owners, are prohibited from alienation, hiding, charging and possession with the properties of the Trade Company "Compact Group" LL.C.; and

- All the actions that may result in changing the status of the objector of the injunctive relief "Compact Group" LL.C. are prohibited.

II. The proposal for imposing the injunctive relief, whereby it was requested to declare null and void the procedure of voluntary

dissolution of the Trade Company "Compact Group" LL.C.; to annul the decisions, actions and other legal works of "Compact Group" LL.C. and its shareholders, especially the legal works that refer to alienation, sale, transfer, charge and giving in use of its property; and to freeze the bank accounts of the Trade Company "Adea Group" L. L. C., the prohibition of the alienation of its property and the prohibition of its status change, is rejected.

III. It is confirmed that pursuant to the Decision of this Court of 20 September 2016, the proposer of the injunctive relief, on 29 September 2016, deposited in the bank account of this Court the amount of EUR 50.000.00, which can serve as a cover for the eventual damage that may be caused to the objectors of the injunctive relief due to the approval and application of injunctive relief measures, imposed by this Decision.

IV. A copy of this Decision shall be sent to: the KBRA and the Notary Chamber of the Republic of Kosovo.

V. This Decision on imposing injunctive relief measures is upheld until the next Court Decision which will modify or withdraw these measures."

9. Accordingly, the Court determines that there has been a clerical error in the Court's Judgment in case KI 122/17 of 18 April 2018, and issues the following:

ORDER

I. The Operative Part of Judgment KI 122/17 of 18 April 2018 is amended such that in item V. shall read:

V. TO HOLD that the Decision of the Court of Appeals Ae. No. 241/2016, of 16 December 2016, is final and binding and, as such, is *res judicata,* in respect of the following points, which are to be executed:

a. Commercial Banks in Kosovo: Pro Credit Bank; Raiffeisen Bank: Economic Bank; TEB Bank; National Trade Bank; NLB Prishtina and Bank for Business are obliged to block the bank accounts of the objector of the injunctive relief "Compact Group" LL.C. [...] up to the amount of EUR 1.364.527.00;
b. The objector of the injunctive relief "Compact Group" LL.C., its managing bodies and its shareholders, are prohibited from alienation, hiding, charging and possession with the

properties of the Trade Company "Compact Group" LL.C.; and

c. All the actions that may result in changing the status of the objector of the injunctive relief "Compact Group" LL.C. are prohibited.

II. Paragraphs 39, 42, 49, 58, 71, 92, 160, 162, 168, and 178 of Judgment KI 122/17 of 18 April 2018, under the respective items (iii), are amended such that the phrase "[...] and its shareholders" is replaced by the phrase "[...] by its managing bodies or by its shareholders";

III. This Order shall be attached to the original Judgment of the Court, in accordance with Rule 61 (2) of the Rules of Procedure;

IV. This Order will be communicated to the parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

V. This Order shall enter into force immediately.

President of the Constitutional Court

Arta Rama-Hajrizi

KI97/16, Applicant, "IKK Classic", Constitutional review of Judgment E. Rev. No. 15/2016 of the Supreme Court of Kosovo of 16 March 2016.

KI97/16, Judgment rendered on 4 December 2017 and published on 11 January 2018

Keywords: *Individual referral, right to fair and impartial trial, violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1, Article 6 (Right to a fair trial) of the European Convention on Human Rights*

The Applicant challenges the Judgment [E. Rev. No. 15/2016] of the Supreme Court of Kosovo of 16 March 2016.
On 16 March 2016, following the Judgment of the Court in case no. KI135/14, the Supreme Court rendered new, namely, the second Judgment on the case, [Judgment E. Rev. No. 15/2016] of 16 March 2016, through which it found the findings of the first Judgment [E. Rev. No. 21/2014] of 8 April 2014, deciding that request for revision of SIGMA is grounded; and that the decisions of the lower instance courts, which found that SIGMA was obliged to compensate the Applicant with the amount of 18.985,36 euro, should be rejected as ungrounded.
The Applicant alleged 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.
The Applicant alleged that the Judgment [E. Rev. No. 15/2016] of the Supreme Court of 16 March 2016 continues to be characterized by a lack of reasoning regarding its essential allegations; and that the Supreme Court failed to give the reasoning for the main findings and issues raised by the first Judgment of the Court in case no. KI134/15, in particular, how the fulfillment of the obligations by SIGMA against the insured D.H., through the extrajudicial agreement, does not allow the Applicant to exercise his right to compensation. Therefore, the Applicant claimed that his substantive claims were not addressed by the Supreme Court nor were they justified by the abovementioned Judgment.
The Court found that the second Judgment of the Supreme Court, namely [E. Rev. No. 15/2016] of 16 March 2016, did not correct the violations found by the first Judgment of the Court in case no. KI135/14 and did not give sufficient reasons to the Applicant as to why his rights to compensation were denied in the circumstances of this specific case. The Court considered that the failure of the Supreme Court to give clear and complete answers constitutes a constitutional violation.

JUDGMENT

in

Case No. KI97/16

Applicant

"IKK Classic"

Constitutional review of
Judgment E. Rev. 15/2016 of the Supreme Court of Kosovo
of 16 March 2016

CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral is submitted by the insurance company IKK Classic (hereinafter: the Applicant), represented by lawyers Besnik Nikqi and Visar Morina from Prishtina.

Challenged decisions

2. The Applicant challenges Judgment [E.Rev.15/2016] of the Supreme Court of Kosovo of 16 March 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to

a Fair Trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. 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 and Articles 22 [Processing of Referrals], 47 [Individual Requests] and 48 [Accuracy of the Referral] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 9 February 2016, the Constitutional Court delivered the Judgment in case KI135/14, Applicant *IKK Classic*, Constitutional review of Judgment E. Rev. No. 21/2014 of the Supreme Court of Kosovo of 8 April 2014 (hereinafter: (Judgment of the Court in Case No. KI135/14). It declared invalid the Judgment of the Supreme Court [E.Rev.no.21/2014] of 8 April 2014, because it found that this Judgment was rendered in violation of a right to a reasoned decision as guaranteed by Article 31 [Right to a Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the ECHR.

6. On 7 April 2016, the Supreme Court notified the Court about its new and second Judgment [E. Rev. 15/2016] of 16 March 2016, respectively, rendered in respect of the Judgment of the Court in Case No. KI135/14.

7. On 25 April 2016, the Applicant also informed the Court about the above referred to Judgment of the Supreme Court, alleging that it: a) again constitutes a violation of its right to a reasoned decision and b) did not implement the Judgment of the Court in Case No. KI135/14.

8. On 29 April 2016, the Court informed the Applicant that, based on the Constitution, it only decides on matters referred to it in a legal manner by authorized parties and that the Applicant has a right to submit a new referral with the Court.

9. On 22 June 2016, the Applicant submitted to the Court a new Referral, registered as referral No. KI97/16, alleging that the new, respectively, the second Judgment of the Supreme Court [E. Rev. 15/2016] of 16

March 2016, rendered in respect of the Judgment of the Court in Case No. KI135/14, continues to violate its right to a reasoned decision.

10. On 12 July 2016, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of judges Almiro Rodrigues (presiding), Snezhana Botusharova and Bekim Sejdiu.

11. On 29 August 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.

12. On 2 November 2016, the President of the Court appointed Judge Gresa Caka- Nimani as Judge Rapporteur to replace Robert Carolan, who resigned from the position of the Judge of the Court on 9 September 2016. The composition of the Review Panel remained unchanged.

13. On 4 December 2017, the Review Panel deliberated on the Report of Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

Summary of facts

14. On 24 November 2008, D.H., the insured of the Applicant, suffered grave injuries in a traffic accident caused by B.L., holder of an insurance at the Insurance Company "SIGMA" in Prishtina (hereinafter: SIGMA). D.H. received medical treatment in the Federal Republic of Germany at an amount 18.985,36 Euro, which was covered by the Applicant.

15. On 3 February 2009, SIGMA and D.H., reached an extra-judicial agreement, whereby the latter was compensated by SIGMA for an amount 2,729 Euro. Based on this agreement, SIGMA considered that it had fulfilled all of its obligations regarding the payment of compensation for the damage caused by the traffic accident of 24 November 2008, including the amount of 18.985,36 Euro paid by the Applicant, as the insurance company of D.H.

16. On an unspecified date, the Applicant requested SIGMA to be compensated for the above referred to amount. The Applicant requested that SIGMA reimburse the above-stated expenses for the treatment of D.H., based on Rule 3 of the Rules on Compulsory Third Party Liability Motor Vehicle Insurance of the Central Banking Authority.

17. The Applicant and SIGMA did not reach an agreement as to the question of compensation and therefore referred their claims to the regular courts.

18. The then District Commercial Court in Prishtina approved as grounded the lawsuit of the Applicant and obliged SIGMA to compensate to the Applicant the amount of 18.985,36 Euro. In the appeal proceedings, the Court of Appeal confirmed the ruling of the District Commercial Court, by holding that the respondent party (SIGMA) must compensate the amount of 18.985,36 Euro to the Applicant.

19. On 4 March 2014, SIGMA filed with the Supreme Court a request for revision, arguing that it had fulfilled its obligation for pecuniary and non-pecuniary damage to the insured D.H. and that the Applicant, as a Foreign Insurance Company, would have compensation rights vis-à-vis Kosovo Insurance Companies only via bilateral agreement between the Republic of Kosovo and the State of the Foreign Insurance Company.

20. The Supreme Court through Judgment [E. Rev. no. 21/2014] of 8 April 2014 approved as grounded the request for revision of SIGMA and ascertained that the courts of lower instance had erroneously applied the law, and that SIGMA is absolved from compensating the amount that the Applicant claimed.

21. On 3 September 2014, the Applicant submitted to the Court a Referral, challenging the abovementioned Judgment of the Supreme Court. That referral was registered under Case no. KI135/14 (see Judgment in Case KI135/14, Applicant *IKK Classic*, Constitutional review of Judgment E. Rev. No. 21/2014 of the Supreme Court of Kosovo of 8 April 2014).

22. The Applicant alleged that this Judgment of the Supreme Court was rendered in breach of Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 (Right to a Fair Trial) of the ECHR and Article 46 [Protection of Property] of the Constitution. The Applicant alleged, among others, that the challenged Judgment of the Supreme Court is characterized by lack of reasoning pertaining to its essential allegations.

23. On 9 February 2016, the Court through Judgment in Case No. KI135/14, held that there has been a breach of Article 31 [Right to a

Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the ECHR, due to unreasoned Judgment of the Supreme Court.

24. The Judgment of the Court in Case No. KI135/14 concluded that the Supreme Court Judgment [E. Rev. No. 121/2014] of 8 April 2014 did not meet the standards of a reasoned decision and through its Judgment [KI135/14], summarized the allegations of the Applicant which it considered are essential and, therefore, require a response by the Supreme Court in order to respect the rights of the Applicant and to meet the standards of a right to a reasoned decision.

25. In fact, the Judgment of the Court in Case No. KI135/14 maintained that the Supreme Court Judgment [E. Rev. No. 121/2014] of 8 April 2014 failed to address the following essential allegations of the Applicant: "*(i) whether the extra-judicial agreement struck between SIGMA and the insured DH barred the Applicant from the right to compensation; (ii) how the compensation paid for by SIGMA to the insured DH absolved the former to pay compensation to the Applicant as well; (iii) how the extra-judicial agreement struck between SIGMA and DH can affect the rights of the Applicant-where it is clear - that the latter was not a party to that agreement*". (See Constitutional Court Case KI135/14, Applicant *IKK Classic*, Judgment of 9 February 2016, § 51).

26. On 16 March 2016, following the Judgment of the Court in Case No. KI135/14, the Supreme Court rendered its new, respectively its second Judgment on the matter [Judgment E. Rev. no. 15/2016] of 16 March 2016, through which it reiterated the findings of the first Judgment, [E. Rev. no. 21/2014] of 8 April 2014, by holding that the request for revision of SIGMA is grounded; and that the rulings of the courts of lower instance, which found that SIGMA is obliged to compensate to the Applicant the amount of 18.985,36 Euro, must be rejected as ungrounded.

27. In responding to the essential allegations of the Applicant, as also emphasized by the Judgment of the Court in Case No. KI135/14, the Supreme Court through its second Judgment [E. Rev. no. 15/2016] of 16 March 2016, responded through the following two paragraphs:

> *"[...] by the aforementioned extra-judicial agreement, entered into by Sigma IC and the Claimant's insured, the Claimant's right to regress of indemnity for the damage, which it paid to its insured, D.H., was denied, because the Claimant's insured has directly realized the damage compensation from the Respondent,*

based on that agreement, according to which, he has waived all the claims – whether present, or future – related to this damage". Therefore, the legal relation between the Claimant and its insured, D.H., remains e legal relation only between them, on the basis of which, the also Claimant has paid the indemnity, without being aware that its insured had realized the indemnity from Sigma IC. This means that the Claimant's insured has been compensated twice, which is not fair.

If the Claimant's insured had not directly realized the indemnity from the Respondent, the Claimant would have undoubtedly been entitled to the regression of debt against the Respondent for the amount it had paid to its insured, because the option of regression has been stipulated by Article 939, paragraph 1, of the aforementioned law".

Applicant's allegations

28. The Applicant claims a 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.

29. As it pertains to allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant maintains that the Supreme Court Judgment [E. Rev. 15/2016] of 16 March 2016 continues to lack reasoning pertaining to its essential allegations; and that the Supreme Court failed to provide reasoning pertaining to the key findings and questions raised by the Judgment of the Court in Case No. KI135/14, primarily on how the fulfillment of obligations by SIGMA to the insured D.H., through the extra-judicial agreement, prevents the Applicant from its right to compensation.

30. As it pertains to the allegations for violation of Article 24 of the Constitution, the Applicant maintains that in its case, the Supreme Court Judgment is inconsistent with its own case-law in similar situations. The Applicant argues that the case-law of the Supreme Court in similar situations suggests that indemnity settlements produce '*inter-partes*' and not '*erga omnes*' legal effects, and accordingly, the rights and interests of third parties cannot be affected through such settlements. In support of these claims, the Applicant refers to three rulings of the Supreme Court [E. Rev. no. 62/2014; E. Rev. no. 48/2014; and E. Rev. no. 14/2015].

Assessment of admissibility

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

32. In this respect, the Court first refers to paragraphs 1 and 7 of the Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

33. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

> *"4. Fundamental rights and* freedoms *set forth in the Constitution are also valid for legal persons to the extent applicable".*

34. In this respect, the Court notes that, pursuant to Article 21.4 of the Constitution, the Applicant is entitled to submit a constitutional complaint, invoking alleged violations of its fundamental rights and freedoms which are valid for individuals as well as for legal persons. (Constitutional Court case No. KI41/09, *Applicant AAB-RIINVEST University L.L.C.,* Resolution on Inadmissibility of 3 February 2010, §14).

35. Accordingly, the Court notes that the Applicant has fulfilled the criteria established by the Constitution's Article 113.7, as it is an authorized party, contesting an act of a public authority, namely the Supreme Court Judgment [E. Rev. 15/2016] of 16 March 2016, and has exhausted all legal remedies provided for by law.

36. In continuation, the Court examines whether the Applicant has fulfilled the admissibility requirements as further specified in the Law and Rules of Procedure. In this respect, the Court first refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide:

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

37. Regarding the fulfillment of these requirements, the Court notes that the Applicant has accurately specified the rights, guaranteed by the Constitution and the Convention that have allegedly been violated, in accordance with Article 48 of the Law and has submitted the referral within the four (4) month legal deadline foreseen in Article 49 of the Law.

38. The Court finally notes that this Referral is not manifestly ill-founded within the meaning of the Rule 36 (1) (d) of the Rules of Procedure. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible. (See also ECtHR case *Alimuçaj v. Albania*, application no. 20134/05, Judgment of 9 July 2012, § 144).

Merits of the Referral

39. The Court recalls that the Applicant alleges violations of its rights guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant primarily maintains that the second, respectively the challenged Judgment of the Supreme Court violates its rights to a reasoned decision, because it has not addressed its essential arguments, including those required by the Judgment of the Court in Case No. KI135/14, in addition to being a Judgment which contradicts Supreme Court's own case law.

40. The Court initially examines the merits of the Referral, pursuant to the allegations related to Articles 31 [Right to Fair and Impartial Trial] of

the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

41. In this regard, the Court refers to Article 31 [Right to a Fair and Impartial Trial] of the Constitution, which provides:

> *"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*
>
> *2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law."*

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

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

43. The Court reiterates that the right to a reasoned decision is guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and its application has been interpreted by the European Court of Human Rights (hereinafter: the ECtHR) through its case law. The Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the human rights and fundamental freedoms guaranteed by the Constitution in harmony with the ECtHR case law. Consequently, regarding the interpretation of allegations concerning violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the ECtHR case law.

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

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

18064/91, Judgment of 9 December 1994, § 27; and *Higgins and Others v. France*, application no. 134/1996/753/952, Judgment of 19 February 1998, § 42).

45. In addition, while the ECtHR has also held that 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 decision". (See ECtHR case *Hadjianastassiou v. Greece*, application no. 12945/87, Judgment of 16 December 1992, § 33).

46. The ECtHR case law emphasizes that an essential function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, 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*, application no. 49684/99, 27 September 2001, § 30; *Tatishvili v. Russia*, application no. 1509/02, Judgment of 22 February 2007, § 58; and *Suominen v. Finland*, application no. 37801/97, Judgment of 1 July 2003, § 37).

47. However, while the ECtHR maintains that Article 6, paragraph 1, obliges the courts to give reasons for their decisions, it has also held that this cannot be understood as requiring a detailed answer to every argument. (See ECtHR cases *Van de Hurk v. the Netherlands,* Judgment of 19 April 1994, § 61; and *Higgins and Others v. France*, application no. 134/1996/753/952, Judgment of 19 February 1998, § 42).

48. 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. (ECtHR cases *Garcia Ruiz vs Spain*, application no. 30544/96, Judgment of 21 January 1999. § 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, § 27; and *Higgins and Others v. France, Ibidem* , § 42).

49. 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*, judgment of 21 January 1999, § 26; and *Helle v. Finland,* judgment of 19 December 1997, § 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.

(ECtHR case *Hirvisaari v. Finland*, application no. 49684/99, judgment of 27 September 2001, § 30).

50. However, the ECtHR has also noted that, even though a domestic court has 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. (ECtHR case *Suominen v. Finland*, application no. 37801/97, Judgment of 1 July 2003, § 36).

51. Therefore, while it is not necessary for the court to deal with every point raised in argument (see also *Van de Hurk v Netherlands*, *Ibidem,* § 61), the applicant's main arguments must be addressed. (ECtHR cases *Buzescu v. Romania*, application no. 61302/00, Judgment of 24 May 2005, § 63; *Pronina v Ukraine*, application no. 63566/00, Judgment of 18 July 2006, § 25). Likewise, giving a reason for a decision that is not a good reason in law will not meet Article 6 criteria.

52. Finally, the Court also refers to its own case law where it considers that the justification of the decision must state the relationship between the merit findings and reflections when considering the proposed evidence on the 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. (Constitutional Court cases No. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, § 61; and No. KI135/14, *IKK Classic*, Judgment of 9 February 2016, § 58).

(ii) The application of the above referred to principles into the present case

53. The Applicant alleges that even through the second Supreme Court Judgment [E. Rev. 15/2016 of 16 March 2016], it fails to understand why its rights to compensation are denied, because its essential allegations have not been addressed nor reasoned by the referred to Judgment.

54. Throughout the regular court system, the Applicant has maintained that, by fulfilling the obligations towards the insured D.H., it has gained the right to subrogation from SIGMA (the transfer of insured person's rights against liable person to insurance agency) as determined by the Law on Obligational Relationships (Law No. 04/L-

77 On Obligational Relationships, published in Official Gazette on 19 June 2012). The Applicant has also claimed throughout the regular court system that the extra-judicial agreement reached between SIGMA and D.H., does not exclude the rights of the Applicant to subrogation, and that this extra-judicial agreement cannot affect the rights of the Applicant, as it has '*inter-partes*' and not '*erga-omnes*' legal effects.

55. The Court through its Judgment in Case No. KI135/14, recognized these Applicant's allegations as essential and as ones that require to be addressed The Court specifically noted that based on the nature and the specific circumstances of the case, the following key questions needed to be addressed in order to have a decision that meets the standards of a right to a reasoned decision as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR: *"(i) whether the extra-judicial agreement struck between SIGMA and the insured DH barred the Applicant from the right to compensation; (ii) how the compensation paid for by SIGMA to the insured DH absolved the former to pay compensation to the Applicant as well; (iii) how the extra-judicial agreement struck between SIGMA and DH can affect the rights of the Applicant-where it is clear - that the latter was not a party to that agreement" (*see the Judgment of the Court KI135/14, § 51).

56. The Court observes that the Supreme Court, in its second Judgment [E.Rev.15/2016] of 16 March 2016, recognized that *"the Constitutional Court, (...) remanded the aforementioned judgment to the Supreme Court of Kosovo for retrial, (...) reasoning that the Court failed to clearly explain some important matters",* which the challenged Judgment enumerates one by one, but fails to respond to.

57. In fact, in an effort to address the Applicant's allegations and the Judgment of the Court in Case No. KI135/14, the Supreme Court noted that *"the insured D.H. was compensated twice by the Applicant and by "SIGMA"* and that "the *Claimant has paid the indemnity, without being aware that its insured had realized the indemnity from Sigma IC"*. Thus the challenged Judgment considers that *"the Claimant's insured has been compensated twice, which is not fair"*. The Supreme Court then also states that "*if the Claimant's insured had not directly realized the indemnity from the Respondent, the Claimant would have undoubtedly been entitled to the regression of debt against the Respondent"*.

58. Therefore, it appears that the Supreme Court maintains that it is unfair that the insured D.H. was compensated twice and that if D.H.

did not get compensation from SIGMA, then the Applicant would have been entitled to compensation instead. However, the Supreme Court Judgment does not address the essential allegations of the Applicant and does not provide adequate reasoning why its rights to compensation are denied.

59. More specifically, while the Supreme Court Judgment maintains that the Applicant is not entitled to any compensation, despite the fact that it has compensated the insured D.H., which the Supreme Court itself maintains is not fair, it still fails to provide the Applicant with the responses to its essential allegations and the reasoning behind its decision, in particular in light of its own case-law.

60. In fact, Supreme Court Judgment has not explained why has the Applicant not gained the right to subrogation nor has it responded to the allegations that the Judgment of the Court in Case No. KI135/14 has designated as essential, namely, how the compensation paid for by SIGMA to the insured D.H. absolved the former to pay compensation to the Applicant as well; and how the extra-judicial agreement struck between SIGMA and D.H. can affect the rights of the Applicant, where it is clear that the latter was not a party to that agreement.

61. The Court reiterates, as it has done in its Judgment of the Court in Case No. KI135/14 (paragraph 47), that it is not its task to consider whether the Supreme Court correctly interpreted the applicable law (legality), but to consider whether the challenged Judgment of the Supreme Court infringed the individual rights and freedoms protected by the Constitution (constitutionality). (See also Constitutional Court case No. KI72/14, Applicant *Besa Qirezi*, Judgment of 4 February 2015, § 65; and ECtHR case *Garcia Ruiz v. Spain*, application no. 30544/96, § 28).

62. Moreover, on this point, the Court reiterates (see also Judgment of the Court in Case KI135/14, paragraph 48) that, as a general rule, the establishment of facts of the case and the interpretation of law are a matter solely for the regular courts whose findings and conclusions in this regard are binding on the Court. However, where a decision of a regular court is clearly arbitrary, the Court can and must call it into question. (See ECtHR *Sisojeva and Others v. Latvia,* application no. 60654/00, Judgment of 15 January 2007, § 89).

63. Furthermore, it is not the task of the Court to decide what would have been the most appropriate way for the regular courts to deal with the arguments raised. However, Court considers that the Supreme Court, by ignoring the point altogether, even though it was specific, pertinent

and important, fell short of its obligations under Article 6 § 1 of the ECHR. (See ECtHR case of *Pronina v. Ukraine*, application no. 63566/00, Judgment of 18 July 2006, § 25).

64. Therefore, in light of the above observations and taking into account the proceedings as a whole, the Court considers that the second Judgment of the Supreme Court, [E.Rev.15/2016] of 16 March 2016, respectively, failed to remedy the violations found through Judgment of the Court in Case No. KI135/14and to give sufficient reasons to the Applicant as to why its rights to compensation are denied in the circumstances of this specific case. Therefore, it did not satisfy the requirements of fairness as required by Article 6 of the ECHR. (See ECtHR case of *Grădinar v. Moldova,* application no. 7170/02, Judgment of 8 April 2008, § 115).

65. The Court considers that the failure of the Supreme Court to provide clear and complete answers with regard to the questions concerning the entitlement of the Applicant to the compensation as determined by the courts of the lower instance is in breach of the Applicant's rights to be heard and the right to a reasoned decision, as a component of the right to a fair and impartial trial. (See the Judgment of the Court, § 59).

66. The Court notes that the ECtHR also found a violation of Article 6 (1) of the Convention (in *Hiro Balani v. Spain*), where the applicant made a submission requiring a specific and express reply. The court failed to give a reply making it impossible to ascertain whether they had simply neglected to deal with the issue or intended to dismiss it and if so, what were the reasons for dismissing it. (See also the Judgment of the Court in case KI135/14, § 56).

67. Accordingly, it must be concluded the Supreme Court Judgment [E. Rev. 15/2016] of 16 March 2016 fell short of the requirement of a "fair trial" under Article 31 of the Constitution in conjunction with Article 6 § 1 of the ECHR due to a lack of a reasoned decision.

68. In this respect, the Court reiterates that this conclusion exclusively concerns the challenged Judgment of the Supreme Court from the perspective of its level of reasoning pertaining to the essential allegations of the Applicant, and in any way, does not prejudge the outcome of the merits of the case.

69. Finally, the Court considers that it is not necessary to examine the allegations of the Applicant under Article 24 [Equality Before the Law]

of the Constitution, as it has found violation of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR.

Conclusion

70. In conclusion, the Court finds that by not giving due consideration and reasoning to the Applicant's alleged right to compensation, in addition to not addressing the findings of Judgment of the Court in Case No. KI135/14, the second Supreme Court Judgment, [E. Rev. no. 15/2016] of 16 March 2016, respectively, has violated the Applicant's right to a fair and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6 § 1 of the ECHR. As a result of this violation, the Applicant was deprived from his right to reasoned decision.

71. In sum, in accordance with the Rule 74 (1) of the Rules, the Judgment of the Supreme Court [E. Rev. no. 15/2016] of 16 March 2016 is declared invalid and the case is remanded to the Supreme Court for reconsideration.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113 (7) and 116 (1) of the Constitution, Articles 47 and 48 of the Law and Rules 56 (1), 63 (1) (5) and 74 (1) of the Rules of Procedure, on 4 December 2017, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 (Right to a Fair Trial) of the European Convention on Human Rights;

III. TO DECLARE invalid the Judgment of the Supreme Court [E. Rev. no. 15/2016] of 16 March 2016;

IV. TO REMAND the Judgment of the Supreme Court [E. Rev. no. 15/2016] of 16 March 2016 for reconsideration, in conformity with this Judgment of the Constitutional Court;

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

VI. TO ORDER the Supreme Court to inform the Court, in accordance with Rule 63 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;

VII. TO NOTIFY this Judgment to the Parties;

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

IX. TO DECLARE this Judgment effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KO79/18, Applicant: *The President of the Republic of Kosovo*, Request for interpretation of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo

KO79/18, Resolution adopted on 2 November 2018, published on 03.12.2018.

Keywords*: institutional referral, Central Election Commission, parliamentary groups, constitutional issues, jurisdiction of the Court*

The Applicant requested the Constitutional Court to interpret Article 139 [Central Election Commission] paragraph 4 of the Constitution of the Republic of Kosovo, asking the following questions: from which parliamentary groups should be appointed members of the CEC: a) from the parliamentary groups that have emerged from the political entities that won the elections for the Assembly of Kosovo? or b) from the parliamentary groups created after the constitution of the Assembly of the Republic of Kosovo?"

The Court first examined whether the submitted Referral meets the admissibility requirements, as established in the Constitution and further specified in the Law on the Constitutional Court and in the Rules of Procedure of the Court.

The Applicant based his request for interpretation of Article 139 (4) of the Constitution on Article 84 (9), and Article 112, paragraph 1 of the Constitution. In this respect, the Court explained that the Constitutional Court, pursuant to Article 113, paragraph 1 of the Constitution, has jurisdiction to decide only on cases brought before it in a legal manner by the authorized party. In this regard, the Court is the final authority for the interpretation of the Constitution under Article 112, paragraph 1 of the Constitution, in relation to the cases brought before it, as provided by Article 113. The Court emphasized that it does not deal with interpretations of matters relating to legal actions or inactions of the constitutional institutions, for which it is not authorized under Article 113 of the Constitution. Therefore, Article 112, paragraph 1, of the Constitution cannot be interpreted outside the context of Article 113 of the Constitution. Concerning the meaning and limits of Article 84 (9) of the Constitution, the Court notes that the referrals filed on this basis can only be admissible within the regular jurisdiction of the Court, clearly and explicitly established in Article 113, paragraphs 2 and 3.

The Court further explained that in its previous case law, applying the broader understanding of the notion of "constitutional questions", examined the referrals that are not explicitly included within the limits of its

jurisdiction under Article 113, paragraphs 2 and 3 of the Constitution. In addition, in its case law, the Court also noted that it was in its discretion to decide whether the matter raised was a "constitutional question" and to decide on a case-by-case basis. The Court, in fact, assessed that not every issue that the Applicant claims to raise a constitutional question may be such a matter per se.

The Court further explained that the Court's earlier case law regarding the addressing of the referrals submitted in a broad meaning of the notion of "constitutional questions" should be understood in the spirit of the process of establishing the foundations of the constitutional adjudication and of the social need that the Court in its beginnings is included in interpretations of specific articles of the Constitution, in particular when the questions raised are related to the exercise of the competencies of the President established by the Constitution; when the issues raised have affected the separation of powers; in preserving the constitutional order; as well as when the issues raised had fundamental implications for the functioning of the constitutional system of the country.

However, the Court reiterates that the content of the provision of Article 113 of the Constitution, taken in its entirety, is clear and specific with regard to the competencies of the President deriving from the context of an authorized party before the Constitutional Court. Therefore, it follows that Article 113 represents the basic and sole jurisdictional foundation of the Court with respect to the authorizations of the President as an authorized party before the Constitutional Court.

Therefore, the Court finds that the questions raised by the Applicant before the Court do not fall within the scope of the jurisdiction of the Constitutional Court, as established in Article 113. Therefore, in accordance with Article 113, paragraph 1 of the Constitution, the Court concludes that the Referral is inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KO79/18

Applicant

The President of the Republic of Kosovo

Request for interpretation of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo

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 President of the Republic of Kosovo, His Excellency, Hashim Thaçi (hereinafter: the Applicant).

Challenged decision

2. The Applicant requests interpretation of Article 139 [Central Election Commission] paragraph 4 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

3. The Applicant submitted the following question to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court):

"From which parliamentary groups CEC members should be appointed:

1.1. from the parliamentary groups that have emerged from the political entities that won the elections for the Assembly of Kosovo? or

1.2. from the parliamentary groups created after the constitution of the Assembly of the Republic of Kosovo?"

Legal basis

4. The Referral is based on Article 84 (9) in conjunction with Article 113 of the Constitution.

5. On 31 May 2018, in an administrative session the Constitutional Court of the Republic of Kosovo adopted 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 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

6. On 7 June 2018, the Applicant submitted the Referral to the Court.

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

8. On 17 August 2018, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.

9. On 24 August 2018, the Court notified the Applicant, the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly) and the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister) about the registration of the Referral.

10. The President of the Assembly was requested that a copy of the Referral be submitted to all the deputies of the Assembly and invited the deputies to submit their comments regarding the Referral, if any, by 20 September 2018.

11. On 11 September 2018, the Court requested the Office of the President to submit copies of the decrees of the President of the Republic of Kosovo on the appointment of members of the last composition of the Central Election Commission.

12. On 13 September 2018, the Office of the President submitted to the Court the copies of the required decrees.

13. On 19 September and 20 September 2018, Ismet Beqiri, deputy of the Assembly, Albulena Haxhiu, on behalf of parliamentary group of Vetëvendosje Movement, Visar Ymeri, on behalf of parliamentary group of the Social Democratic Party and Bilall Sherifi, on behalf of the parliamentary group of Social Democratic Initiative submitted their comments regarding the Referral.

14. On 24 September 2018, the Court notified the Applicant about the comments and invited him to submit his comments, if any, until 28 September 2018. The Applicant did not file any response regarding the above-mentioned comments of the deputy and the parliamentary groups.

15. On the same date, the Court also notified the President of the Assembly and the Prime Minister about the comments. The President of the Assembly was requested to submit copies of all comments to all the deputies of the Assembly.

16. On 25 September 2018, the Court submitted questions to the Forum of the Venice Commission.

17. From 26 September to 29 October 2018, the Court received responses from the Constitutional/Supreme Courts of Austria, Netherlands, Slovakia, Croatia, Luxembourg, Ireland, Lithuania, Bulgaria, South Africa, Norway, Czech Republic, Germany and Latvia.

18. On 21 November 2018, the Review Panel considered the Report of the Judge Rapporteur and, by majority, recommended to the Court the inadmissibility of the Referral.

19. On the same date, the Court voted, by majority, on the inadmissibility of the Referral.

Summary of facts

20. On 16 December 2014, the President of the Republic of Kosovo, based on the nomination by parliamentary groups and political parties of non-majority communities represented in the Assembly of the Republic of Kosovo (hereinafter: the Assembly) appointed members of the Central Election Commission (hereinafter: the CEC).

21. On 11 June 2017, the early elections for the Assembly were held.

22. On 21 June 2017, the President announced the elections for municipal assemblies and mayors of the municipalities in the Republic of Kosovo.

23. On 8 July 2017, the Central Election Commission (hereinafter: the CEC) certified the election results for the Assembly.

24. On 3 August 2017, the Assembly held its constitutive session and, among other things, established an *ad hoc* committee for verification of the quorum and mandates (hereinafter: the *ad hoc* Committee).

25. On the same date, the *ad hoc* Committee submitted the report, based on the list of the certified election results and ascertained the following mandates:

    a. Democratic Party of Kosovo, Alliance for the Future of Kosovo, Initiative for Kosovo, Justice Party, Movement for Union, Albanian Democratic Christian Party of Kosovo, Conservative Party of Kosovo, Democratic Alternative of Kosovo, Republicans of Kosovo, Party of Balli, Social Democratic Party, Balli Kombëtar of Kosovo (hereinafter: PDK, AAK and Nisma), 39 deputies;

    b. "Vetėvendosje" Movement (hereinafter: LVV), 32 deputies;

    c. The Democratic League of Kosovo and Alliance Kosova e Re (hereinafter: the LDK and AKR), 29 deputies;

    d. Građanska inicijativa Srpska lista, 9 deputies;

    e. Kosova Demokratik Tyrk Partisi, 2 deputies;

    f. Coalition "Vakat", 2 deputies;

    g. Nova Demokratska Stranka, 1 deputy;

    h. Samostalna Liberalna Stranka, 1 deputy;

    i. Ashkali Democratic Party of Kosovo, 1 deputy;

    j. Egyptian Liberal Party, 1 deputy;

    k. United Party of Gorani, 1 deputy;

    l. Ashkali Party for Integration, 1 deputy; and

    m. Roma United Party of Kosovo, 1 deputy.

26. On 7 September 2017, with the election of the President and Deputy Presidents the Assembly was constituted.

27. In September 2017, a number of deputies notified the President of the Assembly on the formation of the new parliamentary group, the Social Democratic Initiative.

28. In September 2017, a number of deputies notified the President of the Assembly about the formation of the new Parliamentary Group, the Alliance for the Future of Kosovo (hereinafter: the AAK).

29. On 22 October 2017, local elections were held in the Republic of Kosovo.

30. On 27 December 2017, the CEC certified the results of the local elections.

31. On 14 March 2018, twelve (12) deputies notified the President of the Assembly about the formation of the new Parliamentary Group, the Group of Independent Deputies.

32. On 27 April 2018, the President of the Republic appointed Ms. Valdete Daka Chair of the CEC.

Applicant's Referral

33. The Court recalls that the Applicant requests interpretation of Article 139 [Central Election Commission] paragraph 4 of the Constitution.

34. In light of his Referral, the Applicant requests the Court to answer the following questions:

"From which parliamentary groups the CEC members should be appointed:

> *1.3. from the parliamentary groups that have emerged from the political entities that won the elections for the Assembly of Kosovo?; or*
>
> *1.4. from the parliamentary groups created after the constitution of the Assembly of the Republic of Kosovo?"*

35. With regard to the abovementioned question, the Applicant clarifies his Referral as follows:

"In accordance with the Constitution and the Law No. 03/L-073 on General Elections in the Republic of Kosovo (OG, No. 31, 15 June 2008), the President is in the phase of appointing CEC members with a new mandate.

In order to avoid any dilemma in the appointment of CEC members, I request the Constitutional Court that in the spirit of the Constitution, to interpret Article 139, paragraph 4 of the Constitution [...].”

36. As to the admissibility of the Referral, the Applicant argues:

“The Referral is submitted in accordance with Article 84 (9) of the Constitution, as this provision gives the President the competence to refer the constitutional matters to the Constitutional Court when there are unclear constitutional issues, which he faces in exercising the powers guaranteed by the Constitution and with a purpose of the realization of the primary role of the President, as a representative of the constitutional legal unity of the people of Kosovo and as a guarantor of the democratic functioning of the institutions and the constitutional system of the Republic of Kosovo”.

37. According to the Applicant: “*The competence of the Constitutional Court for the interpretation of the Constitution is established in Article 112.1 of the Constitution:*

“The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.

Article 84 (9) of the Constitution explicitly gives the President the competence to refer matters to the Constitutional Court. This competence under this constitutional provision is a broad competence and is not subject to any limitations, including but not limited to the specific cases listed in Article 113 of the Constitution.

The President has the responsibility for implementing the Constitution and guaranteeing the democratic and constitutional functioning of the institutions of the Republic of Kosovo. In implementing such a constitutional responsibility, the President may refer matters to the Constitutional Court in cases where clarification is needed in relation to a situation where the constitutional provision is unclear and a decision that produces legal effects is required to be taken.

In this context, there is uncertainty as to what are the parliamentary groups that have the right to nominate/propose member/s to be appointed as member/s of the Central Election Commission (hereinafter: the CEC) by the President. In this regard, the President uses his constitutional competence to refer this constitutional question to clarify from which parliamentary groups the CEC members should be appointed”.

38. The Applicant further argues that: *"The Constitutional Court, pursuant to Article 112 of the Constitution, is the final authority in the Republic of Kosovo for the interpretation of the Constitution and the compliance of laws with the Constitution and in accordance with Article 113 of the Constitution has jurisdiction to decide only on cases referred to the Court in a legal manner by the authorized party. Undoubtedly, in these cases, these two requirements are met and accordingly the Constitutional Court must interpret the constitutional provisions whenever an issue is addressed to it by the mandated institutions for referral. In this case, the interpretation of Article 139, paragraph 4 of the Constitution is required in order to clarify this constitutional provision and enable the President to consolidate the CEC by appointing its members."*

39. The Applicant finally emphasizes that*: "[i]n the course of what was emphasized above, the admissibility of this Referral by the Constitutional Court is self-evident."*

Questions submitted to the Venice Commission Forum and summary of responses

Questions

1. Is there any constitutional definition for the parliamentary group (parliamentary groups)?
2. Is there a constitutional (legal) time limit from when a parliamentary group is formally established? At what stage the parliamentary groups are authorized (entitled) to propose or nominate the candidates for the appointment to various bodies (e.g., in parliamentary committees, ad hoc parliamentary committees, in independent institutions)?
3. If applicable in your country, what is the relevant case law for the appointment of CEC members, more specifically, are CEC members elected:

(a) from the parliamentary groups that emerge from political entities that have directly emerged from the elections, and as such have won seats in the Assembly/Parliament; or

(b) from the parliamentary groups created after the constitution of the Assembly/Parliament (and which may or may not correspond to the parliamentary groups that have automatically emerged from the political (coalitions) entities that participated in the election process?

Is there any relevant case law regarding the subject matter covered by prior questions or any other situation that may be relevant to the purposes of this subject matter?

Responses of the Constitutional/Supreme Courts, submitted through the Venice Commission Forum

40. Based on the responses of the Constitutional/Supreme Courts submitted through the Forum of the Venice Commission, it is noted that the provisions of the constitutions of these states do not foresee a definition for the parliamentary groups.

41. Likewise, based on the responses of the Constitutional/Supreme Courts submitted through the Venice Commission Forum, it results that in most of these states, the Central Election Commissions are permanent and professional commissions, composed of the representatives of various institutions, governmental and judicial ones. Meanwhile, in some cases they are composed of members who are proposed, either directly by the political parties, or by parliamentary groups represented in the Parliament.

Comments submitted by Deputy Ismet Beqiri and by the representatives of the parliamentary groups

Comments by Deputy Ismet Beqiri

42. Deputy Ismet Beqiri in his comments submitted on 19 September 2018, among other things, argued that *"[...] this provision is also clear for the fact that its implementation in practice is not happening for the first time in our country. All the compositions of the Central Election Commission since the entry into force of this Constitution and the establishment of the CEC, have been built based on the number of parliamentary groups as they emerged from the election process, based on their results and in the process of verification of the groups and mandates of each deputy separately in the constitutive sessions of all previous legislatures. As such, this formula of the allocation of seats has always been acceptable to all actors and as a result we have never had any dispute and a slightest dilemma in the spirit of the question posed to your institution by the President of Kosovo."*

43. Mr. Beqiri further argues that *"[...] in the provision for which the interpretation is required, it is only for the parliamentary groups that emerge from the election process and not for the groups that can*

be created, ceased, created and ceased ... cases without limitation during a legislature [...]".

44. According to Mr. Beqiri *" [...] in accordance with Article 61, paragraph 4 of Law 03/L-073 on General Elections, the upper limit is sixty (60) days and that the process of appointment of CEC members may be conducted immediately after the certification of election results, even before the constitution of the Assembly (because pursuant to Article 66.1 of the Constitution, the constitutive session of the Assembly of Kosovo must be held within 30 days of the announcement of the election results)".*

45. Mr. Beqiri concludes: *"Thus, the interpretation differently from what we find clear in the content of Article 139.4 of the Constitution and practiced consistently so far, that the seats in CEC are shared by the groups that have emerged as such from the elections, does not have any legal or institutional logic and it would greatly harm the CEC and the work of this very sensitive institution."*

Comments of the Parliamentary Group Vetëvendosje Movement

46. In the comments submitted by Ms. Albulena Haxhiu on behalf of the Vetëvendosje Parliamentary Group on 20 September 2018, among other things, it was stated: "*Paragraph 4 of Article 61 of the Law on General Elections stipulates that "The mandate of the members of the CEC shall begin no later than sixty (60) days after the certifications of the Assembly elections results". This paragraph, beyond the deadline for the mandate of CEC members to begin the latest, also clarifies the legal criterion on the legitimate entities to make nominations for the members of the CEC, as it guarantees the necessary mechanism for institutional continuity of a permanent constitutional institution. We emphasize that this deadline relates to the date of the certification of election results and not to the day or date of the constitution of the Assembly. From this it can be seen that the CEC functionality has no connection with the constitution of the Assembly. Even the constitution of the Assembly could go beyond this 60-day period from the certification of election results, as the failure of the Assembly after constitution to elect the Prime Minister would lead the country to early elections, for which the CEC would have already been functional".*

47. Mrs. Haxhiu further argues that *"Based on the spirit of the Constitution of the Republic, in accordance with the Judgment of the Constitutional Court No. 119/94, based on the Law on General Elections and based on the CEC decision of certification of the final*

results of the general elections of 11 June 2017 , the Central Election Commission should consist of members representing the parliamentary groups that have emerged as political entities from the election results for the Assembly of Kosovo and have passed the parliamentary threshold [...]",

Comments of the Parliamentary Group of Social Democratic Party

48. In the comments submitted by Mr. Visar Imeri, on behalf of the SDP Parliamentary Group on 20 September 2018, it was stated as follows:

"The constitutional text in this provision has used the term "represented". Such a term used in this provision has a post-festum character. This implies that not necessarily the political entity that has won certain mandates in the Assembly will be represented at the parliamentary group level with the same mandated deputies. And since the basis for acquiring the right to nominate the representative for the appointment in the capacity of a CEC member is closely related to constitutional authorizations regarding the morphology of the constitutional mandate of deputies, as members of the highest constitutional body of a legislative character. It is the provision of Article 70, paragraph 1, which gives the freedom to exercise the function of a deputy within his mandate without being subject to any other mandatory mandate. Strengthening the freedom of political determination within the political structure of deputies as members of the Assembly, is related to the very nature of representation. Representation is a dynamic notion. So it is moveable. Its dynamism is also expressed by the definition of a mandate in terms of time. These are even among the fundamental prerogatives of representative democracy, as through the time limitations of mandates, the dynamism of representation is stimulated."

49. Finally, Mr. Imeri noted: *"All these questions are eliminated with the interpretation that "the President will appoint members of the CEC from among the parliamentary groups-those that have been created and function within the framework of the internal political structure of the Assembly [...]. Therefore, based on the above, we consider that in the alternative questions that are included in the referral KO79/18 by the President of Kosovo, the answer to interpretation of the provision of Article 139 paragraph 4 of the Constitution of Kosovo should be found in the modality of the second question, namely that: "The members of the CEC should be elected from the parliamentary groups with the right to nominate representatives in the CEC, created after the constitution of the Kosovo Assembly, namely according to the situation in which reflects the composition of the parliamentary groups when the nominations of the representatives for appointment to the CEC should be made".*

Comments of the Parliamentary Group of Social Democratic Initiative

50. On 20 September 2018, Mr. Bilall Sherifi, on behalf of the Parliamentary Group of Social Democratic Initiative, in essence, stated the following:

"The question of the President of the Republic of Kosovo for the Constitutional Court has no legal constitutional relevance for the appointment of the CEC members regarding the time of establishment of the Parliamentary Groups as it exists according to interpretation of the Court KO119/14 only one time and it is after the constitution of the Assembly.

1. There are no parliamentary groups emerging from the elections and after the constitution of the Assembly as the President has posed the question, but there are parliamentary groups only after the constitution of the Assembly.

2. There is no legal dilemma that the Parliamentary Groups established after the constitution of the Assembly should be represented by a member according to the voting power of the CEC, see Article 139 of the Constitution of the Republic of Kosovo and Article 61 of Law No.03/L-073/2008.

The Parliamentary Group of the Social Democratic Initiative, based on the arguments put forward in these comments, is convinced that the Constitutional Court will maintain the continuity of its interpretation in Judgment KO119/14, regarding the time relevance of the establishment of parliamentary groups as described above so that the Parliamentary Group of the Initiative that now has 8 deputies, to have the right of representation with member in the Central Election Commission in accordance with Article 139 of the Constitution of the Republic of Kosovo and Article 61 of the Law on Central Elections in the Republic of Kosovo."

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 84
[Competencies of the President]

[...]

(26) appoints the Chair of the Central Election Commission;

[...]

Article 112
[General principles]

1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.

[…]

Article 139
[Central Election Commission]

[…]

3. The Chair of the Central Election Commission is appointed by the President of the Republic of Kosovo from among the judges of the Supreme Court and courts exercising appellate jurisdiction.

4. Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats. If fewer groups are represented in the Assembly, the largest group or groups may appoint additional members. One (1) member shall be appointed by the Assembly deputies holding seats reserved or guaranteed for the Kosovo Serb Community, and three (3) members shall be appointed by the Assembly deputies holding seats reserved or guaranteed for other Communities that are not in majority in Kosovo.

Law No. 03/L-073 on General Elections in the Republic of Kosovo (published in the Official Gazette on 15 June 2008)

Article 61
Mandate and Appointment of CEC Members

61.1 The Chair of the CEC shall be appointed in accordance with article 139(3) of the Constitution of Kosovo.

61.2 The mandate of the Chair of the CEC shall be seven (7) years commencing on the day stipulated in the notification of appointment by the President of Kosovo.

61.3 Appointment of CEC members as provided in article 139 (4) of the Constitution of Kosovo shall be done by the following procedures:

a) within 10 days of the coming into force of this law parliamentary groups entitled to appoint a member(s) to the CEC shall notify the President of

Kosovo of their appointment. Provided that the individual appointed by the parliamentary group conforms to the requirements of this law, the President of Kosovo shall, within five (5) days confirm the appointment in writing. The appointment shall be effective on the day stipulated in the official appointment by the President of Kosovo;
b) the Chairman of the CEC shall serve for not more than 2 consecutive mandates;
c) the Members of the CEC shall serve for not more than 3 consecutive mandates. d) the termination of a mandate shall be on the last calendar day of the same month of the commencement of the mandate;
d) the termination of a mandate shall be on the last calendar day of the same month of the commencement of the mandate;

e) notwithstanding point (d) of this paragraph mandate that expires 90 or fewer days before an election or up to 90 days following the certification of the results of an election shall be automatically extended to 90 days after the certification of the results of an election.

61.4 The mandate of the members of the CEC shall begin no later than sixty (60) days after the certifications of the Assembly elections results.

Admissibility of the Referral

51. The Court first examines whether the submitted Referral meets the admissibility requirements, as established in the Constitution and further specified in the Law on the Constitutional Court (hereinafter: the Law) and in the Rules of Procedure.

52. Article 113, paragraph 1 of the Constitution stipulates that *"[t]he Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties"*.

53. The Court emphasizes that the President of the Republic of Kosovo is an authorized party pursuant to Article 113 [*Jurisdiction and Authorized Parties*], paragraphs 2 and 3 of the Constitution.

54. Pursuant to Article 113, paragraph 2, of the Constitution, "*[…] the President of the Republic of Kosovo […] [is] authorized to refer the following matters:*

> *(1) the question of the compatibility with the Constitution of laws, of decrees of the […] Prime Minister, and of regulations of the Government;*

(2) the compatibility with the Constitution of municipal statutes."

55. Furthermore, Article 113, paragraph 3, of the Constitution stipulates that *[…],the President of the Republic of Kosovo […][is] authorized to refer the following matters:*

(1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;
(2) compatibility with the Constitution of a proposed referendum;
(3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;
(4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;
(5) questions whether violations of the Constitution occurred during the election of the Assembly.

56. In this respect, Article 113, paragraphs 2 and 3 of the Constitution explicitly provide for cases that the President of the Republic may refer to the Constitutional Court.

57. Therefore, the Court emphasizes that the right of the authorized parties by the Constitution to file referrals before the Court derives from Article 113 of the Constitution. An exception to this is the situation related to Article 62 [Representation in the Institutions of Local Government], paragraph 4 of the Constitution, as well as the cases that may arise from additional jurisdiction that may be regulated by law, as established in Article 113, paragraph 10 of the Constitution.

58. Article 62, paragraph 4 of the Constitution defines:

"In the event the Municipal Assembly chooses not to reconsider its act or decision, or the Vice President deems the result, upon reconsideration, to still present a violation of a constitutionally guaranteed right, the Vice President may submit the matter directly to the Constitutional Court, which may decide whether or not to accept the matter for review."

59. However, even with respect to this exemption, when the case on this ground is directly brought before the Constitutional Court, it is at the

discretion of the Court to decide whether to accept to consider the relevant case (See the Judgment of the Constitutional Court in case KO01/09, *Applicant: Qemajl Kurtishi*, Deputy President of the Municipality of Prizren, of 18 March 2010).

60. The Court recalls that the Applicant requests the interpretation of Article 139 [Central Election Commission] paragraph 4 of the Constitution, and his request for interpretation was based on Article 84 (9) and Article 112, paragraph 1, of the Constitution.

61. In this regard, the Court notes that the question raised by the Applicant before the Court does not fall within the scope of the jurisdiction of the Constitutional Court as provided by paragraphs 3 and 4 of Article 113 of the Constitution. Furthermore, such a thing was neither requested, nor specified by the Applicant in his Referral.

62. The Court further recalls that the Applicant states: "*Article 84 (9) of the Constitution explicitly gives the President the competence to refer matters to the Constitutional Court. This competence under this constitutional provision is a broad competence and is not subject to any limitations, including but not limited to the specific cases listed in Article 113 of the Constitution.*"

63. The Applicant further states that, under Article 84 (9) of the Constitution, the President has the competence to refer constitutional matters to the Constitutional Court "*[...] as this provision gives the President the competence to refer constitutional matters to the Constitutional Court, when there are unclear constitutional issues that he faces when exercising the competencies guaranteed by the Constitution and in order to realize the primary role of the President as a representative of constitutional legal unity of the people of Kosovo and as a guarantor of the democratic functioning of the institutions and of the constitutional system of the Republic of Kosovo ... The President may refer issues to the Constitutional Court in cases where clarification is needed regarding a situation where the constitutional provision is unclear, and is required that a decision that produces legal effects is rendered*".

64. In addition, the Applicant states that *"[t]he Constitutional Court, pursuant to Article 112 of the Constitution, is the final authority in the Republic of Kosovo for the interpretation of the Constitution and the compliance of laws with the Constitution and in accordance with Article 113 of the Constitution has jurisdiction to decide only on cases brought before a court in a legal manner by the authorized party ..." adding that "[...] the admissibility of this referral by the Constitutional Court is self-evident"*.

65. In this respect, the Court reiterates that Article 112 of the Constitution establishes that the Constitutional Court is the final authority in the Republic of Kosovo for the interpretation of the Constitution and the compliance of the laws with the Constitution.

66. Therefore, as rightly specified in the content of the Applicant's Referral, the Constitutional Court, pursuant to Article 113, paragraph 1 of the Constitution, has jurisdiction only on cases brought before it in a legal manner by an authorized party.

67. In that regard, the Court is the final authority for the interpretation of the Constitution under Article 112, paragraph 1 of the Constitution, in relation to the cases referred before it as provided for by Article 113. The Court does not deal with interpretations of matters relating to legal actions or inactions of the constitutional institutions for which it is not authorized under Article 113 of the Constitution. Therefore, Article 112, paragraph 1, of the Constitution cannot be interpreted outside the context of Article 113 of the Constitution.

68. As to the meaning and limits of Article 84 (9) of the Constitution, the Court notes that the referrals filed on this basis can only be admissible within the regular jurisdiction of the Court, clearly and explicitly established in Article 113, paragraphs 2 and 3.

69. The Court, in its previous case law, applying the broader understanding of the notion of "constitutional questions", had considered referrals that are not explicitly included within the limits of its jurisdiction under Article 113, paragraphs 2 and 3 of the Constitution. The Court was requested by the President of the Republic to interpret the meaning of specific provisions of the Constitution (see, for example, Case No. KO80/10, *President of the Republic of Kosovo*, Judgment of 7 October 2010, Case No. KO97/10, *Acting President of the Republic of Kosovo*, Judgment of 28 December 2010, Case No. KO57/12, *President of the Republic of Kosovo*, Judgment of 22 October 2012, Case No. KO103/14, *President of the Republic of Kosovo*, Judgment of 1 July 2014)·

70. Furthermore, in its case law, the Court had noted that it was in its discretion to decide whether the raised issue was a "*constitutional question*" and it would decide on a case-by-case basis. The Court, in fact, assessed that "*Not every issue that [the Applicant] claims to raise a constitutional question may be such a matter per se*" (See Judgment in case KO130/15, *President of the Republic of Kosovo*, *concerning the assessment of the compatibility of the principles contained in the document entitled "Association/Community of Serb majority municipalities in Kosovo general principles/main elements" with the spirit of the Constitution, Article 3 [Equality Before the Law],*

paragraph 1, Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution of the Republic of Kosovo mentioned above, Judgment of 23 December 2015, paragraph 101).

71. The Court's earlier case law regarding the consideration of referrals submitted under a broad meaning of the notion "constitutional question" should be understood in the spirit of the process of establishing the foundations of the constitutional judiciary and of the social need for the Court in its beginnings to be included in interpretations of specific articles of the Constitution, in particular when the questions raised were related to the exercise of the competencies of the President, as established by the Constitution; when the issues raised affected the separation of powers; in preserving the constitutional order; as well as when the issues raised had fundamental implications for the functioning of the constitutional system of the country (See Judgment in case KO130/15, *the President of the Republic of Kosovo*, cited above, paras 104, 107 and 109. See also case No. KO103/14, *the President of the Republic of Kosovo*, mentioned above, Judgment of 1 July 2014, paragraphs 27, 57 and 61).

72. However, the Court in its present composition considers that, in full compliance with the explicit, exhaustive and restrictive language of Article 113 [Jurisdiction and the Authorized Parties] of the Constitution, all other references in the Constitution related to the referring of constitutional questions to the Constitutional Court stem from Article 113.

73. Based on this, the Court finds that the submitted Referral does not fall within the limits of Article 113, because pursuant to Article 113, paragraph 2, the President may raise questions related to the compatibility with the Constitution of laws, acts of the Government and of the Prime Minister, as defined in 113.2 (1) and the Statute of the Municipality, as defined in Article 113.2 (2) of the Constitution.

74. Whereas, pursuant to Article 113, paragraph 3, the President is authorized to refer matters related to situations of conflict among constitutional competencies of the Assembly, the President and the Government; compatibility of the referendum with the Constitution; the compatibility of the declaration of the state of emergency and the actions taken during this state with the Constitution; the compatibility of the proposed constitutional amendments with international agreements and the review of the constitutionality of the procedure followed; as well as the constitutionality of the process of election of the Assembly.

75. Therefore, the Applicant's competence under Article 84 (9) of the Constitution, must also relate to the jurisdiction of the Court set forth in Article 113, paragraphs 2 and 3 of the Constitution, which explicitly and exhaustively define the questions that the President of the Republic may refer to the Constitutional Court.

76. Based on the fact that the Constitution has explicitly defined the jurisdiction of the Constitutional Court, including the authorized parties to activate its jurisdiction, the possibility for the Court to take a consultative or advisory role is limited, as such role would run counter to its fundamental role to decide on the cases brought before it. The practice of other countries recognizes cases when constitutional courts have exercised advisory jurisdiction, but later such practice of consultative nature has been removed because of its incompatibility with the decision-making nature of constitutional courts. Specifically, in the case of the Constitutional Court of Germany, the Law on the Federal Constitutional Court, at the outset of its existence, provided for the possibility of giving advisory opinions from this court (Law on the Federal Constitutional Court of Germany, *BVerfGG* of 12 March 1951). However, only a few years later, due to the mandatory nature of the "advisory opinions", the provision of the abovementioned law, which allowed such a jurisdiction, was repealed (on 21 July 1956).

77. The Court reiterates that the content of the provision of Article 113 of the Constitution, taken in its entirety, is clear and concrete with regard to the competencies of the President deriving from the context of an authorized party before the Constitutional Court.

78. Therefore, it follows that Article 113 represents the basic and sole jurisdictional foundation of the Court with respect to the authorizations of the President as an authorized party before the Constitutional Court.

79. In addition, the Court recalls that the Applicant in his Referral requests the interpretation of Article 139, paragraph 4 of the Constitution, which stipulates that:

"Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats. If fewer groups are represented in the Assembly, the largest group or groups may appoint additional members. One (1) member shall be appointed by the Assembly deputies holding seats reserved or guaranteed for the Kosovo Serb Community, and three (3) members shall be appointed by the Assembly deputies holding seats reserved or guaranteed for other Communities that are not in majority in Kosovo".

80. Therefore, the Referral does not concern issues that are expressly related to the exercise of the constitutional responsibilities of the President, because neither Article 84 [Competencies of the President], nor Article 139 [Central Election Commission] of the Constitution, provide for the competence of the President to appoint the members of the Central Election Commission, namely:

Article 84
[Competencies of the President]

[...]
(26) appoints the Chair of the Central Election Commission;
[...]

Article 139
[...]

[Central Election Commission]

[...]

3. The Chair of the Central Election Commission is appointed by the President of the Republic of Kosovo from among the judges of the Supreme Court and courts exercising appellate jurisdiction.
[...]

81. Unlike Articles 84 (26) and 139 (3) of the Constitution, which clearly provide the competence of the President to appoint the Chair of the Central Election Commission, the competence of the President for the appointment of CEC members is specifically defined only in the provisions of the Law on General Elections in the Republic of Kosovo, namely Article 61, paragraph 3 (a).

82. Finally, the Court finds that in order for the Court to assess the Applicant's Referral, the Referral should be based on Article 113 of the Constitution.

83. Therefore, based on the above, the Court finds that the questions raised by the Applicant before the Court do not fall within the scope of the jurisdiction of the Constitutional Court, as established in Article 113. Therefore, in accordance with Article 113, paragraph 1, of the Constitution, the Court concludes that the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113, paragraph 1, of the Constitution, Rule 59 (2) of the Rules of Procedure, on 21 November 2018, by majority

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI102/17, Applicant Meleq Ymeri, Constitutional review of Administrative Instruction no. 09/2015 on the categorization of users of contribution- payer pension according to the qualification structure and the duration of the payment of contribution-pension experience of the Ministry of Labor and Social Welfare

KI102/17, Resolution rendered on 10 January 2018 and published on 22 February 2018

Keywords: *Article 47 [Right to Education] and 49 [Right to Work and Exercise Profession] of the Constitution, unauthorized person, pension, inadmissible referral*

The Applicant challenges Administrative Instruction no. 09/2015 on the categorization of users of contribution- payer pension according to the qualification structure and the duration of the payment of contribution-pension experience of the Ministry of Labor and Social Welfare.
The Applicant requests the Constitutional Court to assess the legality and constitutionality of the Administrative Instruction, namely the last provision of Article 5 which, according to him, is discriminatory.
The Court found that the Applicant did not in any way prove that the challenged act violated his fundamental rights and freedoms. The Court reiterated that the constitutional text and jurisprudence of this Court do not recognize the right of individuals to challenge in abstract the acts of a general character. Therefore, the Referral was declared inadmissible by the Constitutional Court, as it was not submitted in a legal way by the authorized person.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI102/17

Applicant

Meleq Ymeri

Constitutional review of Administrative Instruction no. 09/2015 on the categorization of users of contribution- payer pension according to the qualification structure and the duration of the payment of contribution-pension experience of the Ministry of Labor and Social Welfare

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral was submitted by Meleq Ymeri (hereinafter: the Applicant), a graduated lawyer from village Kuk, Municipality of Dragash.

Challenged decision

2. The Applicant challenges Administrative Instruction No. 09/2015 on the categorization of users of contribution-payer pension according to the qualification structure and the duration of the payment of contribution-pension experience (hereinafter: Administrative Instruction No. 09/2015), of the Ministry of Labor and Social Welfare (hereinafter: MLSW).

Subject matter

3. The subject matter is the constitutional review of the Administrative Instruction No. 09/2015 of the MLSW.

Legal basis

4. The Referral is based on Article 113 (1) (7) of the Constitution, Articles 47 and 48 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 21 August 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 22 August 2017, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel, composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

7. On 12 October 2017, the Court notified the Applicant about the registration of the Referral.

8. On 16 October 2017, the Court sent a copy of the Referral to the MLSW.

9. On 10 January 2018 the Review Panel considered the report of the Judge Rapporteur, and recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. On 31 December 2015, the MLSW published Administrative Instruction No. 09/2015, in the Official Gazette.

11. On 21 August 2017, the Applicant challenged the constitutionality of the Administrative Instruction No. 09/2015.

Applicant's allegations

12. The Applicant alleges that the provision of Article 5 of Administrative Instruction No. 09/2015 is *"discriminatory as it does not have legal support, or reasoning, without facts, and arguments ... by restricting the rights with a single alleged date 01.01.1991 ...".*

13. The Applicant further alleges violation of Articles 47 [Right to Education] and 49 [Right to Work and Exercise Profession] of the Constitution.

14. Regarding the obligation to exhaust legal remedies, pursuant to Article 113.7 of the Constitution, the Applicant stated: *"this is an act of a public authority, and only the Constitutional Court can make the assessment of legality and constitutionality".*

15. The Applicant requests the Constitutional Court to hold: *"... that my referral is fair and lawful, requesting the Constitutional Court to assess the legality and constitutionality of the Administrative Instruction no. 09/2015, namely the last provision of Article 5 which is super discriminatory".*

Assessment of the admissibility of Referral

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

17. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish that:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties;*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

18. The Court takes into account Rule 36 (1) (a) of the Rules of Procedure, which specifies:

> *"(1) The Court may consider a referral if:*
>
> *(a) the referral is filed by an authorized party".*

19. Regarding the request for constitutional review of Administrative Instruction No. 09/2015, the Court notes that the Applicants did not prove in any way how that challenged act violated his fundamental rights and freedoms. The Court reiterates that the constitutional text and the case law of this Court do not recognize the right of individuals to challenge *in abstracto* the acts of general character (See for this purpose, among many references, the Constitutional Court of the Republic of Kosovo: Resolution on Inadmissibility in cases no. KI92/12 Applicant *Sali Hajdari*; KI62/12 Applicant *Liridon Aliu*; KI40/11 Applicant *Zef Prenaj*; KI51/10 Applicant *Ljubiša Živić*).

20. The Court reiterates that the Constitution of Kosovo does not provide for an *actio popularis*, meaning that individuals cannot complain in abstract or challenge directly actions or failure to act by public authorities. The Constitution of Kosovo provides recourse to individuals regarding actions or failure to act by public authorities only within the scope provided by Articles 113.1 and 113.7 of the Constitution, which requires the Applicants to show that they are: (1) authorized parties, (2) directly affected by a concrete act or failure to act by public authorities, and (3) that they have exhausted all legal remedies provided by law. (Constitutional Court of the Republic of Kosovo: Case No. KI39/11, Applicant *Tomë Krasniqi*, Constitutional Review of Notification No. 311/07 of 13 April 2007, and Certificate No. 322/07 of 30 April 2007 of the Ministry Labor and Social Welfare, Resolution on Inadmissibility of 30 January 2013, paragraph 40 and the references therein).

21. In this regard, the Court emphasizes that its procedural and substantive jurisdiction for the assessment of acts of general character is initiated only by the constitutional institutions, in accordance with the procedure laid down in Article 113 of the Constitution; while individuals have the right to challenge only individual acts of public authorities that violate their individual rights and only after the exhaustion of all legal remedies provided by paragraph 7 of Article 113 of the Constitution.

22. Therefore, the Referral on constitutional basis is to be declared inadmissible, because it was not submitted in a lawful manner by an authorized party as provided in paragraphs 1 and 7 of Article 113 of the Constitution.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (1) and (7) of the Constitution, Articles 47 and 48 of the Law, and Rules 36 (1) (a) of the Rules of Procedure, in the session held on 10 January 2018, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Arta Rama-Hajrizi

KI152/17, Applicant, Shaqir Totaj, Request for constitutional review of Judgment A.A. U.ZH. No. 63/2017 of the Supreme Court of the Republic of Kosovo, of 7 December 2017

Resolution on Inadmissibility approved on 17 January 2018, published on 8 February 2018

Keywords*: election dispute, local elections, president of municipality, freedom of election and participation*

The Referral was submitted by Mr. Shaqir Totaj, who was a candidate of the Democratic Party of Kosovo (hereinafter: the PDK) for Mayor of Prizren in the local elections of 2017.
The Applicant's main allegation was that the Supreme Court failed to "*prove and verify the complainant's facts and evidence*" and as a consequence his rights guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution have been violated. The Applicant also requested the Court to impose an interim measure so as to suspend the work of the elected Mayor of the Municipality of Prizren until the Constitutional Court decides on the case brought by him.
The Court noted that the Referral of Mr. Shaqir Totaj was filed as an individual referral, in his capacity as a natural person, by which it was requested to assess the constitutionality of the abovementioned judgment of the Supreme Court; whereas the judgment in question was rendered by the Supreme Court following an appeal of the PDK, in the capacity of a political entity and consequently in the capacity of a legal person, filed against a decision of the Election Complaints and Appeals Panel (ECAP).
Following the clarifications submitted by the Applicant to the Court, the latter found that the Applicant did not exhaust any legal remedy in his personal name, namely as a natural person or as a "*person who has a legal interest*", with the ECAP or the Supreme Court, before submitting the Referral to the Constitutional Court. In addition, the Court noted that the Applicant was never mentioned in the decisions which were subject to constitutional review.
In this respect, the Court held that the Applicant had a legal opportunity to file as a natural person, namely as a "*person who has legal interest*" the respective complaints and appeals regarding his allegations of "*violation of the passive election right* (*right to be elected)".* He could have submitted allegations of violation of his constitutional rights to ECAP and the Supreme Court, in accordance with the legislation in force. Only after exhaustion of such legal remedies, he would have been able to submit to the Constitutional Court an individual request for the constitutional review of the decisions in question, of the ECAP and of the Supreme Court, in accordance with Article 113.7 of the Constitution and Article 47 of the Law.

In the light of the foregoing facts, the Court concluded that the Applicant did not exhaust the legal remedies available to him, provided by the legislation in force in the Republic of Kosovo. Therefore, the Applicant's Referral was declared inadmissible because of non-exhaustion of all available legal remedies; whereas as a result of the inadmissibility, the request for interim measures was rejected as ungrounded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI152/17

Applicant

Shaqir Totaj

Constitutional review of Judgment of the Supreme Court of the Republic of Kosovo, A.A. U.ZH. No. 63/2017, of 7 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

The Applicant

1. The Referral was submitted by Mr. Shaqir Totaj from Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court of the Republic of Kosovo A.A. U.ZH. No. 63/2017, of 7 December 2017.

Subject matter

3. The subject matter is the constitutional review of the abovementioned Judgment, which allegedly violated the Applicant's rights guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as the Article 3 [General Principles] of the Law No. 03/L-072 on Local Elections of the Republic of Kosovo (hereinafter: the Law on Local Elections).

4. The Applicant requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) *"to impose as interim measure the suspension of the work of the elected Mayor of the Municipality of Prizren, pending the final Decision of the Constitutional Court"*.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Articles 27 and 47 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rules 29 and 56 of the Rules of Procedure od the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Procedures before the Constitutional Court

6. On 15 December 2017, the Applicant submitted the Referral to the Court.

7. On the same day, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of judges: Almiro Rodrigues (presiding), Snezhana Botusharova and Selvete Gërxhaliu Krasniqi.

8. On 19 December 2017, the Court notified the Applicant on the registration of the Referral and requested from him that within seven (7) days from the receipt of the notification letter, to clarify whether he submitted the Referral as an individual Referral on his behalf. Also, the Court sent a copy of the Referral to the Supreme Court.

9. On the same day, the Court notified the Democratic Party of Kosovo (hereinafter: the PDK), as well as Mr. Mytaher Haskuka, candidate of the VETËVENDOSJE! Movement for the Mayor of the Municipality in Prizren, in local elections for the year 2017 (in their capacity as

interested parties), on registration of the Referral. The Court sent them copies of the Referral and invited them, within seven (7) days from the receipt of the notification, to submit their eventual comments regarding the Referral.

10. On 26 December 2017, within the provided deadline, the Applicant submitted to the Court the requested clarification.
11. On the same day, Mr. Mytaher Haskuka submitted his comments via electronic mail. Within the provided deadline, the PDK did not submit any comment.

12. On 29 December 2017, the Court notified the Applicant, Mr. Mytaher Haskuka and the PDK, on the received clarification and the respective comments (as well as sent to them copies of the clarification and the comments).

13. On 17 January 2018, after having considered the preliminary report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of Referral.

Summary of facts

14. On 22 October 2017 the first round of local elections in the Republic of Kosovo was held. The Applicant was the candidate of PDK for the Mayor of the Municipality in Prizren.

15. The final results of the first round of elections determined that the outcome for the Mayor of the Municipality of Prizren will be decided by the result of the second round of elections (run-offs), which would take place between the two most voted candidates in the first round, namely the Applicant, Mr. Shaqir Totaj of PDK and Mr. Mytaher Haskuka of VETËVENDOSJE Movement!

16. On 19 November 2017 the second round of local elections was held, where the two abovementioned candidates competed for the Mayor of the Municipality of Prizren.

17. On 29 November 2017, the Central Election Commission announced the final results of the second round of elections for the Mayor of the Municipality of Prizren. According to these results, the Applicant, Mr. Shaqir Totaj, had received 49.64% of the votes; whereas, Mr. Mytaher Haskuka had received 50.36% of the votes.

18. On 30 November 2017, the PDK, through its representative, Mr. Gani Koci, filed an appeal with the Election Complaints and Appeals Panel

(hereinafter: ECAP), requesting "*to investigate, count the ballots and other election materials, and after establishing the facts regarding the violation of the electoral process on the voting day, to annul the election result and order the Central Election Commission to repeat the ballots in the Municipality of Prizren*".

19. On 1 December 2017, the ECAP, by Decision ZL. ANR. 1124/2017, rejected the appeal of the PDK as unlawful, with the following reasoning:

> *"The appeal submitted by the political subject Partia Demokratike e Kosovës [...] the Panel treated and proceeded in this stage of the election process as an appeal, within the meaning of the legal provisions of Article 3, paragraph 8, Rule no. 02/2015, of Rules and Procedures of ECAP. [...]*
> *After the review of the admissibility of the appeal, pursuant to Article 117, of the LGE, ECAP found that the allegations of the appellant in this stage of the election process are inadmissible due to the following reasons:*
> *As defined by LGE and Election Rules, each stage of the elections process has definite legal time limits for submitting complaints and appeals at ECAP, that are related to the stage of the election process that is being conducted. In the present case, we are now in the stage of the election process, after the publication of the final results of local elections for the second round held on 19 November 2017 for mayors of the municipalities.*
> *The Panel assesses that this stage of the election process can be appealed only regarding the Decision of CEC* [Central Election Commission] *after the declaration of the final results for mayor of the municipalities and that for the irregularities caused during the administration of data at C&RC, the discrepancies of RRF, CRF and evidence that are eventually brought by the party that has legal interest, evidence which do not comply with the final result of elections, or the irregularities which were publicly known and have been considered by the Panel that they may have direct influence in the final result and that mine the election process, but that have not been improved, namely have not been eliminated by CEC [...].*
> *The appealed allegations of the appellant [...] for the second round of local elections held on 19 November 2017, [...] are assessed as inadmissible in this stage of the election process because all the irregularities related to the voting day, the time limit for submitting a complaint to the ECAP was 24 hours from the closure of polling centers, in this occasion the time limit was until 20 November 2017, at 19:00 hrs."*

20. On 5 December 2017, PDK filed an appeal with the Supreme Court challenging the lawfulness of the abovementioned Decision of ECAP, with the proposal that: the appeal is approved; the Decision of ECAP is annulled; that ECAP is requested to reconsider the decision or to annul the election results and order the CEC to repeat the ballots in the Municipality of Prizren.

21. On 7 December 2017, the Supreme Court, by Judgment AA. UZH. No.63/2017, rejected as ungrounded the appeal of the PDK with the following reasoning:

> *"The appeal of the political subject Partia Demokratike e Kosoves (PDK) Branch in Prizren [...] was dismissed as inadmissible.*
> *The Court assessed that the allegations of the political subject PDK, presented in its appeal against the challenged Decision of ECAP, are ungrounded. The Appellant* [PDK] *did not argue by any evidence its allegations, while the evidence that it revokes do not have an effect on issuance of another Decision upon this legal matter [...].*
> *This Court also assesses all the irregularities that are related to the voting day, namely from 19 November 2017, the time limit for submitting a complaint to ECAP was 24 hours from the closure of Polling Centers, and within this meaning, pursuant to Article 119.1 of the LGE No. 03/L-73 amended and supplemented by Law No. 03/L-256, it is stipulated that the person that has legal interest in a matter within the jurisdiction of ECAP or the rights of whom have been violated regarding the election process regulated pursuant to this Law or election rules, may submit a complaint to ECAP within 24 hours from the moment of closure of the Polling Center and ECAP will decide upon the complaint within 72 hours from the time when the complaint was received.*
> *ECAP correctly confirmed the irregularities during the election process, on the voting day for the second round of local elections of 19 November 2017, directly related to the voting day, and the time limit for submitting a complaint was 24 hours from the closure of polling centers, in this occasion the time limit was until 20 November 2017, at 19:00 hrs.*
> *Therefore, this Court assesses that ECAP correctly decided when it dismissed the complaint of the political subject PDK as inadmissible since the time limit for filing complaints was 20 November 2017 until 19:00 hrs, while the complaint was submitted on 30 November 2017.*
> *According to the assessment of the Court, the contested Decision is clear, understandable and it contains sufficient reasons*

regarding the decisive facts, which are also approved by this Court, which ascertained that also the substantive law was correctly applied. Based on the determined factual situation, this Court ascertained that in this legal matter the factual situation was correctly confirmed and the law was not violated to the detriment of the appellant, therefore it did not approve his allegations since they do not affect the determination of another factual situation from the one that was determined by ECAP".

22. On 11 December 2017, the Central Election Commission certified the final results of the second round for election of the Mayor of Prizren, as well as for some other municipalities.

Clarification submitted by the Applicant

23. Following the notification on the registration of the Referral, the Court requested the following clarification from the Applicant:

"Through your Referral you are challenging the Judgment A.A. U.ZH. no. 63/2017 of the Supreme Court of Republic of Kosovo, of 7 December 2017, which was rendered following the appeal filed by the Democratic Party of Kosovo. [...] Please clarify if you have submitted the Referral to the Constitutional Court as an individual Referral on your behalf. [...]"

24. In his response to the Court, the Applicant clarified as follows:

"Following your notification for registration of Referral KI 152/17 and the request for clarification, I clarify that my Referral should be treated by the Constitutional Court as an individual Referral on my behalf."

Comments submitted by the interested party, Mr. Mytaher Haskuka

25. In his capacity as an interested party, Mr. Mytaher Haskuka has submitted comments regarding the admissibility of the Referral, the admissibility of the request on interim measure and merits of the Referral.

26. Regarding the admissibility of the Referral, in procedural aspect, Mr. Mytaher Haskuka claims that *"the applicant, by filing his referral with the Constitutional Court did not exhaust all legal remedies because "the PDK", in capacity of a legal entity has used the appeals with ECAP and Supreme Court."* Furthermore, Mr. Mytaher Haskuka

states that that *"the PDK, in the capacity of a legal person, represented by certain person, did not submit or signed the appeal or the submission on behalf of the Applicant (Shaqir Totaj) as determined by Article 118.4 and 119.1 of LGE nor in Constitutional Court"*.

27. Regarding the admissibility of the request for interim measure, Mr. Mytaher Haskuka states that: "*The applicant could not substantiate at any moment his request for interim measure with respective evidence or by presenting facts that would convince the Constitutional Court to undertake such a measure."*

28. Regarding the merits of the Referral, Mr. Mytaher Haskuka states that: *"[...] the ECAC and Supreme Court have correctly and fairly decided when they have dismissed the appeal filed by the PDK political party as inadmissible and ungrounded."* Further he states that: *"[...] the lack of compliance with deadline and lack of substantiation of allegations with respective evidence does not reflect violation of Article 45 of the Constitution, specifically the passive right to be elected."*

Applicant's allegations

29. The Applicant alleges a violation of Article 45 [Freedom of Election and Participation] of the Constitution and Article 3 [General Principles] of the Law on Local Elections.

30. In this regard, the Applicant alleges that the Supreme Court failed to *"prove and verify the facts and evidence of the appellant, which are related and implicate directly the legal interest of its applicant and they are decisive in considering the violation or non-violation of the constitutional right, the passive election right (the right to be elected) [...]"*.

31. Further, the Applicant states that, by not reviewing the appeal, the ECAP *"[...] has avoided decisive facts and evidence"*. According to the Applicant *"despite the fact that PDK filed a complaint that was based on the facts and evidence connected to the election process and counting [...] the Decision on dismissing the complaint of PDK as inadmissible, was grounded by ECAP on the fact of the failure to submit the complaint within 24 hours from the closure of counting centers, by not reviewing this complaints based on merit even though a considerable piece of evidence and its facts we exclusively related to the process of counting conditional ballots, postal ballots and*

ballots of persons with specific needs, a process which happened after the declaration of preliminary results by CEC".

32. Moreover, the Applicant alleges that ECAP *"erroneously applied Article 119.1 of Law No. 03/L-073 on General Elections in the Republic of Kosovo, amended and supplemented by Law No. 03/L-256"* as it had *"by considering each fact or evidence, which confirms the violations pursuant to this law, irrelevant and ineffective, even after the ballot day [...]."* According to the Applicant *"those violations result or may result in the violation of the basic election principles and the constitutional and legal passive election right (the right to be elected)."*

33. The Applicant requests from the Court: *"review of the constitutionality and legality of the Judgment A.A. U.ZH. No.63 / 2017 of the Supreme Court of Kosovo of 07.12.2017, by which, the appeal A. ZL. No. 1124/2017, of 1 December 2017, submitted by the political party Partia Demokratike e Kosoves "PDK", against the Decision of the Election Complaints and Appeals Panel "ECAP", due to the misuses during the election process, on the voting day for the second round of local elections of 19 December 2017, was rejected as ungrounded [...]."*

34. The Applicant also requests from the Court "to impose as interim measure the suspension of the work of the elected Mayor of the Municipality of Prizren, pending the final Decision of the Constitutional Court."

Relevant legal provisions of Law No. L-073 on General Elections in the Republic of Kosovo as amended by Law No. -3-L-256 on amending and supplementing the Law No. 03/l-073 on General Elections in the Republic of Kosovo.

Article 118 [Decisions]

118.1 The ECAC shall accept a complaint that is well-grounded and dismiss a complaint that does not meet this standard. [...]

118.4 An appeal may be made from a decision of the ECAP, as ECAP may reconsider any of its decisions upon the presentation by an interested party. An appeal to the Supreme Court of Kosovo may be made within twenty four (24) hours of the decision by ECAP, if the fine involved is higher than five thousand Euro (€5,000) or if the matter affects a fundamental right. The

Supreme Court shall decide within seventy two (72) hours after the appeal is filed.

Article 119 [Complaints]

119.1 A person who has a legal interest in a matter within the jurisdiction of ECAP, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAP within twenty four (24) hours after the close of the polling stations and the ECAP shall decide the complaint within seventy two (72) hours after the complaint is received.

Assessment of the admissibility of Referral

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

36. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution which establishes:

1. The Constitutional Court decides only on matters referred to the court in a legal manner *by authorized parties.*
(...)
7. Individuals are authorized to refer violations by public authorities of their individual *rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.*

37. The Court also refers to Article 47 [Individual Referrals] of the Law which provides:

1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

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

38. In addition, the Court refers to paragraph (1) (b) of Rule 36 [Admissibility Criteria] of the Rules of Procedures which foresees:

(1) The Court may consider *a referral if:*

[...]
(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.

39. The Court recalls that the Referral was submitted as individual Referral by Mr. Shaqir Totaj who requests the constitutional review of the Judgment A.A. U.ZH. No. 63/2017 of the Supreme Court, of 7 December 2017. This Judgment was rendered by the Supreme Court following the appeal that PDK, in its capacity as a political entity and thus as a legal person, filed against the Decision Anr. 1124/2017 of ECAP, of 1 December 2017.

40. The fact that the Applicant submitted his constitutional referral in the capacity of a natural person and on his personal behalf is confirmed by his own clarification submitted to the Court. This clarification was submitted by the Applicant upon the Court's request addressed to him. In his reply, the Applicant stated that "*my Referral should be treated by the Constitutional Court as an individual Referral on my behalf*."

41. The court also notes that in the Referral submitted to the Court, the Applicant stated that "*there were no other regular legal remedies that we have not used*", hinting at the legal remedies exhausted by the PDK, as a single procedural party before ECAP and the Supreme Court.

42. However, from the case file, the Court finds that the Applicant has not exhausted any legal remedy in his behalf, as a natural person or as "person who has legal interest", with ECAP or with Supreme Court, before filing the current Referral before the Constitutional Court. Moreover, the Court notes that the Applicant is never mentioned in the challenged Judgment nor in the abovementioned Decision of ECAP.

43. In this regard, the Court recalls that the Applicant had the legal opportunity as a natural person or as a "person who has legal interest" to file respective complaints regarding his allegations on *"violation of passive election right (the right to be elected)"*. He could have submitted allegations of violation of his constitutional rights before ECAP and the Supreme Court in accordance with the applicable laws. Only after exhaustion of such remedies he would have been able to submit before the Constitutional Court an individual Referral for constitutional review of the above mentioned decisions of the ECAP and the Supreme Court, in accordance with Article 113.7 of the Constitution and Article 47 of the Law.

44. In the light of the facts referred to above, the Court concludes that the Applicant did not exhaust the legal remedies available to him, provided by the applicable laws in the Republic of Kosovo (see *Constitutional Court case KI73 / 09 , Mimoza Kusari-Lila v. the Central Election Commission,* Resolution on Inadmissibility, of 24 March 2010, §§ 28-36).

45. The Court recalls that the rationale for the exhaustion of the legal remedies is a reflection of the principle of subsidiarity as a fundamental principle in the constitutional judiciary, aiming to afford regular courts or relevant public authorities with the opportunity to prevent or remedy the alleged violation of the Constitution (See Constitutional Court case KI41/09, *AAB-RIINVEST University L.L.C. Prishtina v. the Government of the Republic of Kosovo,* Resolution on Inadmissibility, of 21 January 2010, § 16; and ECtHR case *Selmouni vs. France*, Application No. 25803/94, Judgment of 28 July 1999, § 74).

46. In conclusion, the Court finds that the Referral has been filed before the Applicant exhausted all legal remedies and as such is to be declared inadmissible pursuant to Article 113.1 of the Constitution, Article 47 of the Law and Rule 36 (1) (a) of Rules of Procedure.

The request for an interim measure

47. The Court recalls that the Applicant also requests from the Court "*to impose as* interim *measure the suspension of the work of the elected Mayor of the Municipality of Prizren, waiting the final Decision of the Constitutional Court*."

48. In support of this request, the Applicant states that "*the interim measure is to the interest of the public because the lack of it causes an irreparable damage in the functioning of the institution - Municipality of Prizren and the democracy of the Republic of Kosovo*."

49. The Court recalls it's finding that the Applicant's Referral was declared inadmissible because he did not exhaust all legal remedies.

50. Therefore, in accordance with the aforementioned findings and pursuant to Article 116 (2) of the Constitution, Article 27 (1) of the Law and Rule 55 (4) of the Rules of Procedure the request for the interim measure is rejected as unfounded.

FOR THESE REASONS

In accordance with Article 113 (7) of the Constitution, Article 49 of the Law and Rule 36 (1) (b) of the Rules of Procedure, in its session held on 17 January 2018, the Constitutional Court unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measures;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette in accordance with
Article 20.4 of the Law; and

IV. TO DECLARE this Decision effective immediately.

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

KI53/18, Applicant, Hajri Ramadani, Request for constitutional review of Judgment PML No. 181/2016 of the Supreme Court of Kosovo, of 13 February 2017

KI53/18, Resolution on inadmissibility, of 5 November 2018, published on 06.12.2018.

Keywords*: Individual referral, right to fair and impartial trial, equality before the law, out of time*

The Supreme Court of Kosovo, by its Judgment, rejected as ungrounded the request for protection of legality, filed by the Applicant, against the Decision of the Court of Appeals of Kosovo.
The Applicant alleged in essence before the Constitutional Court that the lower instance courts acting on the matter were partial, politically influenced and did not decide based on the established facts, but based on the assumptions. The Applicant claimed that he was served with the challenged decision on 8 December 2017, but did not substantiate this allegation by any evidence, acknowledgment of receipt or a written document.
The Basic Court notified the Constitutional Court that after two unsuccessful attempts to submit by mail service Judgment PML. No. 181/2016 of 13 February 2017, it announced in the notice board of the Basic Court and kept the same in the notice board of the Basic Court until 19 March 2017.
The Court considered that the Applicant received the challenged decision on 19 March 2017.
The Court found that the Referral is inadmissible because the admissibility requirements laid down in Article 113.7 of the Constitution, Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure have not been met. The Referral was declared inadmissible, as out of time.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI53/18

Applicant

Hajri Ramadani

Constitutional review of Judgment PML No.181/2016 of the Supreme Court of Kosovo, of 13 February 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 Hajri Ramadani, residing in the village Brodesan, Municipality of Dragash (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment PML. No. 181/2016 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), of 13 February 2017. The Applicant was served with the challenged decision on 19 March 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant‘s rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 49 [Right to Work and Exercise Profession],

Article 53 [Interpretation of Human Rights Provisions] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). The Applicant also alleges violation of Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraph 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of Law No. 03/L-121 on the 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).

5. On 31 May 2018, 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 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 Constitutional Court

6. On 5 April 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 11 April 2018, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Arta Rama-Hajrizi and Selvete Gërxhaliu-Krasniqi.

8. On 18 April 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

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

10. 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.

11. On 22 August 2018, the President of the Court rendered a decision to replace the Judge Rapporteur, and instead of Judge Ivan Čukalović Judge Radomir Laban was appointed.

12. On 25 September 2018, the President of the Court appointed a new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu-Krasniqi and Bajram Ljatifi.

13. On 28 September 2018, the Court requested the Basic Court in Prizren to submit to the Court the acknowledgment of receipt indicating the date when the Applicant was served with Judgment PML. No. 181/2016 of the Supreme Court of 13 February 2017.

14. On 4 October 2018, the Basic Court in Prizren informed the Court that it twice tried to submit to the Applicant Judgment PML. No. 181/2016 of 13 February 2017, namely the delivery was tried on 25 February 2017 and on 2 March 2017, but could not be submitted because the Applicant was not at the address presented to the Court. The Basic Court further explains that after two attempts to submit the aforementioned decision, it published the latter on the notice board until 19 March 2017.

15. On 5 November 2018, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

16. On 1 December 2014 the Basic Prosecution in Prizren - Serious Crimes Department filed Indictment number PP. No. 244/2014 against the Applicant under a grounded suspicion that he has committed the criminal offense "*Abusing official position or authority*" under Article 422 para. 1 and 2, sub-paragraphs 2.1 and 2.2 of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK).

17. The Applicant, among other things, was accused of having violated the Law on the Education Institution by not implementing Decision Ref. 10/14, prot. 96 of 28 April 2014, of the Education Inspectorate in Prizren, by not complying with the instructions issued by this decision.

18. On 24 December 2015, the Basic Court in Prizren - Serious Crimes Department (hereinafter: the Basic Court), by Judgment P. No. 275/14, found the Applicant guilty and sentenced him to

imprisonment of 1 (one) year, a punishment which will not be executed if the Applicant does not commit another criminal offense within 2 (two) years. Against the Applicant was also imposed a prohibition on exercising the functions in the public administration for a period of 2 (two) years.

19. On an unspecified date, the Applicant filed an appeal with the Court of Appeals of Kosovo against Judgment P. No. 275/14 of the Basic Court of 24 December 2015, alleging essential violation of the provisions of the criminal procedure, erroneous determination of factual situation and violation of the criminal law. On the other hand, the Basic Prosecution in Prizren filed an appeal requesting effective imprisonment of the Applicant.

20. On 3 May 2016, the Court of Appeals of Kosovo, by Judgment PAKR. No. 184/2016 rejected as ungrounded the Applicant's appeal and upheld the Judgment of the of first instance court. The Court of Appeals of Kosovo in its judgment held that the latter was clear, concrete and comprehensible, and in its reasoning were given the reasons on the decisive facts by giving a detailed answer to all the Applicant's allegations.

21. On an unspecified date, the Applicant filed a request for protection of legality with the Supreme Court of Kosovo against Judgment P. No. 275/14 of the Basic Court of 24 December 2015 and Judgment PAKR. No. 184/2016 of the Court of Appeals, of 19 May 2016, claiming that these judgments were rendered with essential violations of the provisions of criminal procedure and violation of the criminal law.

22. On 13 February 2017, the Supreme Court of Kosovo, by Judgment PML. No. 181/2016 rejected as ungrounded the request for protection of legality filed by the Applicant

Applicant's allegations

23. The Court recalls that the Applicant alleges that Judgment PML. No. 181/2016 of the Supreme Court of 13 February 2017 violates his right guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair Trial and Impartial Trial], Article 49 [Right to Work and Exercise Profession], Article 53 [Interpretation of Human Rights Provisions] and Article 55 [Limitation of Fundamental Rights and Freedoms] of the Constitution, in conjunction with Article 6 of the ECHR.

24. The Applicant claims that he was served with the challenged decision on 8 December 2017, and further alleges that: *"The Supreme Court and the lower instance courts when deciding on finding the applicant guilty, have applied a double standard by not approving the applicant's request to find that he had no power to enforce the decision of the Education Inspectorate for annulment of the decision issued by the President of the Municipality. Equality before the law was also violated by the fact that he was found guilty based on the actions of the other accused Sh.N., because there can be no criminal offence if the falsification is not proven…"*.

25. The Applicant further alleges that "*the courts of three instances that have acted on this matter have been partial, politically influenced and have not decided on the basis of proven facts but on the basis of assumptions, even when the subject of the charge did not exist […] the applicant has not been provided fair trial regardless of the evidence that has been in his favour, all of these have been interpreted to the detriment of the applicant"*. The Applicant alleges that the employment relationship was terminated as a result of the decisions of the regular courts.

26. The Applicant requests the Court to declare invalid Judgment PML. No. 181/16 of the Supreme Court of Kosovo, of 13 February 2017 and to remand the judgment for retrial to the Supreme Court.

Admissibility of the Referral

27. The Court first examines whether the admissibility requirements established by the Constitution, as further specified by the Law and the Rules of Procedure have been met.

28. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[…]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

29. In that regard, the Court considers that the Applicant is an authorized party and has exhausted all the legal remedies available to him.

30. However, the Court also refers to Article 49 [Deadlines] of the Law, which provides:

Article 49
[Deadlines]

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

31. The Court also takes into account Rule 39 [Admissibility Criteria] (1) (c) of the Rules of Procedure, which foresees:

1) The Court may consider a referral as admissibe if:
(...)
(c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant [...]"

32. At the outset, the Court refers to the date of service of the final decision and the date of the submission of the Referral to the Court to assess whether the Applicant has submitted the Referral within the specified deadline of 4 (four) months.

33. In this regard, the Court recalls that the final decision in the Applicant's case is Judgment PML. No. 181/2016 of the Supreme Court of 13 February 2017.

34. The Court notes that the Applicant alleges that he was served with the challenged decision on 8 December 2017, but the Applicant did not substantiate this allegation by any evidence, acknowledgment of receipt or a written document.

35. However, the Court, upon the examination of additional documents submitted by the Basic Court in Prizren regarding the date of receipt of the challenged decision, noted that the Basic Court in Prizren twice tried to submit to the Applicant the challenged judgment by mail service.

36. First, on 25 February 2017, the Basic Court in Prizren tried to send the challenged judgment to the address of the Applicant by mail service, the acknowledgment of receipt was returned to the Basic Court in Prizren, with the explanation that the Applicant was displaced together with his family to Prizren.

37. Then, on 2 March 2017, the Basic Court in Prizren tried for the second time to send the challenged decision to the Applicant's address by mail service, the acknowledgment of receipt was returned to the Basic Court in Prizren with the explanation that the Applicant was displaced together with his family to Prishtina.

38. It is clearly seen from the case file that it was not possible that the Applicant is found at the registered address which the Applicant himself submitted to the Court.

39. In accordance with the legal provisions, the Basic Court, after two unsuccessful attempts to submit Judgment PML. No. 181/2016 of 13 February 2017 by mail service, has announced it on the notice board of the Basic Court and kept it on the notice board of the Basic Court until 19 March 2017.

40. In this regard, the Court refers to the provisions of paragraph 4 of the Article 478 [Documents to be Personally Served] of the Criminal Procedure Code, No. 04/L-123, which establishes:

Article 478

> *"4. If the decision or appeal cannot be served on the defendant because he or she has failed to report his or her address, it shall be displayed on the bulletin board of the court and, at the end of eight (8) days from the date of display, it shall be assumed that valid service has been effected".*

41. Based on all of the above, the Court finds that the Basic Court has acted in accordance with the relevant legal provisions.

42. Accordingly, the Court considers that the Applicant was served with the challenged decision on 19 March 2017, whereas he submitted the Referral to the Court on 5 April 2018, which means that the Applicant's Referral was submitted out of the prescribed legal deadline.

43. The Court reiterates that the objective of the four month legal deadline, under Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedures, is to promote legal certainty, by ensuring that the cases

raising the constitutional issues are dealt within a reasonable time and to prevent the authorities and other interested parties from being kept in a state of insecurity over a longer period of time (see: ECtHR decision, *P.M. v. United Kingdom*, No. 6638/03, 24 August 2004, see ECtHR decision *Olivier Gaillard v. France*, No. 47337/99 of 11 July 2000, see ECtHR decision *Franz Hofstädter v. Austria* No. 25407/94, 12 September 2000).

44. This deadline also enables the possible Applicant to examine whether he wishes to file a request and, if he wishes, to decide on the specific complaints and arguments to be raised (see: ECtHR decision *O'Loughlin and Others v. United Kingdom*, application No. 23274/04), and at the same time facilitates the determination of the facts in this case, as over time, any fair consideration of the issues raised becomes problematic (See: ECtHR judgment, *Nee v. Ireland*, No. 52787/99, of 30 January 2003).

45. This rule marks out the time limit of supervision carried out by the Court and signals to both individuals and state authorities the period beyond which such supervision is no longer possible (see ECHR Decision *Walker v. United Kingdom*, No. 34979/97 of 25 January 2000, see Judgment of the ECtHR *Sabri Güneş v. Turkey*, of 29 June 2012, paragraph 40).

46. Therefore, the Court finds that the Applicant's Referral was not filed within the legal time limit established in Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure. Therefore, the Court finds that the Applicant's Referral is inadmissible because the Applicant's Referral was filed out of legal time limit.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 49 of the Law and in accordance with Rule 39 (1) (c) of the Rules of Procedure, on 5 November 2018, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KI112/17, Applicant: Deno Denović, Constitutional review of Judgment ARJ. No. 7/2017 of the Supreme Court of Kosovo, of 16 May 2017.

KI112/17, Resolution on Inadmissibility of 26 September 2018, published on 22 October 2018

Keywords*: Individual referral, hearing, administrative procedure, manifestly ill-founded referral*

The Regional Directorate of Kosovo Customs in Mitrovica, by Decision [08.05.2/394], found the Applicant responsible for the customs offense and sentenced him with a fine, as he was caught by the Kosovo Police while transporting 4 (four) oil cans, with the justification that the invoice by which the Applicant justified the goods, was not confirmed to be valid. Following the appeal of the Applicant, Kosovo Customs by Decision [07.03/497] rejected as ungrounded the request for review of the Decision of the Regional Directorate and upheld the Decision of the Regional Directorate.

The Applicant filed a claim with the Basic Court in Prishtina - Department for Administrative Matters against Kosovo Customs, requesting the annulment of Decision [07.03/497] or remanding his case for reconsideration to Kosovo Customs. The Basic Court, by Judgment [A. No. 1247/14], rejected the Applicant's claim as ungrounded. The Judgment of the Basic Court was also upheld by the Court of Appeals and the Supreme Court.

The Applicant alleges before the Constitutional Court violation of his rights to fair and impartial trial under Article 31 of the Constitution through two following arguments: a) rejection of the request for holding a hearing by the Kosovo Customs Review Division ; and b) that the decisions of Kosovo Customs and the judgments of the regular courts are arbitrary because they consider that the invoice based on which he reasoned the disputed goods is not valid and that none of the administrative and judicial instances confirmed the elements of the offense for which he was found responsible and sentenced.

The Court notes that the Applicant's arguments for violation of Article 31 of the Constitution as a result of the non-holding of a hearing at the level of administrative bodies, do not sufficiently substantiate his allegation of constitutional violation because the relevant decisions of the administrative bodies became subject to subsequent control by a "*judicial authority having full jurisdiction*" with the power to annul such decisions both in matters of fact and law. As regards his allegations against judicial bodies, the Court considered that the Applicant did not prove that the proceedings before the

Supreme Court were unfair or arbitrary or that his fundamental rights and freedoms protected by the Constitution were violated as a result of erroneous interpretation of law and assessment of evidence and facts in his case.

Therefore, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, the Referral was manifestly ill-founded on constitutional basis and was to be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI112/17

Applicant

Deno Denović

Constitutional review of Judgment ARJ. No. 7/2017 of the Supreme Court of Kosovo, of 16 May 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 Deno Denović, with residence in Mitrovica (hereinafter: the Applicant), who is represented by Zyhdi Axhemi, a lawyer from Prishtina.

Challenged decision

2. The challenged decision is Judgment [ARJ. No. 7/2017] of 16 May 2017 of the Supreme Court of the Republic of Kosovo, which was served on the Applicant on 5 June 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the rights of the Applicant guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (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).

5. On 31 May 2018, in an administrative session the Court adopted 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 days after its publication. Consequently, in reviewing the Referral the Court refers to the legal provision of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 18 September 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 19 September 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

8. On 23 October 2017, the Court notified the Applicant and the Supreme Court about the registration of the Referral.

9. On 14 February 2018, the Court requested the Applicant's representative to submit the power of attorney proving that he was authorized to represent the Applicant before the Court. The Court also requested the Applicant and the Basic Court in Prishtina (hereinafter: the Basic Court) to submit the acknowledgment of receipt indicating when the Applicant was served with the challenged decision.

10. On 22 February 2018, the Applicant's representative submitted the power of attorney requested by the Court.

11. On 24 April 2018, the Basic Court submitted the acknowledgment of receipt indicating that the Applicant was served with the challenged decision on 5 June 2017.

12. On 2 July 2018, the Applicant requested the Court that his case be resolved with an urgency.

13. 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.

14. 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.

15. On 12 September 2018, the President of the Court appointed a new Review Panel composed of the Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

16. On 26 September 2018, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

17. On 25 February 2014, the Applicant was caught by the Kosovo Police in the village of Krajkova, Municipality of Leposaviq, while transporting 4 (four) cans of oil in the amount of 3999.00 euro (hereinafter: the disputed goods). In this regard, Kosovo Police initiated a case suspected of unauthorized trade against the Applicant and instructed that the disputed goods be sent to the Customs Terminal in Mitrovica for storage.

18. On 15 April 2014, the Regional Directorate in Mitrovica (hereinafter: the Regional Directorate) of the Customs of the Republic of Kosovo

(hereinafter: the Kosovo Customs) by Decision [08.05.2/394], declared the Applicant responsible for the customs offense established by Article 8 of Law No. 04/L-099 on Amending and Supplementing Customs and Excise Code in Kosovo No. 03/L-109, sentenced him with a fine in the amount of 3822.00 euro and ordered the confiscation of the disputed goods. The Regional Directorate reasoned the Decision in question, *inter alia*, by the fact that the invoice through which the Applicant justified the goods was not confirmed to be valid.

19. On an unspecified date, the Applicant requested the Kosovo Customs to reconsider the Decision [08.05.2/394] of the Regional Directorate, claiming "*essential violation of the provisions of the Customs Code, violation of substantive provisions and fundamental rights guaranteed by Constitution*".

20. On 19 June 2014, the Kosovo Customs by Decision [07.03/497] rejected as ungrounded the request for reconsideration of Decision [08.05.2/394] of the Regional Directorate.

21. On 22 July 2014, the Applicant filed a lawsuit with the Basic Court in Prishtina - Department for Administrative Matters (hereinafter: the Basic Court) against Kosovo Customs, requesting the annulment of Decision [07.03/497] or to remand his case for reconsideration to Kosovo Customs. In his appeal, the Applicant alleges that the Kosovo Customs did not prove the facts, in particular, as to the validity of the invoice through which allegedly was made the purchase of the goods and challenges the qualification of the offense by claiming that the latter cannot be qualified as "smuggling of goods".

22. On 13 April 2016, the Basic Court, by the Judgment [A. No. 1247/14] rejected the Applicant's statement of claim as ungrounded and upheld the Decision [07.03/497] of Kosovo Customs.

23. On an unspecified date, against the Judgment of the Basic Court, the Applicant filed an appeal with the Court of Appeals, claiming "*a violation of the principle of equality of the parties to the proceeding"* and "*non-objective examination of evidence*". The Applicant requested the annulment of the Judgment of the Basic Court or to remand his case for retrial and the restitution of the disputed goods.

24. On 14 October 2016, the Court of Appeals, by Judgment [AA. No. 226/2016], addressing the Applicant's allegations, rejected as ungrounded his appeal and upheld the Judgment of the Basic Court.

25. Against the Judgment of the Court of Appeals, the Applicant filed with the Supreme Court a request for extraordinary review of the court decision, on the grounds of erroneous determination of facts and the violation of the substantive and procedural provisions, claiming again that the facts related to the validity of the invoice for the disputed goods have not been established and requesting that the relevant Judgments of the Basic Court and the Court of Appeals be annulled and that his case be remanded for retrial.

26. On 16 May 2017, the Supreme Court, by the Judgment [ARJ. No. 7/2017], rejected as ungrounded the Applicant's request for extraordinary review of the Judgment of the Court of Appeals.

Applicant's allegations

27. The Applicant alleges that Judgment [ARJ. No. 7/2017] of 16 May 2017 of the Supreme Court violates his rights to fair and impartial trial guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution.

28. The Applicant builds his allegations of violation of his rights to fair and impartial trial through the following two arguments: a) rejection of his request to hold a hearing session by the Kosovo Customs Review Division; and b) that the Decisions of the Kosovo Customs and the judgments of the regular courts are arbitrary because they consider that the invoice based on which he justified the disputed goods is not valid and that none of the administrative and judicial instances have substantiated the elements of the offense for which he was declared responsible and sentenced.

29. Finally, the Applicant requests the Court to declare his Referral admissible; to hold a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and to declare invalid the Judgment [ARJ. No. 7/2017] of the Supreme Court of 16 May 2017 in conjunction with Judgment [AA. No. 226/2016] of the Court of Appeals of 14 October 2016 and Judgment [A. No. 1247/14] of the Basic Court of 13 April 2016, by remanding his case for reconsideration.

Assessment of the admissibility of Referral

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

31. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *(...)*
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

32. The Court further examines whether the Applicant fulfilled the admissibility requirements, as prescribed in the Law. In this respect, the Court first refers to Article 48 [Accuracy of the Referral] and Article 49 [Deadlines] of the Law, which establish:

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...".*

33. As to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, who challenges an act of a public authority, namely Judgment [ARJ. No. 7/2017] of the Supreme Court of 16 May 2017 after having exhausted all legal remedies provided by law. The Applicant has also clarified the rights and freedoms that have allegedly been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

34. In addition, the Court examines whether the Applicant has met the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure sets out the criteria based on which the Court may consider the Referral,

including the criterion that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:

> *"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".*

35. In this regard, the Court first recalls that by the Decision [08.05.2/394] of the Regional Directorate, the Applicant was declared responsible for the commission of the customs offense and has been imposed the respective punishment. This Decision was confirmed by Kosovo Customs by the Decision [07.3/497] and the Judgments of the three judicial instances in the Republic of Kosovo. The Applicant alleges that the decisions in the administrative and judicial proceedings violated his rights to fair and impartial trial because they did not allow to hold a hearing before the administrative authorities and that they did not prove the facts, especially as to the validity of the invoice, related to the offence for which he was declared responsible.

36. The Court first notes that the Applicant's essential allegations concerning the alleged violations of the procedural safeguards guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been interpreted in detail through the case law of the ECtHR, in accordance with which the Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Accordingly, in interpreting allegations of a 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 ECtHR.

37. The Court also notes that the ECtHR consistent case law notes that the fairness of a proceeding is assessed based on the proceeding as a whole. [See ECtHR Judgment of 6 December 1988, *Barbera, Messeque and Jabardo v. Spain*, no. 10590/83, para. 68]. Therefore, when assessing the Applicants' allegations, the Court shall also adhere to this principle. (See also case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38; and case KI143/16, Applicant Muharrem *Blaku and Others*, Resolution on Inadmissibility of 13 June 2018, paragraph 31).

38. In this respect, the Court will first examine the Applicants' allegations as to the alleged violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the alleged

violation of procedural guarantees for a hearing before the administrative authorities based on the ECtHR case law.

Regarding the allegation of a violation of the right to a hearing before the administrative authorities

39. Initially, referring to the ECtHR case law and its case law, the Court notes that the right to a fair trial, in principle, implies the right of the parties to be present in person at the trial and that this right is closely linked to the right to a hearing and the right to follow the proceedings in person. (see ECtHR Judgment of 23 February 1994, *Fredin v. Sweden*, Application no. 18928/91, page 10 and 11; and ECtHR Judgment of 26 May 1988, *Ekbatani v. Sweden*, Application no. 10563/83, ECtHR, Judgment of 26 May 1988, paragraph 25; and case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 40; and KI143/16, Applicant *Muharrem Blaku and Others*, Resolution on Inadmissibility of 13 June 2018, paragraph 37).

40. The Court reiterates that, although not expressly mentioned in the text of Article 6 of the ECHR, an oral hearing constitutes a fundamental principle foreseen through this Article. (See: *Jussila v Finland*, the ECtHR Judgment of 23 November 2006, and case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 42).

41. However, the ECtHR through its case law, also defines the limits of application of this rule and the relevant exemptions. The same was ruled by the case law of the Court, *inter alia,* through cases KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017 and KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018.

42. Moreover, in applying those principles and respective limitations in the circumstances of the present case, the Court notes that the Applicant alleges a violation of his rights guaranteed by Article 31 of the Constitution as a result of rejection of holding a hearing before the administrative authorities, namely Kosovo Customs and not judicial authorities. The limits of the application of procedural safeguards enshrined in Article 31 of the Constitution in conjunction with Article 6 of the ECHR before the administrative authorities are also well defined in the case law of the ECtHR and the Court. (See, KO12/17, Applicant *The Ombudsperson*, Judgment of 30 May 2017).

43. In its Judgment KO12/17, the Court, based on the ECtHR case law, had ascertained that the decisions taken by administrative authorities, must be subject to subsequent control by a "*judicial authority that has full jurisdiction*", including the power of the latter to quash in all respects, on questions of fact and law, the decisions of the administrative authorities. (See the case of the Constitutional Court, KO12/17, The Ombudsperson, Judgment of 30 May 2017, paras. 77 and 101. See also, *mutatis mutandis*, the following ECHR decisions: *Albert and Le Compte v. Belgium*, Applications no. 7299/75, 7496/76, paragraph 29, and the ECtHR Judgment of 26 April 1995, *Fischer v. Austria*, Application no. 16922/90, para. 28).

44. Accordingly, the case law of the ECtHR and of the Court establishes that for the fairness of a procedure as a whole, the decisions of the administrative authorities will fulfill the procedural guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as long as the decisions of such administrative authorities are subject to subsequent control by a "*judicial body having full jurisdiction*", including the power to annul such decisions in all respects - both on questions of fact and law. (See the Judgment of the ECtHR of 10 February 1983, *Albert and Le Compte v. Belgium*, Applications No. 7299/75, 7496/76, paragraph 29, and ECHR Judgment of 23 October 1995, *Gradinger v. Austria*, Application No. 15963/90, paragraph 42, see also the case of the Court, KO12/17, Applicant the Ombudsperson, Judgment of 30 May 2017).

45. Accordingly, the Constitution and the ECHR, based on relevant case-law, incorporate in themselves the following alternatives: either that the administrative authorities themselves meet the requirements of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, or in the event that they do not fulfill these criteria, be subject to judicial control having full jurisdiction and which contains guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see *mutatis mutandis*, case *Albert and Le Compte v. Belgium*, cited above, paragraph 29.)

46. In applying these principles in the circumstances of the present case, the Court notes that the Applicant's arguments for violation of Article 31 of the Constitution as a result of not holding a hearing at the level of administrative authorities do not sufficiently substantiate his allegation of constitutional violation, because the respective decisions of the administrative authorities were subjected to subsequent control by a "judicial authority having full jurisdiction" with the competence to annul such decisions both in questions of fact and law. In this regard, the Court recalls that both decisions of the Kosovo Customs

were upheld by three judicial instances, the Basic Court, the Court of Appeals and the Supreme Court. In the three judicial instances the facts and evidence were examined and a main public hearing was held in the Basic Court.

47. Therefore, having regard to the particular characteristics of the case, the allegations raised by the Applicant and the facts presented by him, the Court, also based on the standards established in its case law and the case law of the ECtHR, does not find that there has been a violation of the right to a hearing as an integral element of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

48. The Court will further examine the Applicant's allegations of incorrect determination of the facts by the administrative and judicial authorities, and in particular with regard to the validity of the invoice for the disputed goods.

Regarding the allegation of incorrect determination of facts

49. The Applicant alleges that the administrative authorities and regular courts have declared the Applicant responsible without confirming the relevant evidence and facts, namely by not properly assessing the validity of the invoice in relation to the disputed goods and by imposing on him the burden of proof to prove that the disputed goods have gone through the regular clearance procedures.

50. The Court considers that this allegation of the Applicant raises issues of legality relating to the application of the legal provisions and the assessment of the evidence based on which the Applicant was found responsible for the customs offense related to the disputed goods. The Court recalls that these allegations pertain to the field of legality and as such do not fall within the jurisdiction of the Court, and therefore, in principle, cannot be considered by the Court.

51. In this respect, the Court reiterates that it is not its role to deal with errors of facts or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that lead a regular court to issue one decision instead of another. If it were different, the Court would act as a "*fourth instance court*", which would result in exceeding the limitations provided for by its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See case *Garcia Ruiz v. Spain*, ECtHR, no.

30544/96, of 21 January 1999, paragraph 28; and see also case: KI70/11, Applicants: *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).

52. In addition, the Court notes that after the request for extraordinary review of the court decision, the Supreme Court rejected the Applicant's allegations of violation of the substantive and procedural provisions by the Basic Court and the Court of Appeals. The Supreme Court responded to all allegations of legal violation raised by the Applicant.

53. In this regard, the Court notes that when addressing the Applicant's allegations, the Supreme Court reasoned that the invoice submitted by the Applicant cannot be accepted as valid because the currency expressed in the invoice is not in use in the territory of Kosovo and economic transactions cannot be carried out. On the other hand, the Applicant did not provide evidence to prove that the disputed goods were subject to customs clearance procedures as required by Article 81. F of Law No. 03/l-222 on Tax Administration and Procedure, amended and supplemented by Law 04/L-102.

54. In this regard, the Supreme Court, *inter alia*, reasoned:

> *"[The invoice submitted by the [Applicant] No. 107/014 dated 25.02.2014 also according to the assessment of this panel cannot be accepted as valid because the currency expressed in the invoice (in dinars) is not in use in the territory of Kosovo and economic transactions cannot be carried out, while on the other hand the claimant has not provided evidence that proves that the goods were subject to customs clearance procedures. Based on the provision of Article 81.F of Law 04/L-102 it is foreseen that the taxpayer shall bear the burden of proof of the facts supporting his/her requests, therefore to treat the disputed goods as domestic goods, as the claimant alleges, the claim must possess respective regular documentation to harmonize the invoice of goods with no. of the business registration - the seller in this case who has issued the invoice, then the fiscal coupon or the payment that would confirm the internal sale of the goods.*
>
> *From the abovementioned, the Supreme Court found that the first and second instance courts in this administrative-judicial matter, have correctly applied the provisions of the substantive law, so that the allegations of the claimant in the request for extraordinary review of the court decision are ungrounded because they are not influential in other determination of the*

factual situation from what was determined by the lower instance courts".

55. The Court further considers that the Applicant did not substantiate that the proceedings before the Supreme Court were unfair or arbitrary, or that his fundamental rights and freedoms protected by the Constitution were violated as a result of erroneous interpretation of the law and assessment of evidence and facts in his case. The Court reiterates that the interpretation of the law is a duty of the regular courts and is a matter of legality. No constitutional issue has been proven by the Applicant. (See: case KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility of 8 August 2016, paragraph 44; and also see KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants *Arben Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku and Sami Lushtaku*, Resolution on Inadmissibility of 15 November 2016, paragraph 62).

56. The Court further notes that the Applicant does not agree with the outcome of the proceedings before the regular courts. However, the dissatisfaction of the Applicant with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim for the violation of the right to fair and impartial trial. (see, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, paragraph 21, ECtHR, Judgment of 26 July 2005, paragraph 21; see also case KI56/17, Applicant *Lumturije Murtezaj*, Resolution of Inadmissibility of 18 December 2017, paragraph 42).

57. As a result, the Court considers that the Applicant has not substantiated the allegations that the relevant proceedings were in any way unfair or arbitrary, and that the challenged Decision violated the rights and freedoms guaranteed by the Constitution and the ECHR. (See *mutatis mutandis, Shub v. Lithuania,* No. 17064/06, ECtHR, Decision of 30 June 2009).

58. In sum, in accordance with Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, the Referral is manifestly ill-founded on constitutional basis and, therefore, inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, on 26 September 2018, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

Case No. KI34/18, Applicant: Albert Berisha, constitutional review of Judgment PML. No. 225/2017 of the Supreme Court, of 18 December 2017

KI34/18, Resolution on Inadmissibility of 23 May 2018, published on 18 June 2018

Keywords: individual referral, criminal proceedings, right to a fair trial, "fourth instance court"

The Applicant was found guilty by the Basic Court in Prishtina for the criminal offense „*Organization and participation in a terrorist group*". The Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court. In the appeal before the Court of Appeals, the Applicant claimed that he was denied a fair trial because his conviction was based on wrong interpretation of the facts. The Court of Appeals rejected the Applicant's claims. The Applicant filed a request for protection of legality with the Supreme Court against Judgment of the Court of Appeals, alleging a violation of his right to a fair trial because of a violation of the principle of equality of arms.

The request for protection of the legality of the Applicant was rejected by the Supreme Court as ungrounded, in particular because the witnesses the Applicant requested to be called were official persons, whose evidence was included in the case file.

In his Referral before the Constitutional Court, the Applicant alleged that his rights to a fair trial had been violated. The Applicant claimed that his right to remain silent was violated because his statements given during the investigation were used in evidence against him. Furthermore, he claimed that his right to equality of arms was violated because he was not allowed to call specific witnesses. He also alleged that the decisions of the regular courts were not reasoned and that, in his case the principles of the right to a fair trial where not respected, therefore his detention was not lawfully based on a conviction by a competent court.

The Court assessed that the regular court's judgments were well reasoned, that the Applicant's statements given during the pre-trial investigation were lawfully obtained and valid evidence, and that the Applicant had benefitted from the presence of defense counsel during his interview by the police officers.

As regards the Applicant's allegations concerning the violation of Article 5 (Right to liberty and security), of the ECHR, the Court found that the Applicant was convicted by a „*competent court*"which conducted a

comprehensive procedure that resulted in the establishment of criminal responsibility.

Accordingly, the Court concluded that nothing in the case presented by the Applicant indicates that the proceedings before the regular courts were unfair or arbitrary in order for the Constitutional Court to conclude that the core of the right to fair and impartial trial has been violated, or that the Applicant was denied any procedural guarantees, which would lead to a violation of the right to a fair trial under Article 31 of the Constitution or Article 6 of the ECHR. Furthermore, the Court further considered that it cannot act as a "fourth instance court" to review all the evidence and pronounce on the Applicant's guilt or innocence.

In this regard, the Court declared the Applicant's Referral as manifestly ill-founded on constitutional basis and declared it inadmissible in accordance with Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI34/18

Applicant

Albert Berisha

Request for constitutional review of Judgment PML. No. 225/2017 of the Supreme Court, of 18 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Albert Berisha from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment PML. No. 225/2017 of the Supreme Court of 18 December 2017, in conjunction with Judgment PAKR. No. 518/2016 of the Court of Appeals of 4 May 2017 and Judgment PKR. No. 263/15 of the Basic Court of 29 April 2016.

Subject matter

3. The subject matter is the constitutional review of the abovementioned court decisions, which allegedly violated the Applicant's rights and freedoms as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) and Article 5 (Right to liberty and security) of the European Convention on Human Rights (hereinafter: the ECHR).

4. The Applicant also requests the Constitutional Court (hereinafter: the Court) to *"impose an interim measure, because he considers that he has been unfairly deprived of his liberty as a result of the adoption of unconstitutional court decisions."*

Legal basis

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

Proceedings before the Court

6. On 8 March 2018, the Applicant submitted the Referral to the Court.

7. On 9 March 2018, the President of the Court appointed Judge Selvete Gërxhaliu- Krasniqi as Judge Rapporteur, and the Review Panel, composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.

8. On 13 March 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 13 March 2018, in accordance with Rule 37 (1) of the Rules of Procedure, the President ordered the joinder of the Referral registered under number KI37/18, with the Applicant's Referral registered under number KI34/18.

10. On 19 March 2018, the Applicant submitted a letter to the Court requesting not to join his Referral with the Referral registered under number KI37/18.

11. On 22 March 2018, in accordance with Rule 37 (3) of the Rules of Procedure, the President ordered the severance of the Applicant's Referral registered under number KI34/18 from the Referral registered under number KI37/18.

12. On 17 May 2018, the Applicant submitted to the Court additional arguments in support of his Referral.

13. The Court, in accordance with Rule 30 (3) (Registration of Referrals and Filing deadlines) of the Rules of Procedure, did not take into consideration the additional arguments submitted by the Applicant on 17 May 2018.

14. On 23 May 2018, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

15. On 11 August 2014, the Kosovo Police Service (hereinafter: the KPS), arrested the Applicant on the grounds of a reasonable suspicion that he had committed the criminal offense of „*Organization and participation in a terrorist group*“, under Article 143, paragraph 2 of the Criminal Code of Kosovo (hereinafter: CCK).

16. On 26 August 2014, the Applicant, in the presence of the defense counsel assigned to him *ex officio*, was interrogated by the police. The Applicant gave the following statement: *„[...] On 6 October 2013, I headed from Pristina to Istanbul and from there I went to Hatay where I stayed for one day and then I travelled to the city of Kilis near the Turkish-Syrian border. On the next day, with the assistance*

of a Turkish citizen, I crossed the border illegally and entered Syria, namely the city of Tal Rivat where I was deployed at a base in the vicinity of Aleppo, then I was asked why I went there whom I told that I want to help the Syrian people and I do not want to become part of Al Qaeda ... ".

17. On 7 May 2015, the Special Prosecutor of Kosovo (hereinafter: the Prosecutor) submitted to the Basic Court in Prishtina - Department for Serious Crimes (hereinafter: the Basic Court), the Indictment PPS. No. 26/2015, against the Applicant for the commission of the criminal offense of „*Organization and participation in a terrorist group*", under Article 143 paragraph 2 of the CCK.

18. During the hearing before the Basic Court, the Applicant maintained his innocence, stating that: *„[...] the purpose of his departure to Syria was to help the Syrian people against the Assad regime and had no intention of joining terrorist groups, he deliberately participated in the group Ahra al-Sham, which was an opposition group that was not part of terrorist organizations, was not on the blacklist of the US State Department."*

19. In the closing statement before the Basic Court, the Applicant's defense counselstated that,, *„The Special Prosecutor failed to confirm his allegation that the accused Albert Berisha committed the criminal offense of Organization and participation in a terrorist group under Article 143, paragraph 2 of the CCK."*

20. In the closing arguments before the Basic Court, the Prosecutor stated that, *„[...] some of the accused pleaded guilty to the criminal offences they were accused of; therefore, he did not engage in the assessment of evidence for these accused, but only assessed the evidence for the accused who were not pleading guilty."*

21. On 29 April 2015, the Basic Court rendered Judgment PKR. No. 263/15, by which the Applicant was found guilty of committing a criminal offense, and sentenced him to 3 years and 6 (six) months.

22. In the reasoning of Judgment PKR. No. 263-15, the Basic Court stated that, *„The Court did not give trust to the accused Albert Berisha, nor to the defense thesis of his lawyer, that allegedly the accused Albert Berisha was not aware of the situation in Syria, that he went there to help the civilian population. [...] „The position of the accused Albert Berisha, that he was in Syria only for a short time, does not acquit him of criminal liability, his statements given during the*

investigation and at the main hearing are contradictory to each other.
[…]
When determining the punishment for the accused, the court took into account all mitigating and aggravating circumstances affecting the type and level of punishment, pursuant to Article 73 of the CCRK.“

23. The Applicant filed an appeal with the Court of Appeals against Judgment PKR. No. 263/15 of the Basic Court, stating:

a) „That the Judgment contains an essential violation of the provisions of the criminal procedure because the enacting clause of the Judgment is incomprehensible and contradictory, and that he was convicted based upon his own statement.

b) That in the judgment the factual situation was erroneously and incompletely determined,

c) That the sentence is unfair, because he was unjustly convicted on the basis of facts that have not been established.“

24. On 4 May 2016, the Court of Appeals rendered Judgment PAKR. No. 518/2016, by which the Applicant's appeal was rejected as ungrounded.

25. Judgment PAKR. No. 518/2016 of the Court of Appeals reads:

a) „As regards the Applicant's allegations of violation of the provisions of the criminal procedure, the first instance court found the accused (Applicant) guilty based on his statement given to the police, the Court further states that according to the legal provisions it was determined that the [Applicant's] statements could be used as evidence (Article 125, paragraph 3 of the Criminal Procedure Code) in criminal proceedings.”

b) “The [Applicant], both in the police and at the court hearing, stated the fact that he was in Syria but categorically denied that he intended to join any terrorist organizations. In fact, at the court hearing, the accused said that he heard from various portals and social networks about the presentation of Lavdrim Muhaxheri and that he knew that he was part of the organization of the Islamic State and the organization "ISIS", and for this reason he decided to join the group „Ahra Al Sham.“

c) "The Court considers that the determination of the punishment against the accused was done in accordance with the general rules for the calculation of punishment, in accordance with Article 73 of the CCK, so that the sentences that were imposed against them are proportionate to the social danger of the committed criminal offense."

26. The Applicant filed a request for protection of legality with the Supreme Court against Judgment PAKR. No. 518/2016 of the Court of Appeals, on the grounds of *"violation of the principle of equality of arms between the parties to the proceedings, because the court did not approve his proposal for hearing the witnesses, thus violating the principle of fair and impartial trial of Article 31 of the Constitution and Article 6 of the European Convention of Human Rights."*

27. On 18 December 2017, the Supreme Court rendered Judgment PML. No. 225/2017, by which the Applicant's request for protection of legality was rejected as ungrounded. The reasoning of the judgment emphasizes:

"The Court assesses that the enacting clause of the judgment of the first instance court in relation to the accused is clear and contains all information about the time, place, manner of execution of the criminal offense, as well as other data that represent the essential elements of the committed criminal offense. In this criminal case, it was not disputed that, at the critical time, as described in the operative part of the first instance court, the Applicant was in Syria, and the fact that he was there to join a terrorist formation."

28. Regarding the allegation of a violation of the principle of *„equality of arms"*, because the Basic Court did not approve the Applicant's proposal for the examination of the police officers who had conducted his initial interrogation, the Supreme Court stated: *„This court considers that, as correctly concluded by the court of first instance, it is not necessary to hear the proposed witnesses, as the official persons (police officers) have interviewed the convict about the circumstances of the criminal offence, while as for his allegation of having been promised not to be included in the indictment, based on the case file, this allegation results to be ungrounded because this convict was not declared a cooperative witness as required by the provision of Article 236 of the CPCK, hence the principle of equality of parties to the proceedings has not been violated."*

Applicant's allegations

29. The Applicant alleges that the entire proceedings before the regular courts, including the examination stage before the police, were in violation of his constitutional rights, as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR, *"because both the national law (CPCK) and the ECHR stipulate that encouraging a suspect to make a statement", "by making promises to him," or "by exerting any pressure," is deemed invalid."*

30. The Applicant considers that the courts violated the principles of the presumption of innocence and the equality of arms, since at all stages of the proceedings they prejudged his guilt for the alleged criminal offense. The courts excluded the constitutional principles that the indictment must be based on reasonable and sufficient evidence, and that the burden of proof falls on the prosecution. Accordingly, they deprived the Applicant of his right to be presumed innocent unti proven guilty, while by refusing to hear the only witnesses that he had proposed, they placed him in an unequal position vis-a-vis the authorities that accuse him.

31. The Applicant also considers that his right to a reasoned court decision was violated, because the courts' decisions are not logical, are not in the prescribed form, are not clear in their content and contain contradictions.

32. The Applicant also alleges that his detention is not based upon a conviction by a competent court, in violation of Article 5 (Right to liberty and security) of the ECHR as a consequence of the violation his right to a fair trial as protected by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR.

33. The Applicant a request to declare the Referral admissible, to impose an interim measure, to find that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR, and, as a consequence, a violation of Article 5 (Right to liberty and security) of the ECHR.

Assessment of the admissibility of Referral

34. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law, and as further specified in the Rules of Procedure.

35. 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.*

36. The Court also refers to Article 49 [Deadlines] of the Law, which establishes:

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

37. In this regard, the Court considers that the Applicant is an authorized party, that he exhausted all legal remedies and filed the Referral within the prescribed deadline.

38. However, the Court also refers to Article 48 [Accuracy of the Referral] of the Law, which states:

> *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.*

39. In addition, the Court takes into account Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresees:

> *(1) The Court may consider a referral if:*
>
> > *(d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
>
> > *(d) the Applicant does not sufficiently substantiate his claim.*

40. The Court notes that the Applicant first alleges that the challenged judgments violated his rights and freedoms guaranteed by Article 31

[Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR, and, as a result of these violations, violated Article 5 (Right to liberty and security) of the ECHR.

41. At the outset, the Court recalls that, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, *"human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*."

42. In this regard, the Court recalls Article 31 [Right to a Fair and Impartial Trial] of the Constitution, which states:

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

43. Similarly, Article 6 (Right to a fair trial), of ECHR 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.*
> *[...]"*

44. The Court notes that the main issue has to do with the determination of a criminal charge against the Applicant, and therefore, the Applicant in the proceedings in question enjoys the guarantee of the right to a fair trial under Article 31 [Right to Fair and Impartial Trial] and Article 6 (Right to a fair trial) of the ECHR.

45. The Applicant essentially alleges that his right to a fair trial has been violated. He bases his allegation on (i)the fact that the challenged judgments are based on his statement given in the pre-trial proceedings, which were used as evidence during the main trial. In this respect, (ii) the Applicant alleges that the rights to conduct his defense were violated because his right to remain silent and not to contribute to his own incrimination was violated, and (iii) because the courts did not allow him to call witnesses in his defense, and (iv) because the impugned judgments do not contain sufficient reasoning and explanations on decisive facts. In the opinion of the Applicant, all of the foregoing lead to the conclusion that he was not ensured the guarantees of a fair trial. Furthermore, (v) the Applicant alleges that serving the sentence on the basis of these court judgments is not

lawful, because the court's violated his rights to a fair trial, and thereby serving his sentence is not based on a conviction by a competent court, as protected by Article 5(1) of the ECHR.

46. The Court, first of all, recalls the case law of the European Court of Human Rights (hereinafter: the ECtHR), according to which, *the question whether the accused had a fair procedure must be considered based on of the proceedings as a whole* (see ECtHR, *Monnell and Morris v. the United Kingdom*, Application No. 9562/81; 9818/82 of 2 March 1987, Series A, No. 115, pp. 21, paragraph 54).

i) On the use of the Applicant's statements in evidence

47. Regarding the Applicant's allegation, *„[...] that the challenged judgments are based on evidence, namely on his statement [to the police], and without a careful and comprehensive assessment of other evidence",* the Court first recalls its case law and that of the ECtHR, according to which it is not its role to consider how the regular courts determined the factual situation or the application of the substantive law unless, and to the extent that, it puts into question the rights and freedoms protected by the Constitution and the ECHR. Therefore, it cannot act as a „*fourth-instance court*" (see: *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, paragraph 65. See also: *mutatis mutandis* case KI86/11, Applicant: *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

48. The Court recalls that Article 6 of the ECHR guarantees the right to a fair trial, but it does not lay down any rules on the use of evidence as such, which is therefore primarily a matter for regulation under national law (see ECtHR Judgment *Schenk v. Switzerland*, No. 10862/84, 12 July 1988, para 45- 46, and ECtHR Judgment T*eixeira de Castro v. Portugal*, report 1998-IV paragraph 34, of 9 June 1998).

49. Therefore, as a matter of principle, the Court considers that its role is not to determine whether a particular kind of evidence in a court can be acceptable or not, or whether the Applicant is guilty or not. To this end, the question to be answered is whether the proceedings as a whole, including the way the evidence was taken, was fair. This includes also the consideration of the „unlawfulness" in question, also where the violations of other rights of the ECHR are concerned, (see the EctHR Judgment, *Bykov v. Russia*, application No. 4378/02, paragraph 89, of 10 March 2009, and the ECtHR Judgment *Lee Davies v. Belgium*, application No. 18704/05 paragraph 41 of 28 June 2009).

50. Furthermore, the Court recalls that it will not review the question as to which evidence of the parties to the proceedings the courts gave more trust based on of a free court assessment (see, the ECtHR Judgment *Doorson v. Netherlands*, application 1996/II, paragraph 78 of 6 March 1996).

51. However, the ECtHR has also noted that, even though domestic courts have a certain margin of appreciation when choosing arguments and admitting evidence in a particular case, at the same time domestic courts are obliged to reason their decisions, by giving clear and comprehensible reasons on which they base their decisions. (ECtHR case *Suominen v. Finland*, application no. 37801/97, paragraph 36, Judgment of 1 July 2003).

52. The Court notes that in the reasoning of the first instance judgment it is stated, *inter alia*, that some of the key evidence on which the conclusion of the existence of the criminal offense and the criminal liability of the Applicant was based is precisely the testimony he gave to the police. In that statement the Applicant described in detail the actions he had taken in Syria, which the regulart courts have assessed as esenital elements which without a doupt show the existence of the criminal offense, and his criminal liability.

53. In this regard, the Court notes that the Applicant gave his statement to the police in the presence of his defense counsel assigned to him *ex officio*. This leads to the conclusion that during the entire proceeding he had access to legal assistance from which he could benefit, and could be made aware of the consequences that arise or may arise from his statement in the further course of the criminal proceedings.

54. The Court further notes that Article 261 of the CCK provides for the possibility that the statements made in the previous proceedings may be used as evidence during the main trial:

55. Article 261 Prior Statements Used at Main Trial of the CCK, states:

> *"[...]*
>
> *2. Pretrial interviews may be used as evidence in accordance with Article 123 paragraph 2 of the present Code.*
> *3. Pretrial testimony may be used as evidence in accordance with Article 123 paragraph 3 of the present Code."*

56. In this regard, the Court notes that the regular courts gave extensive conclusions,providing reasons, and indicating the relevant legal provisions, as to why the Applicant's statement in pre-trial proceedings was used as evidence. The Court does not consider that the reasoning provided by the regular courts was arbitrary.

ii) **Regarding the prohibition against self-incrimination**

57. The Applicant alleges that his right to freedom from self-incrimination was violated because his statement made to the police during the investigation was used against him in court during the criminal trial.

58. The Court recalls Article 10 [Notification on the Reasons for the Charges, Prohibition against Self-incrimination and Prohibition against Forced Confession] of the CPC, which states:

> *"1. At his or her arrest and during the first examination the defendant shall be promptly informed, in a language that he or she understands and in detail, of the nature of and reasons for the charge against him or her.*
>
> *2. The defendant shall not be obliged to plead his or her case or to answer any questions and, if he or she pleads his or her case, he or she shall not be obliged to incriminate himself or herself or his or her next of kin nor to confess guilt. This right is not implicated when a defendant has voluntarily entered into an agreement to cooperate with the state prosecutor.*
>
> *3. Forcing a confession or any other statement by the use of torture, force, threat or under the influence of drugs, or in any other similar way from the defendant or from any other participant in the proceedings shall be prohibited and punishable."*

59. The Court also recalls that the right to a fair trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, provides certain minimum guarantees for any person charged with a criminal offence, which includes the right to freedom from self-incrimination, according to the ECtHR case law (see ECtHR Judgment, *Saunders v. United Kingdom*, application No. 19187/91, para. 68 and 69, of 17 December 1996, as well as the ECtHR *John Murray v. United Kingdom*, application 18731/91, paragraph 45, of 8 February 1996).

60. In this regard, the right of a person not to incriminate himself assumes that in the criminal proceedings the prosecutor is required to prove his case against the accused without using the evidence obtained through the *method of coercion and repression*, contrary to the will of the accused. The right not to incriminate oneself is primarily concerned with the will of the accused party not to make a statement, namely the right to remain silent already applicable to the first examination of the suspect (see ECtHR Judgment, *Saunders v. United Kingdom*, application No. 19187/91, para. 68 and 69, of 17 December 1996, as well as the ECtHR *John Murray v. United Kingdom*, application 18731/91, paragraph 45, of 8 February 1996).

61. Finally, the right to silence is not absolute, and in assessing whether the proceedings infringed the very essence of the guarantees of against self-incrimination, the ECtHR, makes its assessment based on: a) *the nature and degree of coercion*, b) *the existence of any relevant protective measure,* and c) *the use of the evidence obtained in this manner* (see ECtHR *John Murray v. United Kingdom,* application 18731/91, paragraph 45, of 8 February 1996).

62. The Court notes the Applicant's allegation that *„his right to defense and guarantees in respect of protection against mere incrimination has been violated, as his statement was used in evidence".*

63. On this point, the Court first of all emhasizes that when assessing whether the proceedings were fair as a whole, it should be borne in mind whether the rights of the defense have been respected. In that regard, the Court shall assess whether the Applicant had the opportunity to challenge the lawfulness of the evidence and to object to the use of such evidence (see ECtHR *Szilagyi v. Romania*, application 30164/04 of 17 December 2013).

64. In addition, the quality of the evidence must be taken into account, including whether the circumstances in which it was obtained indicate a suspicion as to its reliability or accuracy (see ECtHR *Lisica v. Croatia* judgment, application 20100/06, paragraph 49, of 25 February 2010).

65. Moreover, the problem of justice will not necessarily occur where the evidence obtained is not supported by other material, it should be noted that when the quality of the evidence was very sound and admitted no doubt, the need for further evidence to support it decreased (see, the ECtHR Judgment, *Lee Davies v. Belgium*, application 18704/05 para. 42 of 28 June 2009, as well as the ECtHR Judgment *Bykov v. Russia*, Application No. 4378/02 paragraph 90, of 10 March 2009).

66. In the present case, the Court notes that the regular courts have reached their conclusions, giving sufficient reasoning that this Court does not consider arbitrary, that the Applicant's statement given to the police was obtained in a lawful manner. In addition, prior to giving his testimony, the Applicant voluntarily and consciously in the presence of his defense counsel waived the right not to answer the questions of the competent officers in charge of the investigation, and not to rely upon his right to remain silent.

67. Moreover, at no stage in the proceedings before the Basic Court, Court of Appeals or the Supreme Court, was the Applicant able to prove that he was exposed to any kind of pressure by the police due to the fact that he was in police custody. The Applicant also did not have any objections to the appointment of the defense counsel assigned to him *ex officio*, and in that sense „*there were protective measures*" in the light of the above principles.

68. It also follows from the facts of the case that the Applicant before the statement given to the police, consulted his defense counsel without the presence of other persons. Moreover, the Applicant also had sufficient time when he gave the testimony before the Basic Court in consultation with his defense counsel, to prepare a defense to challenge his previous statement given to the police, concluding that the Applicant was not denied the opportunity to challenge the use of his statement as evidence.

69. Finally, as noted by the Basic Court, by careful analysis of the statement made by the Applicant before the police and the statement he made in his defense before the Basic Court, it was established that they differ to a sufficient extent to confirm the fact that the Applicant is aware of the criminal offense he had committed and that he has decided to defend himself, but that *„[...] the court did not give trust to the accused Albert Berisha and neither to the defence thesis of his lawyer brought before the Basic Court..."* .

70. Based on the foregoing, the Court finds the Applicant's allegations of alleged violations of the right to defense and guarantees with regard to protection against self-incrimination are ungrounded.

iii) Regarding the denial to hear defense witnesses

71. Further, in relation to the Applicant's allegations, *„that the principle of equality of the parties to the court proceedings was violated, because the courts did not want to accept the witnesses he*

proposed[...]", the Court finds them as ungrounded, since the Applicant made the same arguments also before the Court of Appeals and the Supreme Court, where he received detailed answers to his allegations, for which the courts provided the legal basis.

72. The Court cannot fail to note that the Supreme Court in Judgment PML. No. 225/2017, specifically responded to the Applicant why the Basic Court in Judgment PKR. No. 263/15 rejected the request to hear two KP officers, who interrogated the Applicant in the presence of the defense counsel during the course of the investigation, stating that *„[...] that it is not necessary to examine the proposed witnesses because they, as officers (police officers), have interviewed the convict about the circumstances of the criminal offense, whereas as to his allegation that he was promised not to be included in the indictment, this is ungrounded ..."*

iv) Regarding the right to a reasoned decision

73. As regards the Applicant's allegation of a violation of the right to a fair trial *"[...] because the judgments of the courts are not logical, in the prescribed form, they are not clear in content and that they have contradictions"*, the Court emphasizes that, according to the established case law of the ECtHR, Article 6, paragraph 1, of the ECHR, it is obligatory for the courts to, *inter alia*, reason their judgments. This obligation cannot, however, be understood as an obligation to state all the details in the judgment and to answer all the questions raised and arguments presented (see: ECtHR Judgment, *Ruiz Torija v. Spain*, of 9 December 1994, Series A, No. 303-A, paragraph 29, see Decision of ECtHR, *Harutyunyan v. Armenia*, of 5 July 2005, application number 36549/03).

74. The Court also notes that, according to the position taken by the European Commission on Human Rights, *the final decisions of the appellate courts do not have to contain exhaustive reasoning, but the one which the court deems relevant and well-founded* (see: *Decision of the European Commission on Human Rights*, 8769/07 of 16 July 1981 , OI 25).

75. In essence, the Court notes that the Applicant tries to justify the alleged violation by stating that *"[...] the court did not logically link the legal framework and the factual situation. Courts instead of explaining the core of their decision, they ask hypothetical questions - which are irrelevant for a court decision."*

76. The Court also notes that the Applicant repeated the same appealing allegations before the Supreme Court, to which the court in Judgment PML. no. 225/2017 replied, stating that: *"The Court considers that the enacting clause of the first instance judgment in a relation to the accused are clear and contain all information about the time, place, manner of execution of the criminal offense, as well as other data that represent the core elements of the committed criminal offense. In the reasoning of the two judgments, legal reasons for all the the items of the Judgment were provided."*

77. The Court finds these allegations of the Applicant to be ungrounded and not constitutionally unjustified. This is because the Basic Court and Court of Appeals in their judgments gave clear reasons for their decisions, both regarding the established factual situation and the application of the substantive law, which this Court does not consider arbitrary.

78. For the reasons set out above, the Court concludes that the Applicant's allegation of a violation of the right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, is manifestly ill-founded on a constitutional basis.

v) Regarding the right to liberty and security

79. As regards the Applicant's allegations concerning the violation of Article 5 (Right to liberty and security), of the ECHR, the Court notes that the Applicant claims that, because he was not provided with a fair trial, therefore his detention is not based on a "conviction by a competent court" as required by Article 5 of the ECHR. The Applicant alleges that he is being punished by judgments which are unconstitutional, which is why his sentence of imprisonment is also unconstitutional.

80. First of all, the Court recalls that the ECtHR states that Article 5, paragraph (1) item (a) of the ECHR allows the deprivation of liberty „*after conviction by a competent court*". The ECtHR states that the word 'after' does not simply mean that the 'detention' must follow the 'conviction' at the same point of time: in addition, the 'detention' must result from, 'follow and depend upon' or occur 'by virtue of' the 'conviction'" (see the ECtHR Judgment, B. v. Austria, application No 11968/86 of 28 March 1990, paragraph 38).

81. The Court finds that, under the legislative framework of Kosovo, the proceedings leading to a criminal conviction against the Applicant were conducted by courts lawfully and regularly established in

Kosovo. Furthermore, there is nothing in the procedures applied by the regular courts to call into question their „competence“ under the law or the Constitution.

82. Therefore, the Court finds that the Applicant was convicted by a *“competent court“* which conducted a comprehensive procedure that resulted in the establishment of criminal liability and *“rendering of a final judgment“* which sentenced the Applicant to imprisonment (see the ECtHR Judgment, *B. v. Austria*, application No 11968/86 of 28 March 1990).

83. The Court concludes that the Applicant’s conviction by a competent court was entirely sufficient to justify his detention in compliance with the requirements of Article 5 of the ECHR, and the Applicant’s allegations of a violation of Article 5 ECHR are to be rejected as manifestly ill-founded on a constitutional basis.

Conclusions

84. Bearing in mind all of the above, including the circumstances of the caseand the reasoning provided in the challenged decisions, the Court does not see any arbitrariness in the application of the substantive law in the Applicant’s criminal trial. The Courtalso does not find any elements that would indicate irregularity or arbitrariness in rendering the challenged decisions to the detriment of the Applicant.

85. Accordingly, the Court considers that nothing in the case presented by the Applicant indicates that the proceedings before the regular courts were unfair or arbitrary in order for the Constitutional Court to conclude that the core of the right to fair and impartial trial has been violated, or that the Applicant was denied any procedural guarantees, which would lead to a violation of the right to a fair trial under Article 31 of the Constitution or Article 6 of the ECHR.

86. The Court considers that it is the Applicant's obligation to substantiate his constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR. That assessment is in accordance with the jurisdiction of the Court (see: case of the Constitutional Court No. K119/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, Resolution on Inadmissibility of 5 December 2013).

87. However, the Court finds that the Applicant did not substantiate his allegation, nor has he demonstrated that there has been a violation of his rights.

88. The Court further considers that it cannot act as a "fourth instance court".

89. In conclusion, the Court finds that the Applicant's allegations of a violation of the right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, and of the right to liberty and security as guaranteed by Article 5 of the ECHR, are manifestly ill-founded on a constitutional basis.

90. Therefore, the Applicant's Referral as a whole is manifestly ill-founded on a constitutional basis and is to be declared inadmissible in accordance with Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

Request for interim measure

91. The Court recalls that the Applicant also requested the Court to impose an interim measure "*because he considers that he was unjustly deprived of his liberty as a result of rendering unconstitutional court decisions.*"

92. In this regard, the Court refers to Article 27 [Interim Measures] of the Law, which provides:

> *1." The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest."*

93. The Court also refers to Rule 55 (4) of the Rules of Procedure, which specifies:

> *" Before the Review Panel may recommend that the request for interim measures be granted, it must find that:*
>
> *(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
> *(...)*
> *If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application."*

94. The Court reiterates the conclusion that the Applicant's Referral was declared inadmissible, as manifestly ill-founded, because the Applicant has not provided any *prima facie* evidence on the admissibility of the Referral.

95. Therefore, in accordance with Article 116.2 of the Constitution, Article 27.1 of the Law and Rule 55 (4) of the Rules of Procedure, the request for interim measure is rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 (1 and 7) of the Constitution, Articles 27.1 and 47.2 of the Law, and Rules 36 (1)(d) and 36 (2)(d), 55 (4), and 56 (2) of the Rules of Procedure, at its session held on 23 May 2018,

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measures;

III. TO NOTIFY this Decision to the parties;

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

V. TO DECLARE this Decision effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi

KI143/16, Applicant: Muharrem Blaku and others, Request for constitutional review of Judgment ASC-11-0012 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 22 September 2016

KI143/16, Resolution on Inadmissibility, of 17 May 2018, published on 13 June 2018

Keywords: *Individual referral, civil procedure, fair and impartial trial, manifestly ill-founded*

The Applicants requested the Court the constitutional review of the Decision of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, which upheld the Decision of the Specialized Panel of the same court and of the Municipal Court in Podujeva, which decided regarding the compensation of a parcel of land, which was nationalized in 1960.

The Applicants alleged violation of Article 31 of the Constitution, namely the right to fair and impartial trial in some of the key elements of this right such as: the equality of arms, the right to participate in the trial and the right to a reasoned court decision.

The Court reviewed the Applicants' allegations and extensively elaborated the general principles of the right to fair and impartial trial that in the circumstances of the present case, a hearing was held in the first instance court. The Municipal Court in Podujeva held a main hearing where the facts of the case were reviewed, with the participation of all parties which were a part of the dispute. The Applicants had the opportunity to present in the main hearing their arguments and evidence, which the respective court assessed as insufficient to approve the claim. From the Judgment, it can also be noted that in the main hearing the expertise of independent experts was also considered.
The Court also responded to two other allegations regarding the violation of this right, citing the previous cases of this court, applicable in this case and also cases of ECtHR.
In conclusion, the Court found that the Applicants did not substantiate their allegations with convincing evidence, therefore, the Court concluded that their referral is to be declared inadmissible as manifestly ill-founded on constitutional basis.

RESOLUTION ON INADMISSIBILITY

In

Case No. KI143/16

Applicant

Muharrem Blaku and others

Request for constitutional review of Judgment ASC -11-0012 of 22 September 2016 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Applicants are Muharrem Blaku, Imer Blaku, Murat Blaku and Rifat Blaku from Podujeva (hereinafter: the Applicant), represented before the Court by Muhamet Shala, a lawyer from Prishtina.

Challenged decision

2. The Applicants challenge the Judgment [ASC-11-0012] of 22 September 2016 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of SCSC), which was served on them on 7 October 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicants' rights and freedoms guaranteed by Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention of Human Rights (hereinafter: the ECHR) and Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 9 December 2016, the Applicants submitted the Referral to the Constitutional Court (hereinafter: the Court).

6. On 16 January 2017, the President of the Court, appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalović.

7. On 27 January 2017, the Court notified the Applicants about the registration of the Referral and sent a copy of the Referral to the Appellate Panel of the SCSC.

8. On 17 May 2018, the Review Panel considered the report of the Judge Rapporteur and by majority made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 6 January 1960, the National Council of the Municipality of Podujeva, based on the then applicable Law on nationalization (effective from 26 December 1958), through Decision [No. 7732/59], according to the Applicants, nationalized a part of the immovable

property of the Applicants' predecessor and registered it as socially owned property.

10. From the case file it results that the Applicants had submitted a request to the
Commission for Land Restitution in the Municipality of Podujeva in 1993 and to the Directorate for Legal and Property Affairs in the Municipality of Podujeva in 2002, for the restitution of the contested property.

11. On 30 March 2006, the Applicants filed a claim, including a request for interim measure, with the Specialized Panel of the Special Chamber of the Supreme Court (hereinafter: the Specialized Panel of the SCSC) against the respondents, the Municipality of Podujeva and Agricultural Cooperative "Përparimi" in Podujeva, requesting confirmation of property rights over certain cadastral parcels, claiming that these properties were taken by the government in 1960 through a political decision and without the necessary compensation.

12. On 18 May 2006, the Specialized Panel of the SCSC, by the Decision [SCC-06-0139], referred the case to the Municipal Court in Podujeva to decide regarding the Applicants' claim. In the aforementioned Decision, it was stated that the parties dissatisfied with the decision of the Municipal Court may file an appeal with the SCSC.

13. On 18 June 2008, the Municipal Court in Podujeva, through the Judgment [C.No.214/2006] rejected the statement of claim as ungrounded. The Municipal Court, through its Judgment, rejected the abovementioned statement of claim, among others, based on the fact that the claimants, namely the Applicants, had failed to establish that the disputed immovable property was owned by their predecessors or that it was transferred to the social ownership without a legal basis, and that in fact, according to the Judgment, this immovable property had been registered in the ownership of the respondent, namely, the Agricultural Cooperative "Përparimi" since 1952. In addition, the Municipal Court reasoned that in the present case the legal requirements for the acquisition of the property rights stipulated by Article 20 of the Law on Basic Property Relations, have not been met.

14. On 15 September 2008, the Applicants filed an appeal with the Specialized Panel of the SCSC, alleging violation of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation, and erroneous application of the substantive law, requesting that the appealed Judgment be annulled and that the case be remanded for retrial. The claimants, namely the Applicants, mainly

challenged the professionalism and accuracy of the expert's report regarding the clarification of the situation before 1952.

15. On 2 June 2009, the SCSC included in the proceedings as respondents the Kosovo Trust Agency (hereinafter: the KTA) and the Privatization Agency of Kosovo (hereinafter: the PAK). The latter, on 8 November 2011, submitted a response to the claim of the claimants, namely of the Applicants, arguing that they had no fact or evidence that they had in the possession the disputed immovable property at least since 1952.

16. On 13 January 2011, the Specialized Panel of SCSC issued Judgment [SCA-08-0085], by which the Applicant's appeal was rejected as inadmissible, and the Judgment [C. No. 214/2006] of 18 June 2008 of the Municipal Court in Podujeva, was upheld.

17. On 21 February 2011, the Applicants filed an appeal with the Appellate Panel of the SCSC, alleging violation of the contested procedure provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law, requesting that the appealed Judgment be annulled and the case be remanded for retrial.

18. On 8 April 2014, the Applicants also filed a request for interim measure with the Appellate Panel of the SCSC in order to prevent the PAK from bidding the contested immovable property until the final adjudication of the case.

19. On 22 September 2016, the Appellate Panel of the SCSC by Judgment [ASC-11-0012] decided that the appeal and the request for interim measures filed by the Applicants be rejected as ungrounded and the Judgment [SCA-08 -0085] of 13 January 2011 of the Specialized Panel of the SCSC be upheld, with a detailed reasoning.

Applicants' allegations

20. The Applicants allege that the challenged Judgment, which upholds the Judgments of the SCSC and of the Municipal Court in Podujeva, pertaining to the Applicants' property claims over the immovable property which they maintain to have been nationalized through a political decision and without compensation in 1960, was rendered in violation of their constitutional rights, guaranteed by Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

21. The Applicants build their case on allegations for violation of procedural safeguards guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, alleging violation of the principle of equality of arms because they were not notified about the session held in the Appellate Panel of the SCSC and a violation of the right to a reasoned decision, because the challenged Judgment failed to justify the essential allegations over the ownership and the lack of compensation pertaining to the disputed property.

22. The Applicants also emphasize that the ECHR guarantees and the case law of the European Court of Human Rights (hereinafter: the ECHR) are directly applicable in the legal order of the Republic of Kosovo, based on Articles 22 and 53 of the Constitution. In this regard, in support of their allegations for violation of the principle of equality of arms, the Applicants refer to the findings of case *Grozdanoski v. FYR Macedonia* (ECtHR Judgment of 31 May 2007) and *Gusak v. Russia* (ECtHR Judgment of 7 June 2011) and the case of the Court KI108/10 (Applicant *Fadil Selmanaj*, Judgment of 5 December 2011), while in support of their allegations for a violation of the right to a reasoned decision, they refer to the findings of cases *Garcia Ruiz v. Spain* (ECtHR Judgment of 21 January 1999), *Pronina v. Ukraine* (ECtHR Judgment of 18 July 2006), *Nechiporuk and Tonkalo v. Ukraine* (ECtHR Judgment of 21 July 2011), *Mala v. Ukraine* (ECtHR Judgment of 7 July 2014), *Hirvisaari v. Finland* (ECtHR Judgment of 25 December 2001) and *Hadjianastassiu v. Greece* (ECtHR Judgment of 16 December 1992) as well as the case of the Court KI22/16 (Applicant *Naser Husaj*, Judgment of 9 June 2017).

23. Finally, the Applicants request the Court to declare their referral admissible; to annul the challenged Judgment of the Appellate Panel of the SCSC; and to order to remand their case for a retrial.

Assessment of the admissibility of Referral

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

25. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*

[…]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

26. The Court also examines whether the Applicants have met the admissibility requirement as defined by the Law. In this connection, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority."

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

Article 48
[Accuracy of Referral]

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

Article 49
[Deadlines]

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

27. Regarding the fulfillment of these requirements, the Court notes that the Applicants are authorized parties challenging an act of a public authority, namely the Judgment [ASC-11-0012] of 22 September 2016 of the Appellate Panel of the SCSC, after exhaustion of all legal remedies provided by law. In this regard, the Applicants' referral meets the requirements established in paragraphs 1 and 7 of Article

113 of the Constitution and those of Article 47 of the Law. The Applicants have also accurately specified the rights guaranteed by the Constitution and the ECHR, which have allegedly been violated in accordance with Article 48 of the Law and filed a referral within the 4 (four) month period provided for in Article 49 of the Law.

28. In addition, the Court needs to consider whether the Applicants have met the admissibility requirements established in Rule 36 [Admissibility Criteria] of the Rules of Procedure. Rule 36 (1) of the Rules of Procedure specifies the requirements under which the Court may consider a Referral, including the requirement that such a Referral is not manifestly ill-founded. Under Rule 36 (2), a referral is manifestly ill-founded if the Court is satisfied that:

> *"(1) The Court may consider a referral if:*
>
> *[...]*
>
> *(d) the referral is prima facie justified or not manifestly ill-founded.*
>
> *(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
>
> *[...]*
>
> *(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights.*
>
> *[...]*
>
> *(d) the Applicant does not sufficiently substantiate his claim."*

29. In this regard, the Court recalls that the Applicants allege that Judgment [ASC-11-0012] of 22 September 2016 of the Appellate Panel of the SCSC was rendered in violation of their rights guaranteed by Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 53 [Interpretation of Human Rights Provisions] of the Constitution, because, according to the allegations, the challenged Judgment was issued in a) violation of their right to equality of arms because they were not notified about the court session held at the Appellate Panel of the SCSC and b) a violation of their right to a reasoned court decision.

30. The Court initially notes that the essential Applicants' allegations pertaining to alleged violations of the procedural safeguards guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, namely, the equality of arms and the right to a reasoned decision, have been interpreted in detail through the case law of the ECtHR, in accordance with which the Court, pursuant to Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, in interpreting the allegations for a 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.

31. The Court also notes that the ECtHR consistent case law maintains that the fairness of a proceeding is assessed based on the proceeding as a whole. (See the ECtHR Judgment of 6 December 1988, *Barbera, Messeque and Jabardo v. Spain*, no. 10590/83, paragraph 68). Consequently, in determining the merits of the Applicants' allegations, the Court shall adhere to this principle. (See also the Case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38).

32. In this respect, the Court will first examine the Applicants' allegations as to the alleged violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and initially pertaining to the allegations related to the violation of the principle of equality of arms, to continue with allegations for a violation of the right to a reasoned court decision.

The fundamental principles on equality of arms and the right to a public hearing under the ECtHR case law

33. Through its case law, the ECtHR has held that the principle of "*equality of arms*" is one of the key elements of the right to a fair trial and that "*each party to the proceedings to be given* a *reasonable opportunity to present his case - including evidence - under conditions that do not place him at a substantial disadvantage vis- - vis his opponent*." (see the ECtHR Judgment, *Nideröst-Huber v. Switzerland*, of 18 February 1997, paragraph 23; the ECtHR Judgment, *Kress v. France*, 7 June 2001, paragraph 72; the ECtHR Judgment of *Yvon v. France*, 24 April 2003 and the ECtHR Judgment of *Gorraiz Lizarraga and Others against Spain*, of 27 April 2004, paragraph 56).

34. The principle of equality of arms further implies that anyone who is a party to the proceedings must have equal opportunity to present his case and that "*a fair balance*" must be established between the parties. (See *Dombo Beheer B. v Netherlands*, ECtHR Judgment of 27 October 1993, Series A. No. 274, paragraph 33).

35. In this regard, the right to participate in the trial should not be considered as a formal right, where the parties are merely guaranteed physical presence during the civil proceedings, on the contrary, firstly the procedural legislation, and subsequently the judge during the trial, must provide the parties with equal opportunities, to present arguments and evidence in defense of their interests.

36. The failure to comply with this principle does not depend on the unfairness in the assessment of evidence and facts. The procedural violation in itself results in a violation of the right to a fair trial. (See, among others, *Bulut v. Austria*, ECtHR, 22 February 1996, paragraph 84). For example, with regard to cases involving "*civil rights and obligations*", there will be a violation of the principle of equality of arms if one party attends the hearing, while the other does not. (see *Komanicky v. Slovakia*, ECtHR, 4 June 2002, paragraph 45).

37. In this respect, the Court recalls that the requirements of a fair hearing, in principle imply the right of the parties to be present in person at the trial and that this right is closely linked to the right to a hearing and the right to follow the proceedings in person. (see the ECtHR Judgment of 23 February 1994, *Fredin v. Sweden*, Application no. 18928/91, paragraphs 10 and 11; and ECtHR Judgment of 26 May 1988, *Ekbatani v. Sweden*, Application no. 10563/83, paragraph 25; and case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 40).

38. The Court reiterates that, although not expressly mentioned in the text of Article 6 of the ECHR, an oral hearing constitutes a fundamental principle enshrined in Article 6 (1). (See: *Jussila v Finland* the ECtHR Judgment of 23 November 2006 and case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 42).

39. However, the ECtHR, through its case law, also defines the limits of the application of this rule and the relevant exceptions. It holds that the right to a hearing is not absolute in the appeal processes. In this respect, the ECtHR states that *"in cases in which there has been an oral hearing at the first instance, or in which, one has been waived at that level, there is no absolute right to an oral hearing in any appeal proceedings that are provided"*. (See the ECtHR Judgment of 12

November 2002, *Dory v. Sweden*, no. 28394/95, paragraph 37 and case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 43).

40. In addition, the ECtHR further maintains that when the proceedings involve an appeal only on points of law, an oral hearing is generally not required. (See the ECtHR Judgment of 8 December 1983, *Axen v Germany*, Application no. 8273/78, paragraph 28 and the case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 44). If an appeals court is called upon to decide questions of fact, an oral hearing may or may not be required, depending upon whether one is necessary to ensure a fair trial. (See case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 45).

41. In this respect, the Court notes that whether an oral hearing is required at the appellate level, according to the ECtHR case law, "*depends on the special features of the proceedings involved, account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein*". (see the ECtHR Judgment of 26 May 1988, *Ekbatani v. Sweden*, Application No. 10563/83, paragraph 27 and the ECtHR Judgment of 2 March 1987 *Monnell and Morris v. the United Kingdom*, Application Nos. 9562/81 & 9818/82, paragraph 56; see also case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 46).

42. Therefore, the Court summarizes that a right to an oral hearing at the appellate proceedings is not absolute according to the ECtHR case law. In general, the hearing is not required when the appellate proceedings only involve a review on points of law. Whether one is required when the proceedings involve a review of both points of law and fact, depends on whether an oral hearing is necessary to ensure a fair trial. (See case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 49).

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

43. The Court recalls that in the present case, the Applicants were parties to a civil proceeding and claim that they did not attend the hearing of the Appellate Panel of the SCSC, in which their appeal was reviewed.

44. In this regard, the Court notes that a hearing was not held before the Appellate Panel, because the respective Panel decided not to hold a

hearing based on the authorizations provided by the Law on the SCSC. The Panel decided based on the appeal and the response to the appeal to uphold the Judgment [SCA-08-0085] of 13 January 2011 of the SCSC.

45. With the exception of the allegation that they did not participate in the session of the Appellate Panel of the SCSC, the Applicants present no other arguments different from those submitted to the other judicial instances and do not present any facts that the Appellate Panel reviewed any evidence or fact that the Applicants' did not possess or which placed them in a "*substantially unequal*" position with the other parties to the proceedings.

46. Therefore, in the light of the principle of equality of arms, which the Applicants allege to have been violated, the Court notes that the Applicants do not present any fact that they might have been put in a less favorable position vis-à-vis the opposing party. No party attended the hearing before the Appellate Panel because one was not held at all. In this regard, the Court notes that the Applicants' case differs from case KI108/10 to which they refer. This is because, in that case, the applicants were not at all aware of the proceedings before the Supreme Court, had no access to the claim of the respective municipality addressed to the Supreme Court, had no opportunity to respond to the claim, and moreover, were not notified about the Judgment of the Supreme Court.

47. Therefore, case KI108/10 differs substantially from the circumstances of the present case because, except that no hearing was held, which is the main allegation of the Applicants, the latter do not substantiate in any other way that they were placed in a less favorable position in relation to the opposing party pertaining to the case file based on which the Appellate Panel had made the decision.

48. In continuation, the Court will review whether the absence of a hearing in the circumstances of the present case may result into a violation of the Applicants' rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

49. In this regard, the Court refers to the case law of the ECtHR referred to above, to emphasize once again that the right to a hearing in appeal proceedings is not absolute. In principle, if a hearing was held in the first instance court, in the appeal procedure, one is not necessarily required.

50. The Court notes that in the circumstances of the present case, a hearing was held at the first instance court. The Municipal Court in Podujeva held a main trial session where the facts of the case were considered with the participation of all parties to the dispute. The Applicants had the opportunity to submit their arguments and evidence to the main hearing, which the Court considered insufficient to approve the claim. From the Judgment it is also clear that the expertise of the independent experts were also reviewed in the session of the main trial.

51. In addition, the circumstances of the present case also substantially differ from the circumstances of the cases of *Grozdanoski v. FYR Macedonia* and *Gusak v. Russia* of the ECtHR, to which the Applicants are referred. In the first case, the request for revision was submitted by the opposing party, while the request for protection of legality by the state prosecutor, whereas the respective Supreme Court in none of the cases had notified the applicant, thus giving no opportunity for comment or possibility to oppose the facts and arguments presented. This is different from the Applicants' case, where they themselves filed the appeal with the Appellate Panel of the SCSC and the decision of this Panel was rendered on the basis of their appeal and the evidence provided in the case file. Whereas, in the second case, the ECtHR found a violation justified by the fact that the respective applicant was not provided sufficient time to prepare his defense.

52. Based on the foregoing and taking into account the characteristics of the case, the allegations raised by the Applicants and the facts presented by them, the Court, also based on the standards established in its case law in similar cases and the case law of the ECtHR, does not find a violation of the principle of equality of arms or the right to a hearing, as an integral element of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

General principles on the right to a reasoned decision as developed by the ECtHR case-law

53. The Court emphasizes that the right to a fair hearing includes the right to a reasoned decision. The ECtHR has reiterated that, according to its established case-law, which reflects a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. (See *Tatishvili v Russia*, ECtHR Judgment of 22 February 2007, paragraph 58).

54. The ECtHR has also held that although 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 Convention, their courts must *"indicate with sufficient clarity the grounds on which they based their decision"*. (See ECtHR case *Hadjianastassiou v. Greece*, application no. 12945/87, Judgment of 16 December 1992, paragraph 33, see also case of the Court KI97/16, Applicant "*IKK Classic"*, Judgment of 9 January 2018, paragraph 45).

55. According to the ECtHR case-law, the essential 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, among others, *Hirvisaari v. Finland*, no. 49684/99, 27 September 2001, paragraph 30; *Tatishvili v. Russia*, ECtHR Judgment of 22 February 2007, paragraph 58; case of the Court KI97/16, Applicant "*IKK Classic"*, Judgment of 9 January 2018, paragraph 46; and KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017, paragraph 40).

56. However, while the ECtHR maintains that Article 6, paragraph 1, obliges the courts to give reasons for their decisions, it has also held that this cannot be understood as requiring a detailed answer to every argument. (See the ECtHR cases *Van de Hurk v. the Netherlands,* Judgment of 19 April 1994, paragraph 61; *Higgins and Others v. France,* no. 134/1996/753/952, Judgment of 19 February 1998, paragraph 42; case KI97/16, Applicant: "*IKK Classic"*, Judgment of 9 January 2018, paragraph 47).

57. The extent to which the 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 vs Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, Judgment of 9 December 1994, paragraph 27; *Higgins and Others v. France, Ibidem,* paragraph 42; case of the Court KI97/16, Applicant: "*IKK Classic"*, Judgment of 9 January 2018, paragraph 48 and KI22/16, Applicant: *Naser Husaj*, Judgment of 9 June 2017, paragraph 44).

58. For example, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision. (See the ECtHR cases *García Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 26, and *Helle v. Finland,* Judgment of 19 December 1997, 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 the ECtHR case *Hirvisaari v. Finland*, application no. 49684/99, Judgment of 27 September 2001, paragraph 30; case of the Court KI97/16, Applicant: "*IKK Classic"*, Judgment of 9 January 2018, paragraph 49).

59. 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 the ECtHR case *Suominen v. Finland*, application no. 37801/97, Judgment of 1 July 2003, paragraph 36; and case of the Court KI97/16, Applicant: "*IKK Classic",* Judgment of 9 January 2018, paragraph 50).

60. Therefore, while it is not necessary for the court to deal with every point raised in argument (see also *Van de Hurk v Netherlands*, *Ibidem,* paragraph 61), the Applicants' main arguments must be addressed. (See the ECtHR cases *Buzescu v. Romania*, application no. 61302/00, Judgment of 24 May 2005, paragraph 63; *Pronina v Ukraine*, application no. 63566/00, Judgment of 18 July 2006, paragraph 25). Likewise, giving a reason for a decision that is not a good reason in law will not meet Article 6 criteria. (See case of the Court KI97/16, Applicant: "*IKK Classic",* Judgment of 9 February 2016, paragraph 51).

61. Finally, the Court also refers to its own case law where it considers that 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 KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; and KI97/16, Applicant: "*IKK Classic",* Judgment of 9 February 2016, paragraph 52).

The Application of the abovementioned principles in the circumstances of the present case

62. The Court recalls that the Applicants allege that Judgment [ASC-11-0012] of 22 September 2016 of the Appellate Panel of the SCSC was not reasoned because it failed to establish the key facts regarding the

Applicants' ownership of disputed immovable property and the lack of market value compensation.

63. In this regard, the Court first notes that the decisions of the regular courts in fact reject the Applicant's allegations due to the lack of evidence proving the ownership, subsequent to which the assessment of facts for the alleged lack of appropriate compensation would have depended.

64. In addressing the allegations pertaining to the confirmation of ownership, the Appellate Panel, in the relevant Judgment, *inter alia*, reasoned:

> *"the only document that the Appellants are referring to in their appeal is so called "posedovna prijava" (possession report/application), which names Bajramoviq Sherif Latifa as possessor of a number of cadastral parcels. This document was submitted to the court together with the claim. However, the contested parcel is not listed in this document and the Appellants did not specify any of the parcels from that report/application that would match with the contested parcel".*

65. The Appellate Panel further reasoned:

> "*Based only on this document the Claimants were unable to prove the ownership right of their predecessor and illegal expropriation, as already stated by the Municipal Court in Podujeva and confirmed by the Trial Panel of the SCSC. The document they submitted on 8 April 2014 together with the request for preliminary injunction (Decision of the People`s Committee of Podujeve Municipality, number 7322/59 of 25 January 1960) does not relate to the parties and the contested real property in case at hand. Therefore it is not suitable to support the claim."*

66. Furthermore, the Court notes that in addition to the allegations for the erroneous determination of facts, the Applicants did not further specify in their Referral what key arguments they had raised in their appeal and which were not addressed by the Appellate Panel through the challenged Judgment.

67. The Court reiterates, referring to the ECtHR principles on the right to a reasoned decision as elaborated above, that, in principle, the extent of the obligation to provide reasons may vary depending on the nature of the decision and must to be determined in the light of the

circumstances of the case. Therefore, while it is not necessary for a court to deal with every point raised in the argument, the essential ones must be addressed.

68. However, the Court in the present case considers that the substantive arguments of the Applicants were addressed and reasoned by the Appellate Panel of the SCSC. The relevant Judgment explains in detail why the appeal was ungrounded and what facts were important and what were not to reach the conclusion as in the challenged Judgment, which also clearly defines the legal basis and the applicable law upon which the final conclusion was based.

69. In addition, as it pertains to the allegations for erroneous determination of facts, the Court reiterates that it is not its role to deal with errors of facts or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that lead a regular court to issue one decision instead of another. If it were different, the Court would act as "fourth instance court", which would result in exceeding the limitations provided for by its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See: case *Garcia Ruiz v. Spain*, ECtHR, no. 30544/96, of 21 January 1999, paragraph 28; and see also, cases KI70/11, Applicants *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011; and KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, 18 December 2017, paragraph 41).

70. Finally, the Applicants refer to a number of cases of the Court and the ECtHR in building their arguments in support of their allegations for a violation of the right to a reasoned decision. Among others, the Applicants refer to case KI22/16, which in fact is not applicable in the circumstances of the present case due to the differences in the allegations made and differences on the regular court's respective assessments, as the essential argument in the case referred to by the Applicant was not addressed at all by the Supreme Court.

71. In addition, the Court notes all the Applicants' allegations pertaining to the application of the specific ECtHR cases, including G*arcia Ruiz v. Spain, Pronina v. Ukraine, Nechiporuk and Tonkalo v. Ukraine, Mala v. Ukraine, Hirvisaari v. Finland and Hadjianastassiu v. Greece* have been reflected in the references that elaborate the fundamental principles of the ECtHR as to the right to a reasoned decision. However, none of the cases referred coincides with the

circumstances of the present case and that only their mentioning by the Applicants without specifying the essential common elements with their case, does not automatically make them applicable.

72. Based on the foregoing and taking into account the particular features of the case, the allegations raised by the Applicants and the facts presented by them, the Court based on the standards established through its case law in similar cases and the case law of the ECtHR, does not find that the right to a reasoned court decision, as one of the integral elements of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, has been violated.

73. In addition, when examining the allegations for a violation of the right to a fair and impartial trial, the Court considers that the court proceedings in their entirety were fair and impartial, as required by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

74. Finally, the Applicants also allege violation of paragraph 4 of Article 21 [General Principles] and 53 [Interpretation of Human Rights Provisions] of the Constitution.

75. As it pertains to the first allegation, the Court notes that the Applicants have merely mentioned Article 21.4 of the Constitution and quoted its content, without providing any explanation as to how and under what circumstances this provision was allegedly violated. Moreover, this constitutional provision in its substance specifically refers to "legal persons", stipulating that the fundamental rights also apply to them to the extent applicable, implying the possibility that even the legal persons may be affected with violations of fundamental rights and freedoms, when they have applicability in a specific case. In the present case, the Applicants filed an individual Referral and in this context, the Court finds that there is no connection between their Referral and the relevant constitutional provision.

76. As it pertains to the second allegation, the Court notes that Article 53 of the Constitution expressly states that the fundamental rights and freedoms guaranteed by the Constitution must be interpreted in accordance with the ECtHR case law. This constitutional obligation is primarily addressed to the institutions that decide on the fundamental rights and freedoms, including the Court, which fulfills this obligation in each case when deciding on individual referrals reviewing the possible violations of fundamental rights. (See case 74/17, Applicant *Lorenc Kolgjeraj*, Resolution on Inadmissibility of 5

December 2017, paragraph 28). Having said this, the ECtHR cases referred to by the Applicants and which allegedly were applicable for their case, have been specifically addressed by the Court throughout this decision.

77. As a result, and based on the abovementioned elaboration, the Court considers that the Applicants did not support the allegations that the relevant proceedings conducted by the regular courts were in any way unfair or arbitrary and that the challenged Judgment violated the rights and freedoms guaranteed by the Constitution and the ECHR. (See, *mutatis mutandis, Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).

78. Therefore, the Court finds that the Applicants' Referral does not meet the admissibility requirements established in the Rules of Procedure, because the Referral is manifestly ill-founded on constitutional basis, because the facts presented do not in any way justify the allegation of a violation of a constitutional right and that the Applicants do not sufficiently substantiate their allegations of constitutional violations.

79. In sum, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and, in accordance with Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, it is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 49 of the Law and
Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, in its session held on 17 May 2018, by majority

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette in accordance with
Article 20.4 of the Law; and

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI76/18, Applicant: Pjetër Boçi, constitutional review of Judgment PML. No. 279/2017 of the Supreme Court of Kosovo of 26 March 2018 and Decision PN. No. 462/2018 of the Court of Appeals of Kosovo of 28 May 2018

KI76/18, Resolution on inadmissibility, of 22 November 2018, published on 19 December 2018

Keywords*: Individual referral, official person, non-exhaustion of legal remedies, manifestly ill-founded referral, ratione materiae*

The Basic Court in Prizren, by Judgment P. No. 206/2015, found the Applicant guilty of committing the criminal offense under Article 343 [Accepting Bribes] of the Criminal Code, and sentenced him to an imprisonment sentence of 7 (seven) months, while acquitting him of the charge for the criminal offense foreseen by Article 345 [Trading in Influence] of the Criminal Code of Kosovo. The Applicant filed an appeal against the Judgment of the Basic Court, which was rejected as ungrounded by the Court of Appeals. The Applicant filed a request for protection of legality with the Supreme Court against the Judgment of the Basic Court and the Judgment of the Court of Appeals. The Supreme Court, by Judgment (P. No. 279/2015) rejected as ungrounded the request for protection of legality of the Applicant against the Judgment (PKR. No. 540/2011) of the Basic Court and Judgment (PAKR No. 70/17) of the Court of Appeals.

The Applicant filed a request for review of the criminal procedure with the Basic Court in relation to his case, by presenting additional evidence. The Basic Court, by Decision PKRS. No. 157/2017 rejected as ungrounded the Applicant's request for review of the criminal proceedings. This decision was also upheld by the Court of Appeals.

The Applicant before the Constitutional Court alleges violation of his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 102 [General Principles of the Judicial System] of the Constitution and Article 6 of the ECHR.

The Court clarified that the Applicant's allegations related to three different proceedings that took place regarding his case: a) the proceedings for dismissing the indictment; b) the criminal proceedings by which the Applicant was found guilty of the criminal offense of bribery, and c) the proceedings for reviewing the criminal procedure.

Upon reviewing the Applicant's Referral, the Court, pursuant to Article 48 of the Law on Constitutional Court and Rule 39 (1) (b), (2) and (3) (b) of the Rules of Procedure, found that the Applicant's Referral:

(i) as to the allegation that in his case the investigation was terminated and consequently an indictment was filed without a legal basis, the legal remedies provided by law have not been exhausted;

(ii) as to the Applicant's allegation that in the criminal proceedings the provisions regarding the definition of "official person" have not been correctly applied, the Applicant did not sufficiently substantiate his allegation of a violation of the right to fair trial; and

(iii) as to the allegation of the Applicant regarding the review of the criminal procedure the Referral is incompatible *ratione materiae* with the Constitution.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI76/18

Applicant

Pjetër Boçi

Constitutional review of Judgment PML. No. 279/2017 of the Supreme Court of Kosovo of 26 March 2018 and of Decision PN. No. 462/2018 of the Court of Appeals of Kosovo of 28 May 2018

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 Applicant is Pjetër Boçi from Shëngjin, Republic of Albania, residing in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges:

   a) Judgment PML. No. 279/2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), of 26 March 2018, which rejected as ungrounded the request for protection of legality against Judgment PAKR. No. 70/17 of the Court of Appeals of Kosovo, (hereinafter: the Court of Appeals) and Judgment P. No. 206/2015 of the Basic Court in Prizren, (hereinafter: the Basic Court); and

   b) Decision PN. No. 462/2018 of the Court of Appeals of 28 May 2018, which rejected the appeal against Decision PKRS. No. 157/2017 of the Basic Court on rejection of the request for reopening of the criminal proceedings.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decisions, which allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR) and Article 102 [General Principles of the Judicial System] of the Constitution.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 of the Law No. 03/L-121 on the 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).

5. On 31 May 2018, the Constitutional Court of the Republic of Kosovo 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 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 Constitutional Court

6. On 4 June 2018, the Court received the Applicant's Referral.

7. On 8 June 2018, the Applicant supplemented the Referral with additional documents.

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

9. 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.

10. On 10 August 2018, the Applicant supplemented the Referral with additional documents.

11. On 16 August 2018, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

12. On 14 September 2018, the Court notified the Applicant about the registration of the Referral and requested him to submit to the Court the power of attorney proving that the representative mentioned in the Referral was authorized to represent the Applicant before the Court, and the court decisions pertaining to his request for filing an indictment filed with the Basic Court.

13. On the same date, the Court notified the Supreme Court and the Court of Appeals about the registration of the Referral.

14. On 20 September 2018, the Applicant submitted to the Court the documents requested by the Court and notified the Court that "*now in this process I do not have a lawyer*". The Applicant also notified the Court about his new address.

15. On 22 November 2018, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

16. On the same date, the Applicant informed the Court that he was no longer in the previous address and for this reason he submitted a new address.

Summary of facts

17. On 21 May 2011, the District Prosecution Office in Prizren (hereinafter: the District Prosecution), by Decision HP. No. 119/2011, initiated investigations against the Applicant and some other persons, under a reasonable suspicion that the Applicant while he was working as an instructor in "Geni" driving school in Prizren, had committed the criminal offense under Articles 343 [Accepting Bribes], 332 [Falsifying Documents], 274 [Organized Crime] and 23 [Co-Perpetration] of the Provisional Criminal Code of Kosovo (hereinafter: CCK).

18. On 12 September 2011, the District Prosecutor, by Decision HP. No. 119/2011, terminated the investigation against the Applicants in relation to the criminal offenses under Article 274 [Organized Crime] and 23 [Co-Perpetration], on the grounds that there is no reasonable suspicion that the Applicant has committed such criminal offenses.

19. On 17 March 2014, the Basic Prosecution in Prizren - Serious Crimes Department (hereinafter: the Basic Prosecution), with Indictment PP. No. 3409/11-II, accused the Applicant due to a grounded suspicion that he committed the criminal offense under Articles 343 [Accepting Bribes] and 345 [Trading in Influence] of the CCK. Specifically, the Basic Prosecution accused the Applicant that in a capacity as an instructor at the "Geni" driving school he accepted money from the candidates for driving license, promising them that they will pass of tests through the examiner of the Ministry of Transport and Communications.

20. On 27 May 2014, the Applicant submitted to the Basic Court a request for dismissal of Indictment PP. No. 3409/11-II of the Basic Prosecution, reasoning among other things, that with respect to the same criminal offenses on 12 September 2011, by Decision HP. No. 119/2011, the investigation against the Applicant was terminated. Therefore, according to him, these investigations cannot be reopened.

21. On 16 July 2014, the Basic Court in Prizren (hereinafter: the Basic Court), by Decision P. No. 66/2014, rejected the Applicant's request for dismissing the Indictment, finding that it was not a question of the adjudicated matter related to Applicant, because the investigations were terminated only for the criminal offense of Organized Crime committed in co-perpetration, but not for the criminal offenses of Accepting Bribes and Trading in Influence.

22. On 7 December 2016, the Basic Court, by Judgment P. No. 206/2015, found the Applicant guilty of committing the criminal offense under Article 343 [Accepting Bribes] of the CCK, and sentenced him to an imprisonment sentence of 7 (seven) months, while acquitting him of the charge for the criminal offense foreseen in Article 345 [Trading in Influence] of the CCK.

23. The Applicant filed an appeal against the Judgment of the Basic Court (P. No. 206/2015), on the grounds of essential violations of the provisions of the criminal procedure, violation of the criminal law, incomplete and erroneous determination of factual situation and the decision on the criminal sanction.

24. The Basic Prosecution also filed an appeal, on the grounds of essential violations of the provisions of the criminal procedure and in relation to the criminal sanction for the criminal offense for which the Applicant was found guilty.

25. On 15 September 2017, the Court of Appeals, by Judgment (PAKR No. 70/17), rejected the appeals of the Basic Prosecution and of the Applicant and upheld the abovementioned Judgment of the Basic Court (P. No. 206/2015).

26. The Court of Appeals *ex officio* modified the Judgment of the Basic Court regarding the criminal offense – Trading in Influence, so that it rejected the charge after reaching the absolute statutory limitation.

27. The Applicant filed a request for protection of legality with the Supreme Court against the Judgment of the Basic Court (P. No. 206/2015) and Judgment of the Court of Appeals (PAKR No. 70/17), on the grounds of essential violations of the provisions of the criminal procedure and violation of the criminal law, claiming, *inter alia*, that under the provisions of the Criminal Code he did not have the status of "an official person" as established by the Basic Court and the Court of Appeals. The State Prosecutor by submission KMLP. II. No. 194/2017, submitted a response to the Applicant's request, proposing that it be rejected as ungrounded.

28. On 26 March 2018, the Supreme Court, by Judgment (P. No. 279/2015), rejected as ungrounded the Applicant's request for protection of legality against the Judgment of the Basic Court (PKR. No. 540/2011) and Judgment of the Court of Appeals (PAKR. No. 70/17).

29. On an unspecified date, the Applicant filed a request for reopening of the criminal proceedings with the Basic Court in relation to his case, presenting additional evidence.

30. On 10 May 2018, the Basic Court, by Decision PKRS. No. 157/2017, rejected as ungrounded the Applicant's request for reopening of the criminal proceedings.

31. The Applicant filed an appeal against the Decision of the Basic Court (PKRS. No. 157/2017), on the grounds of essential violations of the provisions of the criminal procedure, the violation of the criminal law and the provisions of Article 6 of the European Convention on Human Rights.

32. On 28 May 2018, the Court of Appeals by Decision (PN No. 462/2018) rejected the Applicant's appeal against the Decision of the Basic Court (PKRS No. 157/2017) as ungrounded, as it considered that the legal requirements for reopening of the criminal proceedings have not been met.

Applicant's allegations

33. The Applicant alleges violation of his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 102 [General Principles of the Judicial System] of the Constitution and Article 6 of the ECHR, and violations of provisions of the CCK.

34. The Applicant states that, upon termination of the investigations by final decision (PP No. 119/2011 of 12 September 2011), on 17 March 2014, the Prosecution filed an indictment "*for the same offenses, for the same facts without any new fact or evidence, thus, without any legal basis".*

35. The Applicant alleges that the Basic Court "*in the proceedings [against him] violates Article 102 of the Constitution*" citing this article of the Constitution in his Referral.

36. The Applicant further alleges that the regular courts without a legal basis have qualified him as "an official person", adding that "*the Supreme Court is the court that also had an official document issued [...] which purely verifies that the final decision [in relation to his conviction] is unlawful and that the Supreme Court is obliged to comment on and interpret the legal institutes based on which, I have unjustly been treated as an official person*".

37. With regard to the proceedings for reopening of the criminal proceedings, the Applicant alleges that "*The Basic Court did not review the document issued by the Ministry of Infrastructure at my request, and does not really address the basis and the right to allow the reopening of the proceedings to give a chance to correct and lawful determination of this matter*".

38. He also claims that one of the judges who participated in the panel of the Court of Appeals regarding the request for reopening of the proceedings, has also participated in the panel of the Court of Appeals during the proceeding for finding the Applicant guilty, so he raises the question "*how can I expect this judge to accept the new evidence?*"

39. Finally, the Applicant requests the Court to hold that the regular courts have violated the criminal law and criminal procedure law and its rights as provided by the Constitution, and requests that his case be remanded for retrial.

Admissibility of the Referral

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

41. 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*".

42. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

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

43. The Court further refers to Article 48 [Accuracy of the Referral] of the Law, which provides:

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

44. The Court also refers to paragraphs (1) (b), (2) and 3 (b) of Rule 39 [Admissibility Criteria] of the Rules of Procedure, which establishes:

> *"(1) The Court may consider a referral as admissible if:*
> *[...]*
> *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,*
> *[...]*
>
> *(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".*
>
> *(3) The Court may also consider a referral inadmissible if any of the following conditions are present:*
> *[...]*
> *(b) the Referral is incompatible ratione materiae with the Constitution;*
> *[...]".*

45. The Court recalls that in relation to the Applicant's case, three proceedings were conducted:

a) the proceeding for dismissing the indictment;;

b) the criminal proceedings which found the Applicant guilty of the criminal offense accepting bribes, and

c) the proceedings for reopening the criminal procedure.

46. Therefore, the Court, when assessing the admissibility, will deal with these three proceedings separately.

a) Procedure for dismissing the indictment

47. With respect to this proceeding, the Applicant alleges that he was indicted for the same criminal offenses for which the investigations were terminated by a final decision of the Prosecutor's Office, PP. No. 119/2011 of 12 September 2011.

48. The Court notes that this allegation of the Applicant was subject to review by the Basic Court following the Applicant's request for dismissing the indictment. This request was rejected by the Basic Court, by Decision P. No. 66/2014, with the reasoning that the indictment was not filed with respect to the criminal offenses for which the investigations had been terminated, but for other criminal offenses.

49. In this regard, following the request of the Court to submit the decisions of the regular courts in relation to the dismissal of the indictment, he did not provide any fact or evidence that he had filed an appeal against Decision P. No. 66/2014, with the Court of Appeals as instructed by the Decision of the Basic Court, P. No. 66/2014. The Court considers that the Applicant has not exhausted the effective legal remedies available under the applicable laws, in this case the appeal, so that the Court of Appeals can assess his allegations of a legal violation in the case of filing an indictment.

50. Therefore, the Constitutional Court, in accordance with the principle of subsidiarity, cannot assess the case without having evidence that it has been previously addressed and assessed in the regular procedure.

51. The principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. Otherwise, the Applicant is liable to have his case declared inadmissible by the Constitutional Court, when failing to avail himself of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a giving up of the right to further object the violation and complain. (See: Resolution in case KI139/12, *Besnik Asllani*, Constitutional review of Judgment PKL. No. 111/2012 of the Supreme Court, of 30 November 2012, paragraph 45; and see, *Selmouni v. France [GC], § 74; Kudla v. Poland [GC], § 152; Andrasik and Others v. Slovakia (dec.*}.

b) Criminal proceedings for finding the Applicant guilty

52. With respect to this proceeding, the Court finds that the Applicant has submitted the Referral as an authorized party, challenging an act of a public authority, namely Judgment PML. No. 279/2017 of the Supreme Court of Kosovo, of 26 March 2018, after exhausting all legal remedies provided by law. The Applicant has also clarified the rights and freedoms that allegedly have been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

53. However, the Court notes that the Applicant's allegations of a violation of the right to a fair trial have to do with the way in which regular courts have applied to the CCK and the CPCK, specifically how the regular courts treated the Applicant as "an official person" in violation of the legal provisions.

54. In this regard, the Court recalls that the Supreme Court, by Judgment PML. No. 279/2017, justified its decision, finding that the Applicant: *"apart from being employed in the "Geni" driving school as an official person-instructor-authorized for the preparation of candidates for the exam, and for the practical and theoretical part, was also authorized to hold the lectures, theoretical and practical. According to the provision of Article 120, par. 2 of CCRK, the official person implies:*
[...] 2.2 an authorized person in a state body, business organization or other legal person, who by law or by other provision issued in accordance with the law, exercises public authority;
From this provision it can be understood that [the Applicant] has the capacity of an official person, therefore in this respect all the elements of the criminal offense required by the provisions of Article 343 paragraph 1 of the CCK are met".

55. Therefore, the Court notes that after the request for protection of legality, the Supreme Court dismissed his allegations of violation of the CCK and the CPCK, by fully upholding the Judgment of the Basic Court, namely of the Court of Appeals. The Supreme Court responded to the allegations of violation of CCK and CPCK raised by the Applicant.

56. The Court recalls that the Constitutional Court does not have the jurisdiction to decide whether an Applicant was guilty of committing a criminal offence or not. Nor does it have jurisdiction to assess whether the factual situation was correctly determined or to assess

whether the judges of the regular courts have had sufficient evidence to determine the guilt of an Applicant. (See Case KI68/17, Applicant: *Fadil Rashiti*, Constitutional Court, Resolution on Inadmissibility of 2 June 2017, para, 50).

57. In this regard, the Court reiterates that it is not the role of the Constitutional Court to deal with errors of law (legality), allegedly committed by the Supreme Court or any other court of a lower instance, unless and in so far as it may have infringed rights and freedoms protected by the Constitution (constitutionality). The Court further reiterates that it is not its role under the Constitution to act as a "fourth instance" court in respect of decisions rendered by the regular courts. The role of the regular courts is to interpret and apply the relevant rules of procedural and substantive law. (See *mutatis mutandis*, *Akdivar v. Turkey*, No. 2189/93, ECtHR Judgment of 16 September 1996, para 65, case *Khan v. United Kingdom* no. 35394/97, ECtHR, Judgment of 4 October 2000, paragraph 34; see also case KI70/11, Applicants: *Faik Hima, Magbule Hima* and *Besart Hima*, Constitutional Court, Resolution on Inadmissibility, of 16 December 2011).

58. The Court notes that the reasoning of the Supreme Court, referring to the Applicant's allegation of violation of the criminal law and criminal procedure, is clear and, after reviewing all the proceedings, the Court also finds that the proceedings before the regular courts were not unfair or arbitrary (See, *mutatis mutandis,* case of *Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).

59. The Court reiterates that the mere fact that the Applicant is not satisfied with the outcome of the decisions of the regular courts, or the mere mentioning of articles of the Constitution. When alleging such violations of the Constitution, the Applicant must provide a reasoned allegation and a compelling argument (See Resolution on Inadmissibility of 10 February 2015, *Abdullah Bajqinca,* KI136/14, paragraph 33).

60. Regarding the Applicant's allegation of violation of Article 102 [General Principles] of the Constitution, the Court recalls that it is a general principle that the Articles of the Constitution which do not directly regulate the human rights have no independent effect, since it has effect solely in relation to "*the enjoyment of the rights and freedoms*" safeguarded by the provisions under Chapter II and III of the Constitution. Accordingly, this article cannot individually be applied if the facts of the case do not fall within the ambit of one or more of those provisions of the Constitution regarding *"the enjoyment*

of human rights and freedoms" (see, *inter alia*, *E.B. v. France [GC]*, para. 47, Judgment of 22 January 2008,; *Vallianatos and others v. Greece*, paragraph 72, Judgment of ECtHR of 7 September 2013; also case KI67/16, Applicant *Lumturije Voca,* Resolution on Inadmissibility, of 23 January 2017, par. 128).

61. Consequently, the Court finds that the Applicant did not substantiate his allegation of a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and Article 102 of the Constitution during the proceeding by which he was found guilty of the criminal offense - accepting bribes.

c) Request for reopening of criminal proceedings

62. As to the request for reopening of the criminal proceedings, the Applicant filed the Referral as an authorized party, challenging an act of a public authority, namely Decision PN. No. 462/2018 of the Court of Appeals of Kosovo, of 28 May 2018, after exhausting all legal remedies provided by law. The Applicant also clarified the rights and freedoms that have allegedly been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

63. With respect to this proceeding, the Applicant alleges that the regular courts did not review the document issued by the Ministry of Infrastructure and did not allow a reopening of the procedure in the Applicant's case even though the legal requirements for such a thing were met. He also challenges the composition of the Panel of the Court of Appeals, which decided on the reopening of the criminal proceedings against the Applicant, as according to him, one of the judges who participated in the panel of the Court of Appeals during the criminal proceedings was also a member of the panel of Court of Appeals regarding the request for the reopening of the procedure.

64. In this respect, the Court notes that the final decision regarding the Applicant's request for reopening of the criminal proceedings is Decision PN. No. 462/2018 of the Court of Appeals of 28 May 2018, which rejected the Applicant's request for reopening of the criminal proceedings against Decision PKR. No. 157/2017 of the Basic Court of 10 May 2018.

65. The Court notes that in this proceeding, the regular courts decide only on the fulfillment of procedural requirements for reopening of the criminal proceedings and not on the merits of the case.

66. The Court also reiterates that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights"*.

67. With regard to the Applicant's allegation of a violation of his right to a fair and impartial trial, the Court, referring to the case law of the ECtHR and its own case law, reiterates that Article 31 of the Constitution and Article 6 of the ECHR do not apply to requests for the reopening or repeating of proceedings. (See, by analogy Constitutional Court Cases: KI07/17/15, *Pashk Mirashi*, Resolution on Inadmissibility, of 12 June 2017, paragraph 64; KI80/15, 81/15 and 82/15, *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, par. 31, see also ECtHR cases, inter alia, *Dowsett v. UK*, No. 8559/08, Decision on Inadmissibility of 4 January 2011, *Sablon v. Belgium*, No. 36445/97, Judgment of 10 April 2001, par.86).

68. In addition, the Court recalls the ECtHR case law which holds that Article 6 does not apply to proceedings for the reopening of a case because a person whose sentence has become final and who applies for his case to be reopened is not "charged with a criminal offence" within the meaning of that Article (see ECtHR cases *Franz Fischer v. Austria* No. 27569/02, Decision on Inadmissibility of 6 May 2003).

69. The Court considers that the compatibility *ratione materiae* of a Referral with the Constitution derives from the Court's substantive jurisdiction. The right relied on by the Applicant must be protected by the Constitution in order for a constitutional complaint to be compatible *ratione materiae* with the Constitution. However, the Constitution does not guarantee the Applicant the right to review and repeat the procedure (see, by analogy, the Constitutional Court cases: KI07/17/15, *Pashk Mirashi*, Resolution on Inadmissibility of 12 June 2017, paragraph 66, KI80/15, 81/15 and 82/15, *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, paragraph 33).

70. Therefore, the Court considers that the Applicant's complaints regarding the refusal by regular courts to review the criminal proceedings are not *ratione materiae* in accordance with Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

Conclusion

71. The Court, pursuant to Articles 47 and 48 of the Law and Rule 39 (1) (b), (2) and (3) (b) of the Rules of Procedure, finds that the Applicant's Referral:

(i) regarding the allegation that in his case the investigations were terminated and consequently an indictment was filed without a legal basis, the legal remedies provided by law have not been exhausted;

(ii) regarding the Applicant's allegation that in the criminal proceedings the provisions relating to the definition of "*official person*" were not correctly applied, the Applicant did not sufficiently substantiate his allegation of a violation of the right to a fair trial; *and,*

(iii) regarding the Applicant's allegation pertaining to the reopening of the criminal proceedings, the Referral is incompatible *ratione materiae* with the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 47 and 48 of the Law and in accordance with Rule 39 (1) (b), (2) and (3) (b) of the Rules of Procedure, on 22 November 2018, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

KI 110/17 Applicant: Sekule Stanković, requesting the withdrawal of a request for constitutional review of Judgment Rev. No. 233/2014 of the Supreme Court of Kosovo of 3 September 2014

KI 110/17, resolution on inadmissibility of 24 May 2018, published on 13 June 2018

Keywords; individual referral, withdrawal of the request for constitutional review of the Judgment of the Supreme Court, Applicant's request for withdrawal of the referral approved.

The Applicant submitted the Referral based on Article 113.7 of the Constitution, Articles 22 and 23 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rules 32 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

The Applicant submitted the Referral to the Court requesting the constitutional review of the Judgment of the Supreme Court.

Subsequently, the Applicant filed a request for withdrawal of his request for constitutional review, as well as withdrawal of the request for the imposition of interim measure and withdrawal of request for holding a public hearing.

Therefore, the Court decided to approve the Applicant's request for the withdrawal of the request for constitutional review of the Judgment of the Supreme Court, including the withdrawal of the request for imposition of interim measure and withdrawal of the request for a public hearing.

DECISION ON WITHDRAWAL OF REFERRAL

in

Case No. KI 110/17

Applicant

Sekule Stanković

Assessment of the Applicant's request for withdrawal of the Referral for constitutional review of Judgment Rev. No. 233/2014 of the Supreme Court of Kosovo of 3 September 2014

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Sekule Stanković from Medvegje, Republic of Serbia (hereinafter: the Applicant), who is represented by Žarko Gajić, a lawyer from Gracanica.

Subject matter

2. The subject matter is the assessment of the Applicant's request for withdrawal of the Referral for constitutional review as well as the withdrawal request for the imposition of interim measure and withdrawal of the request to hold a public hearing.

Legal basis

3. The Referral is based on Article 113 paragraph 7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 22 and 23 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 32 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

4. On 13 September 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

5. On 18 September 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.

6. On 17 October 2017, the Court notified the Applicant and the Supreme Court of Kosovo about the registration of the Referral. By this notification, the Court requested the Applicant to submit a copy of the acknowledgment of receipt with the date on which he received the challenged decision.

7. On 7 November 2017, the Applicant submitted a copy of the acknowledgment of receipt with the date of receipt of the challenged decision of 17 May 2017. By this letter, the Applicant also submitted a request to the Court for the imposition of an interim measure.

8. On 4 December 2017, the Applicant submitted additional documents. By this letter, the Applicant also requested the Court to hold a public hearing when deciding on this case.

9. On 23 April 2018, the Applicant, namely his authorized legal representative (Žarko Gajić) addressed the Court with a request to withdraw the Referral.

10. On 24 May 2018, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court to approve the Applicant's Referral for withdrawal of the request for constitutional review and withdrawal of the request for interim measure and withdrawal of the request to hold the public hearing.

Summary of facts

11. On 13 September 2017, the Applicant submitted the Referral to the Court requesting constitutional review of Judgment (Rev. No. 233/2014) of the Supreme Court of 3 September 2014.

12. On 24 April 2018, the Applicant filed a request for withdrawal of his Referral request for constitutional review as well as withdrawal of requests for the introduction of an interim measure and withdrawal of requests for holding a public session. In his letter, among other, the Applicant stated:

> *"[...] After submitting the Referral, by examining the website of the Constitutional Court in Prishtina, it was established that this legal matter has already been decided by a decision of the Constitutional Court in case KI176/14.*
>
> *In this way, the representative, the lawyer Žarko Gajić notifies the Court about the withdrawal of the request submitted for the constitutional review of the court decision on the revision and*

proposes to the Court to inform him about the suspension of the proceedings on the address of the office in Gracanica".

Assessment of request for withdrawal of the Referral

13. In order to decide on the Applicant's request to withdraw the Referral, the Court needs first to examine whether the Applicant has fulfilled the requirements provided by the Law and the Rules of Procedure.

14. The Court recalls that the Applicant after the receipt of Judgment Rev. No. 233/2014 of the Supreme Court, filed a request for constitutional review of the abovementioned judgment.

15. On 24 April 2018, the Applicant filed a request for withdrawal of his Referral for constitutional review of Judgment Rev. No. 233/2014 of the Supreme Court of 3 September 2014.

16. The Court refers to Article 23 [Withdrawal of a party] of the Law, which foresees that:

"The Constitutional Court shall decide on matters referred to it in a legal manner by authorized parties notwithstanding the withdrawal of a party from the proceedings".

17. The Court also refers to Rule 32 [Withdrawal, Dismissal and Rejection of Referrals] of the Rules of Procedure, which stipulates that:

"(1) A party may withdraw a filed referral or a reply at any time before the beginning of a hearing on the referral or at any time before the Court decision is made without a hearing.

(2) Notwithstanding a withdrawal of a referral, the Court may determine to decide the referral [...]".

18. Taking into account the Applicant's Referral and the circumstances of the case, the Court considers that there is no reason to continue with consideration of the request for constitutional review of the aforementioned Judgment of the Supreme Court and of the request for the imposition of an interim measure as well as a request for holding the public hearing.

19. Therefore, the Court pursuant to Rule 32 (1) decides to approve the Applicant's request for the withdrawal of the Referral.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rule 32 (1) of the Rules of Procedure, on 24 May 2018,

DECIDES

I. TO APPROVE the Referral for constitutional review, including the withdrawal of the request for the imposition of interim measure and withdrawal of the request for public hearing;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

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

KI74/18, Applicant: Gëzim Murati, Constitutional review of unspecified decisions or acts of public authorities

#
KI74/18, Decision of 5 November 2018, published on 6 December 2018

Keywords: Individual referral, decision to reject the Referral

The Applicant filed a Referral with the Constitutional Court claiming that various public authorities violated many of his rights guaranteed by the Constitution. Regarding the violation of these rights, the Applicant in the Referral requested the compensation in the amount of 100.000 euro.

Given the fact that the Applicant did not submit the relevant documents, the Court requested him to clarify what decision of what public authority was he challenging before the Court, as well as to attach the relevant documents.

The Applicant consequently sent only one email by not attaching relevant documents and not clarifying his Referral.

In conclusion, the Court summarily rejected his Referral because he did not meet the requirements established in the provisions of the Constitution, the Law and the Rules of Procedure.

DECISION TO REJECT THE REFERRAL

in

Case No. KI74/18

Applicant

Gëzim Murati

Constitutional review of unspecified decisions or actions of public authorities

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 Gëzim Murati residing in Mitrovica (hereinafter: the Applicant).

Challenged decision

2. The Applicant does not challenge any particular decision or act of a public authority.

Subject matter

3. The subject matter is the constitutional review of unspecified decisions or acts of public authorities, which allegedly violate the Applicant's rights guaranteed by Articles 23 [Human Dignity], 25 [Right to Life]], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 44 [Freedom of Association], 49 [Right to Work and Exercise Profession] and 51 [Health and Social Protection] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of Law No. 03/L-121 on the 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 Court (hereinafter: the Rules of Procedure).

5. On 31 May 2018, in an administrative session the Constitutional Court ((hereinafter: the Court) adopted 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

6. On 29 May 2018, the Court received the Applicant's Referral, which he had submitted to the Post of Kosovo on 24 May 2018.

7. On 16 June 2018, the mandate of judges Almiro Rodrigues and Snezhana Botusharova ended. On 26 June 2018, the mandate of judges Altay Suroy and Ivan Čukalović ended.

8. 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.

9. On 16 August 2018, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

10. On 3 September 2018, the Court notified the Applicant about the registration of the Referral and requested him to specify and clarify what act of what public authority he is challenging before the Court, and to attach it.

11. On 6 September 2018, the Applicant sent a document with a title "*Notification about articles, legal rules on material compensation*" to the e-mail address of the Court.

12. On 5 November 2018, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to summarily reject the Referral.

Summary of facts

13. The Applicant has not submitted to the Court any decision of the public authority, except some training certificates, the secondary school diploma and the faculty diploma.

14. The Applicant also attached several medical reports.

Applicant's allegations

15. The Applicant alleges that the actions of the Ministry of Labor and Social Welfare, namely the Employment Agency of the Republic of Kosovo, the Municipality of Mitrovica and the Ministry of Health, violated his right guaranteed by Articles 23 [Human Dignity], 25

[Right to Life], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 44 [Freedom of Association], 49 [Right to Work and Exercise Profession] and 51 [Health and Social Protection] of the Constitution.

16. The Applicant claims that "*I have finished [...] the faculty of economy [...] branch management and 11 trainings [...] and 13 certificates [...]*"

17. The Applicant initially claims that he has reported to the Employment Agency of Kosovo since 2009. He further complains that the Municipality of Mitrovica has never dealt with his employment problem for 10 years and he calls this action *"institutional negligence"*.

18. According to the Applicant, these actions of the aforementioned institutions caused him health problems. Consequently, the Applicant emphasizes *"[...] I request compensation in the amount of 100.000 Euro"*.

19. The Applicant also states in his letter of 6 September 2018: "*[...] I request the Constitutional Court to protect my right guaranteed by law"*.

Admissibility of the Referral

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

21. 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"*.

22. The Court also refers to paragraph 4 of Article 22 [Processing Referrals] of the Law which stipulates:

> *"If the referral [...] is [...] incomplete, the Judge Rapporteur informs the relevant parties or participants and sets a deadline*

of not more than fifteen (15) days for [...] supplementing the respective referral [...]".

23. In addition, the Court refers to Rule 32 (2) (h) [Filing of Referrals and Replies] and Rule 35 (5) [Withdrawal, Dismissal and Rejection of Referrals] of the Rules of Procedure, which establish:

"32 (2) The referral shall also include:

[...]
(h) the supporting documentation and information.
[...]

[...]

35 (5) The Court may decide to summarily reject a referral if the referral is incomplete or not clearly stated despite requests by the Court to the party to supplement or clarify the referral, if the referral is repetitive of a previous referral decided by the Court, or if the referral is frivolous."

24. The Court recalls that on 3 September 2018, pursuant to Article 22.4 of the Law, requested that the Applicant clarify his Referral by attaching the challenged acts or decisions of the public authorities.

25. However, the Applicant did not submit any act or decision of public authorities which constitutionality would be subject to constitutional review by the Court, as requested by the Court in its letter of 3 September 2018.

26. Therefore, the Court cannot take into account the Applicant's allegations, because the Referral is incomplete, as the challenged decisions of the public authorities have not been specified and attached (see, *mutatis mutandis*, the case of the Constitutional Court, KI03 Applicant: *Hasan Beqiri*, of 13 May 2015, paragraph 19, as well as the case of Constitutional Court KI07/16, Applicant: *Rifat Abdullahi*, of 14 July 2016, paragraph 22).

27. In this regard, the Court emphasizes that it is not its duty and responsibility to research and build the Applicant's case. The Court reiterates that the responsibility for meeting the formal-procedural criteria as required by the Constitution, the Law and the Rules of Procedure falls on the Applicant (see, Constitutional Court Case KI130/17, *Applicant: Ndue and Simon Palushaj*, Decision to reject the Referral, of 14 March 2018, paragraph 26*)*.

28. Accordingly, the Court concludes that the Applicant's Referral does not meet the requirements as established by the Rules of Procedure, because of the abovementioned reasons.

29. In sum, the Court considers that the Applicant's Referral does not meet the procedural requirements for further review, because it has not been completed with the respective documentation, as required by Article 22.4 of the Law and Rules 32 (2) (h) and 35 (5) of the Rules of Procedure.

30. Therefore, the Court concludes that the Referral is to be summarily rejected.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 22.4 of the Law and Rule 35 (5) of the Rules of Procedure, on 5 November 2018, unanimously

DECIDES

I. TO REJECT the Referral;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

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