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

Prishtina, on 13 August 2019
Ref. no.:RK 1410/19

This translation is unofficial and serves for informational purposes only

RESOLUTION ON INADMISSIBILITY

in

cases no. KI154/17 and KI05/18

Applicant

Basri Deva, Afërdita Deva and the Limited Liability Company "BARBAS"

Constitutional review of Decision AC. No. 3917/17 of the Court of Appeals of Kosovo, of 25 October 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. Referral KI154/17 was submitted by Basri Deva and Afërdita Deva from the Municipality of Gjakova (hereinafter: the first Applicant).

2. Referral KI05/18 was submitted by the Limited Liability Company „BARBAS", with the founder Basri Deva and its seat in the Municipality of Gjakova (hereinafter: the second Applicant).

3. When the Court refers jointly to the first and second Applicant, it shall refer to them as the Applicants.

Challenged decision

4. The Applicants challenge Decision [AC. No. 3917/17] of 25 October 2017 of the Court of Appeals in conjunction with the Order [P. No. 330/16] of 22 August 2017 of the Private Enforcement Agent.

Subject matter

5. The subject matter is the constitutional review of the challenged decision of the Court of Appeals, which allegedly violates the Applicants' rights and fundamental freedoms guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], and 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), as well Articles 46 [Protection of Property], and 54 [Judicial Protection of Rights] of the Constitution.

Legal basis

6. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and the Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

7. 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

8. On 15 December 2017, the first Applicant submitted the Referral (KI154/17) to the Court.

9. On 19 December 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel, composed of Judges: Altay Suroy (Presiding), Arta Rama Hajrizi and Bekim Sejdiu.

10. On 12 January 2018, the second Applicant submitted the Referral (KI05/18) to the Court.

11. On 31 January 2018, the first Applicant submitted to the Court a completed official referral form of the Court.

12. On 8 February 2018, given the fact that in both referrals, it is about the same judicial process, in accordance with Rule 37 (1) of the Rules of Procedure, the President of the Court ordered the joinder of referrals KI154/17 and KI05/18. Accordingly, the Judge Rapporteur and the composition of the Review Panel, in both cases, remain the same as in Referral KI154/17.

13. On 13 February 2018, the Court notified both Applicants about the joinder of the referrals and requested them to attach the additional documents to the Court.

14. On 16 June 2018, the mandate of judges: Almiro Rodrigues and Snezhana Botusharova 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 11 January 2019, the Court sent to the Applicants the second letter and informed them that, within seven (7) days from the day of receipt of this letter, the following documents must be submitted to the Court: (i) The Loan Agreement [No. 6278] of 23 July 2004; (ii) Decision [E. No. 305/06] of 9 May 2006 of the Municipal Court in Gjakova (hereinafter: the Municipal Court), as well as all the court decisions that preceded this Decision and the appeal procedure, if any; (iii) Decision [E. No. 166/2012] of 5 March 2012 of the Municipal Court; and (iv) Decision [In. No. 330/2004] of 23 July 2017 of the Basic Court in Gjakova (hereinafter: the Basic Court).

17. On 14 January 2019, as the mandate as judges of the Court of four abovementioned judges has ended, the President of the Court by Decision No. K.SH. KI154/17, appointed the new Review Panel, composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

18. On 15 January 2019, the Court notified the Court of Appeals and the Private Enforcement Agent Gj.R (hereinafter: the Private Enforcement Agent) about the registration of the Referral.

19. On 23 January 2019, the Private Enforcement Agent submitted additional documentation relating to this referral.

20. On 25 January 2019, the Applicants submitted certain documents to the Court.

21. On 22 July 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

22. On 23 July 2004, the Applicants concluded a Loan Agreement [No. 6278] (hereinafter: the Agreement) with Raiffeisen Bank Kosovo (hereinafter: the RBK) in the amount of € 100,000.00. On the same date, on the request of the RBK, the Municipal Court by Decision [In. No. 268/2004], allowed the registration of the mortgage on immovable property which was the subject of the Agreement in question.

23. On an unspecified date, based on (i) the Agreement; and (ii) the Decision [In. No. 268/2004] of 23 July 2004 of the Municipal Court, RBK initiated the enforcement procedure against the Applicants in the Municipal Court for failure to fulfill their obligations, requesting the publication of the public sale of immovable property in order to fulfill the obligation in the amount of 78,709.68 euro.

24. On 9 May 2006, the Municipal Court by Decision [E. No. 305/06] allowed the implementation of the enforcement procedure through the public sale of the immovable property of the Applicants, in the capacity of the debtors, based on the abovementioned enforcement documents.

25. On 8 March 2012, the creditor, namely, RBK, addressed the Municipal Court with the request for withdrawal of the proposal for enforcement against the debtors namely the Applicants. The Municipal Court approved this proposal and suspended the enforcement procedure in this case.

26. However, RBK then submitted to the Municipal Court the new request for initiation of the enforcement procedure, based on (i) the Agreement; and (ii) the Decision [In. No. 268/2004] of 23 July 2004 of the Municipal Court, requesting to announce the public sale of immovable property for the purpose of meeting the obligations of debtors in the amount of 78,709.68 euro.

27. On 5 March 2012, the Municipal Court by Decision [E. No. 166/12] allowed the implementation of the new enforcement procedure through the announcement of the public sale of immovable property as defined by the Agreement.

28. On 12 March 2012, the debtors, namely, the Applicants filed an objection to the abovementioned Decision.

29. On 20 May 2016, the Basic Court, acting upon the request of the creditor, respectively the RBK, through the Conclusion transferred the enforcement case to the Private Enforcement Agent.

30. On 23 May 2016, the Private Enforcement Agent notified the parties in the proceeding for the continuation of the enforcement procedure through the public sale of the immovable property as defined by the Agreement.

31. On 22 July 2016, the Private Enforcement Agent issued the Conclusion on the first public sale of the immovable property and scheduled the latter on 22 August 2016. At the request of the creditor, namely the RBK, the first public sale was

postponed and the same was scheduled to 9 September 2016. The first public sale was not realized.

32. On 9 September 2016, the Private Enforcement Agent through the Conclusion appointed the second public sale of immovable property determined by the Agreement to a determined value of the immovable property of 151,600.00 euro.

33. On 10 October 2016, the Private Enforcement Agent, since there was no one interested in purchasing the immovable property, declared the auction failed.

34. On the same date, the Private Enforcement Agent through the Conclusion scheduled the third public sale of the immovable property as set out in the Agreement on the determined value of the immovable property of 151,600.00 euro on 11 November 2016.

35. The creditor, namely the RBK, requested three consecutive times, on 7 November 2016, 19 January 2017 and 4 April 2017, that this sale should not be held because according to the reasoning "*the parties should clarify regarding the parcel 3085/3, which is in auction stage*". These requests were approved by the Private Enforcement Agent through relevant conclusions, and the enforcement was postponed to 4 June 2017.

36. On 20 June 2017, according to the case file, the Private Enforcement Agent issued a Conclusion by which he scheduled the second public sale on 21 July 2017.

37. On 21 July 2017, as it was ascertained that the procedural requirements for holding the public sale were fulfilled and after it was ascertained that there is no other bidder for the purchase of the immovable property concerned, the Private Enforcement Agent through the Conclusion [P. No. 330/16] found that the requirements for accepting the RBK bid were met in the amount of 50,535.00 euro.

38. On 23 July 2017, the Basic Court in Gjakova rendered Decision [In. No. 330/2004] for registration of mortgage based on the Agreement.

39. On 22 August 2017, the Private Enforcement Agent by Order [P. No. 330/16] stated that the immovable property which was the subject of the Agreement was sold to RBK for the value of € 50,535.00.

40. On an unspecified date, against the above mentioned Order, the Applicants filed an appeal with the Court of Appeals alleging essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.

41. On 25 October 2017, the Court of Appeals by Decision [Ac. No. 3917/2017] rejected as ungrounded the appeal of the debtors, namely, the Applicants and upheld the Order [P. No. 330/16] of 22 August 2017.

Applicant's allegations

42. The Applicants challenge the Decision [Ac. No. 3917/2017] of 25 October 2017 of the Court of Appeals in conjunction with the Order [P. No. 330/16] of 22 August 2017 of the Private Enforcement Agent, with the allegation that they have been rendered in violation of their fundamental rights and freedoms guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR and Articles 46 [Protection of Property] and 54 [Judicial Protection of Rights] of the Constitution.

43. With respect to the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants allege that in their case the wrong law was applied. According to the allegation, the provisions of Law 05/L-118 On Amending and Supplementing the Law no. 04/L-139 on Enforcement Procedure (hereinafter: the Law on Amending and Supplementing the LEP), which entered into force on 18 July 2017, were applied in the public sale of their immovable property. The Applicants allege that the requests of the creditor, namely the RBK for the postponement of the public sale were intentional because according to the allegation, the application of Article 22 of the Law on Amending and Supplementing the LEP in public sale and which was organized only 3 days after the new law had entered into force, instead of Article 234 of Law No. 04/L-139 on Enforcement Procedure (hereinafter: LEP), applicable at the time when the enforcement procedure was initiated, resulted in the reduction of the threshold for the sale of immovable property to the detriment of the Applicants and in favor of the RBK.

44. The Applicants further allege that in the circumstances of their case was erroneously calculated (i) the amount of the obligation due to the erroneous calculation of the applicable interest rate; and (ii) the value of their immovable property. The Applicants in this regard emphasize that their request for the assignment of an expertise was rejected without reasoning by the courts, thus resulting in a violation of their right to a reasoned judicial decision. In support of their allegation, the Applicants refer to the case of Court no. 131/17 Applicant: *Shefqet Berisha*, Judgment of 15 June 2017 (hereinafter: Case 131/17).

45. Furthermore, the Applicants also allege that the Agreement is in contravention of the provisions of Law no. X of the Obligational Relationship (hereinafter: the LOR) and "*with the principles and acts of the Central Bank of Kosovo*", in particular with regard to penalty interest. In this regard, the Applicants refer to a number of regular court decisions, the Judgment [Rev. E. No. 23/2012] of 1 July 2013 of the Supreme Court; Decision [Ae. No. 45/2014] of 10 March 2015 of the Court of Appeals; and Judgment [III. C. 163/2015] of 9 March 2016 of the Basic Court in Prishtina, which declared them to be contrary to paragraph 3 of Article 270 of the LOR, the articles related to the penalty interest of the specific Loan Agreements.

46. The Applicants also ultimately allege that the LEP is in violation of Articles 22, 31, 46 and 54 of the Constitution and Article 6 and Article 1 (Protection of Property) of Protocol no. 1 of the ECHR. The Applicants in this context

specifically state that the relevant law is unconstitutional because the latter (i) enables the debtor's immovable property to be sold at a public auction in 1/3 of the determined value; and (ii) it does not allow the use of an extraordinary legal remedy.

47. Finally, the Applicants request the Court to declare the Referral admissible; and declare invalid the Decision [AC. No. 3917/17] of 25 October 2017 of the Court of Appeals in conjunction with the Order [P. No. 330/16] of 22 August 2017 of the Private Enforcement Agent, and to remand the case for retrial to the Court of Appeals.

Relevant legal provisions

LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE of 2013

Article 234 The sale price of a real estate

1. In the first session of the auction, real estates cannot be sold with the price that is lower than eighty percent (80%) of the determined value. The starting offers for the first session that is lower than eighty percent (80%) of the determined value will not be reviewed. 2. Without agreement of persons who have a pre-purchase right in the enforcement procedure to settle their credits before creditor, the real estates in the auction session cannot be sold at the price that cannot even partly cover the amount of a proposer's enforcement's credit. 3. In case that the real estates cannot be sold in the first session, the enforcement body will determined the second session in the timeframe of thirty (30) days. 4. The enforcement body will assign the second session in the timeframe of thirty (30) days even when three (3) convenient purchasers did not pay the bill in the first session within the foreseen deadline.
5. In the second session the real estates cannot be sold at the price that is a lower than half of the assigned value with the selling conclusion. The starting offer in the second session cannot be lower than half of the determined value.
6. In case that the real estate is not sold even in the second session, the enforcement body will determine the third session in the timeframe of fifteen (15) to thirty (30) days. In this session the real estates cannot be sold at a price lower than one third of the determined price of the real estate.
7. In case there are persons with the right of pre-purchase or contractual right, than the person who according to the law has right of settlement with priority of his credit from selling price, shall acquire the right of pre-purchase of the real estates at the price reached in the third session.

LAW NO. 05/L-118 ON AMENDING AND SUPPLEMENTING THE LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE of 2017

Article 22
Article 234 of the basic Law is reworded with the following text:

1. In the first session of the public sale, real estate cannot be sold at a price that is lower than fifty percent (50%) of the value of real estate as appraised.

The starting offers for the first session that are lower than fifty percent (50%) of the appraised value will not be reviewed.
2. In case the real estate is not sold in the first session of the public sale, the enforcement body shall designate a second session of the public sale within a time frame of fifteen (15) to thirty (30) days. At this session, real estate shall not be sold at a value lower than one third (1/3) of the value of real estate as appraised".
3. In case real estate is not sold in the second auction, the enforcement body shall, by proposal of creditor, render a decision to hand over the real estate to the ownership of creditor, in which case the claim against the debtor is considered fully covered.
4. In case there are no persons with the right of pre-emption or contractual right, than the person who according to this law has right of settlement with priority of his credit from selling price, shall acquire the right of pre-emption of the real estate at the price reached in the second session.

Admissibility of the Referral

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

49. In this respect, the Court refers to paragraphs 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

Article 21
[General Principles]

"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".

Article 113
[Jurisdiction and Authorized Parties]

"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 refers to the admissibility requirements as prescribed 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 establish:

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 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...".

51. In addition, the Court will also refer to the relevant rules of the Rules of Procedure, as follows:

Rule 39
Admissibility Criteria

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

(a) the referral is filed by an authorized party,

(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.

52. The Court will further consider whether the Applicants' Referral meets the abovementioned admissibility criteria, established in the Constitution, the Law and the Rules of Procedure.

53. In this regard, the Court initially recalls that the debtors, namely the Applicants and the creditor namely the RBK, had concluded the Loan Agreement in the amount of 100,000 euro. As a result of non-fulfillment of obligations by the debtor, the creditor requested the initiation of the enforcement procedure for

the remaining loan amount, namely 78,709.68 euro. The Municipal Court allowed the enforcement and the case was transferred to the Private Enforcement Agent. The latter, through relevant conclusions, assigned public auctions for the sale of the immovable property as defined by the Agreement in the amount of 151,600.00 euro. According to the case file, the immovable property was sold to the RBK in the second public auction, in the amount of 1/3 of the determined value of the immovable property, namely 50,535.00 euro. As a result, the Private Enforcement Agent issued the Order for the Sale of Immovable Property. The debtors, namely the Applicants, challenged this Order in the Court of Appeals, which by the Decision [Ac. No. 3917/2017] rejected as ungrounded the debtors' complaint. Before the Court, the Applicants challenge the latter, essentially claiming that *"the enforcement procedure was unconstitutional and unlawful"*.

54. In this regard, the Court recalls the essential allegations of the Applicants, including those under which: (i) the public sale was carried out on the basis of the law which was not in force at the time when the enforcement proceedings were initiated, namely the Law on Amending and Supplementing the LEP, resulting in different and more unfavorable result for the Applicants than if the LEP had been applied; (ii) the Private Enforcement Agent refused to appoint an expert to prove the amount of liability to the creditor, namely the RBK; (iii) The Agreement is in contradiction with the LOR; and (iv) the LEP is in contradiction with the Constitution and ECHR.

55. The Court emphasizes that, in addressing the Applicants' allegations, it will apply the standards of the case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is required to interpret the fundamental rights and freedoms guaranteed by the Constitution.

56. In this respect, the Court initially notes that the case law of the ECtHR states that the fairness of a proceeding is assessed looking at the proceeding as a whole (See ECHR Judgment of 6 December 1988, *Barbera, Messeque and Jabardo v. Spain*, paragraph 68). Consequently, in assessing the Applicant's allegations, the Court will also adhere to this principle (See, in this regard, cases 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).

57. The Court will further deal with each allegation of the Applicants separately, applying on that assessment the relevant standards and practice of the ECtHR and the Court.

(i) As to the application of the erroneous law

58. In addressing the first allegations of the Applicants, the Court recalls that they allege that the enforcement procedure was conducted based on the LEP until the Law on Amending and Supplementing the LEP entered into force on 18 July 2017, after which date in their enforcement procedure, namely in the public sale in which their immovable property was sold, the new law was applied, and,

which according to the allegation was unfavorable and resulted in different results for the Applicants.

59. In the context of the allegations of interpretation and erroneous and manifestly arbitrary application of the law, the Court, as stated above, will refer to the case law of the ECtHR.

60. In this regard, the Court notes that, as a general rule, the allegations of erroneous application of law, allegedly committed by the regular courts, relate to the field of legality and as such, are not in the jurisdiction of the Court, and therefore, in principle, the Court cannot review them. (See Case of the Court No. KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 36; and case KI122/16, Applicant *Riza Dembogaj,* Judgment of 30 May 2018, paragraph 56).

61. The Court has consistently reiterated that it is not its task to deal with errors of facts or law allegedly committed by the regular courts (*legality*), unless and in so far as they may have infringed the fundamental rights and freedoms protected by the Constitution (*constitutionality*). It may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "*fourth instance*", which would be to disregard the limits imposed on its jurisdiction. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See, ECtHR case, *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, par. 28; and see, also cases of the Court: KI70/11, Applicants *Faik Rima, Magbule Rima and Besart Rima*, Resolution on Inadmissibility, of 16 December 2011, paragraph 29; KI06/17, Applicant *L. G. and five others*, cited above, paragraph 37; and KI122/16, cited above, paragraph 57).

62. This stance has been consistently held by the Court, based on the case law of the European Court of Human Rights (hereinafter: ECtHR), which clearly maintains that it is not the role of this Court to review the conclusions of the regular courts in respect of the factual situation and application of the substantive law (see: ECtHR case, *Pronina v. Russia*, Decision on admissibility of 30 June 2005, paragraph 24; and cases of the Court KI06/17, Applicant *L. G. and five others*, cited above, paragraph 38; and KI122/16, cited above, paragraph 58).

63. The Court, however, also notes that the case-law of the ECtHR also provides for the circumstances under which exceptions from this position can be made. The ECtHR reiterated that while it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of legislation, the role of the Court is to verify whether the effects of such interpretation are compatible with the ECHR. (See the ECtHR cases, *Miragall Escolano and Others v. Spain*, Judgment of 25 May 2000, paragraphs 33-39).

64. Therefore, even though the role of the Court is limited in terms of assessing the interpretation of law, it must ensure and take measures where it observes that a court has "*applied the law manifestly erroneously*" in a particular case or so as to reach "*arbitrary conclusions*" or "*manifestly unreasoned*". (See the ECtHR cases *Anheuser-Busch Inc. v. Portugal,* Judgment of 11 January 2007,

paragraph 83; *Kuznetsov and Others v. Russia*, Judgment of 11 January 2007, paragraphs 70-74 and 84; *Păduraru v. Romania*, Judgment of 1 December 2005, paragraph 98; *Sovtransavto Holding v. Ukraine*, Judgment of 25 July 2002, paragraphs 79, 97 and 98;, *Beyeler v. Italy*, Judgment of 5 January 2005, paragraph 108; see also cases of the Court KI06/17, Applicant *L. G. and five others*, cited above, paragraph 40; and KI122/16, cited above, paragraph 59).

65. Based on the principles elaborated above, the Court will first assess whether, in the circumstances of the present case, the law was applied and interpreted in a manifestly erroneous and arbitrary manner and whether this interpretation resulted in "*arbitrary conclusions*" or "*manifestly unreasonable*" for the Applicant.

66. In this regard, the Court recalls that the Private Enforcement Agent scheduled three public sales, through the conclusions of 22 July 2016, 9 September 2016 and 10 October 2016. The first two public sales were not realized, while the third was postponed three times at the request of the creditor. Through the Conclusion of 20 June 2017, the latter was scheduled and held on 21 July 2017, whereby the debtor's immovable property was purchased by the creditor, namely the RBK, at one third (1/3) of its value.

67. The Court also notes that after the issuance of the Conclusion on the third public sale of 10 October 2016 and before the Conclusion of 20 June 2017 which resulted in the realization of the public sale, the Law on Amending and Supplementing the LEP entered into force. The latter amended the procedure regarding the public sale, *inter alia*, by amending and reducing (i) the minimum values for the sale of immovable property in public sale; and (ii) the number of public sales from three to two.

68. More specifically, Article 234 of the LEP, through Article 22 of the Law on Amending and Supplementing it, by reducing the threshold for the sale price in public auctions as it follows (i) in the first auction, according to the first, the immovable property cannot be sold at a price that is lower than 80 (eighty) percent of the determined value; whereas according to the second, the immovable property cannot be sold at a price that is lower than 50 (fifty) percent of the determined value; (ii) in the second auction, according to the first one, the immovable property cannot be sold for a price that is lower than half (1/2) of the value determined by the conclusion on the sale; whereas according to the second, the immovable property cannot be sold at a lower price than one-third (1/3) of the determined value. While in the third auction, according to the first, the immovable property cannot be sold at a lower price than one third (1/3) of the set value of the immovable property, whereas according to the second, the third auction is not held but with a proposal of the creditor, the office of the enforcement agent decides that the immovable property shall be handed over to the creditor by transferring to his ownership.

69. The Court recalls that the Applicants allege that, prior to the organization of the public sale in which their immovable property was sold, the Law on Amending and Supplementing the LEP entered into force, in this public sale were applied the provisions of the new Law that were not in force at the time the enforcement

proceedings were initiated against the Applicants, and that the latter was more detrimental to the debtors, namely the Applicants and consequently more favorable to the creditor, namely the RBK. This is because, according to the Applicants, if the law in force was applied at the time when the enforcement procedure began, namely the LEP, in the second public sale, the immovable property could not be sold below the value of half (½) of the set value of the immovable property, while with the provisions of the new Law, the immovable property could be sold at the value of one third (1/3) of the set value of the immovable property.

70. In this regard, the Court first notes that both the Order [P. No. 330/16] of 22 August 2017 of the Private Enforcement Agent and the Decision [Ac. No. 3917/2017] of 25 October 2017 of the Court of Appeal refer only to the provisions of the LEP and not the Law on Amending it. However, the uncertainty regarding the applicable law in the circumstances of the present case relates to the fact that the aforementioned Order of the Private Enforcement Agent refers to the public sale in which the debtor's immovable property was sold as a second public sale, despite the fact that (i) the second public sale appointed through the Conclusion of 9 September 2016 was declared failed; and (ii) the third public sale determined through the Conclusion of 10 October 2016 was scheduled and the same was postponed three times at the request of the creditor.

71. The Court recalls in this respect Order [P. No. 330/16] of 22 August 2017 of the Private Enforcement Agent, which *inter alia,* maintains:

> *"In the auction for the second public sale held on 10.10.2016, as it was ascertained that there was no interested in purchasing the immovable property, the auction was declared failed, the auction for the third public sale was scheduled for 11.11.2016, but the same auction was not held since the creditor through e-mail dated 07.11.2016 requested that this auction be postponed for 2 months, namely until 07.01.2017 in order to clarify the issue of the mortgage related to the parcel no. 3085/3, the same auction for the same issue, at the request of the creditor was postponed two times until 20.03.2017 as well as until 04.06.2017.*
>
> *According to e-mail of 19.06.2017 by the creditor, after reviewing the parcel in question, which is a mortgage in this case and after the meetings with the debtors, who so far failed to reach any agreement on the payment of the debt, at the request of the creditor, the Enforcement Agent issued a conclusion on 20.06.2017 and assigned the auction for second public sale on 21.07.2017.*
>
> *Since in the auction for the second public sale of immovable property, the creditor used the legal right to be a buyer, the Enforcement Agent accepted that the immovable property is sold to the creditor, and after the conclusion of the public auction, the conclusion of 02.07.2017, by which the immovable property was sold to the bidder, here the creditor, for the price of 50,353.00 euro".*

72. The Court notes that the reasoning of the Order of the Private Enforcement Agent refers as the second public sale to the sale in which the immovable property was sold, however, in the same document, it is clarified that in fact, the second public sale scheduled by the Conclusion of 9 September 2016 failed, and that it was the third public sale in which the debtor's immovable property was sold. In this respect, this Order reads:

> *"In the auction for the second public sale held on 10.10.2016, as it was ascertained that there was no interested in purchasing the immovable property, the auction was declared failed, the auction for the third public sale was scheduled for 11.11.2016, but the same auction was not held since the creditor through e-mail dated 07.11.2016 requested that this auction be postponed for 2 months, namely until 07.01.2017 in order to clarify the issue of the mortgage related to the parcel no. 3085/3, the same auction for the same issue, at the request of the creditor was postponed two times until 20.03.2017 as well as until 04.06.2017.*
>
> *According to e-mail of 19.06.2017 by the creditor, after reviewing the parcel in question, which is a mortgage in this case and after the meetings with the debtors, who so far failed to reach any agreement on the payment of the debt, at the request of the creditor, the Enforcement Agent issued a conclusion on 20.06.2017 and assigned the auction for second public sale on 21.07.2017.*

73. Accordingly, the Court notes that despite the fact that Order [P. No. 330/16] of 22 August 2017 of the Private Enforcement Agent refers to the second public sale, which based on the LEP stipulates that the immovable property may not be sold for less than half (½) of its value, as the Applicant alleges, from the case file and the enforcement proceedings in the circumstances of the present case as a whole, it results that in fact the sale of the immovable property was made in the third public sale, in which based on the LEP, the immovable property cannot be sold for less than a third (1/3) of its value, as much as the immovable property of the debtors, namely the Applicants, was sold. This is because, as stated above, according to the case file, the second public sale determined through the Conclusion of 9 September 2016 was declared as unsuccessful, and it is the third public sale which was set through the Conclusion of 10 October 2016 and, which was postponed several times and was finally due to be realized on 21 July 2017.

74. Such a conclusion is also supported by the reasoning of the Decision [AC. No. 3917/17] of 25 October 2017 of the Court of Appeals, which *inter alia*, explains:

> *"The private enforcement agent assigned the first and the second public auction for the sale of the immovable property where no bidder appeared, in the third public auction dated 21.07.2017, the sole and most favorable bidder was declared the creditor Raiffeisen Bank".*
>
> *"Considering that in the present case we are dealing with a proposal for execution, based on the enforcement document, the first instance court allowed the enforcement on the basis of the Decision on the registration of the mortgage In. No. 330/2004 dated 23.07.2017, of the Municipal Court in Gjakova, as well as the loan agreement No. 6278 dated 23.07.2004, based*

on Article 22 paragraph I, item 1.7 of the LEP. From this it follows that the private enforcement agent acted rightly when he conducted the procedure for the public sale of immovable property and has designated as a buyer here the creditor Raiffeisen Bank".

75. The Court therefore notes that in the circumstances of the present case, in the public sale in which the debtor's immovable property was sold, (i) Article 234 of the LEP was applied and not Article 22 of the Law on Amending and Supplementing the LEP, as alleged by the Applicants; and (ii) the Applicant's immovable property was sold at a third public sale, at one-third (1/3) of its value, as determined by the LEP.

76. Therefore, based on the above and having regard to the allegation raised by the Applicants and the facts presented by them, the Court also based on the standards established in its own case-law in similar cases and the ECtHR case law, finds that the Applicants' allegations are manifestly ill-founded on constitutional basis, because in the circumstances of the present case (i) the law has not been applied in a manifestly erroneous and arbitrary manner and that, consequently, (ii) its application and interpretation have not resulted in "*arbitrary conclusions*" or "*manifestly unreasonable*" for the Applicant.

77. Therefore, the Applicants' allegations of the application of the erroneous law in the circumstances of their case, are manifestly ill-founded on constitutional basis, as established in paragraph 2 of Rule 39 of the Rules of Procedure.

(ii) As to the rejection of the appointment of the requested expert

78. The Court recalls that the Loan Agreement was signed at a value of 100,000 euro. According to the case file, it results that at the time of commencement of enforcement, the remaining liabilities to the RBK, including the interest, had the value of 78,709.68 euro, while the Applicant claims that this obligation was in fact 33,414.06 euro. Moreover, with respect to the value of immovable property, the Applicants allege that the value of the immovable property had in the meantime changed and should be valued at the amount of 300,000 euro, and not at the value determined initially by the Agreement at the amount of 151,600.00 euro.

79. According to the case file it appears that the issue of engagement of an expertise was also raised in session of the public sale on 9 September 2016, where according to Order [P. No. 330/16] of 22 August 2017 of the Private Enforcement Agent, the Applicants' request was addressed and rejected.

80. In this context, the Order of the Private Enforcement Agent, contains the reasoning as follows:

"From the submissions of the debtors submitted to this enforcement office on 23.08.2016, it is required that an expert in this matter be appointed to determine the amount of the debt as well as the determination of the value of the mortgaged property.

In the public sale session held on 09.09.2016, the creditor's authorized representative opposed in entirety the debtor's proposals, as the creditor as a financial institution has sufficient staff to calculate the amount of the claim as well as the allegations that the value of the immovable property has changed and is not sufficient basis for the assignment of the expert of evaluation, since the value of the immovable property is determined by the agreement between the parties on the occasion of granting the loan, therefore it opposes all the claims of the debtors from this submission, because they are intended for the delay of the case, therefore he requests the Enforcement Agent to proceed with the holding of the second auction, at the time the auction for the second sale was scheduled for 10.10.2016".

81. Furthermore, this case was addressed by the Court of Appeals, which in this regard, by Decision [AC. No. 3917/17] of 25 October 2017 of the Court of Appeals, held that:

"The Court of Appeals assesses that the appealing allegation of the debtors that the value of the unpaid debt is 33.414.04 euro and not as alleged in the Conclusion is ungrounded because the debtors have not provided the enforcement authority with any evidence which would prove that the debt is at the amount as alleged. As to other appealing allegations which consist against the Order on the sale of the immovable property, the second instance court considers that these appealing allegations are ungrounded because we do not have to do with essential violation of the provisions of the Law on Contested Procedure, of which violations this Court acts ex officio in terms of Article 194 of the LCP, or of the Law on Enforcement Procedure, therefore, the enforcement authority has acted fairly when it held the auctions and sold the immovable property of the debtors in conformity with the provisions of the LEP".

82. The Applicants' allegations regarding the lack of reasoning of the challenged decisions concerning the rejection of the proposed expertise will be examined by the Court on the basis of its already consolidated practice with regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. This practice was built based on the ECtHR case law, including, but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. In addition, the fundamental principles regarding the right to a reasoned judicial decision have also been elaborated in the cases of this Court, including but not limited to KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012; KI22/16, *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant "*IKK Classic*", Judgment of 9 January 2018; and KI143/16, *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018.

83. According to that practice, in principle, the ECtHR and the Court point out that the right to a fair trial includes the right to a reasoned decision and that the courts must "*sufficiently indicate with sufficient clarity the reasons on which they base their decision*". However, this obligation of the courts cannot be understood as a requirement for a detailed answer to any argument. The extent to which the obligation to give reasons may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. The essential arguments of the Applicants are to be addressed and the reasons given must be based on the applicable law.

84. In the circumstances of the present case, the Order of the Enforcement Agent and the Decision of the Court of Appeals refer to (i) the value of the loan determined by the Agreement; (ii) the fact that the value of the immovable property had not changed and that the same was set by the original Agreement; and (iii) the lack of evidence that will prove a different value of the liability or of the immovable property.

85. Therefore, the Court considers that the Order of the Private Enforcement Agent and the challenged Decision of the Court of Appeals have addressed the essential allegations of the Applicants in terms of procedural guarantees regarding the right to a reasoned court decision embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR and are "*sufficiently reasoned*". The concept of "*sufficiency of reasoning*" even where desirable could be a wider and more detailed reasoning is a concept developed and also used by the ECtHR itself. (See, in this regard the ECtHR case *Merabishvili v. Georgia*, No. 72508/13, Judgment of the Grand Chamber [GC] of 28 November 2017, paragraph 227).

86. The Court also notes that the Applicants in support of their allegation of refusal of a request to appoint an expert and non-reasoning of this refusal, refer to the case of the Court KI31/17. However, apart from the fact that the Applicants have mentioned and cited this decision, they did not elaborate its factual, and legal connection, with the circumstances of the present case. The Court emphasizes that the reasoning of other court decisions must be interpreted in the context and in light of the factual circumstances in which they were rendered. (See, in this context, Judgment in Case KI 48/18 of 4 February 2019, with Applicants Arban *Abrashi and the Democratic League of Kosovo (LDK),* paragraph 275; and case KI119/17, Applicant *Gentian Rexhepi,* Resolution on Inadmissibility, of 3 May 2019, paragraph 80).

87. The Court however notes that the circumstances of the case referred to by the Applicant, namely Case KI131/17, do not coincide with their circumstances, because in this case the Court found a violation of the right to fair and impartial trial as a result violation of the principle of equality of arms and a reasoned court decision related to (i) refusal to hear a witness and more importantly, (ii) the identity and legitimacy of the responding party.

88. Therefore, based on the foregoing and taking into account the allegation raised by the Applicants and the facts presented by them, the Court relying also on the standards established in its case law in similar cases and the case law of the ECtHR, finds that the Applicants did not prove and did not sufficiently

substantiate their allegation of a violation of their rights and freedoms as to the reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

89. Therefore, the Applicants' allegations of the lack of the reasoned court decision, are manifestly ill-founded on constitutional basis, as established in paragraph 2 of Rule 39 of the Rules of Procedure.

(iii) As to the unlawful Agreement

90. With respect to the third allegation, namely the unlawfulness of the Loan Agreement, the Court notes that from the case file, it does not result that the Applicants have filed this allegation in the proceedings before the regular courts. Unlike cases referred to by the Applicants in support of their allegation, the Judgment [Rev. E. No. 23/2012] of 1 July 2013 of the Supreme Court; Decision [Ae. No. 45/2014] of 10 March 2015 of the Court of Appeals; and Judgment [III. C. 163/2015] of 9 March 2016 of the Basic Court in Prishtina, the claimants in all other cases, during the proceedings before the regular courts challenged the legality of Article 4 of the Loan Contracts with respect to the penalty interest and the latter by the relevant courts were declared in contradiction with paragraph 3 of Article 270 of the applicable law on Obligational Relations.

91. This does not appear to be the case from the case files in the Applicants' case and therefore, in such a context, the Court refers to its case-law and the case-law of the ECtHR, regarding the criterion for exhaustion of legal remedies in the substantive sense.

92. The Court initially notes that, while in the context of machinery for the protection of human rights, the rule of exhaustion of legal remedies must be applied with some degree of flexibility and without excessive formalism, this rule normally requires also that the complaints and allegations intended to be made subsequently at the court proceedings should have been aired before the regular courts, at least in substance and in compliance with the formal requirements and time-limits laid down through the applicable law (See, ECtHR case, Jane *Nicklinson v. The United Kingdom* and *Paul Lamb v. United Kingdom*, Judgment of 16 July 2015, paragraph 89 and the references therein; see also the case of the Court KI119/17, Applicant *Gentian Rexhepi,* cited above, paragraph 71).

93. More specifically, the ECtHR maintains the position that, in so far as there exists a legal remedy enabling the regular courts to address, at least in substance, the argument of violation of a right, it is that legal remedy which should be used. If the complaint presented before the Court has not been put, either explicitly or in substance, to the regular courts when it could have been raised in the exercise of a legal remedy available to the applicant, the regular courts have been denied the opportunity to address the issue, which the rule on exhaustion of legal remedies is intended to give. (See, ECtHR case, Jane *Nicklinson v. The United Kingdom* and *Paul Lamb v. United Kingdom*, cited above, paragraph 90 and the references therein; see also the case of the Court KI119/17, cited above, of X, paragraph 72).

94. Therefore, the Court reiterates that the exhaustion of legal remedies includes two important elements: (i) the exhaustion in the formal-procedural aspect, which implies the possibility of using a legal remedy against an act of a public authority, in a higher instance with full jurisdiction; and (ii) exhausting the remedy in a substantial aspect, which means reporting constitutional violations in "*substance*" before the regular courts so that the latter have the opportunity to prevent and correct the violation of human rights protected by the Constitution and the ECHR. The Court considers as exhausted the legal remedies only when the Applicants, in accordance with applicable laws, have exhausted them in both aspects. (See also the case of the Court, KI71/18, Applicants *Kamer Borovci, Mustafë Borovci and Avdulla Bajra*, Resolution on Inadmissibility of 21 November 2018, paragraph 57; see also the case of the Court No. 119/17, Resolution on Inadmissibility, of X, paragraph 73).

95. Having regard to these principles and the circumstances in which, according to the case file, it follows that these specific allegations of the Applicant have been filed for the first time before the Court, it concludes that the Applicants did not give the opportunity to the regular courts, including the Court of Appeals, to address these allegations and on that occasion, to prevent alleged violations raised by the Applicant directly to this Court without exhausting legal remedies in their substance. (See, *mutatis mutandis*, the case of the Court, KI118/15, Applicant *Dragiša Stojković*, Resolution on Inadmissibility of 12 April 2016, paras. 30-39; see also the case of the Court KI119/17, cited above, of X, paragraph 74).

96. Accordingly, with regard to this allegation of the Applicants, the Court finds that the latter should be rejected as inadmissible on procedural grounds due to substantial non-exhaustion of all legal remedies as required by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure. (See, the case of the Court, No. 119/17, cited above, of X, paragraph 75)

(iv) Regarding unconstitutional law

97. Finally, and with respect to the fourth allegation of the Applicants, namely the allegation that the LEP is in contradiction with the Constitution, the Court recalls subparagraph 1 of paragraph 2 of Article 113 of the Constitution, according to which the Constitution has established the authorized parties that may challenge the constitutionality of a law, the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and the Ombudsperson. The Constitution does not define individuals, as is the case in the circumstances of the present case, as parties authorized to challenge the constitutionality of a law. Such a possibility is determined only under the circumstances and under the conditions laid down in paragraph 8 of Article 113 of the Constitution, and the relevant legal provisions and the Rules of Procedure.

98. The Court therefore emphasizes that the Applicants as individuals are excluded from the exhaustive list of authorized parties, who are entitled in accordance with the Constitution, to submit to the Court the issue of the compatibility of laws with the Constitution, including the challenged LEP itself.

99. The Court recalls that the individuals are authorized parties merely to raise the issue of violation by public authorities of their individual rights and freedoms, guaranteed by the Constitution, only after the exhaustion of all legal remedies provided by law (See, in this regard the case of the Court KI38/17, Applicant: *Meleq Ymeri,* Resolution on Inadmissibility of 10 July 2017).

100. Therefore, the Court considers that regarding this allegation, the Applicants are not an authorized party who can initiate the compatibility of LEP with the Constitution in a direct way in the Court, and therefore, based on paragraphs 1 and 7 of Article 113 of the Constitution, Article 47 of the Law and sub-paragraph (a) of paragraph 1 of Rule 39 of the Rules of Procedure, these allegations are not admissible for review before the Court.

101. Therefore and finally, the Court finds that the allegations of the Applicants with respect to (i) the manifestly erroneous application and interpretation of the law are manifestly ill-founded on constitutional basis and therefore, inadmissible in accordance with paragraphs 1 and 7 of Article 113 of the Constitution and paragraph 2 of Rule 39 of the Rules of Procedure; (ii) the refusal to appoint an expert and the lack of reasoning for this refusal, as manifestly ill-founded on constitutional basis and therefore inadmissible in accordance with paragraphs 1 and 7 of Article 113 of the Constitution and paragraph 2 of Rule 39 of the Rules of Procedure; (iii) the unlawfulness of the Agreement as inadmissible as a result of the non-exhaustion of legal remedies in substantive aspect, in accordance with paragraphs 1 and 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law, and item (b) of paragraph 1 of Rule 39 of the Rules of Procedure; and (iv) non-compliance of the LEP with the Constitution as inadmissible because the latter were not raised by an authorized party in accordance with subparagraph 1 of paragraph 2 of Article 113 of the Constitution, Article 47 of the Law and item (a) of paragraph 1 of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 47 of the Law, and Rules 39 (2); 39 (1) (a); and 39 (1) (b) of the Rules of Procedure, on 22 July 2019, 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

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