



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

Prishtina, on 21 April 2020  
Ref. no.:RK 1548/20

*This translation is unofficial and serves for information purposes only*

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI107/19**

Applicant

**Gafurr Bytyqi**

**Constitutional review of Decision AC-I-19-0065 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 6 June 2019**

### **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 Gafurr Bytyqi, residing in the Municipality of Lipjan, who is represented by Armend Deskaj, a lawyer (hereinafter: the Applicant).

## **Challenged decision**

2. The Applicant challenges the Decision [AC-I-19-0065] of 6 June 2019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC) in conjunction with Decision [C-I-19-0002] of 7 May 2019 of the Specialized Panel of the SCSC.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged Decision, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Articles 10 [Economy], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 41 [Right of Access to Public Documents], 42 [Freedom of Media], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
4. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measure, to "*prohibit the sale of Unit no. 37: Marketing Export Premise Lipjan/Sale of assets in Wave 42*" (hereinafter: the disputed property).

## **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 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).

## **Proceedings before the Court**

6. On 20 June 2019, the Applicant submitted by mail services the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 26 June 2019, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel, composed of Judges: Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban (members).
8. On 11 July 2019, the Court notified the Applicant's representative about the registration of the Referral and requested him to submit the power of attorney for representation before the Court.
9. On 26 July 2019, the Applicant's representative submitted to the Court the general power of attorney of 19 December 2018.
10. On 31 July 2019, the Court reiterated the request for additional documents with the notice that in the event of failure to bring the power of attorney for representation before the Court, the Referral would be summarily rejected in

accordance with paragraph 5 of Rule 35 (Withdrawal, Dismissal and Rejection of Referrals) of the Rules of Procedure.

11. On 5 August 2019, the Applicant (i) submitted the power of attorney for representation in the Court; and (ii) notified the Court that the disputed property was being re-tendered through the 49<sup>th</sup> Wave, marked with unit no. 98 and on the day of bidding set on 21 August 2019.
12. On 4 October 2019, the Applicant again submitted to the Court by mail service a supplementation to the Referral, emphasizing the request for an interim measure to prohibit the sale of the disputed property. By this letter, the Applicant also submitted to the Court the Decision [C-I-19-0008] of 20 August 2019 of the Specialized Panel of the SCSC and by which the request for granting the preliminary injunction in another case was approved, but according to the Applicant in the circumstances similar to his, therefore alleging before the Court violation of Article 31 of the Constitution as a consequence of the lack of consistency in the case law of the SCSC.
13. On 14 October 2019, the Applicant filed the next supplementation to the Referral, informing the Court that, on 4 October 2019, the Appellate Panel of the SCSC by the Decision [AC-I-19-0154] rejected as ungrounded his appeal. The Applicant also requested an urgent review of his case, stating that *“the SCSC also- is awaiting the decision of the Constitutional Court of the Republic of Kosovo on how it will decide on the Referral submitted to the Constitutional Court.”*
14. On 11 March 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

### **Summary of facts**

15. On 7 November 2018, the Privatization Agency (hereinafter: the PAK) announced the 42<sup>nd</sup> wave for the sale of assets, including unit 37, namely *“Marketing Export Premise Lipjan/Sale of assets in Wave 42”*.
16. On 9 November 2018, the Applicant was notified by the PAK that the bidder with the highest bid price was announced, in terms of participation in the sale process for the disputed property. The PAK notification explained that *“according to Tender's General Rules, the highest price offered does not constitute in any way a Decision on the sale of the asset, but the Decision on the approval or refusal of the sale will be taken by the Board of Directors of the PAK”*. Based on the case file, the PAK management recommended to the Board of Directors the approval of the sale for unit 37, in the respective tender wave based on paragraph 1 of Article 14 (Approval and Refusal of bids for assets/new tendered entities) of the General Tender Rules of the Privatization Agency of Kosovo (hereinafter: the Tender Rules).
17. On 3 December 2018, PAK notified the Applicant about Decision [No. Ref. BD-110/17] of 23 November 2018 of the PAK Board of Directors (hereinafter: the Decision) regarding the annulment of tender for the contested property based

on paragraph 14.3 [a] of Article 14 of the Tender Rules because “*the highest bid price is not reasonable compared to the previous average selling prices*”. The notification also contained the instruction for a legal remedy against the abovementioned Decision for annulment, namely for the possibility of initiating the court procedure with the SCSC.

18. On 17 January 2019, the Applicant filed a claim with the SCSC against the PAK, alleging that the abovementioned decision was contrary to (i) Article 10 of the Constitution because, according to the allegation, the reasoning of the PAK that “*the price offered for the tendered item is not reasonable compared to the average prices of previous sales*” is contrary to the market economy; and (ii) paragraph 14.1 and 14.3 [a] of Article 14 of the Tender Rules. The Applicant requested the SCSC: (i) the annulment of the Decision [No. Ref. BD-110/7] of 23 November 2018 of the Board of Directors of the PAK; and (ii) the certificate that the claimant, namely the Applicant, is the buyer of the disputed property.
19. On 6 March 2019, the PAK filed a response to claim with the Specialized Panel of the SCSC, challenging the claim of the Applicant in entirety with the proposal that the latter be rejected as ungrounded. The PAK through this submission, *inter alia*, stated: (i) the claimant did not present the facts within the meaning of Article 7 of Law No. 03/L-006 on the Contested Procedure (hereinafter: the LCP); and (ii) no legal arguments have been provided to prove that the challenged Decision of the Board of Directors is unlawful.
20. Meanwhile, and as the claim of the Applicant of 21 January 2019 was pending before the Specialized Panel of the SCSC, on 17 April 2019, the Applicant submitted a request for the issuance of a preliminary injunction/interim measure, through which the sale of the disputed property to the respondent, namely the PAK, would be prohibited.
21. On 19 April 2019, the PAK responded to the Applicant's request for a preliminary injunction, challenging the latter in its entirety, on the grounds that it did not rely on relevant and reliable evidence which can satisfy the relevant court to issue a preliminary injunction, because there is no risk that the an irreparable damage would be caused to the Applicant and which cannot be compensated in any way.
22. On 7 May 2019, the Specialized Panel of the SCSC rendered the Decision [C-I-19-0002], by which: (i) approved the Applicant's request for the preliminary injunction, prohibiting the respondent, namely the PAK, to sell the disputed property in the 46<sup>th</sup> Wave of the sale; (ii) clarified that the relevant order is applicable provided that the claimant within 7 (seven) days from the receipt of the Decision deposits the amount of one thousand (1,000) euro for the provision of possible damage that could be caused through the imposed order; and (iii) determined that the relevant order would remain in force until the SCSC takes a final decision regarding the claim. By this Decision, the Specialized Panel, among other things, reasoned that (i) the Applicant has complied with the requirements of paragraph 1 of Article 55 (Preliminary Injunctions) of Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on the Kosovo Privatization Agency of Kosovo Related Matters (hereinafter: the Law on SCSC); (ii) pursuant to paragraphs 1 and 3 of Article

14 of the Tender Rules, the PAK Board has the right to approve or not a sale, where the refusal is not an absolute right of the Board, therefore there must be valid reasons; and (iii) stated that the PAK did not provide any reasoned reason as to why it had rejected the bid, but only in a generalized manner challenged the claim and the Applicant's request for a preliminary injunction.

23. On 8 May 2019, the PAK re-tenders the disputed property in the 46<sup>th</sup> Wave of sales, now through Unit no. 75 and on the date of bidding set on 8 May 2019.
24. On 21 May 2019, the PAK filed an appeal against the Decision [C-I-19-0002] of 7 May 2019 of the Specialized Panel of the SCSC in the Appellate Panel, alleging that through the issuance of the preliminary injunction “*procedural and substantive provisions have been violated*”, with a proposal that (i) the appeal be approved as grounded; (ii) Decision [C-I-19-0002] of 7 May 2019 be annulled; and (iii) the request of the claimant, namely the Applicant be rejected, regarding the preliminary injunction, as ungrounded.
25. On 3 June 2019, the Applicant submitted the response to the PAK appeal before the Appellate Panel, proposing that (i) the PAK appeal be rejected as ungrounded; and (ii) Decision [C-I-19-0002] of 7 May 2019 of the Specialized Panel of the SCSC be upheld.
26. On 6 June 2019, the Appellate Panel of the SCSC rendered Decision [AC-I-19-0065] by which (i) approved the PAK appeal as grounded; (ii) modified Decision [C-I-19-0002] of 7 May 2019 of the Specialized Panel of the SCSC; and (iii) rejected as ungrounded the Applicant's request for the issuance of a preliminary injunction. By this Decision, the Appellate Panel initially stated that it does not prejudice the resolution of the merits of the initial claim of the Applicant. As for the decision-making regarding the preliminary injunction, by this Decision, the Appellate Panel, among others, reasoned that (i) pursuant to paragraph 3 of Article 14 of the Tender Rules, the PAK Board has the right to approve or not a sale; (ii) the cancellation of the tender cannot be considered as damage caused because paragraph 3 of Article 14 of the Tender Rules provides for the right of the Board of Directors to cancel the relevant sale; (iii) by signing the same tender rules, the claimant, namely the Applicant, agreed to the possibility of canceling the tender; and (iv) by the Notice of 9 October 2018, the claimant was notified that this notice did not imply the sale of the asset because it had to be approved or not through a decision of the Board of Directors, as set out in the Tender Rules.
27. On 5 August 2019, after the PAK announced the new wave, namely the 49<sup>th</sup> Wave of the sale of the disputed property, this time identified as unit no. 98, with a bid day of 21 August 2019, the Applicant submitted a new request for the issuance of a preliminary injunction on the grounds that the relevant sale would result in irreparable damage. The Applicant also stated through this request that he had already submitted to the Court the referral with No. KI107/19, challenging the constitutionality of the Decision [AC-I-19-0065] of 6 June 2019 of the Appellate Panel.
28. On 13 August 2019, the PAK submitted a response to the second request of the Applicant for the preliminary injunction, through which it requested that the

latter be rejected as ungrounded as by the Decision [AC-I-19-0065] of 6 June 2019 of the Appellate Panel, this case has already been resolved and the claimant's request for an interim measure was rejected as ungrounded.

29. On 19 August 2019, the Specialized Panel of the SCSC rendered the Decision [C-I-19-0002] which rejected as ungrounded the Applicant's request for preliminary injunction. Among other things, the Decision stated that "*Decision [AC-I-19-0065] of 6 June 2019 of the Appellate Panel of the SCSC (emphasis added) as far as this matter is concerned and under the same factual circumstances is final, therefore the first instance panel in the same circumstances cannot come up with another assessment of the same case for which it has already been decided by the second instance - the Appellate Panel*".
30. On 5 September 2019, the Applicant filed an appeal against the aforementioned Decision with the Appellate Panel, proposing that (i) the appealed Decision be modified; and (ii) the preliminary injunction be imposed in order to prevent the PAK from taking any action regarding the re-tendering of the disputed property.
31. On 24 September 2019, the PAK responded to the Applicant's appeal, by which it completely challenged the Applicant's allegations as entirely ungrounded in the applicable law, proposing that the appeal of the claimant, namely the Applicant, be rejected as ungrounded, by upholding the Appeal of the Specialized Panel.
32. On 4 October 2019, the Appellate Panel of the SCSC rendered the Decision [AC-I-19-0154] by which (i) rejected as ungrounded the Applicant's appeal; and (ii) upheld the Judgment [C-I-19-0002] of 19 August 2019 of the Specialized Panel of the SCSC.

### **Applicant's allegations**

33. The Applicant alleges that Decision [AC-I-19-0065] of 6 June 2019 of the Appellate Panel of the SCSC, which rejected the Applicant's request for imposition of the preliminary injunction on the disputed property, was rendered in violation of the Applicant's fundamental rights and freedoms guaranteed by Articles 10 [Economy], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution
34. Regarding the alleged violations of Article 31 of the Constitution, the Applicant states that (i) Decision [AC-I-19-0065] of 6 June 2019 of the Appellate Panel "*does not provide legal protection to the claimant*" and that "*such an action is contrary to fundamental human rights and freedoms, in contradiction with Article 10, 41, 42, 53, 54*"; and (ii) Decision [No. Ref. BD-110/7] of 23 November 2018 of the PAK Board of Directors is contrary to the "*basic tender principles*".

35. The Applicant in essence challenges the interpretation of Article 14 of the Tender Rules by the Judgment [AC-I-19-0065] of 6 June 2019 of the Appellate Panel of the SCSC. The Applicant alleges that the competence of the Board of Directors to cancel the tenders is not unlimited and in support of this position also refers to the case law of the SCSC, claiming that in rendering the challenged Decision of the Appellate Panel, it acted contrary to its case law, thus violating the principle of legal certainty. In this context, the Applicant refers to (i) two decisions, namely the Decision [AC-I-14-0257] of 10 September 2015 and the Decision [C-IV-14-5624] of 19 August 2014, referring to “*Summary of the Case Law of the Special Chamber of the Supreme Court of Kosovo, published by the members of the Appellate Panel, volume 2016, page 140- 144*”, which did not submit to the Court; and (ii) Decision [C-I-19-0008] of 20 August 2019 of the Specialized Panel of the SCSC and which he submitted to the Court through a letter of 4 October 2019.
36. The Applicant justifies the request for the imposition of an interim measure by stating that (i) re-tendering of the disputed property would result in “*immediate and irreparable damage for the claiming party*”; and (ii) re-tendering would allow a third party to be declared the winner and that “*such an action for the claimant would be irreparable damage as there would be no possibility of a reasonable indemnity by a financial compensation*”.
37. Finally, the Applicant requests the Court that (i) his request for interim measure be approved; and (ii) to prohibit the PAK from taking actions for re-tendering the disputed property, until the referral is reviewed on merits.

## **Relevant Constitutional and Legal Provisions**

### **Constitution of the Republic of Kosovo**

#### **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.*

(...)

### **European Convention on Human Rights**

#### **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. 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.*

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

**Article 55  
Preliminary injunctions**

*1. Upon application by a party, the Special Chamber may issue a preliminary injunction provided the applicant gives credible evidence that immediate and irreparable damage will result to the party if no preliminary injunction is granted. Damage shall only be deemed to be “irreparable” if it cannot reasonably be compensated with an award of monetary compensation. The request for a preliminary injunction is to be submitted together with a claim, or if submitted subsequent to a claim that has been filed, shall refer to that claim.*

**Law No. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters**

**Article 61  
Security measures**

*1. Upon the submission of the proposal by a party, the Special Chamber may install a security measure provided that gives credible evidence on the existence of a claim or his subjective right and that irreparable damage will result to the party if the security measure is not granted. Damage shall only be deemed to be “irreparable” if it cannot reasonably be compensated with an award of monetary compensation. The proposal for the installment of the security measure is to be submitted together with a claim, or if submitted subsequent to a claim/lawsuit that has been filed, then it shall refer to that claim/lawsuit.*

**Tender General Rules (25 September 2017)**

**Article 14  
Approval and rejection of bids for tendered assets/subsidiaries**

*14.1 The Board of Directors decides on the approval of sales if during the period for submission of bids three (3) and more bids have been received.*

*[...]*



*14.3 According to its assessment, the Board decides on the rejection of the bid or the cancellation of the tender in the circumstances presented below:*

*a) If according to the Board's assessment the highest bid price is not reasonable compared to the average price of previous sales.*

*b) If the Agency accepts indications or suspects any collusion between the bidders or any other illegal or improper activity incurred in connection with the bidding process.*

(...)

### **Admissibility of the Referral**

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

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

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

[...]

*7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

40. In the following, the Court also refers to the admissibility criteria as provided by Law. In this regard, the Court further 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..."*

41. As to the fulfillment of these criteria, the Court notes that the Applicant has fulfilled the requirements established in paragraph 7 of Article 113 of the Constitution, as he is an authorized party; he challenges an act of a public authority, namely Decision [AC-I-19-0065] of 6 June 2019 of the Appellate Panel of the SCSC and has exhausted all legal remedies provided by law. The Applicant also clarified the fundamental rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines provided by Article 49 of the Law.
42. The Court will further refer to the admissibility criteria established in its Rules of Procedure. In this regard, the Court notes that the Applicant has fulfilled the admissibility criteria established in items a), b), c) and d) of paragraph 1 of Rule 39.
43. However, in the circumstances of the present case, the Court also refers to (i) item (b) of paragraph 3 of Rule 39, according to which the Court may consider a referral inadmissible if the latter is incompatible *ratione materiae* with the Constitution.; and (ii) paragraph 2 of Rule 39, according to which, 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. The assessment of the first, in the circumstances of the present case is important because the challenged decision is connected by the Applicant with the request for a preliminary injunction and consequently enters the scope of the "*preliminary proceedings*". In such cases, based on the case law of the European Court of Human Rights (hereinafter: the ECtHR), the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR), in principle, are not applicable, unless the circumstances of the case meet certain criteria established in the case law of the ECtHR and the Court.
44. Consequently and in the following, in order to determine the admissibility of the referral, the Court must first (i) assess whether in the circumstances of the present case, Article 31 of the Constitution, in conjunction with Article 6 of the ECHR are applicable, thus resulting in meeting the requirement set out in item b) of paragraph 3 of Rule 39 of the Rules of Procedure; and if this is the case, (ii) to consider whether the Applicant's referral is manifestly ill-founded on

constitutional basis or not, in accordance with paragraph 2 of Rule 39 of the Rules of Procedure..

***I. As to item b) of paragraph 3 of Rule 39 of the Rules of Procedure***

45. The Court initially recalls the content of this rule as follows:

*(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;*

46. As noted above, in the circumstances of the present case, the Court must consider the fulfillment of the criteria set out in item (b) of paragraph 3 of Rule 39 of the Rules of Procedure, according to which the Court may consider a referral inadmissible if the latter is incompatible *ratione materiae* with the Constitution, because the court proceedings that resulted in the challenged Decision had for the subject matter an “*interim measure*” and accordingly dealt with “*preliminary proceedings*”. Based on the case law of the ECtHR and of the Court, Article 31 of the Constitution in conjunction with Article 6 of the ECHR is, in principle, are not applicable regarding “*preliminary proceedings*”.

47. Therefore, to ascertain whether this referral is compatible *ratione materiae* with the Constitution, the Court will first refer to the general principles set out in the ECtHR case law and the case law of the Court regarding the applicability of 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*” and subsequently, will apply the latter in the circumstances of the present case in order to determine this applicability.

*(i) Applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in the “preliminary proceedings”*

48. In this regard, the Court recalls that the general principles regarding the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in “*preliminary proceedings*” are established by the Court in cases KI122/17, Applicant, *Ceska Exportni Banka A. S.*, Judgment of 30 April 2018; and KI150/16, Applicant *Mark Frrok Gjokaj*, Judgment of 31 December 2018. The general principles set out in these two judgments are based on the case of the ECtHR, *Micallef v. Malta*, Judgment of 15 October 2009.

49. The Court notes that the relevant case law of the ECtHR and of the Court clarify the general principles on the basis of which the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in the “*preliminary proceedings*” is limited. In determining whether the circumstances of a case exceed these limitations, namely in determining whether the circumstances of a particular case meet the criteria for the applicability of procedural guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court should apply

these principles based on the case law of the ECtHR and mainly on the above-mentioned case of the ECtHR *Micallef v. Malta*.

50. In this regard, the Court first recalls that the scope of Article 6 of the ECHR, applies to proceedings that define “*civil rights or obligations*”. (See case of the ECtHR: *Ringeisen v. Austria*, Application No. 2614/65, Judgment of 22 June 1972). Therefore, in order that Article 6 is applicable in the circumstance of a case there must be a “*dispute*” over a “*civil right*” and which, in principle, is determined through the applicable laws. (See the ECtHR case, *Micallef v. Malta*, cited above, paragraph 74; and case of the Court KI150/16, Applicant *Mark Frrok Gjokaj*, cited above, paragraph 63).
51. The Court further emphasizes that, in principle, based on the ECtHR case law, 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, in principle, do not fall within the ambit of such protection under Article 6 of the ECHR. (See the ECtHR case *Micallef v. Malta*, cited above, paragraph 75 and the references stated therein).
52. However, by Judgment *Micallef v. Malta*, the ECtHR altered its previous approach regarding non-applicability of procedural safeguards of Article 6 of the ECHR in the “*preliminary proceedings*”. By this Judgment, the ECtHR (i) explained that 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, and consequently, frequently interim proceedings decide the same “*civil rights or obligations*” and have the same resulting long-lasting or permanent effects. (See ECtHR case, *Micallef v. Malta*, cited above, paragraph 79); and (ii) determined the criteria on the basis of which the applicability of Article 6 of the ECHR in the “*preliminary proceedings*” should be assessed. (See ECtHR case, *Micallef v. Malta*, cited above, paragraphs 83-86).
53. Regarding the criteria that must be met in order for the procedural guarantees of Article 6 of the ECHR to be applicable, the ECtHR stated that: (i) *the “preliminary procedure” should cover a “civil right”* (see, in this regard, the ECtHR case, *Micallef v. Malta*, cited above, paragraph 84 and references mentioned therein); and (ii) this procedure should effectively determine the respective civil right. (See, in this regard, the ECtHR case, *Micallef v. Malta*, cited above, paragraph 85 and references mentioned therein).
54. Therefore, the Court must further assess whether these two criteria are met in the circumstances of the present case, thus enabling the applicability of the procedural guarantees set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

*(ii) Application of these principles in the circumstances of the present case*

55. The Court recalls that the circumstances of the present case are related to a Decision of the Board of Directors of the PAK, which had annulled the tender in which the Applicant submitted the highest price based on the authorizations

set out by Law No. 04/L-034 on the Privatization Agency of Kosovo and amended through the respective amendments (hereinafter: Law on PAK) and Tender Rules.

56. The possibility of initiating the court proceedings in relation to this Decision is also determined through the cited laws and rules. These legal remedies enable the Applicant to challenge the decision regarding the right acquired over the disputed property, thus resulting in the existence of a civil right included in the circumstances of the present case. Furthermore, the purpose of the preliminary injunction is to ensure, at least for a certain period of time, the same right that is challenged in the contested procedure regarding the merits of the case. Consequently, the Court must find that the first requirement for the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the relevant preliminary procedures is met. The Court further states that in the circumstances of the present case, the preliminary injunction is decisive for this right because it is the only possible mechanism for the Applicant to prohibit the sale of the disputed property through the new tender wave announced by the PAK, until the SCSC decides on its case initiated through the claim of 21 January 2019. Consequently, the Court must find that the second requirement for the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the relevant preliminary proceedings, is met.
57. In this regard, the Court recalls that the Specialized Panel of the SCSC by the Decision [C-I-19-0002] of 7 May 2019, also emphasized the existence of the civil right and its determining nature in the circumstances of the present case. Moreover, the same finding was reached by the Court in assessing the constitutionality of the Decision [AC-I-19-0007] of 14 March 2019 of the Appellate Panel of the SCSC in case KI81/19, Applicant *Skender Podrimqaku* (hereinafter: case of the Court KI81/19).
58. Therefore, taking into account that the civil right included in the “*preliminary proceedings*”, namely the preliminary injunction and its decisive nature for the civil right in question, the Court finds that the circumstances of the case, based on its case law and that of the ECtHR, 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.
59. Therefore, the Court must find that the Applicant’s Referral is compatible *rationae materie* with the Constitution and in the following, as noted above, will assess whether this referral is manifestly ill-founded on constitutional basis.

## **II. Regarding paragraph 2 of Rule 39 of the Rules of Procedure**

60. The Court initially recalls the content of this rule as follows:

*“(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”.*

61. In addition, the Court recalls that the circumstances of the present case are related to the privatization procedures through liquidation conducted by the PAK and the terms and criteria for concluding sales contracts for the respective bidders. As explained above, the Applicant offered a bid for unit no. 37 in the wave of privatization no. 42 and was notified through the PAK that (i) he was selected as the bidder with the highest price offered; and that (ii) the decision on the sale of the respective asset or not would be taken by the Board of Directors of the PAK. Subsequently, the Applicant was notified that pursuant to item a) of paragraph 3 of Article 14 of the Tender Rules and under which the Board of Directors may cancel the tender if “*the highest bid price is not reasonable compared to the average price of previous sales*”, the PAK Board decided to cancel the relevant tender. This Decision was challenged by the Applicant in the SCSC. While the latter has not yet decided on the merits of the case, the court proceedings so far and those that are challenged before the Court, are related to the request for a preliminary injunction and through which it would be impossible to sell the disputed asset until the resolution of merits of the case. The SCSC rendered four (4) decisions regarding the request for this order. This request was initially approved by the Specialized Panel and then annulled by the SCSC Appellate Panel through the Decision [AC-I-19-0065] of 6 June 2019, Decision which is challenged before the Court. The request for a preliminary injunction was repeated by the Applicant, when the PAK announced a new wave for sale of the disputed property, and this request was also rejected by the Specialized Panel and the Appellate Panel of the SCSC. Before the Court, the Applicant challenges the findings of the regular courts, alleging, in essence, that the challenged Decision of the Appellate Panel was rendered in violation of the (i) Tender Rules; and (ii) the case law of the SCSC, resulting in a violation of Article 31 of the Constitution.
62. Regarding the allegations related to the issuance of the challenged Decision in contradiction with the Law on PAK and the Tender Rules, the Court considers that (i) the Applicant has built his case on the basis of legality, namely on the determination of facts and erroneous interpretation of the law applicable by the regular courts; moreover that (ii) all the allegations of the Applicant submitted before this Court regarding the preliminary injunction, were presented also before the Specialized Panel and the Appellate Panel of the SCSC, and the latter have been reviewed and reasoned by them.
63. More specifically, with regard to the first case, namely the allegations regarding the legality of the challenged Decision, the Court recalls that it has consistently stated that such matters do not fall within the jurisdiction of the Court and, therefore, cannot in principle, be examined by the Court. (See, in this regard, *inter alia*, the cases of the Court KI99/19, Applicant *Persa Raičević*, Resolution on Inadmissibility of 19 December 2019, paragraph 37; KI154/17 and 05/18 Applicants *Basri Deva, Afërdita Deva and the Limited Liability Company “Barbas”*, Resolution on Inadmissibility, of 12 August 2019, paragraph 60; KI192/18, Applicant, Kosovo Energy Distribution and Supply Company, KEDS jsc, Resolution on Inadmissibility, of 16 August 2019, paragraph 49).
64. The Court has consistently reiterated that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated 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 result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See ECtHR case, *García Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, also cases of the Court, KI99/19, cited above, paragraph 38; KI154/17 and KI05/18, cited above, paragraph 61; and KI192/18, cited above, paragraph 50).

65. The Court also, based on the case law of the ECtHR, has consistently reiterated that in principle and except in cases where it is argued that “*the law was interpreted and applied in an obviously arbitrary manner*” which would result in the “*arbitrary conclusions*” or “*manifestly unreasonable*” for the respective applicants, its task is to assess whether the proceedings before the courts, in their entirety, are in compliance with the Constitution and the ECHR. (With regard to the fundamental principles concerning the obviously erroneous interpretation and application of law, see, *inter alia*, the case of the Court KI154/17 and 05/18, cited above, paragraphs 60 to 65 and the references used therein).
66. In this regard, the Court notes that the Applicant does not substantiate that the applicable law in his case has been interpreted and applied in an obviously erroneous manner, and based on the case file, the Court considers that this is not the case in the circumstances of the present case. Furthermore, the Court notes that the proceedings before the SCSC and the Appellate Panel, in their entirety, were not unfair or arbitrary. (See, in this regard, the case of the ECtHR, *Shub v. Lithuania*, Decision of 30 June 2009).
67. In this context and further, the Court relates to the second case identified above, namely the fact that the allegations brought before the Court have also been raised before the regular courts, which have already been reviewed and reasoned by them.
68. In this regard, the Court notes that the main reason for the rejection of the request for a preliminary injunction of the Applicant, namely the modification of the Decision [C-I-19-002] of 7 May 2019 of the Specialized Panel of the SCSC through the challenged Decision of the Appellate Panel relates to the fact that (i) the notice for the highest bidder is not a notice of sale of the asset and that such a decision belongs to the Board of Directors of the PAK; (ii) pursuant to paragraph 3 of Article 14 of the Tender Rules, the Board of Directors of the PAK has the competence to cancel the tender in the circumstances specified in letters a) and b) thereof; and (iii) the claimant, namely the Applicant, failed to provide evidence that would substantiate the damage caused. In the context of the latter, the Appellate Panel reasoned as follows:

*“[...]the appellant neither before the Specialized Panel nor before the Appellate Panel provided any evidence to substantiate the damage caused to him. Furthermore, every participant in a tender procedure has it clear, according to Article 14.3 of the Tender Rules, that only the PAK Board has the authority to approve a sale. While the sale may not be approved even*

*due to the low price offered. Therefore, despite the claimant's expectations, especially after the announcement of the bid with the highest price, the cancellation of the tender cannot be considered as damage caused and therefore no compensation can be requested precisely due to Article 14.3 of the Tender Rules, which provide for the cancellation of the sale due to unreasonable price. The claimant signed the tender rules and this means that he also agreed on the possibility of canceling the tender".*

69. In addition, by the challenged Decision, the Appellate Panel also addressed the Applicant's allegations regarding (i) the unlawfulness of the PAK Decision, namely the interpretation of item a) of paragraph 3 of Article 14 of the Tender Rules by the PAK; (ii) average sale price; and (iii) the discretion of the PAK Board regarding the sale of assets. The Appellate Panel, in this context, clarified as follows:

*"The Appellate Panel does not accept the claimant's allegation that the respondent has erroneously applied Article 14.3 (a) of the Tender General Rules nor his allegation that the reasoning given by the respondent for the cancellation of the sale is unlawful, because the claimant failed to prove these allegations before the Court with any concrete evidence.*

*The Appellate Panel notes that in this case there is no evidence in the file and neither the claimant claims that the PAK annulled the sale of the asset in question more than once. With this action, the PAK aimed to get a higher price in the new tender procedure for the asset in question and this is a right and its legitimate aim and there is no legal basis to challenge it. Certainly, in the ongoing proceedings, when examining the merits of the claim, it will be assessed whether this action was correct.*

*The claimant in his submission submitted on 3 June 2019, by which he responded to the complaint of the PAK, stated that the average sales price for that area from past sales was 1097 euro per m<sup>2</sup>, while he offered the price of 1766 euro per m<sup>2</sup>. This claimant's allegation given in this submission has not been confirmed by any concrete evidence, therefore the Appellate Panel has not taken into account this unsubstantiated allegation.*

*The Appellate Panel states that for similar legal situations as the respondent has acted in this case, in its jurisprudence so far, it has maintained the same legal position regarding the discretion of the PAK Board".*

70. In this regard, the Court considers that the Appellate Panel of the SCSC provided a reasoned response to the allegations of the Applicant regarding the interpretation and application of the relevant rules of procedural and substantive law in the circumstances of the present case.
71. The Court also recalls that the Applicant alleges that the SCSC acted contrary to its case law when it rendered the challenged Decision. In this context, and as explained above, the Applicant refers to (i) two decisions, namely the Decision [AC-I-14-0257] of 10 September 2015 and Decision [C-IV-14-5624] of 19



August 2014, with reference to “*Summary of the Case Law of the Special Chamber of the Supreme Court of Kosovo, published by the members of the Appellate Panel, volume 2016, page 140- 144*” and which he has not submitted to the Court; and (ii) the Decision [C-I-19-0008] of 20 August 2019 of the Specialized Panel of the SCSC and which he submitted to the Court.

72. The Court has established general principles regarding the lack of consistency, namely the divergence in the case law in the context of procedural guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in case KI35/18, Applicant *Bayerische Versicherungsverband*, Judgment of 6 January 2020 (hereinafter: case of the Court KI35/18).
73. In this case, the Court initially clarified that it is the duty of any applicant to substantiate divergence in the relevant case law, as it is not its function to compare different decisions of the regular courts, even if taken in apparently similar proceedings. It must respect the independence of the courts. Moreover, in such cases, namely when alleging the constitutional violations of fundamental rights and freedoms as a result of divergences in the case law, the Applicants should submit to the Court relevant arguments concerning the factual and legal similarity of the cases alleging that they have been resolved differently than the regular courts, thus resulting in a divergence in case law and which may have resulted in a violation of their constitutional rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. (See, in this respect, the case of the Court KI35/18, cited above, paragraph 76).
74. In addition, in case KI35/18, the Court clarified the basic principles related to the lack of consistency, namely divergence in the case law, as well as the relevant criteria on the basis of which the ECtHR assesses whether the alleged divergence in the case law constitutes a violation of Article 6 of the ECHR, including whether: (i) the divergences in case law are “*profound and long-standing*”; (ii) the domestic law establishes mechanisms capable of resolving the relevant divergence; and (iii) these mechanisms have been implemented and with what effect.
75. In this case, the Court found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in assessing 9 (nine) cases of the Supreme Court issued over a period of 5 (five) years and after finding that (i) there have been “*profound and long-standing divergences*”; (ii) the mechanism of the Supreme Court for the harmonization of case law existed; but that (iii) the aforementioned mechanism was not used. (See case of the Court KI35/18, cited above, paragraph 70 and 110-111). However, in this case, the Court also clarified that there could not be held “*profound and long-standing divergences*”, in comparing only 2 (two) cases even if the latter can be contradictory. In this case, in such a circumstance which includes only a decision which was contrary to the case law of the Supreme Court, the Court did not find that the principle of legal certainty has been violated, dealing with such a case, based on the case law of the ECtHR, as an isolated case. (See, for more on this context, paragraphs 104 and 114 of case of the Court KI35/18).

76. Similarly, in the circumstances of the present case, the Applicant submitted to the Court only one decision, namely the Decision [C-I-19-0008] of 20 August 2019 of the Specialized Panel of the SCSC, also by not substantiating the factual and legal connection of the two cases. Furthermore, as explained above, based on its case law and that of the ECtHR, the Court cannot find any violation of the principle of legal certainty based solely on the comparison of the two decisions, because in such circumstances, it cannot be concluded that there have been “*profound and long-standing divergences*” in a relevant case law, failing to meet the first requirement set by the case law of the ECtHR to reach such a finding.
77. Finally, the Court also recalls that the Applicant also alleges violations of Articles 10, 41, 42, 32, 53 and 54 of the Constitution.
78. As to the alleged violation of Article 10 of the Constitution, the Court recalls that it is a general principle that Articles of the Constitution which do not directly regulate fundamental rights and freedoms do not have an independent effect, as their effect applies solely to the “*enjoyment of rights and freedoms*” guaranteed by the provisions of Chapters II [Fundamental Rights and Freedoms] and III [Rights of Communities and Their Members] of the Constitution. Therefore, these articles cannot be applied independently unless the facts of the case fall within the scope of at least one or more of the provisions of the Constitution relating to “*the enjoyment of human rights and freedoms*” (See, in this regard, cases of the Court KI16/19, Applicant *Bejta Commerce*, Resolution on Inadmissibility, of 29 November 2019, paragraph 42; and KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility, of 23 January 2017, paragraph 128).
79. In addition, despite the fact that Article 53 of the Constitution is an integral part of Chapter II of the Constitution, the latter only stipulates that human rights and fundamental freedoms guaranteed by the Constitution are interpreted in accordance with the court decisions of the ECtHR. The Court adheres to this constitutional obligation and has applied the relevant case law of the ECtHR even during the assessment of the Applicant's allegations by this Decision.
80. Whereas, regarding the alleged violations of Articles 32, 41, 42 and 54 of the Constitution, the Court reiterates its position according to which only the mention of an article of the Constitution, without clear and adequate reasoning as to how that right has been violated, is not sufficient as an argument to activate the machinery of protection provided by the Constitution and the Court, as an institution that cares for the respect of human rights and freedoms. (See, in this context, the cases of the Court KIo2/18, Applicant *Government of the Republic of Kosovo [Ministry of Environment and Spatial Planning]*, Resolution on Inadmissibility of 20 June 2019, paragraph 36; KI95/19, Applicant *Ruzhdi Bejta*, Resolution on Inadmissibility of 8 October 2019, paragraphs 30-31; and KI99/19, Applicant *Persa Raičević*, Resolution on Inadmissibility of 7 November 2019, paragraph 52).
81. Such a position of the Court is based on the case law of the ECtHR, on the basis of which, unreasoned allegations or complaints, which are not substantiated

with arguments and evidence are declared inadmissible as manifestly ill-founded. (See ECtHR Guide of 30 April 2019 on Admissibility Criteria; part I. Procedural Grounds for Inadmissibility; A. Manifestly ill-founded applications; 4. Unreasoned complaints: lack of evidence, paragraphs 280 to 283).

82. Therefore, taking into account the abovementioned explanations, the Court emphasizes that the Applicant's allegations were addressed and clarified by the regular courts, and that in the entirety of the proceedings, it does not follow that the regular courts acted arbitrarily or have interpreted the applicable law in an arbitrary manner, moreover, the Applicant has not sufficiently substantiated and reasoned his allegations of violation of fundamental rights and freedoms guaranteed by the Constitution and the ECHR.
83. The Court also reiterates that in accordance with the case law of the ECtHR, the "fairness" required by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, is not "substantive" fairness, but "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court. (See, in this regard, the case of the Court No. KI99/19 Applicant: cited above, paragraph 47; and KI118/18, Applicant *Eco Construction l.l.c*, Resolution on Inadmissibility of 10 October 2019, paragraph 48).
84. The Court also reiterates that the Constitution, and the ECHR, do not guarantee anyone a favorable outcome in the course of a judicial proceeding nor provide for the Court, in principle, to challenge the application of substantive law by the regular courts of a civil dispute, where often one of the parties wins and the other loses. (See, in this regard, cases of the Court KI99/19, cited above, paragraph 48; KI118/18, cited above, paragraph 49; and KI118/17, *Şani Kervan and others*, Resolution on Inadmissibility of 17 January 2018, paragraph 36).
85. The Court reiterates that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts cannot of itself raise a substantiated claim of violation of a constitutional right. (See, ECtHR case, *Mezotur - Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).
86. Therefore, based on the foregoing and having regard to the special case characteristics, the allegations raised by the Applicant and the facts presented by him, the Court also referring to the standards established in its own case law in similar cases and in the case law of the ECtHR, finds that the Applicant has not sufficiently proved and substantiated his allegations of a violation of his constitutional rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and Articles 10, 41, 42, 32, 53 and 54 of the Constitution.
87. Therefore, the Court finds that the Referral is manifestly ill-founded on constitutional basis and is declared inadmissible, in accordance with paragraph 7 of Article 113 of the Constitution, Article 47 of the Law and paragraph 2 of Rule 39 of the Rules of Procedure.

## **The request for an interim measure**

88. The Court recalls that the Applicant submitted before it the request for imposition of the interim measure by which the sale of the disputed property would be prohibited until the case is decided on merits by the Specialized Panel of the SCSC.
89. The Court has already concluded that the Applicant's Referral is to be declared inadmissible as manifestly ill-founded on constitutional basis.
90. Therefore, in accordance with paragraph 1 of Article 27 (Interim Measures) of the Law and item a) of paragraph 4 of Rule 57 (Decision on Interim Measures) of the Rules of Procedure, the Applicant's request for interim measure is to be rejected, as the latter cannot be the subject of review, as the referral is declared inadmissible (See, in this regard, the cases of the Court, KI159/18, Applicant *Azem Duraku*, Resolution on Inadmissibility of 6 May 2019, paragraphs 89-91; KI19/19 and KI20/19, Applicants *Muhamet Thaqi and Egzon Keka*, Resolution on Inadmissibility of 29 July 2019, paragraphs 53-55).

## **FOR THESE REASONS**

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Article 20, 27 and 47 of the Law and Rule 39 (2), 57 and 59 (2) of the Rules of Procedure, on 11 March 2020, unanimously:

## **DECIDES**

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for interim measure;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and
- V. This Decision is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Gresa Caka-Niman

Arta Rama-Hajrizi



*This translation is unofficial and serves for information purposes only*