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

Prishtina, on 24 April 2020
Ref. no.:RK1552/20

This translation is unofficial and serves for information purposes only

RESOLUTION ON INADMISSIBILITY

in

Case No. KI42/18

Applicant

Asija Muslija

Constitutional review of Notification KMLC No. 09/2018 of the State Prosecutor, of 2 March 2018 and Decision AC. No. 3538/2017 of the Court of Appeals of the Republic of Kosovo, of 8 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, 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 is submitted by Asija Muslija, from the Municipality of Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Notification [KMLC. No. 09/2018] of 2 March 2018 of the State Prosecution of the Republic of Kosovo (hereinafter: the State Prosecution) and Decision [AC. No. 3538/2017] of 8 December 2017 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals).

Subject matter

3. The subject matter is the constitutional review of the Notification and the abovementioned Decision which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Articles 5 [Languages], 24 [Equality Before the Law] 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).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] 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).

5. 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

6. On 27 March 2018, the Applicant submitted the Referral to the Court.

7. On 29 March 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

8. On 5 April 2018, the Court notified the Applicant about the registration of the Referral and requested that he completes the official form of the Court or its equivalent and submit to the Court the Decision of the Basic Court in Prizren (hereinafter: the Basic Court) and to whom he referred at the initial request, but did not submit it to the Court.

9. On 30 April 2018, the Applicant submitted the required documents to the Court.

10. On 7 May 2018, the Applicant submitted another additional document to the Court.

11. On 16 June 2018, the term of office of the Judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the term of office of the judges: Altay Suroy and Ivan Čukalović ended.

12. 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.

13. On 20 June 2019, the Court sent a copy of the Referral to the Court of Appeals and the State Prosecutor's Office.

14. On 26 June 2019, the Court requested the Basic Court to submit a copy of the entire file to the Court, within 15 (fifteen) days of the receipt of the Court's letter. Within the set time limit, the Court did not receive the file requested by the Basic Court.

15. On 3 July 2019, as the mandate of the abovementioned four judges as judges of the Court ended, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision No. GJK. 42/18 on the replacement of the judges of the Review Panel, and the latter was appointed composed of: Selvete Gërxhaliu Krasniqi (Presiding), Safet Hoxha and Radomir Laban.

16. On 25 July 2019, the Court sent to the Basic Court a repeated request for the submission of a copy of the complete file relating to the Referral submitted to the Court, KI42/18. The Court reminded the Basic Court about their obligation to respond to its request set out in Article 26 [Cooperation with other Public Authorities] of the Law. The Court set an additional period of 7 (seven) days for the submission of the complete copy of the file in question.

17. On 15 August 2019, the Basic Court submitted to the Court a copy of the requested file.

18. On 28 August 2019, the Court sent a copy of the Referral to the interested parties H.M. and the Branch in Prizren of ProCredit Bank Kosovo (hereinafter: the ProCredit Bank), both parties sued by the Applicant in the proceedings before the regular courts. In that case, the Court gave the interested parties the opportunity to submit their comments regarding the Referral, if any, within a period of 7 (seven) days from the receipt of the Court's letter.

19. On 6 September 2019, the Court received the several comments from ProCredit Bank, which are reflected in paragraphs 47-52 of this Decision. Within the set time limit, the Court did not receive any comments from the interested party H.M.

20. On 6 March 2020, the Deputy President of the Court, Judge Bajrami Latifi, pursuant to subparagraph 1.2 of paragraph 1 of Article 18 (Exclusion of a

Judge) of the Law and Rule 9 (Recusal Procedures) of the Rules of Procedure, requested exclusion from decision-making in case KI42/18.

21. On 11 March 2020, the President of the Court approved the abovementioned request, and based on paragraph 4 of Rule 9 of the Rules of Procedure, this decision was communicated to all judges.

22. On 11 March 2020, the Court considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

23. On 2 December 2011, H.M. [the Applicant's spouse] and A.M. [brother of H.M.], as a mortgagors, signed with ProCredit Bank a Mortgage Contract, in which the cadastral parcel P-71813068-07517-2 with a total area of 319 m2 and which, according to the case file, was evidenced on behalf of H.M. in parts of 1/3 (one third) and on behalf of A.M. in parts of 1/3 (one third). In the Contract in question, A.M. and H.M. were considered the first and second mortgagors. Their spouses, including the Applicant, did not sign the Mortgage Contract.

24. On 5 December 2011, the Mortgage Contract was registered in the Register of Immovable Property Rights by the Decision [No. 07-027-13612/H] of the Municipal Cadastre Office in Prizren.

25. On 6 December 2011, H.M. as a borrower and A.M., R.M. and A.M., namely his brother and their spouses, including the Applicant, as co-borrowers signed the Loan Agreement. Based on the case file, this loan and mortgage contracts were amended on 24 November 2014 and 28 April 2015, the amendments through which the main debt, interest and loan payment plan were restructured. Spouses R.M. and A.M., including the Applicant, also signed in a capacity of the co-borrowers.

26. On 19 January 2016, according to the case file and taking into account that the Loan Agreement was not respected by the borrowers, and consequently by the co-borrowers, ProCredit Bank addressed the Private Enforcement Agent with a proposal for enforcement.

27. On 1 June 2016, the Private Enforcement Agent issued the Conclusion [P. No. 10/2016] by which assigned the sale of the mortgaged immovable property, sceduling the first session for sale, on 1 July 2016.

28. On 30 June 2016 the Applicant filed a lawsuit against H.M,, namely her husband, as the first respondent, and ProCredit Bank as the second respondent, requesting the annulment of the abovementioned Mortgage Agreement and certification of ownership over the respective cadastral parcel, as the spouse of H.M. In the reasoning of her lawsuit, the Applicant stated that her husband acted without her knowledge, when he mortgaged their joint property. Consequently, the Applicant requested the Basic Court to (i) impose an interim security measure, through which all enforcement actions in the

enforcement proceedings will be terminated; (ii) to approve the statement of claim; (iii) to confirm her ownership of the property/immovable property which is mortgaged; (iv) to order the cadastral authorities to take the necessary steps in accordance with the decision of the Basic Court; and, (v) to declare invalid the Mortgage Agreement of 2 December 2011.

29. On 14 July 2016, the Basic Court, by Judgment [C. No. 651/16], approved as grounded the proposal of the Applicant for the imposition of interim security measure and prohibited the ProCredit Bank from exercising its right as a creditor and to sell the immovable property left in the mortgage, through the Mortgage Agreement. The Basic Court reasoned the approval of this proposal, with the fact that it is reasonable to believe that without the imposition of this measure "*it will be significantly difficult to realize the statement of claim by the claimant, provided by Article 297.1 item b) of the LCP"* and that there is a real risk *"that without the imposition of the proposed interim measure, the claimant [the Applicant] could suffer irreparable damage*",

30. On 22 and 27 July 2016, ProCredit Bank filed (i) its objection to the abovementioned Judgment of the Basic Court regarding the interim security measure, emphasizing, *inter alia*, that the claimant, namely the Applicant, signed the loan agreement and subsequent amendments, in the capacity of a co-borrower, and that the relevant immovable property was registered in the mortgage register by the Decision of the Municipal Cadastre in Prizren; and (ii) respond to the Applicant's lawsuit of 30 June 2016, requesting the Basic Court to reject the lawsuit of the claimant, namely the Applicant, as ungrounded.

31. In the meantime, without deciding on the aforementioned objection of the ProCredit Bank regarding the imposition of the security measure, the Basic Court on 26 September 2016, by another Judgment with the same number [C. No. 651/16] , decided that the Applicant's lawsuit should be considered as withdrawn. This is due to the fact that the Applicant, although duly notified about the main hearing where her lawsuit would be reviewed, did not appear before the Basic Court and, according to the latter, pursuant to paragraph 3 of Article 423 of Law no. 03/L-006 on Contested Procedure (hereinafter: the LCP), in cases where "*if the plaintiff does not come to the main hearing session even though he's been summoned regularly*", the lawsuit is considered withdrawn.

32. On 19 December 2016, the Applicant filed a request for return to previous situation with the Basic Court, requesting that the aforementioned Decision of the Basic Court be annulled, by which her lawsuit was considered as withdrawn and to continue with the review of the lawsuit.

33. On 28 December 2016, the Basic Court, by another Judgment, which also has the same number [C. No. 651/16], approved as grounded the Applicant's request for return to previous situation and annulled its previous Decision, by which the lawsuit was considered withdrawn. By this Decision, the Basic Court emphasized that "*the contested process in this legal matter is returned to the state in which it was before the inaction*". The Basic Court considered that the Applicant's request for return to previous situation was justifiable because it

was established that the party was not duly notified and therefore the reasons set out in Article 129 of the LCP, according to which the request for return to the previous situation must be approved. It follows from the case file that this Court Decision was compiled in Bosnian and Albanian.

34. On 23 February 2017, the Basic Court, by the Decision bearing the same number as the other three aforementioned Decisions, namely [C. No. 651/16], examined the objection filed by ProCredit Bank on 22 July 2016 and annulled the interim security measure imposed on 14 July 2016, after determining through the objection of the ProCredit Bank that the Applicant in fact signed the Loan Agreement in the capacity of a co-borrower. This Decision, in addition to the annulment of the interim security measure, emphasized that the contested procedure initiated according to the lawsuit of 30 June 2017, will continue based on the provisions of the LCP.

35. Against the aforementioned Decision of the Basic Court, the Applicant filed an appeal with the Court of Appeals on the grounds of violation of the contested procedure provisions, erroneous determination of factual situation and erroneous application of substantive law, with the proposal that the second instance court approves her appeal and annuls the decision of the Basic Court, remanding the case for retrial.

36. On 8 December 2017, the Court of Appeals rendered the Judgment [AC. No. 3538/2017], by which rejected as ungrounded the Applicant's appeal and upheld the Decision [C. No. 651/16] of 23 February 2017 of the Basic Court.

37. On an unspecified date, the Applicant addressed the State Prosecutor with a request to file a request for protection of legality in her case. She also complained that the Decision [AC. No. 3538/2017] of the Court of Appeals was not submitted to her in her native language, namely in Bosnian.

38. On 2 March 2018, the State Prosecutor by the submission [KMLC. No. 09/2018] notified the Applicant that after receiving her proposal, the State Prosecutor's Office requested all case files from the Basic Court and after reviewing them has come to the conclusion that there is no "*sufficient basis, under Article 247, paragraph 1, items a) and b) of the Law on Contested Procedure, to submit this request for protection of legality*". Furthermore, regarding the allegations of the Applicant for the service of the decision in her own language, namely Bosnian, the State Prosecutor stated: "*Regarding the non-submission of the decision of the Court of Appeals in your language, you can address the Basic Court in Prizren with the request that the decision be translated to you".*

39. To date, according to the information available to the Court, the regular courts have decided only on the Applicant's request for an interim security measure, while her initial lawsuit is still pending before the Basic Court.

Applicant's allegations

40. The Applicant alleges that the Notification [KMLC. No. 09/2018] of 2 March 2018 of the State Prosecutor and the Decision [AC. No. 3538/2017] of 8 December 2017 of the Court of Appeals, were rendered in violation of her fundamental rights and freedoms guaranteed by Articles 5 [Languages], 24 [Equality Before the Law] and 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

41. The Applicant challenges the abovementioned Notification of the State Prosecutor, alleging a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to (i) lack of reasoning, namely "*contradictory reasoning*"; and (ii) failure to review evidence in support of the proposal to initiate a request for protection of legality. The Applicant in this context specifically alleges that the State Prosecutor was obliged to examine her evidence in support of the proposal to initiate a request for protection of legality and not to instruct the Applicant to address the Basic Court with a request for translation of the challenged Decision stating the following: "*Regarding the non-submission of the decision of the Court of Appeals in your language, you can address the Basic Court in Prizren with the request that the decision be translated to you*".

42. In support of the allegations of lack of the reasoned court decision, the Applicant referred to the case law of the European Court of Human Rights (hereinafter: the ECtHR), namely the case *Hirvisaari v. Finland*, Judgment of 27 September 2001; while in support of the allegations of non-examination of the evidence presented by the Applicant to the State Prosecutor's Office, she refers to the case law of the ECtHR, namely the cases *De Haes and Gijsels v. Belgium*, Judgment of 24 February 1997 and *Tinelly & Sons Ltd and others and McElduff and others v. the United Kingdom*, Judgment of 10 July 1998.

43. The Applicant challenges the aforementioned Decision of the Court of Appeals, alleging, in essence, a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, stating that the latter has not correctly determined the factual situation, with emphasis on the fact that the Applicant did not give her consent to the Mortgage Contract.

44. The Applicant also alleges violation of Articles 5 and 24 of the Constitution. Regarding the alleged violation of Article 5 of the Constitution, the Applicant states that the Court of Appeals and the State Prosecutor acted in violation of Article 5 of the Constitution, by not submitting the relevant decision in her own language and without taking into account the allegations regarding non-submission of the decision in her own language. In the context of not submitting the challenged Decision of the Court of Appeals in her native language, the Applicant states that (i) due to language "*I was not able through translation with Google translate to identify the essential facts which I would have submitted through the Proposal which I sent to the State Prosecutor for violation of legality*"; and (ii) failure to take this fact into account by the State Prosecutor has resulted in *"absolute violation of all rules on the use of language and even more of the Law on the Use of Languages, the Constitution*

of Kosovo, and the Convention on Human Rights and Fundamental Freedoms".

45. Whereas, regarding the alleged violation of Article 24 of the Constitution, the Applicant, in essence, states that she and ProCredit Bank have not been treated equally, in essence raising issues related to the principle of equality of arms. According to the Applicant's allegation, if the State Prosecutor and the courts "*had taken strict legal approach against me and ProCredit Bank if there is no consent by me to the mortgage, this would not have resulted in such a paradox.*

46. Finally, the Applicant, in essence, requests the Court to declare her Referral admissible and to declare invalid the Notification [KMLC. No. 09/2018] of 2 March 2018 of the State Prosecutor and the Decision [AC. No. 3538/2017] of 8 December 2017 of the Court of Appeals in conjunction with the Decision [C. No. 651/16] of 23 February 2017 of the Basic Court, by remanding her case regarding the imposition of an interim security measure for retrial.

Comments of ProCredit Bank

47. With regard to the Referral in question, ProCredit Bank submitted comments to the Court following the latter's invitation. In essence, ProCredit Bank challenged in entirety all the Applicant's allegations *"as unreasonable and not based on law and the Constitution of the Republic of Kosovo".*

48. According to ProCredit Bank, the challenged Decision of the Court of Appeals [AC. No. 3538/2017] of 8 December 2017 came as a result of complete and correct determination of the factual situation and that in this case "*we are not dealing with no violation*". ProCredit Bank further states that both the Applicant and the case file itself show that the Basic Court initially approved her request for security measure, but later, following the objections submitted by ProCredit Bank, the Basic Court held a hearing, and based on the administered evidence rendered another Decision by which it "*annulled the interim security measure*" which was imposed by the Basic Court through its first decision.

49. Regarding the violation of Article 5 of the Constitution, ProCredit Bank states that the allegation that *"the parties to the proceedings have been denied the right to use their mother tongue"* is ungrounded because, *"as evidenced by the case file, during the entire procedure, the parties have exercised their right to use their native language in the procedure, in which case they have submitted all the documents/submissions in their native language".* Moreover, during the hearings, the parties to the proceedings *"were always provided with an interpreter",* ProCredit Bank emphasizes. The latter considers that the parties to the proceedings have exercised all their rights and have used all legal remedies according to the law in their native language, therefore the regular courts have decided *"in a fair and impartial manner".*

50. With regard to the violation of Articles 24 and 31 of the Constitution, ProCredit Bank states that the fact that the Applicant did not succeed at the end of the

court proceedings where it was decided on the security measure and was not satisfied with the decision to reject such a measure, does not mean that there has been a violation of "*equality before the law or even the right to fair and impartial trial*". According to ProCredit Bank, all parties to the proceedings have been provided with and guaranteed equal protection of their rights and the claims of the Applicant that there has been a violation in this regard are ungrounded. ProCredit Bank also considers that the Applicant was not able to substantiate her allegations of violations with any evidence as grounded.

51. With regard to the Applicant's allegation that she did not give consent to the mortgage, ProCredit Bank stated that the Applicant's allegation that she "*did not give consent to the mortgage of the immovable property*" is ungrounded. She, according to the ProCredit Bank, was a signatory to the loan agreement, no. 20044522 and that all these facts are emphasized by ProCredit Bank *"during the procedure in this case"*.

52. Finally, the ProCredit Bank states as follows: *"We believe that the sole purpose of this complaint/referral is to prolong the case and that they are trying at all costs to prolong the return of the obligations, which she and her husband and other debtors have towards us"*. In this regard, ProCredit Bank proposed to the Court to reject the Applicant's Referral as ungrounded.

Relevant Constitutional and Legal Provisions

The Constitution of the Republic of Kosovo

Article 5
[Languages]

1. *The official languages in the Republic of Kosovo are Albanian and Serbian.*
2. *Turkish, Bosnian and Roma languages have the status of official languages at the municipal level or will be in official use at all levels as provided by law.*

Article 24
[Equality Before the Law]

1. *All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*
2. *No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.*
3. *Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.*

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. 03/L-006 on Contested Procedure, published in the Official Gazette on 20 September 2008, with amendments and supplementation to the Law No. 04/L-118 on Amending and Supplementing the Law No. 03/L-006 on Contested Procedure, published in the Official Gazette on 16 October 2012

Article 6
(amended and supplemented in 2012)

6.1. The official languages shall be used on an equal basis in the contested procedure.
6.2 The Contested procedure proceeds in the official language of the court in accordance with law.
6.3. Any party and participant in the proceedings may use the official language of his or her choice.
6.4. The parties and other participants in the procedure that do not understand or speak the official language of the court shall have the right to speak his or her language or the language that he or she understands.

CHAPTER VI

THE LANGUAGE IN THE PROCEDURE

Article 96

96.1 The party and other participants in the procedure have the right to speak in front of the court their own language or the language they understand.
96.2 If the procedure is not conducted in the language of the party or other participants in the procedure, upon their request shall be provided verbal interpretation into their language or language they understand of all submissions and evidences and of all that is submitted in the court session.
96.3 The parties and other participants in the procedure shall be informed about the right to follow the verbal proceeding in their language through the interpreter. They may waive from the right to interpreter if they declare that understand the language in which is proceeded. The minutes will record that they were instructed about the right to use their language and the statements of parties and other participants about the instructions provided by the court.
96.4 Interpretation is conducted through the interpreter.

Article 97

Calling letters, decisions and other court documents are sent to parties in the official language of the court.

Article 98

The parties and other participants in the procedure shall send claims, appeals and submissions in the official language of the court.

Article 182

182.1 Basic violation of provisions of contested procedures exists in case when the court during the procedure didn't apply or wrong application of any of the provisions of this law, while this has or will impact a rightful legal decision.
182.2 Basic violation of provisions of contested procedures exists always:
(...)
j) if in opposition with provisions of this law the court has refused the request of the party that in the procedure use its own language and writing, and follow the procedure in ones own language, and for this reason complaints;
(...)

Article 247

247.1 The public prosecutor may raise the request for protection of legality:

a) for basic violence of provisions of contested procedure, if the violence has to do with territorial competencies, if the court of the first instance has

issued a verdict without main proceeding, while it was its duty to held a main proceeding, if decided for the request, on which the contest is continuing, or if is in contradiction with the law, the public is excluded from the main proceeding;
b) for wrong application of the material right.

247.2 Public prosecutor can not raise a request for protection of legality because of the claim but not because of a wrong attestation or non complete facts.

Law No. 02/L-37 on the Use of Languages, published in the Official Gazette on 1 March 2007

Article 12
(Use of Languages in Judicial Proceedings)

12.1. Official languages shall be used on an equal basis in judicial proceedings.
12.2. Courts and prosecution bodies, as well as other authorities involved in a criminal procedure, shall, in any proceedings before them, ensure that any person participating in criminal or any other judicial proceedings may use the official language of his or her choice.

Article 13

13.1. Courts shall conduct proceedings in the official language or official languages chosen by parties to the proceedings. At the request of any party to the proceedings, facilities shall be made available for simultaneous interpretation of the proceedings, including evidence given, from one official language into another.
13.2. Courts shall make available facilities for the simultaneous interpretation of proceedings, including evidence given, from one official language into another, where it considers the proceedings to be of general public interest.

Article 14

Courts have a duty to issue documents related to proceedings in the official language(s) chosen for the proceedings and in other official languages if so requested by any party to proceedings or if in the view of the court so doing would serve the general public interest.

Article 16

16.1. Any person participating in criminal or other judicial proceedings who does not speak and understand the language(s) of proceedings, has the right to use his or her language in the proceedings. 1
6.2. Persons belonging to communities whose mother tongue is not an official language and who are participating in criminal or other judicial proceedings have the right to use their mother tongue in the proceedings.

16.3. Courts and prosecution bodies, as well as other authorities involved in a criminal procedure, should provide to persons mentioned in paragraphs 1 and 2 of this article the assistance of an interpreter free of charge.

Admissibility of the Referral

53. 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.

54. 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".*

55. In the following, the Court also refers to the admissibility criteria as provided by Law. In this regard, the Court further refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

> Article 48
> [Accuracy of the Referral]
>
> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".*
>
> Article 49
> [Deadlines]
>
> *"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...".*

56. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely the Notification [KMLC No. 09/2018] of 2 March 2018 of the State Prosecutor and Decision [AC. No. 3538/2017] of 8 December 2017 of the Court of Appeals, after having exhausted all legal remedies provided by law. The Applicant has clarified all rights and freedoms she claims to have been violated, in accordance with the requirements of Article 48 of the Law, and submitted the Referral within the legal deadlines provided by Article 49 of the Law.

57. In the following, the Court also refers to the admissibility criteria set out in its Rules of Procedure. In this respect, the Court notes that the Applicant met the admissibility criteria set out in items (a), (b), (c) and (d) of paragraph 1 of Rule 39.

58. However, in the circumstances of the present case, the Court also refers to: (i) 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; 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.

59. The assessment of the former in the circumstances of the present case is important because the challenged acts and the Applicant's allegations that the latter were rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR are related to a request for a security measure and, consequently, enter into 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 ECHR are in principle not applicable, unless the circumstances of the case meet certain criteria established in the case law of the ECtHR and the Court.

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

60. In this regard, 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;*

61. 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 Notification and 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 6 of the ECHR, and in the context of the Constitution, its Article 31, in principle, are not applicable regarding "*preliminary proceedings*".

62. Therefore, to ascertain whether this referral is compatible *rationae 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.

63. 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.

64. The Court notes that the relevant case law of the ECtHR and of the Court explain 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*.

65. In this regard, the Court first recalls that the scope of Article 6 of the ECHR, applies to proceedings that determine "*civil rights or obligations". (*See case of the ECtHR: *Ringeisen v. Austria,* Judgment of 22 June 1972*).* Therefore, in order that Article 6 is applicable in the circumstances 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).

66. 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).

67. However, by Judgment *Micallef v. Malta*, the ECtHR altered and consolidated 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, the 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).

68. 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 proceedings"* 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).

69. 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.

70. In this regard, the Court recalls that the circumstances of the present case are related to a Notification of the State Prosecutor which rejected the Applicant's proposal to initiate the request for protection of legality against a Decision of the Court of Appeals, which also rejected the Applicant's appeal regarding the imposition of the interim security measure by the Basic Court, and which would prohibit the enforcement proceedings against the mortgaged property in respect of which she claims she had no knowledge and consequently sued her husband and ProCredit Bank. The lawsuit filed by the Applicant regarding the confirmation of ownership in the parcel which was mortgaged through the Mortgage Contract, but also the request for the imposition of an interim security measure, are related to a civil right, namely her right to property. In addition, the purpose of the interim security measure is to ensure, at least for a certain period of time, the civil right, which is also challenged in the contested procedure regarding the merits of the case. Therefore, the Court finds 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 proceedings is met.

71. The Court further states that, in the circumstances of the present case, the interim security measure is decisive for this right, as it is the only possible mechanism for the Applicant to prohibit the sale of the disputed property, through the enforcement procedure mechanisms, already initiated by ProCredit Bank and defined at least through the first Conclusion of 1 June 2016 of the Private Enforcement Agent. The Court recalls the reasoning of the ECtHR in case *Micallef v. Malta*, which also emphasized that as a result of the lengthy court proceedings until the merits of the case are decided, it is often the interim measure that can be equivalent to a decision on merits. 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.

72. Therefore, and as noted above, the Court will further consider whether the Applicant's allegations in the present case are manifestly ill-founded on constitutional basis, as established in paragraph 2 of Rule 39 of the Rules of Procedure.

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

73. 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."*

74. In this regard, the Court initially recalls that in 2011, the Applicant's spouse and his brother signed a Loan Agreement and a Mortgage Agreement. According to the case file and the Applicant's allegations, she signed the Loan Agreement, but not the Mortgage of the Immovable Property, which formal owners are her husband and his brother, but she also claims the ownership. The loan contract was amended several times in 2014 and 2015, respectively, the amendments which were also signed by the Applicant. In 2016, taking into account that the terms of the loan were not respected, the ProCredit Bank initiated the enforcement proceedings against the recipients of the respective loan. The private enforcement agent also set the date of the first public sale, before which the Applicant filed a lawsuit against her husband and ProCredit Bank, requesting the annulment of the Mortgage Agreement and the confirmation of her ownership over the parcel which was mortgaged, also requesting the imposition of the interim security measure. The latter was initially decided by the Basic Court, but after the objection of the ProCredit Bank, the latter was annulled. The Court of Appeals upheld the decision of the Basic Court on the interim security measure, while the State Prosecutor also rejected the proposal of the Applicant to initiate the request for protection of legality against the Decision of the Court of Appeals. All these proceedings are related to the imposition and annulment of the interim security measure, while the contested procedure, based on the case file, is pending before the Basic Court..

75. The Applicant challenges before the Court the decisions of the public authorities, namely the Notification. [KMLC. No. 09/2018] of 2 March 2018 of the State Prosecutor and the Decision [AC. No. 3538/2017] of 8 December 2017 of the Court of Appeals, which upheld the Decision of the Basic Court on the annulment of the interim security measure. In this context, it raises, in essence, three main allegations before the Court. The first allegation relates to (i) the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR; the second allegation of (ii) the right to use the language guaranteed by Article 5 of the Constitution; and, the third allegation to (iii) the right to equality before the law guaranteed by Article 24 of the Constitution.

76. In this context and initially, the Court emphasizes that Article 5 of the Constitution is an integral part of Chapter I [Basic Provisions] of the

Constitution which defines the Basic Provisions on which the constitutional system of the Republic of Kosovo is built, and therefore is not an integral part of Chapter II [Fundamental Rights and Freedoms] or III [Rights of Communities and Their Members] of the Constitution, which explicitly define the Fundamental Rights and Freedoms of the citizens of the Republic of Kosovo, including those of non-majority communities. Based on the case law of the Court, the general principle according to which it has already been consolidated, the articles of the Constitution which do not directly regulate the fundamental rights and freedoms have no independent effect, as their effect is valid in relation to "*the enjoyment of the rights and freedoms*" guaranteed by the provisions of Chapters II and III of the Constitution. (See, in this context, cases of the Court KI136/16, Applicant *Vllaznim Bytyqi*, Resolution on Inadmissibility, of 20 December 2017, paragraph 40; and KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility, of 23 January 2017, paragraph 128 and references mentioned therein). Therefore, Article 5 of the Constitution, but also other articles out of Chapter II and III, cannot independently be applied if the facts of the case do not fall within the scope of one or more of the provisions of the Constitution pertaining to the *"enjoyment of the rights and freedoms"*.

77. In the circumstances of the present case, taking into account that the Applicant's allegations are related to the right to fair and impartial trial and the circumstances of the case are related to the right to use the language of choice in the court proceedings, the Court will deal with the Applicant's allegations of violation of Article 5 of the Constitution in conjunction with Article 31 of the Constitution.

78. Following this clarification, the Court will consider the Applicant's allegations relating to (i) the Notification of the State Prosecutor; and (ii) Decision of the Court of Appeals.

(i) Constitutional review of Notification [KMLC No. 09/2018] of 2 March 2018 of the State Prosecutor

79. The Court recalls that the most substantial allegation of the Applicant relates to (i) the lack of alleged reasoning of the challenged Notification of the State Prosecutor; and (ii) failure to consider evidence and testimonies by the latter.

80. Before addressing both allegations separately, the Court recalls that its case law recognizes other cases in which the constitutionality of the Notifications of the State Prosecutor has been assessed (see, in this respect, the cases of the Court where, *inter alia*, the constitutionality of the Notification of the State Prosecutor has been assessed, by which the request of the parties for initiation of the request for protection of legality in their favor has not been approved, KI139/13, Applicant *Zorica Đokić*, Resolution on Inadmissibility of 24 March 2014; KI107/14, Applicant *Xufe Rracaj*, Resolution on Inadmissibility of 7 November 2014; KI54/14, Applicant *Baton Morina*, Resolution on Inadmissibility of 10 August 2015; KI111/16, Applicant *Asllan Zenuni*, Resolution on Inadmissibility of 22 May 2017; and KI51/18, Applicant *Sahit Musa*, Resolution on Inadmissibility of 11 June 2018). However, in any of the

abovementioned cases the relevant Notification was challenged in the context of the lack of a reasoned court decision contrary to Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

81. In the context of this allegation of lack of reasoning of the challenged Notification of the State Prosecutor regarding her right to use the language in court proceedings, the Court initially refers to its 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 and *Merabishvili v. Georgia*, Judgment of the Grand of 28 November 2017.

82. Furthermore, the fundamental principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including, but not limited to cases KI72/12, Applicant *Veton Berisha and Ilfete Haziri,* Judgment of 17 December 2012; KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant "*IKK Classic",* Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; and KI24/17, Applicant *Bedri Salihu,* Judgment of 27 May 2019.

83. In principle, the case-law of the ECtHR and that of the Court point out that the right to a fair trial includes the right to a reasoned decision and that the courts must "*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 each 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 Applicant are to be addressed and the reasons given must be based on the applicable law.

84. However, the Court, in contrast to the abovementioned cases, states that in the circumstances of the present case the lack of reasoning of the Notification of the State Prosecutor which rejected the Applicant's proposal for initiation of the request for protection of legality against Judgment of the Court of Appeals is being challenged, namely alleged. In this regard, and (i) to ascertain whether the procedural guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR regarding the lack of a reasoned decision are also applicable in cases of Notification of the Prosecutor; and if so, (ii) to assess whether this Notification is sufficiently reasoned in accordance with these guarantees, the Court refers to the case law of the ECtHR, namely case *Gorou v. Greece* (No. 2), Judgment of 20 March 2009, in harmony with

which, the Court pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

85. In this regard and initially, the Court emphasizes that the factual circumstances of the abovementioned case differ from those of the present case (for the facts of case *Gorou v. Greece* (No. 2), see paragraphs 10 to 14 thereof), however, the essential allegations of relevant Applicant in this case, similar to the Applicant in the circumstances of the present case, are related to (i) her request addressed to the public prosecutor to file a complaint based on issues of legality against a decision of the Criminal Court of Athens; and (ii) a letter, namely the notification of the public prosecutor through which, the respective Applicant was notified that her request was rejected on the grounds that: "*There is no legal basis for an appeal to the Court of Cassation*". The respective Applicant challenged the reasoning of this Notification before the ECtHR, alleging precisely the lack of a reasoned court decision contrary to the guarantees of Article 6 of the ECHR. In assessing this case, the ECtHR assessed (i) the applicability of the procedural guarantees of Article 6 of the ECHR in cases where a Notification of the Prosecutor is challenged; and (ii) the adequacy of the reasoning of the relevant Notification. The finding of the ECtHR was positive in both cases, finding no violation of Article 6 of the ECHR in the circumstances of the case.

86. More specifically, in assessing the applicability of the procedural guarantees of Article 6 of the ECHR in relation to the Notifications of the Prosecutor regarding the requests for filing complaints on behalf of the parties, the ECtHR stated that in principle, in order to ascertain such applicability, there should be a "*dispute*" over a "*civil right*" recognized under the relevant domestic legislation. The ECtHR found that in the circumstances of the respective case these requirements have been met and consequently the allegations regarding the lack of the reasoning for the notification of the public prosecutor entered into the scope of Article 6 of the ECHR. Moreover, the ECtHR in this case recognized as a civil right, the right of a party to request the public prosecutor to file a complaint on her behalf, despite the fact that such a right was not specifically defined in Greek legislation, but nevertheless it was based on a consolidated case law. (See the reasoning regarding the applicability of Article 6 of the ECHR in paragraphs 27–36 of case *Gorou v. Greece* (No. 2)).

87. However, in assessing the sufficiency of the reasoning of the Public Prosecutor's Notification, the ECtHR took a more restrictive approach, taking into account the discretionary role of the Public Prosecutor in approving or not approving such requests. The ECtHR stated that a positive response from the relevant prosecutor in the event of such requests results in the prosecutor's own complaint regarding the legality of the challenged decision; while a negative response to it implies a refusal to file such a complaint regarding the legality of the challenged decision. (See in this context paragraph 40 of case *Gorou v. Greece* (No. 2)).

88. Furthermore, and beyond emphasizing the discretionary competence of the prosecutor in approving or not approving the requests for such complaints, the

ECtHR also emphasized in its case law that a detailed justification in cases where a specific legal provision to reject a complaint based on legality issues and which has no chance of success is not required. (See paragraph 41 of the case *Gorou v. Greece* (No. 2); and also see the ECtHR Guide of 31 December 2018 on Article 6 of the ECHR, the Right to a Fair and Impartial Trial (Civil limb); IV. Procedural Requirements; 7. Reasoning of Judicial Decisions; paragraph 340). The ECtHR stated that the same principle applies in cases where a public prosecutor is required by a party in a civil dispute to file a complaint on his behalf. In this context, in the circumstances of the relevant case, the ECtHR found that the reasoning given to the relevant party through the Notification of the Public Prosecutor that "*There is no legal basis for an appeal to the Court of Cassation*", was sufficient and, consequently, in accordance with Article 6 of the ECHR

89. Taking into account the elaborated case law of the ECHR, the Court emphasizes that the procedural guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR are applicable in the circumstances of the present case regarding the Notification of the State Prosecutor. As elaborated above, the circumstances of the present case encompass a "*civil right*" and also a "*dispute*". The competence and criteria on the basis of which the request for protection of legality can be raised by the Public Prosecutor is established in Article 247 of the LCP. In addition, despite the fact that the right of a party to address the State Prosecutor requesting the submission of a request for protection of legality against a court decision is not specifically defined by the provisions of the LCP, there is a consolidated case law also in the context of the proposals/requests of the parties but also the responses of the Public Prosecutor, and which, the ECtHR accepted as sufficient to ascertain the applicability of Article 6 of the ECHR. (See paragraphs 30 to 36 of case *Gorou v. Greece* (No. 2)).

90. Consequently and in the following, the Court will assess whether the Notification [KMLC. No. 09/2018] of the State Prosecutor is sufficient and in accordance with the relevant case law of the ECtHR regarding a reasoned decision.

91. In this dispute, the Court recalls the reasoning of the Notification of the State Prosecutor as follows:

> *"Dear Ms. Muslija* [the Applicant],
>
> *The Office of the Chief State Prosecutor, on 24.01.2018 received your proposal to initiate a request for protection of legality against the decision of the Basic Court in Prizren, C. No. 651/2017 of23.03.2017 and against the decision of the Court of Appeals in Prishtina, AC. No. 3538/2017 of 08.12.2017.*
>
> *After receiving your proposal, we have requested the case file from the Basic Court in Prizren and on 01.03.2018 we have received the case file from the Court and after reviewing them we inform you that the Office of the Chief Prosecutor has not found a sufficient legal basis under Article*

247, paragraph 1, item a) and b) of the Law on Contested Procedure, to submit the request for protection of legality.

Regarding the non-submission of the decision of the Court of Appeals in your language, you can address the Basic Court in Prizren with the request that the decision be translated to you".

92. Based on the abovementioned reasoning of the challenged Notification, the Court notes that (i) the State Prosecutor requested the case file from the Basic Court and reviewed it; (ii) pursuant to item (a) and (b) of paragraph 1 of Article 247 of the LCP, it has not found a legal basis to file a request for protection of legality; and (iii) referred the Applicant to the need for a request to the relevant court to receive the court decision, namely the Decision [AC. No. 3538/2017] of the Court of Appeals in the language of her choice.

93. Based on the relevant case law of the ECtHR, the Court considers that the reasoning given by the State Prosecutor is sufficient. In support of this finding, the Court emphasizes the (i) discretionary nature of the State Prosecutor to raise or not a request for protection of legality; and (ii) the fact that Article 247 of the LCP, in respect of the criteria on the basis of which such a request may be raised, is clear and specific.

94. The Court more specifically notes that based on paragraphs a) and b) of the abovementioned article, the request for protection of legality may be filed by the State Prosecutor on the grounds of (i) essential violations of the provisions of the contested procedure, if the violation concerns the territorial jurisdiction, if the first instance court has rendered the judgment without the main hearing, and it was obliged to hold the main hearing, if it has decided on the request, on which the dispute is ongoing, or if contrary to the law, the public is excluded from the main hearing; and (ii) or on the grounds of erroneous application of substantive law. The latter based on Article 184 of the LCP exists when the court has not applied the provision of substantive law which should have been applied, or when such a provision has not been correctly applied. While LCP in paragraph 2 of Article 247 specifically excludes the possibility of filing a request for protection of legality by the State Prosecutor based on exceeding the statement of claim and erroneous or incomplete determination of factual situation.

95. The Court recalls that in the circumstances of the present case, the Applicant's proposal to initiate the request for protection of legality was based on the reasoning for (i) failure to determine the facts by the Court of Appeals regarding the lack of her signature in the Mortgage Contract of 2 December 2011; and (ii) failure to submit the Decision of the Court of Appeals in Bosnian. The first argument, which is related to the erroneous or incomplete determination of factual situation, is specifically excluded through paragraph 2 of Article 247 of the LCP, on the basis of which the request for protection of legality by the State Prosecutor could be raised. While the second, namely the allegation of non-submission of the challenged Decision in Bosnian language, while it constitutes the basis for finding the essential violation of the provisions of the contested procedure based on item j) of Article 182 of the LCP if the

request of the party for use of his/her own language during the court proceedings was unlawfully rejected by the relevant court, the same has not been defined as the basis on which the requests for protection of legality can be filed by the State Prosecutor based on paragraph 1 of Article 247 of the LCP.

96. Furthermore, as stated in the reasoning of the Notification of the State Prosecutor, based on the applicable legislation, the use of language which is not an official language in the Republic of Kosovo or is not in official use, in the court proceedings, is conditioned by a request of the party. The criterion for such a request stems from the conditionality of the application of paragraph 2 regarding the status of official languages at the municipal level or those in official use at any level of Article 5 of the Constitution in "*accordance with law*" and is based on the criteria set out in this "*law*, and that in the circumstances of the present case, are Law No. 02/L-37 on the Use of Languages (hereinafter: the Law on the Use of Languages) and the LCP. The first regulates the use of languages in the court proceedings in Articles 12 to 18, while the second in Articles 6 and 96 to 98. (See the section on relevant legal provisions which cites all of these articles in their entirety).

97. Based on this legal regulative, and as far as it is relevant in the circumstances of the present case, in principle, the courts conduct the proceedings in the official language or in the "*chosen official languages*" by the parties to the relevant proceedings. Regarding the last category, namely the "*chosen official language*" by the parties to the proceedings, Articles 13 and 14 of the Law on the Use of Languages, stipulate that, beyond the action of the relevant court on its own initiative if it considers that it is in the general public interest, at the request of the party, the court must (i) provide the equipment for simultaneous interpretation, including the evidence given, from one official language to another; and (ii) issue documents relating to procedures in the "*chosen official language*" for the procedure.

98. Furthermore, the provisions of the contested procedure fulfill the rights of the parties to use their language in the court proceedings. Beyond the guarantees set out in Article 6 of the LCP, Chapter VI in relation to Language in Procedure, in its Articles 96, 97 and 98, in principle, guarantees to the parties to the proceedings (i) the right to use their own language or the language they understand in the court proceedings; and (ii) providing translation into their language or the language they understand of all written submissions and evidence, if the party submits such a request.

99. The Court notes that the assessment of the aforementioned articles in their entirety, and insofar as it is relevant to the circumstances of the present case, in principle shows that each party has the right to use the language chosen in a court process and to receive documents and decisions in the same language, if it has made such a request. Based on the case file, the allegations of the Applicant and the explanations of the State Prosecutor, such a request at the level of the Court of Appeals has never been made by the Applicant.

100. In this context, beyond the finding that the allegations of the Applicant of lack of reasoning of the Notification of the State Prosecutor are ungrounded,

because the relevant Notification, based on the case law of the ECtHR, is sufficiently reasoned, the Court also reiterates that the allegations of the Applicant of violation of Article 5 of the Constitution, in the absence of a request for the use of her language in the proceedings before the Court of Appeals and for the receipt of the relevant decision in the language chosen by her, are not sufficiently proven and substantiated and, consequently, they are manifestly ill-founded on constitutional basis.

101. The Court also considers that the Applicant did not sufficiently prove and substantiate her claims regarding the non-consideration of the evidence and testimonies by the State Prosecutor in violation of the ECtHR case law, namely the cases which the Applicant refers to support her claims, *De Haes and Gijsels v. Belgium* and *Tinelly & Sons Ltd and others and McElduff and others v. the United Kingdom*.

102. In this regard, the Court initially emphasizes that, based on its case law, it is the obligation of the Applicants to elaborate and argue the factual and legal connection of their case to those of the ECtHR cases and to which they refer in favor of their arguments before the Court. (See, in this respect, cases of the Court, KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 4 February 2019, paragraphs 275-276; KI119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility, of 3 May 2019, paragraph 80; and KI49/19, Applicant *Limak Kosovo International Airport J.S.C.. "Adem Jashari"*, Resolution on Inadmissibility, of 10 September 2019, paragraph 44). The Applicant failed to make this connection.

103. But furthermore, the Court notes that the circumstances of the referred cases are not related to the circumstances of the present case and therefore, are not applicable. In the first case cited above, the respective applicants were an editor and a journalist of a newspaper which published an article that had created a public sensation as it spoke about issues of incest in Belgium and raised allegations of violations of Articles 6 and 10 (Freedom of expression) of the ECHR, but which at no point is related to the current case under consideration. While the second case cited above, concerned the procedures for refusing to offer certain public contracts in Northern Ireland to the applicants of those common applications and raised allegations of violations of Articles 6, 8 (Right to respect for private and family life), 13 (Right to an effective remedy) and 14 (Prohibition of discrimination) of the ECHR, which circumstances also have nothing to do with the circumstances of the present case.

104. The Court does not challenge the obligation of the regular courts to correctly assess the submissions, arguments and evidence submitted by the parties, an obligation arising from Article 31 of the Constitution in conjunction with Article 6 of the ECHR and relevant procedural laws and the case law of the ECtHR. The Court has elaborated the general principles regarding the obligation of the courts to properly assess the submissions, arguments and evidence submitted by the parties, *inter alia*, in the case KI07/18, Applicant *Çeliku Rollers l.l.c.*, Judgment of 20 January. 2020. However, in contrast to this case law, the Court reiterates that in the circumstances of the present case, the allegations of non-examination of evidence and testimonies are related to a

Notification of the State Prosecutor, which, as noted above, is vested with the discretion to file or not the request for protection of legality depending on the respective assessment whether the criteria set out in Article 247 of the LCP have been met. Moreover, in the circumstances of the present case, the Applicant's allegation of non-consideration of her evidence in the context of the proceedings relating to the imposition of the interim security measure are not supported by any concrete argument. The Court recalls that the merits of the Applicant\'s case, according to the case file, are pending before the Basic Court.

105. Therefore, based on the above and taking into account the special characteristics of the case, the allegations raised by the Applicant and the facts presented by her, the Court, also based on the standards established in its case law in similar cases and the ECtHR case law, finds that the Applicant does not sufficiently substantiate and prove her allegations that the challenged Notification of the State Prosecutor was rendered in violation of the procedural guarantees for a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and therefore, these allegations are manifestly ill-founded on constitutional basis, as established in paragraph 2 of Rule 39 of the Rules of Procedure.

(ii) Constitutional review of Decision [AC. No. 3538/2017] of 8 December 2018 of the Court of Appeals

106. The Court also recalls that the Applicant also challenges the Decision of the Court of Appeals, which upheld the decision of the Basic Court, to withdraw the order for an interim security measure that temporarily prohibited the sale of mortgaged property. The Applicant's main allegation in this respect is the non-determination of the fact by the Court of Appeals that the Applicant did not sign the Mortgage Agreement of 2 December 2011. The other allegation of the Applicant was that the Court of Appeals, in addition to the State Prosecutor's Office, acted in violation of Article 5 of the Constitution, by not submitting the relevant decision in her own language and not taking into account the allegations of non-submission of the decision in her language. Regarding the last allegation, the Court recalls its reasoning in paragraphs 94 to 100 of this Judgment, where it was concluded that the Applicant never requested that the Decision in question be translated and submitted in her language. Therefore, the Court will consider this allegation as already addressed and will not return to it.

107. Whereas with regard to the allegations that the challenged Decision of the Court of Appeals was rendered as a result of the erroneous or incomplete determination of the factual situation, the Court refers to its consolidated case law, based on which, such allegations do not raise legality issues, and consequently, do not fall within the jurisdiction of the Court. Such allegations of legality, in principle, cannot be considered by the Court. (See, in this regard, *inter alia*, cases of the Court KI49/19, Applicant *Joint Stock Company Limak Kosovo International Airport J.S.C., "Adem Jashari",* cited above, paragraph 47; KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 35, KI154/17 and 05/18 Applicants *Basri Deva,*

Afërdita Deva and 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 4949).

108. The Court has consistently reiterated through its case law 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, *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, also cases of the Court: KI49/19, Applicant *Joint Stock Company Limak Kosovo International Airport J.S.C., "Adem Jashari",* cited above, paragraph 48; KI154/17 dhe KI05/18, Applicants *Basri Deva, Afërdita Deva and Limited Liability Company "Barbas"*, cited above, paragraph 61, KlI92/18, Applicant, *Kosovo Distribution Company and Power Supply, KEDS jsc*, cited above, paragraph 50).

109. Furthermore, the Court considers that the challenged Decision of the Court of Appeals has sufficiently substantiated the assertion made by the Basic Court as to the non-existence of further conditions for upholding the interim security measure, because new evidence showed that the Applicant signed the Loan Agreement and subsequent amendments. The Court of Appeals reasoned the annulment of the interim security measure as follows:

> *"[...] the circumstances in which the interim security measure has been imposed by this court have changed. This is due to the fact that during the main trial by the second respondent ProCredit Bank, the evidence was submitted which proved that the claiming party has signed the loan contract with the second respondent, namely that the claimant gave the consent to the respondent of the first-rank spouse for receiving loan from the second-rank respondent.*
>
> *In the present case, taking into account the loan agreement no. 20-044522 which is pf 06.12.2011 as well as the amendments to the pledge contract no.20056761 of 28.04.2015 then business loan contract no. 20056761 of 28.04.2015, the list of pledges of 28.04.2015, business loan contract with no. 20055493 of 24.11.2014, which the court did not have evidence when it decided on the interim security measure. So it has now been established that the claiming party* [the Applicant] *with no evidence during this hearing regarding the objection of the respondent of the second rank against the decision to impose an interim security measure, has not justified or proved her subjective right and that the evidence provided by the same on the basis of which the court originally imposed the interim security measure now contradicts the evidence presented by the respondent of the second rank and which evidence the court trusted. [...] Based on all the above mentioned data, the court annulled the interim*

security measure, after assessing that the legal requirements provided by Article 297.1 item a in conjunction with Article 306.2 of the LCP have not been met, therefore this court decided as in the enacting clause of this judgment [...].”

110. The Court also emphasizes that the challenged Decision of the Court of Appeals relates only to the request for the imposition of an interim measure, and that the Applicant's allegations regarding the merits of her case, including the complete determination of factual situation, are conducted despite the “*preliminary proceedings”*, namely those related to interim security measures, based on the lawsuit of the Applicant of 30 June 2016 and which, based on the case file, is pending before the Basic Court.

111. Therefore, based on the above and taking into account the special characteristics of the case, the allegations raised by the Applicant and the facts presented by her, the Court based on the standards established in its case law in similar cases and the ECtHR case law, finds that the Applicant did not sufficiently prove and substantiate her allegations that the challenged Decision of the Court of Appeals was rendered in violation of the procedural guarantees for a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and that consequently these allegations are manifestly ill-founded on constitutional basis, as stipulated in paragraph 2 of Rule 39 of the Rules of Procedure.

112. The Court reiterates its position that the Applicant's mere dissatisfaction with the outcome of the proceedings by the regular courts with regard to the imposition of an interim security measure and its subsequent annulment may not in itself constitute an arguable claim of violation of the rights guaranteed by the Constitution and the ECHR.

113. Finally, the Court also recalls that the Applicant also alleged a violation of Article 24 of the Constitution regarding the right to “*equality before the law*”, noting that the challenged decisions caused “*inequality between the parties*” and that the State Prosecutor and the regular courts did not have “*strict legal*” approach both, to the Applicant, and to the second respondent, namely the ProCredit Bank.

114. Regarding this allegation, the Court recalls its case law 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 KI02/18, 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).

115. 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 on constitutional basis. (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).

116. In the circumstances of the present case, the Court considers that the Applicant does not prove and sufficiently substantiate the allegations of violation of Article 24 of the Constitution, and therefore, these allegations are to be declared inadmissible as manifestly ill-founded on constitutional basis, as established in paragraph 2 of Rule 39 of the Rules of Procedure.

Conclusions

117. The Court clarified that the subject of review before it were only the decisions of the regular courts dealing with "*preliminary proceedings"* for imposing an interim security measure. The Court, after applying the general principles relating to the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in cases relating to "*preliminary proceedings"*, found that the abovementioned articles are applicable in the circumstances of the present case; and consequently, the Applicant's Referral is compatible *ratione materiae* with the Constitution. Further, the Court continued with the assessment of the Applicant's allegations, to find whether the latter are manifestly ill-founded on constitutional basis.

118. Regarding the Applicant's allegations that the Notification of the State Prosecutor was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. the Court found that: the Notification of the State Prosecutor has fulfilled its constitutional obligation to provide sufficient reasoned court decision in accordance with the case law of the ECtHR; (ii) the allegations of non-examination of evidence and testimonies by the State Prosecutor are ungrounded, because the latter is vested with the discretion to initiate or not the request for protection of legality; and (iii) the assessment of the State Prosecutor that the Applicant was able to request the translation of the Decision of the Court of Appeals and that she did not do so, is correct. Therefore, the Court emphasized that these allegations are manifestly ill-founded on constitutional basis in accordance with paragraph 2 of Rule 39 of the Rules of Procedure.

119. Whereas, regarding the Applicant's allegations that the Decision of the Court of Appeals was rendered in contradiction with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court found that she did not prove and sufficiently substantiate her allegations of violation of the right to fair and impartial trial, and that, consequently, the latter, are manifestly ill-founded on constitutional basis in accordance with paragraph 2 of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Article 20, 47 and 48 of the Law, and Rule 39 (2) and 39 (3) (b) of the Rules of Procedure, in the session held on 11 January 2020, 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. TO DECLARE this Decision effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Gresa Caka-Nimani Arta Rama-Hajrizi

This translation is unofficial and serves for information purposes only