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

BULETIN OF CASE LAW

2019

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OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Foreword:

I have the special honour and pleasure to write, in the capacity of the President of the Court, this foreword for the 9th Bulletin of the Case Law of the Constitutional Court. The Bulletin has become a useful reference for those who work in the field of constitutional law and fundamental human rights and freedoms. Our basic goal is that through this Bulletin, not only to show some of the main results of our work during 2019, but also to create a research mechanism that enables easy and practical access to the jurisprudence of the Court.

The present Bulletin edition contains all judgments of the Court of 2019 and a selection of the most specific resolutions. Among other things, this edition includes: (i) the referral submitted by the President of the Assembly for the assessment of constitutional amendments regarding the inclusion of the Council of Europe Convention on preventing and combating violence against women and domestic violence in Article 22 of the Constitution; (ii) the referral submitted by the Prime Minister for the interpretation of the act of resignation of the Prime Minister and the determination of the competencies or the clarification of the functions of the Government after the resignation of the Prime Minister; (iii) two referrals submitted by the deputies of the Assembly regarding the assessment of the Law on the State Delegation, and the assessment of the President's decisions regarding the appointment of members of the Central Election Commission; as well as (iv) two referrals submitted by the Ombudsperson regarding the assessment of certain provisions of the Law on the Independent Oversight Board and the Law on Notary.

During 2019, the Court also rendered a significant number of decisions relating to individual referrals. In those cases the allegations of the Applicants were addressed and by applying the principles established by its consolidated case law and that of the European Court of Human Rights found violations of the right to fair and impartial trial guaranteed by Article 31 of the Constitution, namely the right to a reasoned court decision and the principle of legal certainty, as a result of the contradictory decisions. In particular, it is worth noting that for the first time in the history of its functioning, the Court has dealt with the allegations on merits of violation of Article 29 [Right to Liberty and Security] of the Constitution and in light of the case law of the European Court of Human Rights, found violation of this right as a result of the failure to reason the decisions of the regular courts to extend the detention on remand.

It is important to note to future applicants and their representatives, who intend to file referrals with the Constitutional Court, to consult Bulletins

carefully, and consider whether their case may have any possibility of success. It would be very useful for the further development of the case law of the Constitutional Court if the applicants become preliminarily familiar with the case law of the Court and use the latter to build their constitutional arguments. The Bulletin can certainly serve the colleagues of the regular courts and other institutions of the justice system in terms of how their activity and functions are related to constitutional rights and freedoms or generally defined constitutional rights and obligations. Students and researchers can benefit from a comprehensive and systematic presentation of the selected cases.

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

Arta Rama-Hajrizi

President of the Constitutional Court

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KO162/18, Judgment rendered on 19 December 2018, published on 7.2.2019

Keywords*: Institutional referral, proposed constitutional amendment, Chapter II of the Constitution, admissible referral*

On 24 October 2018, the President of the Assembly of the Republic of Kosovo, in accordance with Articles 113.9 and 144.3 of the Constitution, referred to the Constitutional Court of the Republic of Kosovo an amendment of the Constitution proposed by 80 (eighty) deputies of the Assembly of the Republic of Kosovo, requesting the Court to make a preliminary assessment of whether the proposed amendment diminishes any of the rights and freedoms guaranteed by Chapter II of the Constitution.

The proposed amendment foresees the addition of a new paragraph after paragraph 8 of Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, namely to add paragraph 9, as follows:

"(9) *Council of Europe Convention on preventing and combating violence against women and domestic violence*".

The proposers of the amendment allege that the proposed amendment establishes important standards in the field of violence against women and domestic violence and aims to protect women from all forms of violence and prevent, prosecute and eliminate violence against women and domestic violence.

The Court found that the wording of the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of the Constitution. Moreover, it only advances and develops these rights.

JUDGMENT

in

Case No. K0162/18

Applicant

President of the Assembly of the Republic of Kosovo

Confirmation of the proposed constitutional amendment, submitted by the President of the Assembly of the Republic of Kosovo on 24 October 2018, by letter No. 06/2156/D0-1156

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 President of the Assembly of the Republic of Kosovo (hereinafter: the Applicant) referred to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) a constitutional amendment proposed by eighty (80) deputies of the Assembly of the Republic of Kosovo, submitted by letter No. 06/2156/D0-1156 (hereinafter: the proposed amendment).

Subject matter

2. The subject matter of the Referral is the assessment of the proposed amendment whether it diminishes any of the rights and freedoms guaranteed by Chapter II of the Constitution.

3. The proposed amendment reads:

"In Article 22 after paragraph (8) the following paragraph (9) is added:

(9) Council of Europe Convention on preventing and combating violence against women and domestic violence".

Legal basis

4. The Referral is based on Article 113.9 and Article 144.3 of the Constitution, Articles 20 and 54 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 78 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 24 October 2018, the Applicant (the President of the Assembly of the Republic of Kosovo), by letter No. 06/2156/DO-1156, referred to the Court the proposed amendment for a prior assessment by the Court whether this amendment diminishes any of the rights and freedoms set forth in Chapter II of the Constitution.

6. On 25 October 2018, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama- Hajrizi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

7. On 26 October 2018, the Court notified the Applicant about the registration of the Referral. In addition, the Court requested the Applicant to provide a copy of this notification to each deputy of the Assembly in order to provide them the opportunity to submit to the Court their comments, if any, regarding the abovementioned Referral.

8. On the same date, a copy of the Referral was sent to the President of the Republic of Kosovo, the Prime Minister of the Republic of Kosovo and the Ombudsperson. The Court has not received any comments from either party.

9. On 19 December 2018, the Court reviewed the Referral and unanimously decided that the Referral is admissible and that the proposed amendment to the Constitution does not diminish the human rights and freedoms set forth in Chapter II of the Constitution.

Summary of facts

10. On 11 May 2011, the Council of Europe adopted the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: the Convention), which, inter alia, aims at protecting women from all forms of violence and prevention, prosecution and elimination of violence against women and domestic violence.

11. The Convention, inter alia, foresees and governs issues of fundamental rights, equality and non-discrimination, state obligations and preliminary measures to prevent, investigate, punish and provide compensation for acts of violence covered by the scope of this Convention, the issue of legal remedies, integrated policies and data collection, investigation and prosecution issues and preventive measures.

12. In addition, the Convention in its final provisions, namely Article 73 [Effects of this Convention], establishes:

> *"The provisions of this Convention shall not prejudice the provisions of internal law and binding international instruments which are already in force or may come into force, under which more favourable rights are or would be accorded to persons in preventing and combating violence against women and domestic violence".*

13. On 22 October 2018, 80 (eighty) deputies forwarded to the President of the Assembly of the Republic of Kosovo their proposal for amendment of Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, adding to this Article a paragraph (9), namely "Council of Europe Convention on preventing and combating violence against women and domestic violence".

14. On 24 October 2018, the Applicant (the President of the Assembly of the Republic of Kosovo), pursuant to Articles 113.9 and 144.3 of the Constitution, referred to the Court the proposed amendment to the Constitution. The Applicant requested the Court to make a prior assessment as to whether the proposed amendment diminishes any of the rights and freedoms set forth in Chapter II of the Constitution.

Admissibility of the Referral

15. In order to be able to adjudicate the Applicant's Referral, the Court must first examine whether the admissibility requirements established in the Constitution and further specified in the Law and in the Rules of Procedure have been met.

16. First, the Court must examine whether the Referral was submitted by an authorized party, and secondly, it must examine whether it has jurisdiction to assess the proposed amendment.

17. The Court recalls that, in accordance with Article 113.9 of the Constitution:

> *"The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly[...]",*

18. The Court notes that the President of the Assembly, Mr. Kadri Veseli submitted the proposed amendment and that, consequently, the Referral was submitted by an authorized party pursuant to Article 113.9 of the Constitution.

19. In addition, the Court recalls that under Article 113.9 of the Constitution, it must:

> *"[...] confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution".*

20. Therefore, the Court has jurisdiction to assess whether the proposed amendment diminishes the rights and freedoms guaranteed by Chapter II of the Constitution.

21. Therefore, having been submitted by an authorized party and since the Court has jurisdiction to review the case, the Referral is admissible pursuant to Article 113.9 of the Constitution.

Scope of the constitutional assessment

22. As stated in the section "Proceedings before the Court" above, the Applicant submitted to the Court the proposed amendment.

23. Therefore, the Constitution, as the highest legal act must be respected formally and solemnly when proposing amendments to it. The Court,

mindful of the necessity for legal certainty in relation to this issue, emphasizes that, in accordance with Article 112 [General Principles] of Chapter VIII of the Constitution, "the Constitutional Court is the final authority for the interpretation of the Constitution and compliance of laws with the Constitution" (see case No. K044/14, Applicant: President of the Assembly of the Republic of Kosovo, Judgment of 31 March 2014, para. 24).

24. In this respect, the Court confirms that the constitutional review under Article 144.3 of any proposed amendment to the Constitution must be considered in light of Chapter II [Fundamental Rights and Freedoms], including the legal order of the Republic of Kosovo, the very basis of which - by virtue of Article 21 [General Principles] of Chapter II of the Constitution - consists of human rights and freedoms mentioned in that Chapter (See case No. K029j12 and K048j12, Applicant: President of the Assembly of the Republic of Kosovo, Judgment of 20 July 2012; see, also: Case No. K061j12, Applicant: President of the Assembly of the Republic of Kosovo, Judgment of 31 October 2012, par. 18, see also case no. K044/14, Applicant: President of the Assembly of the Republic of Kosovo, Judgment of 31 March 2014).

25. The Court also considers that Article 21 of the Constitution should be read in conjunction with Article 7.1 of the Constitution that defines the values of the constitutional order of the Republic of Kosovo which is based "*on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of the law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers and a market economy*".

26. The Court notes that the proposed amendment is consistent with the obligations deriving from Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, which requires that human rights be interpreted in accordance with the case law of the European Court on Human Rights.

27. Therefore, when assessing the constitutionality of the proposed amendments, this Court will not take into account only the human rights and freedoms contained in Chapter II, but also the entire letter, content and spirit of the Constitution (see: Cases Nos. K029j12 and case K048/12, Applicant: President of the Assembly of the Republic of Kosovo, Judgment of 20 July 2012).

28. In light of the above, the Court will now consider the proposed amendment.

Proposed amendment: new paragraph (9), of Article 22 of the Constitution

29. Article 22 [Direct Applicability of International Agreements and Instruments of the Constitution, currently stipulates:

> *"Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:*
>
> *(1) Universal Declaration of Human Rights;*
> *(2) European Convention for the Protection of Human Rights and*
> *Fundamental Freedoms and its Protocols;*
> *(3) International Covenant on Civil and Political Rights and its*
> *Protocols;*
> *(4) Council of Europe Framework Convention for the Protection of National Minorities;*
> *(5) Convention on the Elimination of All Forms of Racial Discrimination;*
> *(6) Convention on the Elimination of All Forms of Discrimination*
> *Against Women; (7) Convention on the Rights of the Child;*
> *(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment";*

30. The Court recalls that the proposed amendment foresees the addition of a new paragraph after paragraph 8 of Article 22, namely to add paragraph 9 as follows:

> *"(9) Council of Europe Convention on preventing and combating violence against women and domestic violence".*

Reasons for the proposed amendment as emphasized by 80 (eighty) deputies

31. The proposers of the amendment allege that the proposed amendment establishes important standards in the field of violence against women and domestic violence and aims at "*protecting*

women from all forms of violence and prevent, prosecute and eliminate violence against women and domestic violence".

32. The proposers of the amendment are of the opinion that through this Convention, "*The state of the Republic of Kosovo demonstrates the commitment to zero tolerance to any violence against women*".

33. According to the authors of the amendment, "*The state as such should have the responsibility if it does not respond to the violation of human rights envisaged by this Convention*".

34. The deputies proposing this amendment further consider that through this Convention are sanctioned *"the offences such as: genital mutilation, forced marriage, persecution, abortion and forced sterilization. This means that our state for the first time will include these criminal offenses in our legal system and that it will support other offenses that are part of the criminal code. Through this Convention, we will try to change the behavior of society, gender roles and stereotypes that make violence against women acceptable, training of professionals working with victims* [...]".

Assessment of the constitutionality of proposed amendment

35. The Court recalls that, in addition to the rights expressly contained in Chapter II, the Court must also assess the compliance of the proposed amendment with Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution.

36. In this regard, the Court emphasizes that human rights and fundamental freedoms guaranteed by the international instruments contained in Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution are directly applicable and are part of the legal order of the Republic of Kosovo.

37. The Court notes that through the amendment proposed by eighty (So) deputies of the Assembly, the Applicant proposes adding a new paragraph after paragraph 8 of Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, namely adding paragraph "(9) Council of Europe Convention on preventing and combating violence against women and domestic violence".

38. The Court specifies that the international instruments, which are directly applicable, do not exclude and limit each other, nor diminish

the rights and freedoms foreseen by other provisions established in Chapter II of the Constitution.

39. The Court once again recalls the purpose of the Convention, which, inter alia, stipulates:

> *a. protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;*
>
> *b. contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;*
>
> *c. design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;*
>
> *d. promote international co-operation with a view to eliminating violence against women and domestic violence;*
>
> *e. provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.*

40. In addition, the Convention specifically obliges states to take the necessary legislative measures, as well as other measures, by establishing mechanisms with a view to have it fully implemented.

41. Therefore, the Court notes that the implementation of the Convention produces effects of various nature for member states of the legislative nature (supplementing and amending the legal framework in force), budget implications, etc.

42. The Convention, inter alia, specifies the need for comprehensive and coordinated policies, which require data collection and search, training of professionals dealing with victims or perpetrators of all acts of violence covered by the provisions of this Convention.

43. In addition, the provisions of this Convention also stipulate the establishment of monitoring mechanisms, specialized support

services, victim housing, and the adoption of legislative measures in accordance with the international principles.

44. The Convention also envisages availability of civil legal remedies against the state authorities that do not fulfil their obligations. Furthermore, Article 30 [Compensation] of the Convention provides for adequate compensation from states, for those victims who have suffered serious bodily injury or impairment of health.

45. The Court also notes that the proposers of the proposed amendment did not submit to the Court any preliminary analysis of the impact that the Convention may have, such as the financial implications or the necessary mechanisms and institutions to be created for the purpose of its implementation.

46. Specifically, these provisions have as a consequence a high financial impact, which implies the assessment and inclusion of this cost in the appropriate budget framework.

47. In the light of the foregoing explanations, the Court notes that even within the member states of the Council of Europe there are different views on the adoption of the Convention and the manner of its adoption.

48. The Court further notes that the Convention was adopted by the Council of Europe on 11 May 2011 in Turkey and was ratified by thirty-three (33) member states of the Council of Europe and thirteen (13) states have only signed it and twenty-one (21) states have expressed their reservations regarding the application of certain provisions of this Convention. Most of the states, which have expressed reservations about the application of certain provisions, mainly relate to Article 30 [Compensation] and Article 44 [Jurisdiction] of this Convention.

49. The Court further recalls Article 7 [Values] of the Constitution, which provides:

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

(2) The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing

equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.

50. The Court considers that the proposed amendment leads to enrichment of these values.

51. In light of the foregoing, the Court considers that the wording of the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of the Constitution. Moreover, it only advances and develops these rights.

52. The Court considers that, pursuant to Article 144, paragraph 4, of the Constitution, the proposed amendments to the Constitution enter into force upon adoption by the Assembly of Kosovo.

53. Therefore, the Court confirms that the proposed amendment is in compliance with Chapter II of the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.9 and Article 144.3 of the Constitution, in accordance with Article 20 of the Law and in accordance with Rule 59 (1) of the Rules of Procedure, in its session held on 19 December 2018, unanimously

DECIDES AS FOLLOWS:

I. TO DECLARE, unanimously, the Referral admissible;

II. The Court confirms that the amendment proposed by eighty (80) deputies, submitted by the President of the Assembly on 24 October 2018, does not diminish the rights and freedoms set forth in Chapter II of the Constitution;

III. This Decision shall be notified to the parties and shall be published in the Official Gazette, in accordance with Article 20-4 of Law; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

KO157/18, Applicant: The Supreme Court of the Republic of Kosovo, constitutional review of Article 14, paragraph 1.7 of the Law No. 03/L-179 on the Red Cross of the Republic of Kosovo

KO157/18, Judgment rendered on 13 March 2019, published on 29 March 2019

Keywords: institutional referral, the Supreme Court of the Republic of Kosovo, constitutional review of Article 14, paragraph 1.7 of the Law on Red Cross, admissible referral, the incompatibility of Article 14, paragraph 1.7 of the challenged Law with Articles 24, 46 and 119 of the Constitution.

This Referral was submitted by the Supreme Court of the Republic of Kosovo, pursuant to Article 113.8 of the Constitution. The Applicant requested the Constitutional Court the constitutional review of Article 14, paragraph 1.7 of the Law on the Red Cross, raising doubts as to its incompatibility with Articles 24 [Equality Before the Law], 46 [Protection of Property], 119 [Economic Relations] and 120 [Public Finances] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

The essence of the Referral of the referring court, also referring to the allegations of the "Illyria" Company presented before it, consisted in the allegation that paragraph 1.7 of Article 14 of the challenged Law, which obliges the insurance companies in Kosovo to pay (1%) of the gross prim value of insured vehicles insurance and which does not foresee any obligation to contribute to other companies in Kosovo, placed insurance companies in a discriminatory position in relation to other companies, contrary to the principle set out in paragraph 2 of Article 119 of the Constitution [General Principles], which provides that "*The Republic of Kosovo shall ensure equal legal rights for all domestic and foreign investors and enterprises".*

The Court first examined whether the Referral has fulfilled the admissibility requirements, as established in the Constitution, and further specified in the Law on the Constitutional Court and the Rules of Procedure of the Court.

After having assessed all Applicant's allegations, the Court considered that although the legislator, by limiting the rights, aimed at achieving an aim that is in line with the general social interest, however it was not clear why the lawmaker did not extend and distribute the financial obligation established by the provision of the challenged law also to other economic entities, but only to the insurance companies that provide this type of insurance. Thus, the Court noted that neither the Assembly nor any other relevant instance, presented any consistent reasoning as to why the challenged law obliges only the insurance companies to contribute to the financing of the Red Cross. The

Court further considered that, if the payment provided for by the provision of the challenged law would be reasonably and proportionately distributed to all economic entities, this would be in accordance with the requirements of Article 24 [Equality Before the Law] of the Constitution, with the equal position in the market guaranteed by Article 119 of the Constitution, as well as with the requirements of paragraphs 4 and 5 of Article 55 of the Constitution.

In the light of the foregoing considerations, the Court considered that the obligation of only insurance companies to pay the determined amount from the income collected from the motor liability insurance as a contribution to the Red Cross budget, is not justified, namely it is not based on objective reasons. Consequently, there is no legitimate aim that would justify the unequal treatment of motor insurance companies.

In this respect, the Court considers that as a consequence of unequal treatment of insurance companies in relation to other companies in Kosovo, and by taking into account that the payment by insurance companies of one percent (1%) of the amount of the gross vehicle prim reduces the wealth of insurance companies, paragraph 1.7 of Article 14 of the challenged law also does not comply with the right of property, according to Article 46 of the Constitution.

The Court also recalled that the referring court also raises the issue of compliance of the challenged law with Article 120 [Public Finances] of the Constitution. However, having in mind that the Court found a violation of Articles 24, 46 and 119 of the Constitution, it does not find it necessary to assess the compliance of the challenged law with Article 120 of the Constitution.

In sum, the Court concludes that paragraph 1.7 of Article 14 of the challenged Law is not compatible with Article 24 [Equality Before the Law], Article 119 [General Principles] and Article 46 [Protection of Property] of the Constitution.

JUDGMENT

in

Case No. KO157/18

Applicant

The Supreme Court of the Republic of Kosovo

Constitutional review of Article 14, paragraph 1.7 of the Law No. 03/L-179 on Red Cross of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the Supreme Court of the Republic of Kosovo (hereinafter: the referring court) signed by the President Enver Peci.

Challenged decision

2. The referring court raises doubts as to the constitutionality of Article 14, paragraph 1.7 of the challenged Law No. 03/L-179, on Red Cross of the Republic of Kosovo, published in the Official Gazette, on 20 July 2010 (hereinafter: the challenged Law).

Subject matter

3. The subject matter of the Referral is the constitutional review of Article 14, paragraph 1.7 of the challenged Law, raising allegations that it is not in compliance with Articles 24 [Equality Before the Law], 46

[Protection of Property], 119 [General Principles] and 120 [Public Finances] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113.8 of the Constitution, Articles 51, 52 and 53 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law), and Rule 77 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 15 October 2018, the referring court submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 16 October 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.

7. On 19 October 2018, the Court notified the referring court, the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo, the Prime Minister of the Republic of Kosovo, the Ombudsperson, the Red Cross of the Republic of Kosovo (hereinafter: the Red Cross), Insurance Company "Illyria" j.s.c.. (hereinafter: "Illyria" Company) and the Insurance Association of Kosovo.

8. The Court also notified the referring court that based on Article 52 of the Law on the Court and Rule 77 (5) of the Rules of Procedure, the proceedings relating to the case that is connected to the Referral submitted to the Court are suspended until a decision is rendered by the Constitutional Court. The Court also requested the referring court that within a time limit of 15 (fifteen) days submits a copy of the case file in relation to which it filed the referral to the Court and a copy of the challenged law. Whereas, the Red Cross (in the capacity of the interested party) was notified that their comments, if any, may submit within 15 (fifteen) days from the day of receipt of the notification from the Court.

9. On 23 October 2018, the referring court submitted to the Court the documents requested by the letter of 19 October 2018.

10. On 5 November 2018, the Red Cross submitted comments regarding the Referral.

11. On 8 November 2018, the Court notified the referring court, the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo, the Prime Minister of the Republic of Kosovo, the Ombudsperson, the "Iliyria" Company and the Kosovo Insurance Association about the comments of the Red Cross. The referring court was notified that its comments regarding the comments of the Red Cross, if any, may be submitted by 29 November 2018. The referring court did not submit any comment regarding the comments of the Red Cross.

12. On 13 March 2019, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

13. On the same date, the Court voted, unanimously, that the Referral is admissible and that Article 14, paragraph 1.7 of the challenged Law, is not in compliance with Articles 24, 119 and 46 of the Constitution.

Summary of facts

14. On 10 June 2010, the Assembly of Kosovo adopted the challenged law, which was published in the Official Gazette on 20 July 2010.

15. On 26 November 2010, the Insurance Association of Kosovo, based on Article 113, paragraph 7 of the Constitution, filed a referral with the Court for annulment of Article 14, paragraph 1.7 of the challenged Law (that is, it is the same article of the challenged law, which is the subject of review).

16. On 23 May 2011, the Court, by Resolution on Inadmissibility KI118/10, Applicant *the Insurance Association of Kosovo*, declared the Referral inadmissible after finding that the Applicant was not a party authorized to challenge the above mentioned Law.

17. On 2 December 2014, Str. P., director of the Insurance Association of Kosovo, based on Article 113, paragraph 7 of the Constitution, submitted the Referral KI174/14 for the constitutional review of Article 14 of the challenged Law (that is, it is the same article of the challenged law, which is the subject of review).

18. On 3 February 2015, the Court declared the Referral KI174/14 inadmissible by a resolution after finding that the Applicant was not an authorized party to challenge the above-mentioned law.

19. On an unspecified date, the Red Cross filed a lawsuit with the Basic Court in Prishtina (hereinafter: the Basic Court), against the "Illyria" company, requesting it to pay it one percent (1%) of gross prim of the value of the compulsory insurance of the vehicles carried out by the "Illyria" company, for the period 2010-2016.

20. On 16 November 2016, the Basic Court, by Judgment C. No. 546/13, approved the statamement of claim of the Red Cross and obliged "Illyria" company, that in the name on the collection of gross prim from vehicle insurance for 1% "*For the period from 05.08.2010 until 31.07.2017, to pay the amount of 248.648,16 €, with interest [...] and the costs of the proceedings in the amount of 1.065 €, within 15 days*". The Basic Court reasoned that the obligation to pay the amount determined by the above-mentioned judgment stems from Article 14, paragraph 1.7 of the challenged Law.

21. On 16 February 2017, against the Judgment of the Basic Court, "Illyria" company filed an appeal with the Court of Appeals of Kosovo (hereinafter: the Court of Appeals), claiming that there has been a substantial violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law, requesting that the case be remanded for re consideration. The Insurance Company also claimed that the challenged law is unconstitutional and requested that the Court of Appeals seeks a constitutional review of Article 14, paragraph 1.7 of the challenged Law, before the Constitutional Court.

22. On 14 October 2017, "Illyria" company submitted an appeal with the Court of Appeals for the extension of the appeal, considering that the challenged law is also in collision with the Law on Foreign Investments.

23. On 12 June 2018, the Court of Appeals, by Judgment AC. No. 1165/2017 rejected as ungrounded the appeal and the extension of the appeal and upheld the Judgment of the Basic Court. Regarding the allegation of the "Illyria" company, that the challenged law is unconstitutional and the request that the question of constitutionality of Article 14, paragraph 1.7 of the challenged Law be referred to the Constitutional Court for constitutional review, the Court of Appeals reasoned as follows: *[it is the assessment of the Court of Appeals that the challenged law] is a law which has no flaw that the latter be*

considered unconstitutional, as [Illyria Company] claims, so that, as the first instance court, which did not consider it reasonable to submit this law to the Constitutional Court for assessment, the Court of Appeals considers the same, because the law as such is well and should be applied by those whom this law obliges by its provisions, as it is in the present case the provision of Article 14 paragraph 1.7 of the same law, referring to the Insurance Companies in Kosovo".

24. On 15 August 2018, the "Illyria" Company filed a request for revision with the Supreme Court against the Judgment of the Court of Appeals mentioned above. It also requested from the Supreme Court to refer the case to the Constitutional Court for the assessment of the compatibility of Article 14, paragraph 1.7 of the challenged law with the Constitution, and requested that the implementation of the Judgment of the Court of Appeals and the Basic Court be suspended until the decision by the Constitutional Court is rendered.

25. In addition, "Illyria" Company in its submission of 15 August 2018 reasoned: "*Given that neither the [CBK] Regulation on Determination of the Premium's Structure Insurance for Compulsory Motor Liability Insurance, nor the Law No. 04/L-018 [on Compulsory Motor Liability Insurance], specified that the insurance premium should contain the funding of the Red Cross, the respondent was unable to collect funds for the Red Cross. On the other hand, the premium amount cannot be increased because it is not authorized by the CBK. Hence, the Law on Red Cross constitutes direct expropriation of the respondent's income. On the other hand, the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in its Chapter II guarantees the protection of human rights and fundamental freedoms. According to Article 21 par. 4 of the Constitution, the fundamental rights and freedoms guaranteed in Chapter II of the Constitution also apply to legal persons, as to the extent applicable. In this regard, it should be noted that the respondent has the status of a legal person and the provisions of this chapter apply also to it".*

26. On 15 October 2018, the referring court (namely the the Supreme Court) submitted to the Court the referral for assessment of the compatibility of the provision of Article 14, paragraph 1.7 of the challenged Law with the Constitution.

Applicant's allegations

27. The referring court alleges that Article 14, paragraph 1.7 of the challenged Law is incompatible with Articles 24 [Equality Before the

Law], 46 [Protection of Property], Article 119 [Economic Relations] and 120 [Public Finances] of the Constitution.

28. The essence of the Referral of the referring court, also referring to the allegations of the "Illyria" Company presented before it, consists in the allegation that paragraph 1.7 of Article 14 of the challenged Law, which obliges the insurance companies in Kosovo to pay (1%) of the gross prim value of insured vehicles insurance and which does not foresee any obligation to contribute to other companies in Kosovo, places insurance companies in a discriminatory position in relation to other companies, contrary to the principle set out in paragraph 2 of Article 119 of the Constitution [General Principles], which provides that "*The Republic of Kosovo shall ensure equal legal rights for all domestic and foreign investors and enterprises*".

29. The referring court also claims that "*the right of property of citizens as natural persons and various domestic and foreign private enterprises is guaranteed by law and by the Constitution. In this context, we consider that the respondent rightly raised the issue of compliance of the abovementioned legal provision, considering that the same legal provision is in contravention with Article 46 of the Constitution of the Republic of Kosovo*".

30. In support of its allegations, the referring court refers to the decision of the Constitutional Court UI-2441/2002, UI-1107/2002 of 12 February 2013. In this regard, the referring court notes that the Constitutional Court of Croatia. in assessing the constitutionality of the provisions of the Law on Croatia, as Article 14 of the challenged Law, held that those provisions "*are in contradiction with the provisions of Article 49, paragraph 2 (The State shall provide all the undertakings concerned with the legality of the provisions of Article 49 , paragraph 2 (The state shall ensure all entrepreneurs equal legal status in the market) and Article 51, paragraph 1 (Everyone shall participate in the defrayment of public expenses, in accordance with their economic capability) of the Croatian Constitution*".

31. The referring court states that *"[even Ombudsperson [...], in the capacity of a court friend (amicus curiae) with submission no. 1553/2018, of 04.07.2018, provided legal opinion that this disputed legal provision is in contradiction with the aforementioned constitutional provisions"*.

32. Finally, the referring court ascertains that *"[for the reasons presented above, we would like to inform you that the decision on merits of the Supreme Court of Kosovo in the present case is directly related to the*

legal norm challenged above, so the Supreme Court cannot decide upon revision, until the Constitutional Court [...] takes a decision on merits regarding this referral".

Comments of the Red Cross

33. The Red Cross, initially, referring to the judgments of the Court in cases KO126/16 and KO142/16, reiterates the admissibility criteria in relation to the referrals submitted under Article 113, paragraph 8 of the Constitution. In this respect, they claim that, according to the Court's interpretation, the right to "*refer a request for incidental control is recognized to a judge or a trial panel which is competent to adjudicate the case. [...] In the present case, [...], the Referral was not referred by the Trial Panel which is competent to decide on the merits of the case".*

34. The Red Cross also alleges that the preliminary procedure for initiating a request for a constitutional review of a norm in an incidental control proceeding obliges the referring court to first examine itself in its composition (trial panel) the suspicion despite the constitutionality of the norm . Only if the trial panel considers that the norm is unconstitutional, it may address the Constitutional Court with a request for assessment of the constitutionality of the specific provision. In the present case, such an assessment was not carried out by the competent trial panel.

35. The Red Cross also claims that after the referring court has not submitted the "*file to the Constitutional Court*", the essence of the dispute cannot be understood even if the other criteria of direct application of the challenged norm in the present case and that the constitutionality of the challenged norm be a prerequisite for the resolution of the case, are fulfilled. Consequently, they claim that the admissibility criteria under Article 113, paragraph 8 of the Constitution are not fulfilled.

36. They also claim that the referring court did not justify its referral as required by the Judgment in case KO126/ 6, as they merely mentioned Articles 46 and 120 of the Constitution. Also from the referral of the referring court it is seen that the President of the Supreme Court has submitted the Referral to the Court and informed that the procedure in the concrete case will be suspended. This constitutes a violation of the principle of legal certainty and infringement of an independent court, as the proceedings may be suspended only by a court decision and by the trial panel of the concrete case.

37. As to the merits of the case, the Red Cross alleges that the referring court merely considers that the challenged provisions "*violate Articles 46 and 120 of the Constitution and moreover, mentioned a decision of the Constitutional Court of Croatia and a submission of the Ombudsperson"* adding that "*the decision of the Court of Croatia may serve, along with some decisions of other European constitutional courts, as reference to support its claims*", but not to merely mention the constitutional articles, and then to point out that the Constitutional Court of Croatia did so.

38. In this regard, the Red Cross emphasizes that the Constitutional Court of Croatia has not found a violation of the right to property, as the referring court alleges.

39. Regarding the violation of Article 120, the Red Cross states that "*the Constitutional Court has declared inadmissible in a number of decisions the referrals of individuals for alleged violation of other articles outside the chapter on fundamental freedoms and rights as manifestly ill-founded".*

40. The Red Cross finally requires that the Referral of "*the President [the referring court] be declared inadmissible"*, requiring that the procedural and substantive omissions of the referring court be dealt seriously.

Relevant provisions of the challenged law (Law No. 03/L-179 on Red Cross of the Republic of Kosovo):

Article 1
The objective of the Law
This Law regulates the status, functions and financial sources of the Red Cross of Kosovo.

Article 2
Field of application
1. Red Cross of Kosovo is the only National Society of the Red Cross in the Republic of Kosovo, which carries out its voluntary, humanitarian and non profitable activities in the whole territory of Kosovo.
2. Red Cross of Kosovo acts as an auxiliary to the government on humanitarian issues in the whole territory and enjoys support from Government Institutions.

Article 7
Mission of Red Cross of Kosovo

The mission of Red Cross of Kosovo is to alleviate the suffering of individuals and the communities at risk through focused programs, with priority and sustainability as an auxiliary to the central and local authorities, in accordance with the Fundamental Principles of the International Red Cross and Red Crescent Movement.

Article 14
Financial resources

1. For the purpose of fulfilling its tasks and objectives stipulated by this Law, the Red Cross of Kosovo shall acquire means from the following sources:
1.1. membership with the Red Cross of Kosovo;
1.2. activities which are entrusted to Red Cross of Kosovo, by Republic of Kosovo, natural and legal persons;
1.3. traditional activities;
1.4. contributions (donations) done by natural and legal persons of the republic of Kosovo and foreign countries;
1.5. incomes from properties and rights of Red Cross of Kosovo;
1.6. incomes from implementation of programs contracted with cooperation agreements with respective ministries;
1.7. obligatory insurance of the vehicles 1% (one percent) from gross prim of the value of vehicle insurance;
1.8. from the divided fund for humanitarian support from Lottery of Kosovo, in accordance with law in force;
1.9. Red Cross of Kosovo shall not accept donations directly stemming from revenues of activities contrary to the Fundamental Principles of the International Red Cross and Red Crescent Movement.

Article 19
Punitive provisions

For not respecting the obligations from Article 13 sub-paragraphs 1.1, 1.2, 1.3 and Article 14, paragraphs 1.7, 1.8, 1.9, Competent Court for violations fines with cash, the legal persons in the amount from one thousand (1000) to three thousand (3000) Euros while the natural person respectively legal representatives of the natural persons in amount from five hundred (500) to one thousand (1000) Euros.

Admissibility of the Referral

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

42. In this respect, the Court refers to paragraphs 1 and 8 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.*
>
> *(...)*
>
> *8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue".*

43. The Court refers to Articles 51, 52 and 53 of the Law, which stipulate:

> *Article 51*
> *Accuracy of referral*
>
> *1. A referral pursuant to Article 113, Paragraph 8 of the Constitution shall be filed by a court only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.*
>
> *2. A referral shall specify which provisions of the law are considered incompatible with the Constitution.*
>
> *Article 52*
> *Procedure before a court*
>
> *After the submission of a referral pursuant to Article 113, Paragraph 8 of the Constitution, the procedure before the referring court shall be suspended until a decision of the Constitutional Court is rendered.*

Article 53
Decision

The Constitutional Court shall decide only about the compliance of the legal provision with the Constitution and shall not decide on other factual or legal matters related to the dispute before the referring court.

44. The Court also takes into account Rules 39 and 77 of the Rules of Procedure, which specify:

*Rule 39 [*Admissibility Criteria*]*

"[...]

(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.
[...]

Rule 77 [Referral pursuant to Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law]

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law.

(2) Any Court of the Republic of Kosovo may submit a referral under this Rule provided that:

(a) the contested law is to be directly applied by the court with regard to the pending case; and

(b) the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

(3) The referral under this Rule must specify which provisions of the contested law are considered incompatible with the Constitution. The case file under consideration by the court shall be attached to the referral.

(4) The referring court may file the referral ex officio or upon the request of one of the parties to the case and regardless of whether a party in the case has disputed the constitutionality of the respective legal provision.

> *(5) After the filing of the referral, the Court shall order the referring court to suspend the procedure related to the case in question until a decision of the Constitutional Court is rendered.*

45. In the light of the above normative framework, it results that any referral submitted under Article 113, paragraph 8 of the Constitution, in order to be admissible, must meet the following criteria:

> a) The referral must be filed by a "court";
> b) The (referring) court must not be certain of the compliance of the challenged law with the Constitution;
> c) The referring court must specify which provisions of the challenged law are considered incompatible with the Constitution
> d) The challenged law must be applied directly by the referring court in the case before it;
> e) The legality of the challenged law is a prerequisite for deciding in the case under consideration.

46. The Court recalls its case-law, which confirms the abovementioned criteria, regarding the admissibility of referrals filed under Article 113.8 of the Constitution (see*, mutatis mutandis,* case of the Constitutional Court, KO126/16, Applicant: *Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters*, of 27 March 2017, paragraph 62*,* and the case of the Constitutional Court KO142/16, Applicant: *Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters*, of 9 May 2017, paragraph 58).

47. Consequently, the Court first finds that the referring court is an authorized party to submit such a referral.

48. In this regard, the Court recalls that the Referral was submitted by the Supreme Court and was signed by its President within the scope of authorizations relating to his function. The Referral clearly states that it is submitted by the Supreme Court which has to decide on the revision of the "Illyria" Company Hence, the Court considers that the present Referral was submitted by the "court" within the meaning of Article 113.8 of the Constitution (see case of the Constitutional Court, KO04/11, Applicant: *the Supreme Court of Kosovo*, of 1 March 2011. See also cases of the Constitutional Court, KO126/16).

49. The Court also notes that the referring court has raised doubts as to the constitutionality of the challenged law. Thus, the referring court is

not sure about the compliance of the challenged law with the Constitution.

50. In addition, the referring court has specifically specified paragraph 1.7 of Article 14 of the challenged law as a provision which it considers to be inconsistent with the Constitution.

51. The Court further considers whether the challenged law should be directly applied by the referring court in the case before it, and if the legality of the challenged law is a prerequisite for the decision of the referring court.

52. The Court considers that "the direct application" of the concrete norm means that the outcome of the decision by the referring court depends on the direct implementation or non-implementation of the challenged norm. Namely, as a result of the direct implementation or non-implementation of the specific norm, the regular courts could render decisions with different results (see, Case of the Constitutional Court, KO126/16, cited above, paragraph 64).

53. Therefore, in order to have a direct connection, there must be a necessary relation between the decision of the Constitutional Court (resolution of the issue of the constitutionality of the law by this Court) and resolution of the main issue by the referring court, in the sense that the adjudication by the referring court cannot be completed independently from the adjudication in the Constitutional Court"" (see, *mutatis mutandis,* the case of the Constitutional Court, KO126/16, cited above, paragraph 65, and the Constitutional Court, KO142 / 16, cited above, paragraph 62.)

54. In this regard, the Court refers to Article 14, paragraph 1.7 of the challenged Law:

> *1. For the purpose of fulfilling its tasks and objectives stipulated by this Law, the Red Cross of Kosovo shall acquire means from the following sources:*
>
> *[...]*
>
> *1.7 obligatory insurance of the vehicles 1% (one percent) from gross prim of the value of vehicle insurance".*

55. The Court notes that the Red Cross lawsuit was initiated because it considered that "Illyria" Company did not fulfill the legal obligation under Article 14, paragraph 1.7 of the challenged Law, to pay one

percent (1%) of the gross prim of the insurance value of the vehicle from compulsory motor insurance.

56. The statement of claim of the Red Cross was approved by the Basic Court and upheld by the Court of Appeals, obliging the "Illyria" Company to pay to the Red Cross the amount determined, entirely based on the provisions of Article 14, paragraph 1.7 of the challenged law.

57. The Court recalls that, following the Judgment of the Court of Appeals on the Red Cross lawsuit, the "Illyria" company submitted a revision to the Supreme Court, where the allegations in the revision are directly related to the challenged law and the constitutionality of the challenged legal norm. In this regard, the referring court clarifies that "*it cannot decide upon revision until the Constitutional Court takes a decision on merits regarding this Referral*".

58. Therefore, having regard to the foregoing, the Court considers that the challenged law must be directly applied by the referring court in the case under consideration before it.

59. In addition, the Court considers that the constitutionality of the challenged law is a precondition for deciding in the case under consideration, since the declaration (un) constitutional of the challenged provisions would have a decisive influence on the decision-making epilogue on the revision by the Supreme Court (see, *mutatis mutandis*, the case of the Constitutional Court, KO126/16, cited above, paragraph 65.)

60. Therefore, with regard to the fulfillment of the admissibility criteria, the Court finds that the referring court is an authorized party, has raised reasonable doubts about the challenged law and has proved that that law should be applied directly by the referring court in the case under consideration before it. The referring court also reasoned that the legality, namely the constitutionality of the challenged law is a prerequisite for taking a decision in the case under review and has clarified what provisions of the challenged law are considered incompatible with specific provisions of the Constitution.

61. Moreover, the Court notes that the Referral is not inadmissible on any of the grounds contained in Rule 39 [Admissibility Criteria] of the Rules of Procedure.

62. Therefore, the Court declares that the Referral is admissible for review of its merits.

Merits of the Referral

63. The Court recalls that the referring court in the course of the examination of the preent case raised doubts as to the incompatibility of Article 14, paragraph 1.7 of the challenged Law with Articles 24 [Equality Before the Law] and 46 [Protection of Property], Article 119 [Economic Relations], and 120 [Public Finances] of the Constitution.

64. The Court recalls, again, paragraph 1.7 of Article 14 of the challenged Law, which provides that:

> *"1. For the purpose of fulfilling its tasks and objectives stipulated by this Law, the Red Cross of Kosovo shall acquire means from the following sources:*
>
> *[...]*
>
> *1.7 obligatory insurance of the vehicles 1% (one percent) from gross prim of the value of vehicle insurance".*

65. The substance of the Referral of the referring court consists in the allegation that paragraph 1.7 of Article 14 of the challenged Law, obliging him to pay one percent (1%) of the gross prim of the insurance value of insured vehicles insurance companies in Kosovo, and by not foresseing any such obligation to other companies in Kosovo, places insurance companies in a discriminatory position in relation to other companies. This, in violation of the principle set out in Article 24, paragraph 2, and Article 119 of the Constitution.

66. In this regard, the referring court, based on the allegation of the "Illyria" Company reasons that the prim amount paid by the insured cannot be increased to cover the requirements of the challenged law, since the prim increase should be authorized by the Central Bank of Kosovo (hereinafter: the CBK), based on the prim structure and this payment is not foreseen in the prim structure. Therefore, the amount of one percent (1%) of gross prim of vehicle insurance should be paid from the budget of the insurance companies that provide this service. Therefore, according to them, unequal treatment of insurance companies offering this type of insurance in relation to other companies in Kosovo results in violation of their right to property under Article 46 of the Constitution.

67. In this regard, the Court refers to Article 24 [Equality Before the Law] of the Constitution, which establishes:

"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".

68. The Court further refers to Article 14 [Prohibition of Discrimination] of the ECHR, which defines:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

69. With regard to Article 14 of the Convention, the Court also refers to Article 1 of Protocol No. 1 [Protection of Property] of the ECHR, which defines:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.".

70. The Court further refers to Article 46 [Protection of Property] of the Constitution, which defines:

"1. The right to own property is guaranteed.
2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.
[...]".

71. The Court also refers to Article 119 [General Principles] and Article 120 [Public Finances] of the Constitution, which define:

"Article 119 [General Principles]

1. *The Republic of Kosovo shall ensure a favorable legal environment for a market economy, freedom of economic activity and safeguards for private and public property..*

2. *The Republic of Kosovo shall ensure equal legal rights for all domestic and foreign investors and enterprises.*

8. Every person is required to pay taxes and other contributions as provided by law.
[...]

Article 120 [Public Finances]

1. *Public expenditure and the collection of public revenue shall be based on the principles of accountability, effectiveness, efficiency and transparency.*

2. *The conduct of fiscal policy at all levels of government shall be compatible with the conditions for low-inflationary and sustainable economic growth and employment creation.*

3. *Public borrowing shall be regulated by law and shall be compatible with economic stability and fiscal sustainability".*

72. The Court notes that the substance of the claims of the allegations of the Referral relates to the incompatibility of Article 14 (1.7) of the challenged Law with Articles 24, 46 and 119 of the Constitution.

73. In this connection, the Court first notes that, under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, "*Human rights and fundamental freedoms guaranteed by this*

Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".

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

General principles regarding equality before the law and right to property

75. The Court reiterates that Article 24 of the Constitution provides that everyone is equal before the law and that everyone enjoys the right to equal legal protection.

76. With regard to this right, the ECtHR has reiterated that "*Article 14 [of the ECHR] complements other substantive provisions of the Convention and the Protocols. There is no independent existence, as it only has an effect on the 'enjoyment of the rights and freedoms' protected by those provisions*" (See case of *ECtHR Khamtokhu and Aksenchik v. Russia*, Application Nos 60367/08 and 961/11, Judgment of 24 January 2017, para 53. The ECtHR further established that "*although the application of Article 14 does not imply the violation of those [other] provisions - and in that regard is independent - there can be no room for its implementation, as long as the facts of the case do not fall within any of those [provisions],* (see case *Sejdic and Finci v. Bosnia and Herzegovina*, Judgment of 22 January 2009).

77. The Court refers to the case-law, which emphasizes that only differences in treatment based on an identifiable characteristic *or status*, may represent unequal treatment within the meaning of Article 24 of the Constitution and Article 14 of the ECHR. In addition, in order for an issue to be raised under Article 24, there must be a difference in the treatment of persons in analogous situations or similar situations (See, *mutatis mutandis, Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Application No. 5095/71, 5920/72 and 5926/72, 7 December 1976, para 56, *Carson and Others v. United Kingdom*, Application No. 42184/05, 16 March 2010, para. 61).

78. The Court considers that, for the purposes of interpreting Article 24 of the Constitution and Article 14 of the ECHR, a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or 2) if there is not a reasonable relationship (namely proportionality) between the means

employed and the aim sought to be realised (See, *mutatis mutandis, Abdulaziz, Cabales and Balkandali v. United Kingdom*, Application no. 9214/80; 9473/81 and 9474/81, 24 April 1985, paragraph 72).

79. The Court emphasizes that the Government and the Assembly enjoy a margin of appreciation, respectively a discretionary space, in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin varies according to the circumstances, according to the subject matter and the history of the case. A wide margin is usually allowed when it comes to general measures of the economic or social strategy, unless they are clearly without any reasonable grounds (See, *mutatis mutandis, Burden v. United Kingdom*, Application No. 13378/05, 29 April 2008, paragraph 60; *Khamtokh and Aksenchik v. Russia*, cited above, paragraph 64).

80. The Court notes that the essence of the Referral concerns the allegations of incompatibility of the challenged law with Article 24 of the Constitution. However, the Referral also raised claims of the property rights, guaranteed by Article 46 of the Constitution and Article 1 of Protocol No. 1 of the Convention. Regarding the rights guaranteed and protected by Article 46 of the Constitution, the Court emphasizes that paragraph 1 of Article 46 of the Constitution guarantees the right to property; paragraph 2 of Article 46 of the Constitution defines the manner of use of the property, clearly specifying that its use is regulated by law and in accordance with the public interest and in paragraph 3, guarantees that no one can arbitrarily be deprived of property, also specifing the conditions under which property may be expropriated (see, *mutatis mutandis*, Case KI50/16, Applicant *Veli Berisha and Others*, Resolution on Inadmissibility of 10 March 2017, paragraph 31).

81. The Court notes that the ECtHR has ascertained that the right to property consists of three fundamental rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph (See, *mutatis mutandis*, the ECHR Judgment of 23 September 1982, *Sporrong and Lonnrot v. Sweden*, no. 7151/75; 7152/75, para. 61).

82. The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (See, *mutatis mutandis*, ECHR Judgment of 21 February 1986, *James and Others v. United Kingdom*, no. 8793/79, para 37).

Application of general principles of equal treatment with regard to the right to property in the present case

A. With regard to unequal treatment

83. The Court first determines whether there is a difference in the treatment of companies providing insurance to self-employed persons, on one hand, and other companies exercising their economic activity in Kosovo (including those providing other insurance services) on the other.

84. Initially, the Court notes that the challenged law establishes some sources of funding for the Red Cross of Kosovo, where Article 14 (1.7) creates specific obligations for a category of economic entities, namely insurance companies providing motor liability insurance.

85. The Court notes that paragraph 1.7 of Article 14 of the challenged Law foresees that, for the fulfillment of duties and obligations determined by this Law, the Red Cross of Kosovo provides financial resources by collecting one percent (1%) of the gross prim value. This amount is to be paid only by the companies offering this type of insurance in Kosovo. However, other economic entities operating in Kosovo, which provide insurance in Kosovo, but do not provide vehicle insurance, are not obliged to pay this amount set for the Red Cross. Similar contributions are not required to pay neither other economic entities operating in Kosovo.

86. The Court notes that from paragraph 1.7 of Article 14 of the challenged Law follows that only the companies providing this type of insurance are obliged to pay one percentage of their income for the Red Cross.

87. The Court considers that insurance companies that provide vehicle insurance services. on one hand, and companies that exercise other activities in Kosovo, on the other, are in an analogous situation or in a similar situation compared to the activity of the Red Cross. So all of them, exercise their activity in Kosovo. However, due to their scope, the provision of vehicle insurance, they are placed in a different

position regarding the obligation to contribute to the Red Cross budget.

88. The Court further notes that the scope of the companies, in this case the provision of vehicle insurance, is a criterion for imposing an obligation to contribute to the Red Cross budget. The Court recalls that the scope constitutes an aspect of personal status for the purposes of Article 24 of the Constitution. Article 24 requires that no one may be discriminated against, *inter alia*, on the basis of "any other personal status", whereas, in this connection, Article 119 of the Constitution stipulates that *"The Republic of Kosovo shall ensure equal legal rights for all domestic and foreign investors and enterprises"*.

89. The Court therefore considers that the distinction in the obligation to contribute to the Red Cross has been made dependent on the scope of the companies in Kosovo, resulting in a situation in which the companies providing motor insurance in Kosovo are obliged to pay one percent (1%) of the prim from vehicle insurance, but not those that offer different types of insurance or engage in other activities in Kosovo. However, all the companies that exercise the activity in Kosovo are in a relatively similar situation.

90. Therefore, the Court concludes that there is a difference in the treatment of the companies in Kosovo that are in an analogous situation or in a similar situation which is manifested through the obligation to pay a certain amount of their income for the financing of the Red Cross of Kosovo. This fact limits their right to equality before the law, which results in the restriction of the right to protection of property under Articles 24, 119 and 46 of the Constitution.

B. Regarding the justification of limitations of rights

91. The Court recalls the human rights set forth by the Constitution may be limited in specific cases, if the limitation pursues a legitimate aim, and if there is a reasonable relationship of proportionality between the means used and the purpose sought to be achieved.

92. In this respect, the Court refers to Article 55 [Limitation on Fundamental Rights and Freedoms] of the Constitution, which establishes:

1. *"Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law..*

2. *Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society.*

3. *Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.*

4. *In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.*

5. *The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right".*

93. In light of this constitutional provision as well as the ECtHR case law regarding Article 14 of the ECHR (which refers to the same conditions as regards the assessment of discrimination), in the present case the Court shall analyze:

1) whether the limitation of rights is foreseen by law;
2) whether there was a legitimate aim that was to be achieved by the limitation; and
3) whether there was a relationship of proportionality between the limitation of rights the legitimate aim intended to be achieved.

1) whether the limitation is foreseen by law

94. The Court firstly recalls that the institutions of public authority enjoy a margin of appreciation of the issues of general interest and coverage of various spheres by written norms, namely by law.

95. In this regard, the Constitution in Chapter II has given special importance to human rights and freedoms and has also provided for cases where such rights may be restricted by law, if this is required by the general interest of society and State.

96. With regard to the limitation provided by law, the Court notes that the limitation of the rights in the present case was foreseen by Article 14,

paragraph 1.7 of the challenged Law, which was approved by the Assembly on 10 June 2010, an institution in which the Constitution vested the exercise of legislative power.

97. Therefore, given that a right guaranteed by Chapter II of the Constitution may be limited by law, where this is required by the general interest, the Court considers that the limitation of the rights is in accordance with the requirements of paragraph 1 of Article 55 of the Constitution. The Court finds that the obligation of the insurance companies to pay one percent (1%) of the prim from vehicle insurance in the present case, was provided for by law.

2) whether the limitation pursues a legitimate aim and is proportionate

98. With regard to the second criterion, the Court notes its case-law and the ECtHR case-law, stating that unequal treatment is not in accordance with Article 24 of the Constitution and Article 14 of the Convention if it does not pursue n legitimate aim or if there is no reasonable relationship of proportionality between the means used and the purpose sought to be achieved (see the Judgment of the Constitutional Court in the case KO01/17). Along this line of argument, the ECtHR in case *Sejdic and Finci v. Bosnia and Herzegovina*, emphasized that: "*[...] discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. No objective and reasonable justification means that the distinction in issue does not pursue a legitimate aim or that there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised".*

99. In this regard, the Court notes that the legislator through the adoption of the challenged law aimed at regulating the status, activity and financial resources of the Red Cross. Pursuant to Article 2 of the challenged Law, Red Cross of Kosovo is an association which carries out its humanitarian, voluntary, non-profitable activity, in the whole territory of Kosovo - an activity which enjoys the support of the governmental institutions of the Republic of Kosovo. The mission of the Red Cross under Article 7 of the challenged Law is the support of central and local authorities in alleviating the suffering of individuals, communities at risk, and their health education.

100. Moreover, although the Red Cross of Kosovo has been established as an association, its status is regulated by a special law issued by the Assembly of the Republic of Kosovo. This fact testifies the public

benefit of the Red Cross of Kosovo and, consequently, the need to ensure its sustainable funding resources.

101. In this context, the Court points out that the power institutions based on their competencies and their free assessment considered that the issuance of the challenged law is of general interest, taking into account the mission and activity of the Red Cross in providing assistance and support to central and local institutions for the benefit of the individual and society and serving the public interest.

102. However, the Court recalls the requirements of paragraph 4, of Article 55 of the Constitution, which clearly states what are the obligations and duties of the institutions of the public authorities and of the courts in cases of limitation of rights. This provision expressly stipulates that the institutions concerned should pay attention to the essence of the rights that are restricted, the importance, the purpose of limiting the rights, the nature and scope of the limitation, the relationship between the limitation and the purpose intended to be achieved, as well and to consider the possibility of achieving that aim with the least limitation of rights, which implies the existence of a proportionality relationship between the limitation and purpose intended to be achieved.

103. In that regard, the Court will assess whether the payment provided for in the provision of the challenged law has an objective and reasonable justification and, if proportionate, to the extent that that obligation does not affect the essence of the rights which the Constitution and the ECHR guarantee to the natural and legal persons, first of all the right to equality before the law.

104. Initially, the Court wishes to emphasize that the provision of the challenged law, namely paragraph 1.7, of Article 14 is a provision of a binding character, which foresees one of the forms of funding of the Red Cross. The binding character of this provision is provided by Article 19 [Punitive provisions] of the challenged Law, which foresees:

> "*For not respecting the obligations from... and Article 14, paragraphs 1.7... Competent Court for violations fines with cash, the legal persons in the amount from one thousand (1000) to three thousand (3000) Euros while the natural person respectively legal representatives of the natural persons in amount from five hundred (500) to one thousand (1000) Euros*".

105. The Court also notes that, apart from the binding character, the provision of the challenged law also has a selective character, because it obliges only one category of economic entities, namely insurance

companies, that from their assets (property) collected from the compulsory vehicle insurance allocate one percent (1%) of the gross prim for financing the Red Cross and not other economic entities operating in the Republic of Kosovo.

106. The Court considers that although the legislator, by limiting the rights, aimed at achieving an aim that is in line with the general social interest, it is not clear why the lawmaker did not extend and distribute the financial obligation established by the provision of the challenged law also to other economic entities, but only to the insurance companies that provide this type of insurance.

107. Thus, the Court notes that neither the Assembly nor any other relevant instance, have not presented any consistent reasoning as to why the challenged law obliges only the insurance companies to contribute to the financing of the Red Cross.

108. The Court considers that, if the payment provided for by the provision of the challenged law would be reasonably and proportionately distributed to all economic entities, this would be in accordance with the requirements of Article 24 [Equality Before the Law] of the Constitution, with the equal position in the market guaranteed by Article 119 of the Constitution, as well as with the requirements of paragraphs 4 and 5 of Article 55 of the Constitution.

109. In this connection, the Court refers to the Decision of the Constitutional Court of the Republic of Croatia, No. U-I-244112002, U-I-1107/2002 of 12 February 2003, in which case the referring court also referred to. In the case of Croatia, the application was filed by the Croatian Insurance Office and Chamber of Commerce of Croatia, which requested the Constitutional Court of Croatia the assessment of compatibility of Article 12, paragraph 3 and Article 24, paragraph 1.1 of the Law on the Red Cross of Croatia (the challenged law), with Articles 3, 49, 50 and 51 of the Constitution of the Republic of Croatia.

110. Article 12, paragraph 3 of the Law on the Red Cross of Croatia provided for: *"From the compulsory car insurance, 1% of the means is allocated annually to the Croatian Red Cross for the advancement of the activities related to first aid, with the aim of decreasing the number of traffic accidents"*. Whereas, Article 24 (Punitive provisions), paragraph 1, item (1), provided for the imposition of a fine in the event of non-application of Article 12, paragraph 3, by Croatian motor insurance companies.

111. As to the compatibility of the provision of the Law on the Red Cross of Croatia with Article 49 (2) of the Croatian Constitution (Equal Position), the Constitutional Court of Croatia considered that this provision of the challenged law: *"Is in contradiction with the constitutional guarantee of the equal legal status of all entrepreneurs in the market, the determination of obligations by which a group of entrepreneurs is placed unequally in relation to others. This is done with the challenged legal provision to insurance companies, which alone among all commercial organizations have to allocate funds from insurance prims, in the present case of those insurance in which the owners or users of motor vehicles are insured from the liability for damages that are caused to the third parties in traffic (...)".*

112. The Constitutional Court of Croatia also found that the provision of the challenged law is not in accordance with Article 51 of the Constitution of Croatia, reasoning that: *"[...] if the lawmaker considered that it was necessary in the interest of the social community to improve the conditions of exercising the activity of the Croatian Red Cross in general, then the obligation of increased allocation for this purpose had to be determined for all economic entities in accordance with their possibilities, and this would also be in accordance with the provision of Article 51, paragraph 1 of the Constitution "Everyone shall participate in the defrayment of public expenses, in accordance with their economic capability".*

113. In the light of the foregoing considerations, the Court considers that the obligation of only insurance companies to pay the determined amount from the income collected from the motor liability insurance as a contribution to the Red Cross budget is not justified, namely it is not based on objective reasons. Consequently, there is no legitimate aim that would justify the unequal treatment of vehicle insurance companies.

114. The Court refers to its case law (see Judgment in case KO01/17), when it found that the non-existence of a legitimate aim of unequal treatment rendered unnecessary the analysis of the proportionality between the means used and the aim to be achieved.

115. In this respect, the Court considers that as a consequence of unequal treatment of insurance companies in relation to other companies in Kosovo, and by taking into account that the payment by insurance companies of one percent (1%) of the amount of the gross vehicle prim reduces the wealth of insurance companies, paragraph 1.7 of Article 14 of the challenged law also does not comply with the right of property, according to Article 46 of the Constitution.

116. From the foregoing, the Court considers that the provision of the challenged law is incompatible with the requirements of Article 24 [Equality Before the Law], paragraph 2 of Article 119 [General Principles] and Article 46 [Protection of Property] of the Constitution, in conjunction with Articles 14 and 1 of Protocol No. 1 to the ECHR.

117. The Court recalls that the referring court also raises the issue of compliance of the challenged law with Article 120 [Public Finances] of the Constitution. However, having in mind that the Court found a violation of Articles 24, 46 and 119 of the Constitution, it does not find it necessary to assess the compliance of the challenged law with Article 120 of the Constitution.

118. In sum, the Court concludes that paragraph 1.7 of Article 14 of the challenged Law is not compatible with Article 24 [Equality Before the Law], Article 119 [General Principles] and Article 46 [Protection of Property] of the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.8 and 116.3 of the Constitution, Articles 20 and 51 of the Law and Rules 39 and 59 (a) of the Rules of Procedure, on 13 March 2019, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that paragraph 1.7 of Article 14 of Law No. 03/L-179 on the Red Cross of the Republic of Kosovo, is not in compliance with Article 24 [Equality Before the Law], Article 119 [General Principles] and Article 46 [Protection of Property] of the Constitution;

III. DECIDES, in accordance with Article 116.3 of the Constitution, that paragraph 1.7 of Article 14 of Law No. 03/L-179 on the Red Cross of the Republic of Kosovo, is invalid, from the day of entering into force of this judgment;

IV. TO NOTIFY this judgment to the Parties;

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

VI. This judgment is effective immediately.

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

KO171/18, Applicant: The Ombudsperson , Constitutional review of articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3), 18, 19 (paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3) of Law No. 06/L-048 on Independent Oversight Board for Civil Service in Kosovo

KO171/18, Judgment of 25 April 2019, published on 20 May 2019

Keywords: institutional referral, Independent Oversight Board for Civil Service of Kosovo,

The Referral was submitted by the Ombudsperson, in the capacity of the authorized party pursuant to paragraph 2, subparagraph 1, of Article 113 [Jurisdiction and Authorized Parties] of the Constitution.

The Applicant requested the Constitutional Court to assess the constitutionality of certain provisions of Law No. 06/L-048 on Independent Oversight Board for Civil Service in Kosovo (hereinafter: the challenged Law) and requested the imposition of interim measure.

In his Referral addressed to the Constitutional Court, the Applicant alleged that the challenged Law is not in compliance with Article 132 [Role and Competencies of the Ombudsperson] and Chapter VI [Government of the Republic of Kosovo] of the Constitution.

The Applicant's main allegations were about: (i) exceeding the narrow scope of the Board, as defined in Chapter VI of the Constitution; (ii) the violation of the constitutional independence of the Ombudsperson and other independent constitutional institutions; and (iii) granting immunity to the members of the Board.

The Court found that the Referral fulfills the admissibility requirements established in the Constitution and further specified in the Law and foresees in the Rules of Procedure, and in the merits of the Judgment addressed each allegation of the Applicant. The Court assessed and found the following:

Firstly, as regards the Applicant's allegation of exceeding the narrow scope of the Board, the Court considered that the term "Civil Service" according to the reading and interpretation of Article 101 of the Constitution should be understood in its context and the purpose of the drafter, which is stated in Article 1 of the Law on Civil Service, thus avoiding the possibility of misinterpretations or technical interpretations of the norm in question. Consequently, the Court found that Article 2 of the challenged Law is in

compliance with Article 101 [Civil Service], paragraphs 1 and 2 of the Constitution.

Secondly, as regards the second set of allegations, the Court initially recalled its case law in which it developed the principles regarding the independence of the constitutionally independent institutions, emphasizing that the latter are not exempted from the obligation that in the regulations or legal acts regulate the specifics regarding the employment relationship that differ from the general norms established by other laws, including the challenged Law; and during the implementation of the challenged Law, their function should be recognized, *inter alia*, in the issuance and application of their internal rules to protect their independence established in the Constitution and specific laws, to the extent necessary, to protect their independence.

Whereas, as regards the constitutional review of the provisions of the challenged Law in relation to other public institutions, the Court concluded that Article 4 (paragraph 1) in conjunction with Article 3 (paragraph 1.1) governing the status of the Board, are not in compliance with the Constitution because the Court held that the Board cannot be categorized by the status of an independent constitutional institution under Chapter XII of the Constitution.

Regarding the constitutional review of Article 6 (paragraph 1.2) and Article 19 (sub-paragraphs 5, 6, 7 and 8) of the challenged Law, these articles regulated the oversight of the selection of civil servants for senior management positions by the Board, the Court found that they are not in compliance with the Constitution. The Court considered that the unequal treatment of civil servants in relation to the competence of the Board for overseeing the selection of civil servants as foreseen by these provisions of the challenged Law, are not in compliance with the constitutional right to equality before the law.

The Court found that the following provisions of the challenged Law, namely Article 2 on the scope; Article 3 (paragraphs 1.2, 1.3, 1.4) for the definitions “civil servant”, “civil servant of high management level”, “civil servant of management level”; Article 7 (paragraph 1, subparagraphs 2, 3 and 4) for the competencies of the Board; Article 11, paragraph 3 on immunities; Article 18 on the ways of filing appeals; Article 20 (paragraph 5) for the implementation of the Board recommendations; Article 21 on Board decisions; Article 22 for initiating administrative conflict; Article 23 on procedures in case of non-implementation of the Board decision; Article 24 on administrative sanctions; and Article 25 (paragraphs 2 and 3) regarding the cooperation of the institutions of the challenged Law, are in compliance with the Constitution.

Thirdly, the Court, having regard to the limited immunity guaranteed by the challenged Law to the Board members, considered that the measure used was proportionate and found that Article 11, paragraph 3 of the challenged Law is compatible with the right of access to court, as an integral part of the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

Finally, regarding the imposition of the interim measure, the Court considered that it was not necessary to consider it since it was decided on the merits of the case.

JUDGMENT

in

Case No. KO171/18

Applicant

The Ombudsperson

Constitutional review of articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3), 18, 19 (paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3) of Law No. 06/L-048 on Independent Oversight Board for Civil Service in Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the Institution of the Ombudsperson of the Republic of Kosovo (hereinafter: the Applicant).

Challenged decisions

2. The Applicant challenges the constitutionality of certain provisions of Law No. 06/L-048 on the Independent Oversight Board for Civil Service of Kosovo (hereinafter: the challenged Law), which entered into force on 25 August 2018, namely, Articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3) 18, 19 (sub-paragraphs 5,

6, 7 and 8), 20 (paragraph 5) 21, 22, 23, 24 and 25 (paragraphs 2 and 3).

Subject matter

3. The subject matter of the Referral is the constitutional review of the abovementioned provisions of the challenged Law, which according to the Applicant's allegations, are not in accordance with Article 132 [Role and Competencies of the Ombudsperson] and Chapter VI [Government of the Republic of Kosovo] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

4. The Applicant requested the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely to suspend the application of Articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3) 18, 19 (sub-paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3) of the challenged Law.

Legal basis

5. The Referral is based on paragraph 2, subparagraph 1, of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, Articles 22 [Proceedings of the Referral], 27 [Provisional Measures], 29 [Accuracy of Referral] and 30 [Deadlines] of the Law on the Constitutional Court of the Republic of Kosovo, as well as Rules 32 [Filing of Referrals and Replies], 56 [Request for Interim Measures] and 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] 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 2 November 2018, the Applicant submitted the Referral to the Court.

7. On 5 November 2018, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Nexhmi Rexhepi.

8. On 7 November 2018, the Applicant was notified about the registration of the Referral.

9. On the same date, the Referral was communicated to the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo with the instruction to distribute the referral to all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), to the Prime Minister of the Republic of Kosovo, the Chair of the Committee on Public Administration, Local Governance and Media of the Assembly of the Republic of Kosovo, the Independent Oversight Board for Civil Service of Kosovo (hereinafter: the Board) with the instruction to submit to the Court the comments, if any, by 21 November 2018.

10. The Referral was also communicated to the Secretariat of the Assembly of the Republic of Kosovo, which was requested to submit to the Court all relevant documents regarding the referral.

11. On 9 November 2018, the Referral was communicated to the Auditor General of Kosovo, the Central Election Commission, the Central Bank of Kosovo and the Independent Media Commission with an instruction to submit to the Court their comments, if any, by 21 November 2018.

12. On 12 November 2018, the Secretariat of the Assembly submitted to the Court the documentation regarding the procedure for reviewing and approving the challenged Law in the Assembly, *inter alia*, as follows: the legislative initiative, namely the Draft Law on the Independent Oversight Board for Civil Service of Kosovo (hereinafter: the Draft Law); the opinion of the Government regarding the Draft Law; transcript of the session for approval in principle of the draft law; the transcript of the session in which the challenged Law was approved; and the Decision of the Assembly on the adoption of the challenged Law.

13. On 20 November 2018, the Independent Media Commission sent a document confirming that it supports the allegations raised by the Applicant.

14. On 21 November 2018, the Board submitted their comments, by which they challenge in entirety the Applicant's allegations, also submitting additional documents.

15. On 29 November 2018, the Applicant submitted the response to the comments of the Board of 21 November 2018.

16. On 28 March 2019, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

17. On 25 April 2019, the Court voted on the admissibility of the Referral and to find a violation in respect of the challenged Law.

Summary of facts

18. On 22 December 2001, UNMIK Regulation No. 2001/36 on the Kosovo Civil Service, which established the Independent Oversight Board of Kosovo, was rendered within the Ministry of Public Administration.

19. On 16 August 2010, the Law No. 03/L-192 on the Independent Oversight Board for Civil Service of Kosovo was promulgated in the Official Gazette.

20. In January 2018, the Committee on Public Administration, Local Governance and Media of the Assembly of the Republic of Kosovo initiated the procedure for the adoption of the challenged Law.

21. On 23 July 2018, the Assembly of Kosovo adopted the challenged Law, with 58 (fifty-eight) votes for, 1 (one) vote against and 7 (seven) abstentions.

22. On 8 August 2018, the challenged Law was promulgated by the President of the Republic of Kosovo (Decree no. DL - 028-2018).

23. On 10 August 2018, the challenged Law was published in the Official Gazette of the Republic of Kosovo.

24. Article 32 of the challenged Law provides that: "*This law shall enter into force fifteen (15) days after the publication in the Official Gazette of the Republic of Kosovo".*

25. Article 31 of the challenged Law provides that: *"upon the entry into force of this Law, the Law no. 03/L-192 on Independent Oversight Board for Civil Service of Kosovo is abrogated".*

Applicant's allegations

26. The Applicant challenges the provisions of the challenged Law, namely Articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3) 18, 19

(sub-paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3).

27. The Applicant with respect to the challenged provisions of the challenged Law raises allegations regarding: (i) *violation of the constitutional independence of the Ombudsperson; (ii) exceeding the narrow scope of the Board, established in Chapter VI (Government of the Republic of Kosovo) of the Constitution; and (iii) immunity from criminal prosecution, civil lawsuit or dismissal, with respect to the performance of the functions of the Board.*

(i) Regarding the allegation of violation of the constitutional independence of the Ombudsperson

28. The Applicant, initially referring to Article 2 [Scope] of the challenged Law, alleges that, *"the functions and competencies that the law provides to the Board in the supervision of the Ombudsperson Institution, among other institutions "*without providing exclusion regarding this scope in relation to independent institutions seriously violate *"constitutional independence of this Institution*". According to the Applicant "*...this constitutional independence is guaranteed by Article 132, par. 2 of the Constitution of the Republic of Kosovo, which stipulates that "The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo*". This allegation is supported by the Applicant, referring also to the Judgment of the Constitutional Court, in the case KO73/16.

29. The Applicant summarizes his allegations and challenged provisions of the new Law on Independent Oversight Board as follows: *"By authorizing direct guidance and direct interference to the Ombudsperson Institution, the law gives the Board the right to:*

> • *"reviews and decides on the complaints filed by civil servants and candidates for admission to the civil service (Article 6, par. 1, subparagraph 1);*
> • *"supervises the selection procedure and decides whether the appointments of civil servants of senior management level and of the management level, have been conducted in accordance with the rules and principles of civil service legislation (Article 6, par. 1, subparagraph 2);*
> • *"monitors public administration institutions employing civil servants regarding the implementation of the rules and principles of civil service legislation" (Article 6, par. 1, par. 3);*

• "have access and examine files and any document regarding the implementation of the rules and principles of the civil service legislation" (Article 7, par. 1, subparagraph 2);
• "interview any civil servant who may possess information of direct relevance to the carrying out of the Board's functions" (Article 7, par. 1, subparagraph 3);
• "requires and obtains from institutions any information necessary for the performance of its duties" (Article 7, par. 1, subparagraph 4);
• "decides... repeals or annuls the administrative act" (Article 18, par. 1, subparagraph 2);
• "decides... changes the administrative act" (Article 18, par. 1, subparagraph 3);
• "annuls the election procedure, when it determines that it was conducted in violation of the rules and principles of legislation for civil service (Article 19, par. 5, subparagraph 2) and
• "monitors public administration institutions employing civil servants.... through regular monitoring conducted based on the annual plan of monitoring, and through extraordinary monitoring carried out in special cases, related to serious breaches of the civil service legislation (Article 20, par. 1 and 2).

30. The Applicant referring to the provisions of the challenged Law referring to the obligation to implement the recommendations of the Board (Article 20, paragraph 5), the consequences for the responsible person of the institution in the event that the Decision of the Board is not applicable (Article 21, paragraphs 1 and 3), as well as the obligation to cooperate with the Board (Article 25, paragraph 2), states that *"these provisions make it clear that the Ombudsperson cannot consider other Board decisions and actions merely as recommendations or suggestions. On the contrary, the Law claims to force the Ombudsperson to comply with these decisions and actions"*.

31. Furthermore, the Applicant referring to the provisions of the challenged Law, pertaining to the reporting of the Board in case of non-enforcement of its decision and in case of non-cooperation (Article 23, paragraphs 1 and 3), and the financial consequences in the case of non-implementation of the Board decision (Article 24, paragraph 1) alleges that *"all these provisions of the Law on the Board have the purpose and effect of obliging the Ombudsperson to receive instructions and interference from the Board. In this way, the Law represents a direct violation of Article 132, par. 2 of the Constitution, which obliges the Ombudsperson not to "accept any instructions or intrusions from the organs, institutions or other authorities". According to the Applicant: "[...] the instructions and intrusions*

provided by the Law on the Board are not irrelevant. On the contrary, these instructions and intrusions affect the very essence of independence of the Ombudsperson Institution, seriously violating the organizational independence of this Institution".

32. The Applicant further states that *"The Law on the Board is constitutionally deficient because it imposes on the Ombudsperson precisely [...] "technical and unifying" approach, which gives the Board the same competencies over all institutions, without making the "necessary distinction between independent institutions and other state bodies". Moreover, this "technical and unifying" approach differs, for example, from Law No. 03/L-149 on Civil Service, which expressly states that: "During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected" (ibid., Article 3, par. 7). No such provision, which could have emphasized that, in the implementation of the Law on the Board, "the constitutional autonomy of the institutions independent from the Board shall be respected" is not included anywhere in the Law. Without the inclusion of this differentiation, the Law on the Board constitutes a violation of constitutional independence, not only of the Ombudsperson but of all independent institutions".*

33. However, the Applicant clarifies that "*The Board can still play an advisory role for the Ombudsperson on matters within the scope of the Board, such as the development of job vacancies. However, in the end, the Ombudsperson should be the one who decides whether to follow the suggestions of the Board or not. In other words, in order to comply with the Constitution, these suggestions should remain merely suggestions, not mandatory instructions, which is how they are presented in the current Law. This distinction, between non-binding suggestions and binding instructions, is important for assessing the constitutionality of the various provisions of the Law".*

(ii) ***Regarding the Applicant's allegation that the narrow scope of the Board, as defined in Chapter VI (Government of the Republic of Kosovo) of the Constitution, has been exceeded***

34. The Applicant alleges that the scope of the challenged Law, as defined in Article 1, paragraph 2 *"[...] is in direct contradiction with its narrow scope as envisaged by the Constitution".*

35. The Applicant specifically states that: *"The Constitution does not explicitly define the term "civil service" nor does it stipulate that employees of which institutions are considered part of this "civil*

service". However, even in the absence of such a definition, the fact that Article 101 is included within Chapter VI clearly shows that at the constitutional level, the civil service is considered part of the Government".

36. The Applicant continues: *"not only in this case, but throughout the structure of the Constitution, classification of institutions according to the chapter in which they appear constitutes an important principle of interpretation. For example, the Constitution, in any of its provisions, does not explicitly state that the Auditor General has the status of an independent institution (see Constitution, Articles 136-138). However, the fact that Article 136 ("Auditor General of Kosovo") is included within Chapter XII ("Independent Institutions") is sufficient to establish the status of this institution as an independent institution, even in the absence of such an explicit definition".*

37. The Applicant also alleges that *"moreover, given the fact noted above, that the Constitution obliges the Ombudsperson to not accept "instructions or intrusions from the organs, institutions or other authorities", it is necessary that the Constitution be interpreted in such a way that give the Board the power to oversee the Ombudsperson Institution. On the contrary, there would be a direct contradiction between Article 101 of the Constitution, which would give the Board the right to instruct and interfere in the Ombudsperson Institution, and Article 132, which prohibits precisely such a thing. In order to avoid this contradiction, it is necessary that the term "civil service" be interpreted in a limited way, not including the staff of the Ombudsperson Institution".*

38. In this regard, the Applicant states that *"an important principle of interpretation is that constitutional terms have an autonomous meaning that does not depend on other lower legal acts".*

39. The Applicant concludes by reiterating that *"[...] by conferring on the Board the power to oversee institutions outside the Government, the Law directly contradicts Chapter VI of the Constitution of the Republic of Kosovo, which clearly defines the civil service as part of the Government".*

(iii) Regarding the allegation that the challenged Law "gives the President and the members of the Board the immunity from criminal prosecution, civil lawsuit or dismissal, regarding the performance of the functions of the Board"

40. With respect to this allegation, the Applicant states that *"this broad immunity has no basis in the Constitution. The Constitution states very clearly and in detail what state officials enjoy immunity, and how extensive this immunity is in each case. In this regard, according to the Constitution, only the members of the Assembly (Article 75), the President (Article 89), the members of the Government (Article 98), judges of the regular courts (Article 107), judges of the Constitutional Court (Article 117) and the Ombudsperson (Article 134) enjoy immunity. In contrast to these, the Independent Oversight Board is not given any immunity in the text of the Constitution. For this reason, according to the practice of this Court, it should not enjoy any kind of immunity"*.

41. The Applicant, referring to the Judgment of the Court, in case no. KO98/11 (Applicant: *The Government of the Republic of Kosovo, concerning the immunity of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, and Members of the Government of the Republic of Kosovo, Judgment of 20 September 2011)"* further states that *"Immunity cannot be granted with other legal acts unless it is provided by the Constitution itself. The Constitution is the only legal act that determines which officials enjoy immunity and how wide is this immunity. In other words, it is the Constitution that has the first and last word regarding the issue of immunity of state officials"*.

42. Accordingly, the Applicant claims that "*Article 11, par. 3 of the Law on the Board, giving the President and members of the Board immunity from criminal prosecution, civil lawsuit or dismissal, must be of no legal value, as the Constitution does not provide such immunity"*.

Request for interim measure

43. The Applicant requested the Court to impose an interim measure, namely to suspend the application of the provisions of the challenged Law "*or at least to suspend the application of these provisions in relation to the Ombudsperson"*, until the final decision of this Court.

44. The Applicant alleges that "*the arguments put forward in this request give more grounds than prima facie for the annulment of the challenged provisions*".

45. The Applicant also alleges that "*in the absence of the approval of the interim measure, the functioning of the Ombudsperson Institution will be severely hampered by the ongoing interference of the Board in this institution"*.

46. In this regard, the Applicant clarifies that *"so far, the Board annulled the results of the four job vacancies announced by the Ombudsperson. Lack of sufficient staff to deal with citizens' complaints coming to the Institution's doors will result in the inability of existing staff to give due attention to these complaints, including urgent complaints. Especially in these urgent cases, the ongoing interventions of the Board will cause irreparable damage to the citizens of the Republic of Kosovo"*. Accordingly, the Applicant also considers that *"in order to avoid these damages, [...] it is necessary that this Court immediately suspend the challenged provisions on the basis of which the Board is preventing the efficient work of the Ombudsperson and his staff"*.

47. In conclusion, the Applicant alleges that *"The Ombudsperson Institution often serves as the ultimate hope for victims of human rights violations to address these violations and to resolve them. The impossibility of normal functioning and exercise of the mandate of the Ombudsperson as the only national institution for human rights would inevitably prevent the protection of the fundamental rights and freedoms of citizens of the Republic of Kosovo"*.

48. Therefore, the Applicant considers that *"[...] the approval of the interim measure, in order to ensure that the staff of the Institution is completed as quickly as possible, is clearly of public interest"*.

Comments of Independent Oversight Board

49. The Board submitted its comments on the Referral and completely rejected the Applicant's allegations.

50. Initially, the Board clarified that *"The functions and powers of the Board since its establishment by the UNMIK Regulation have so far not changed and they are focused on reviewing the complaints of civil servants and applicants for employment in the Kosovo civil service, overseeing the implementation of civil service legislation and observing the election of civil servants of the management level in the central and local public administration institutions"*. In addition, the Board reasoned that most of the provisions of the previous law are the same as those of the challenged Law.

51. In its comments, the Board provided its comments regarding the Referral, explaining and justifying its position regarding: (i) the functions and powers of the Board established in the challenged Law; exceeding the Applicant's mandate and the powers of the Board; (ii)

the scope of the challenged Law; (iii) the issue of independence of independent institutions; (iv) the issue of immunities; (v) the selection, appointment or dismissal of civil servants; and (vi) sanctions.

(i) Concerning the issue of the functions and competencies of the Board

52. The Board considers that the Applicant *"has exceeded outside its mandate to protect fundamental rights and freedoms from the unlawful and irregular actions and inactions of public authorities because its tendency [Applicant] to minimize the role of the Independent Oversight Board for Civil Service of Kosovo, such as an independent constitutional institution (see Article 101.2 of the Constitution) as well as its request for the removal of the functions of the Board established by law would directly affect public authorities to create space to abuse and violate the rights from the employment relationship of the civil servants and candidates for admission to the civil service "*. According to them, the abolition of the powers of the Board foreseen by the challenged Law, as the Applicant claims, would violate the rights of civil servants and the candidates for civil service, while *"[...] no public authority, including independent constitutional institutions, can violate human rights and fundamental freedoms"*.

(ii) Regarding the scope of the challenged law

53. As to the scope of the challenged Law, the Board specifies: *"The Ombudsperson has no clear address regarding the scope of the civil service of the Republic of Kosovo, because this scope is not defined by the Law on the Independent Oversight Board but by the Law on Civil Service of Kosovo, therefore the Board under Article 101.2 of the Constitution exercises competences in the civil service, and accordingly within the scope given to the civil service, by the relevant Law on Civil Service.*

Therefore, the scope of the Law on the Board is directly dependent on the limitation of the term "civil servant" in Law No. 03/L-149 on Civil Service of the Republic of Kosovo".

54. The Board further specifies that *"[...] in Article 32, paragraph 2 of Law No. 05/L-019 on the Ombudsperson, it was determined that "The other employees of the Institution of Ombudsperson shall be subject to the legal provisions in force for civil servants"*.

55. Therefore, the Board considers that: *"taking into account the provisions of the Law on the Ombudsperson, it is concluded that the Board has a full mandate to exercise its constitutional and legal functions, to civil servants employed in the Ombudsperson Institution, respecting constitutional independence in accordance with Article 3 , paragraph 7 of Law No. 03/L-149 on Civil Service of the Republic of Kosovo, which stipulates that: "During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected"*.

56. In this regard, the Board also refers to the Judgment of the Court in Case KI129/11, Applicant *Viktor Marku*, namely paragraph 42 of this Judgment, whereby the Court, *inter alia*, reasoned *"[…] all obligations arising by this institution [the Board] regarding the matters that are under the jurisdiction of this institution produce legal effects for other relevant institutions, where the status of employees is regulated by the Law on Civil Service […] The decision of this institution provides final administrative decision […]"*.

57. According to the Board, if *"the civil service should be understood only as a part of the Government", then the Ombudsperson as the Applicant of this Referral should have raised the issue of compatibility of the Law on Civil Service with the Constitution because this law defines the scope of the civil service, which has established the scope of the civil service also outside the executive branch, namely: "administration of the Assembly, administration of the Presidency, Office of Prime Minister and Ministries, executive agencies, independent and regulatory agencies and municipal administration"*.

(iii) Regarding institutional independence

58. The Board considers the issue of institutional independence *"relates to the constitutional and legal functions of the Ombudsperson, but does not relate to the constitutional and legal right of the Board to oversee the respect of civil service legislation related to the employment relationship of civil servants to these institutions"*.

59. The Board also refers to its decision No. 144/2017 of 5 September 2017, which found that "*the request for obtaining the authorization to announce vacancies for civil servants of independent constitutional institutions from the Ministry of Public Administration and obtaining the budget confirmation from the Ministry of Finance constitutes an interference with the independence of the independent constitutional institutions […]"*.

60. The Board further specifies that *"the vacancy criteria are determined by the independent constitutional institution itself, because setting criteria for the education and work experience for the positions of civil servants of the independent constitutional institutions constitutes an interference with their institutional independence"*. Also regarding the salaries of civil servants in the independent constitutional institutions, the Board asserts that the Assembly of Kosovo has recommended that *"the same wage principle for the same work should not apply to independent institutions"*.

iv) With regard to functional immunity

61. As to the functional immunity, the Board stated that according to the Judgment of the Constitutional Court in Case KI33/16, Applicant *Minire Zeka*, Judgment of 4 August 2017 (hereinafter: case KI33/16), is stipulated that *"[the Board] enjoys prerogatives of a court [...]"*. Therefore, according to the Board, they enjoy the prerogatives of a *"court"*, namely *"those of the judges of the regular courts (Article 75 of the Constitution)"*. Furthermore, the Board refers to the Law on Ombudsperson, according to which the deputies and staff of the Ombudsperson Institution enjoy the same immunity.

(v) Regarding the selection, appointment or dismissal of civil servants

62. As regards the Ombudsperson's allegation of the Board competence to "*select, appoint or dismiss civil servants*", the Board notes that their competence is limited only to assessing whether the selection procedure and their appointment have been made in accordance with the legislation in force.

63. The Board further clarifies that *"termination of employment relationship is made by the Disciplinary Committee of the employment body and the Council does not have the power to dismiss the civil servant from the civil service, nor in the independent constitutional institutions, or in any other public administration institution that employs civil servants"*.

64. The Board specifies that if the challenged provisions of the challenged Law were annulled, as requested by the Applicant, then the law would become non-functional, and consequently the Board too.

65. The Board, in the end, states that *"the request of the Ombudsperson to remove the executive power of the decisions of the Independent*

Oversight Board for the Civil Service would directly affect the protection of the employment relationship of civil servants, which is related to the right to work and to exercise the profession as defined in Article 49 of the Constitution of the Republic of Kosovo".

(vi) Regarding the issue of sanctions

66. Finally, as regards the issue of sanctions, the Board notes that the sanctions have been set in order to influence the implementation of the Board's decisions, and according to them, if the sanctions are removed, only *"irresponsible officer"* who has not applied the law and has therefore violated the fundamental freedoms and rights of the civil servants and citizens of the Republic of Kosovo applying for admission to the civil service, would be protected.

The Applicant's response to the Board's comments

67. Initially, the Applicant clarified that he did not challenge the competence of the Board with regard to civil servants employed in public authorities, but same as in case KO73/16 raised the question of the Board's competence in independent institutions, same as it has acted in case KO73/16.

68. The Applicant further states that *"the issue raised in the present case constitutes a constitutional issue in the sense of the independence of the Ombudsperson which has a direct impact on fundamental rights and freedoms [...] because the Ombudsperson cannot exercise his or her mandate if his/her independence is violated".*

69. With regard to the Board's comments on the Applicant's immunity, he stated that the immunity of the Ombudsperson *"is based on the Constitution, which then extends to its deputies and staff, because each action taken by the deputies of the Ombudsperson and the staff within their duties and responsibilities is taken on behalf of the Ombudsperson. The scope of the immunity for the deputies of the Ombudsperson and the staff is justified and is recommended by the Venice Commission".*

70. With regard to the issue of immunity, the Applicant specifies that, according to the Board *"The Board "enjoys the prerogatives of a court" [...], we consider that [the Board] makes a deformed and partial interpretation. When it comes to Article 6 of the ECHR, it should be noted that it is also applicable in administrative proceedings. The Constitutional Court in the same Judgment (KI33/16) stipulates that a decision of the Board produces legal*

effects on the parties and, therefore, such a decision is final administrative (emphasis added) and enforceable, thus implying that the Board is an administrative body, but that in aspect of decision of matters, within its competences, the based on the rules of law enjoys the prerogatives of a court. But that does not mean that the Board must necessarily enjoy immunity. Therefore, the Board may not be the only administrative body that may, within the scope of legally defined competences, have the prerogatives of a court".

71. In this regard, the Applicant concludes that *"[...] such an interpretation by the Board is not sustainable from a constitutional point of view, because the Constitution itself stipulates that powers in the Republic of Kosovo are separated, and in this regard the Board, as an administrative body cannot be part of the judiciary and does not can enjoy the immunity of judges".*

72. With respect to the announcement of vacancies for civil servants, for which procedure the Board had stated that independent institutions do not need to obtain approval from the Ministry of Public Administration and that of Finance, the Applicant assesses that the Board's comments are contradictory, because they do not reflect the Board's decisions to cancel the recruitment procedures in the Ombudsperson Institution. In this regard, the Applicant cites a Board Decision issued on 28 November 2018, where the Board reasoned that "*no approval was granted for authorization of public announcement by the Ministry of Public Administration [...]".*

73. As regards the example of the Board regarding the oversight by the National Audit Office (hereinafter: the NAO) to independent institutions, the Applicant emphasizes two differences between the Board and the NAO. The first difference is that the NAO gives recommendations while the Board instructions. Whereas, the second distinction according to the Applicant is that the Auditor General, unlike the Board, is an independent institution under Chapter XII of the Constitution.

74. Finally, the Applicant considers that *"The challenged law does not contain provisions that carry the constitutional spirit of the independence of the Ombudsperson and to what extent extend the competences of the Board vis-à-vis independent institutions, therefore, we consider that the challenged provisions of the Law are in contradiction with the Constitution".*

Comments submitted by the Independent Media Commission

75. The Independent Media Commission submitted a letter confirming the allegations raised by the Ombudsperson regarding respect for the independence of independent institutions and at the same time requests the Constitutional Court that, based on its constitutional and legal mandate, reconfirms the constitutional independence and the importance of Independent Institutions, as defined in Chapter XII of the Constitution of the Republic of Kosovo.

Relevant provisions of the challenged Law:

Article 2
Scope

The scope of this law includes Board and all institutions of the public administration employing Civil Servants.

Article 3
Definitions

1. Terms used in this law shall have the following meaning:
1.1. Independent Oversight Board of Civil Service of Kosovo- the independent constitutional institution which ensures the compliance with the rules and principles governing the civil service
1.2. Civil Servant- the civil servant as defined in the Law on Civil Service;
1.3. Senior Civil Servant of the management level – the civil servants of the senior management level as defined by the Law on Civil Service;
1.4. Civil Servants of the management level - the civil servants of the management level as defined by the Law on Civil Service;
[…]

Article 4

Independent Oversight Board of the Civil Service of Kosovo

1. The Board is an autonomous constitutional body that ensures the compliance with the rules and principles governing the civil service.
[…]

Article 6
Functions of the Board

1. For the supervision of the implementation of rules and principles of the Civil Service legislation, the Board shall have the following functions:
1.1. reviews and determines appeals filed by civil servants and candidates for admission to the civil service;
1.2. supervises the selection procedure and determines whether the appointments of civil servants of high executive and management level have been conducted in accordance with the rules and principles of civil service legislation;
1.3. monitors public administration institutions employing civil servants regarding the implementation of the rules and principles of civil service legislation.

Article 7
Powers of the Board

1. For the purpose of exercising its functions, the Board has the right to:
[...]
1.2. obtain access and examine files and any document regarding the implementation of the rules and principles of the civil service legislation;
1.3. interview any civil servant who may possess information of direct relevance to the carrying out of the Board's functions;
1.4. requires and obtains from institutions any information necessary for the performance of its duties;

[...]

Article 11
Term of Office for members of Board

[...]
3. Regarding the decision-making within the constitutional and legal functions of the Board, the Chairperson and members of the Board enjoy immunity from prosecution, civil lawsuit or discharge.
[...]

Article 18

Deciding on complaints

1. College of the Board which reviews complaints, decides in the following way:

1.1. leaves the administrative act in force and rejects the complaint;

1.2. repeals or annuls the administrative act and approves the complaint;

1.3. changes the administrative act by partially approving the complaint;

1.4. obliges the competent administrative body to issue an administrative act when its issuance was unrightfully rejected;

1.5. ends the administrative proceeding;

1.6. returns for review;

1.7. dismisses the complaint;

1.8. declares not competent;

1.9. suspends the proceedings.

2. Colleges of the Board reviewing the complaints, based on paragraph 1., sub-paragraph 1.3. of this Article, have the right to change the disciplinary measures in cases when it is confirmed that the civil servant has made a breach, but the employing authority has not set the disciplinary measure corresponding to the breach.

Article 19

Oversight procedure for the selection of senior management and management level of Civil Servants

[...]

5. After reviewing the report, the Board issues a decision and decides to:

5.1. approve the election procedure, when determined it was developed in accordance with rules and principles of the legislation on Civil Service;

5.2. to annul the election procedure, when it determines that it was developed in violation of the rules and principles of legislation for Civil Service

6. The Board is obliged to issue a decision for the procedure of election of senior management and management level Civil Servants, within the thirty (30) days deadline from receiving the complete file from the employing authority.

7. If the development of the procedure for election of senior management and management level Civil Servants, is done without notifying the Board for participating in the oversight, the procedure is considered invalid and according to its official duty the Board issues a decision for annulment of the procedure.

8. The decision of the Board about the procedure for election of senior management and management level Civil Servants, is a final decision in the administrative procedure and against this decision the parties in the procedure can initiate an administrative conflict, in accordance with the provisions of the law on administrative conflict.

Article 20
Monitoring of public administration institutions regarding the implementation of rules and principles of the legislation for Civil Service

[...]

5. Relevant institution of the public administration is obliged to implement the recommendations of the Board, within the deadline set with the Board decision.

Article 21
Board's decision

1. Board's decision is a final administrative decision and is implemented by the senior management level official or the responsible person from the institution that made the first decision towards the party.
2. Implementation of the decision should be done within fifteen (15) days deadline from the receipt of the Board decision.
3. Non-implementation of the Board decision by the responsible person from the institution, constitutes serious breach of the work duties..

Article 22
Initiation of the administration conflict

1. The party which is unsatisfied, and claims that the Board decision is not lawful may initiate an administrative conflict against the Board decision at the competent court, within the deadline set in the provision of the law on administrative conflict.
2. Initiating an administrative conflict does not stop the execution of the Board decision.

Article 23
Procedure in case of non-implementation of the Board decision

1. If the responsible person from the institution does not implement the Board decision within the deadline foreseen in Article 21 of this Law, in all such cases, Chairperson of the Board should inform in written the President of the Assembly, relevant Committee on Public Administration
and the immediate supervisor of the person responsible for non-implementation, within fifteen (15) days from the day of expiry of the execution deadline.
2. In cases when the person responsible for implementation of the Board decision is within the executive branch, the Prime Minister of the Republic of Kosovo should be informed in written about the non-implementation of the decision.
3. In cases when the person responsible for implementation of the Board decision is the Mayor of the Municipality, the relevant minister for local government and the Prime Minister of the Republic of Kosovo should be informed in written about the non-implementation of the decision.
4. Notice from paragraph 1. and 2. of this Article is considered as a request for initiating a disciplinary procedure against the person responsible for implementation, a procedure which is developed in accordance with the provisions foreseen by the legislation in force.
5. Prime Minister or the responsible supervisor is obliged to initiate the disciplinary procedure towards the person responsible for implementation, within the thirty (30) days deadline from the receipt of the notice by the Chairperson of the Board.
6. In case the actions foreseen under paragraph 5. of this article are not taken, Chairperson of the Board informs the President of the Assembly and the relevant Committee for Public Administration in written. President of the Assembly requires in written from the Prime Minister or the responsible supervisor of the institution, to take all the necessary actions for immediate implementation of the Board decision and take the necessary measures towards the responsible person in accordance with the provisions foreseen by the legislation in force.
7. Within thirty (30) days deadline from the expiry of the Board decision implementation deadline, party can initiate the enforcement procedure for the Board decision at the competent court, in accordance with the provisions of the Law on Enforcement Procedure.

Article 24
Administrative sanctions for non-implementation of the Board decision

1. In cases of non-implementation of the Board decision according to Article 21 of this law, Chairperson of the Board issues a decision for withholding fifty percent (50%) of the monthly salary of the responsible person, until the implementation of the Board decision.
2. According to paragraph 1. of this Article, the decision is sent for implementation to the main administrative official of the relevant ministry for managing payrolls, who is obliged to implement the decision within fifteen (15) days deadline from the receipt of the decision and inform in written the Board about the implementation of the decision.
3. Against the decision for withholding fifty percent (50%) of the monthly salary, the unsatisfied party has the right to initiate an administrative conflict at the competent court for administrative issues, in accordance with the provisions of the Law on Administrative Conflict.
4. Initiation of an administrative conflict does not stop the execution of the Board decision.
5. In cases of non-implementation of the decision of the Chairperson of the Board on withholding fifty percent (50%) of the monthly salary, the Board may initiate the enforcement procedure for the decision at the competent court, in accordance with the provisions of the law on enforcement
procedure within thirty (30) days deadline from the expiry of the implementation deadline.

Article 25
Cooperation with public administration institutions
[...]
2. Public administration institutions with Civil Servants employed, as well as all other public officials or Civil Servants, that have competencies in administration of the civil service, or are informed about this field, are obliged to cooperate with the Board.
3. In cases when the employing authority or the responsible person does not cooperate, the Board reports to the Assembly about this non-cooperation, which shall then forward this notice to the Prime Minister or the immediate supervisor of the responsible person".

Admissibility of the Referral

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

77. Initially, the Court refers to paragraph 1, of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes that *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties"*.

78. In addition, the Court refers to paragraph 2, subparagraph 2 of Article 113 of the Constitution, which provides that:

> *"2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:*
>
> > *(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government*";

79. The Court also refers to paragraph 4, of Article 135 [Ombudsperson Reporting], which stipulates that: *"The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution"*.

80. In this regard, the Court notes that the Applicant is an authorized party, which raises the issue of the compatibility of the challenged Law before the Court, pursuant to Article 113, paragraph 2 of the Constitution.

81. The Court also takes into account Article 30 [Deadlines] of the Law and Rule 67, paragraph 4 of the Rules of Procedure, which provide that the Referral must be filed within a period of 6 (six) months after the entry into force of the challenged act.

82. The Court notes that the challenged Law entered into force on 25 August 2018, while the Applicant filed the Referral with the Court on 2 November 2018.

83. In addition, the Court takes into account Article 29 [Accuracy of the Referral] of the Law, which provides that:

"1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, the Government or the Ombudsperson.

2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution.

3. A referral shall specify the objections put forward against the constitutionality of the contested act".

84. The Court also refers to Rule 67 of the Rules of Procedure, which specifies:

Rule 67
Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law

"(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.
(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.
(3) The referral shall specify the objections put forward against the constitutionality of the contested act.
(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act".

85. The Court notes that the Applicant specified the relevant constitutional provisions that allegedly have been violated, he also specified the provisions of the challenged Law that are considered incompatible with the Constitution and has submitted evidence supporting his allegations.

86. In conclusion, the Court finds that the Applicant is an authorized party, has identified the challenged provisions of the challenged Law, specified its constitutional allegations, provided supporting evidence and filed the referral within the prescribed time-limit.

87. Therefore, the Court declares that the Referral is admissible for review of its merits.

Assessment of the merits of the Referral

88. The Court recalls once more that the Applicant challenges the constitutionality of certain provisions of the challenged Law, namely Articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3) 18, 19 (paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3), claiming they are not in compliance with Article 132 [Role and Competencies of the Ombudsperson] and Chapter VI [Government of the Republic of Kosovo] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

89. In this regard, he alleges that the challenged provisions:

(i) Vest the Board with the competence to supervise not only the institutions of the Government but also other institutions, exceeding the narrow scope of the Board, established in Chapter VI (Government of the Republic of Kosovo) of the Constitution";

(ii) Vest the Board with the power to issue instructions and to interfere in the Ombudsperson Institution, constituting a violation of the constitutional independence of the Ombudsperson"; and

(iii) Provisions of the challenged Law immunity from criminal prosecution, civil lawsuit or dismissal, regarding the performance of the Board functions.

(i) As to the allegation of exceeding the narrow scope of the Board, defined in Chapter VI (Government of the Republic of Kosovo) of the Constitution;

90. The Court recalls that the Applicant alleges that the Constitution does not expressly define the term "Civil Service", nor does it stipulate that employees of which institutions are considered part of that civil service. In addition, the Applicant alleges that the fact that Article 101 is included within Chapter VI [Government of the Republic of Kosovo] clearly shows that at the constitutional level the civil service are considered the Government employees themselves.

91. Therefore, the Court notes that the Applicant alleges that the scope of the challenged Law, as defined by Article 2 of the Law in question , violates Article 101 [Civil Service] of the Constitution.

92. With regard to this, the Court again refers to Article 2 of the challenged Law, which defines:

> *"The scope of this law includes Board and all institutions of the public administration employing Civil Servants".*

93. The Court also refers to the provisions of Article 101 [Civil Service] of the Constitution, which establish:

> *"1. The composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognized principles of gender equality.*
>
> *2. An independent oversight board for civil service shall ensure the respect of the rules and principles governing the civil service, and shall itself reflect the diversity of the people of the Republic of Kosovo".*

94. First of all, the Court wants to clarify that the interpretation of constitutional norms should not be understood as creating a new norm, but as a reading and a fair interpretation of existing norms, when they create ambiguity in terms of their content and purpose.

95. The Court recalls that Article 101 [Civil Service] of the Constitution, with which the Applicant alleges that Article 2 of the challenged Law is in contradiction, is mentioned at the end of Chapter VI of the Constitution.

96. In this regard, the Court notes that Chapter VI regulates the following issues: 1) composition, competencies, election, responsibilities, immunity of the members of Government, procedures, and motion of no confidence of the Government, 2) the competencies of the Prime Minister, 3) establishment , the number of ministries and the representation of communities within them. At the end of this chapter, the legislator with the provisions of Article 101 of the Constitution mentions the term "Civil Service". This Article of the Constitution in paragraph 1 defines: 1) the composition (diversity) of the civil service at the level of the Republic of Kosovo, and 2) the establishment of an independent institution that oversees the observance of the norms and principles of the civil service. These two provisions within the meaning of Article 101 of the Constitution are in chain interdependence, yet not

in chain interdependence with the other articles of Chapter VI of the Constitution.

97. By reading this article in context, namely by its content and purpose, we come to the conclusion that we are dealing with a constitutional norm which requires that the matter (civil service) be regulated more specifically by special acts.

98. In this respect, the right to issue a special law for the regulation of civil service in the Republic of Kosovo derives from paragraph 1 of Article 101 of the Constitution, whereas the right to issue a special law on the Board derives from paragraph 2, of Article 101 of the Constitution.

99. From the foregoing, paragraph 2 of Article 101 is closely related and is a derivative of paragraph 1, which specifically requires that the application of legal norms governing the civil service will be overseen by an "independent oversight board". Therefore, in this connection, the Court notes that the scope of the Board is limited and closely linked to the basic law, namely the special law governing the civil service.

100. In this respect, the Court refers to the relevant provisions of the Law on Civil Service, which establish as follows:

Article 1
Purpose and Scope

"1. This law regulates the status of Civil Servants and the terms and conditions of their employment relationship with the institutions of the central and municipal administrations.

2. For the purposes of this law, the institutions of the central and municipal administrations that are subject to this law include: the administration of Assembly, the administration of the Office of the President, the Office of the Prime Minister and ministries, executive agencies, independent and regulatory agencies and municipal administrations.
[...]
4. The institutions of the public administration that regulated by special law shall be subject to the provisions of this law, except in cases where the special law contains provisions that are different from this law.

Article 2
Definitions
1. Terms used in this law have the following meaning:

1.1. Civil service – the entire body of employed administrative personnel, in institutions of central and municipal administration foreseen by this law, which apply policies and ensure respectability of certain rules and procedures.
[...]

Article 3
The Civil Service of the Republic of Kosovo

[...]
7. During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected".
[...]

101. According to the abovementioned provisions, the purpose of this law is to regulate the status and employment of employees in the central and local administration institutions. Further, the legislator in paragraph 2 of Article 1 stipulates that the central administration includes the administration of the Assembly, the administration of Presidency, the Office of the Prime Minister and ministries, executive agencies, independent and regulatory agencies, as well as the municipal administration.

102. However, the legislator with paragraph 4 of Article 1 also foresees limitations on the scope and application of provisions of the LSC, stating that central administration institutions will be subject to the provisions of the Law on Civil Service, unless the special law contains provisions other than the Law on Civil Service. Moreover, as outlined above, the lawmaker in the drafting of the law has also considered the constitutional independence of the independent institutions, and by Article 3, paragraph 7 of the Law on Civil Service has determined that during the implementation of this law the constitutional independence of independent institutions from the executive should be respected.

103. The Court also notes that the legislator in Article 2 [Definitions] of the Law on Civil Service clarifies the definitions used in the law. Always under this article the term "Civil Service" refers to employees in the central and municipal administration level, and not only to civil servants of the administration of the Government, namely ministries, as the Applicant claims.

104. Therefore, in the light of all the foregoing considerations, the Court considers that the expression "Civil Service" as read and interpreted by Article 101 of the Constitution must be understood in its context and the purpose of the drawer. This purpose is expressed in Article 1

of the Law on Civil Service, together with the limitations of the scope provided for in paragraph 4 of Article 1 of the LCS, stipulating that the central administration institutions will be subject to the provisions of the Law on Civil Service, unless the special law contains provisions other than the Law on the Civil Service, thus avoiding the possibility of misinterpretations or technical interpretations of the norm in question.

105. For these reasons, the Court finds that Article 2 of the challenged Law does not limit and does not affect the essence of Article 101 [Civil Service] of the Constitution. Therefore, the Court considers that Article 2 of the challenged Law is in compliance with Article 101 [Civil Service], paragraphs 1 and 2 of the Constitution.

(ii) Regarding the allegation of violation of the constitutional independence of the Ombudsperson and other independent constitutional institutions

106. With respect to independent constitutional institutions, the Court refers to independent institutions explicitly listed in Chapter XII [Independent Institutions], namely Articles: 132-135 [Role and Competencies of the Ombudsperson], 136-138 [Auditor General of Kosovo], 139 [Central Election Commission], 140 [Central Bank of Kosovo] and 141 [Independent Media Commission], as well as regarding the Constitutional Court as defined in Chapter VIII [Constitutional Court] of the Constitution.

107. The Court recalls that in relation to the constitutional independence of the Ombudsperson and other independent institutions, the Applicant essentially alleges that:

> *a)* The challenged Law, conferring competence on the Board, *inter alia*, for overseeing the selection and appointment of staff of independent constitutional institutions, to decide on complaints related to violations of civil service legislation, namely by issuing binding decisions and recommendations for implementation of civil service legislation for the Ombudsperson; and
>
> *b)* Applying in the same/uniform manner the provisions of the Law, regarding the Applicant's staff and other independent institutions on one hand, and other institutions employing civil servants, on the other, violates the organizational independence of the Applicant in violation of Article 132, paragraph 2 of the Constitution and the independence of other independent constitutional institutions.

108. Accordingly, the Applicant challenges the competencies of the Board foreseen by the challenged Law on overseeing the implementation of civil service legislation and to issue binding decisions regarding the implementation of civil service legislation towards independent constitutional institutions, without taking into account the internal rules of the civil service issued based on the Constitution and specific laws. The Applicant alleges that civil service legislation cannot be applied to the independent constitutional institutions, in particular the Ombudsperson, as well as to civil servants of other institutions, as this violates the independence of the independent constitutional institutions guaranteed by the Constitution and special laws.

109. With respect to the foregoing, the Court first notes that the Board, by the challenged Law, is a body established by Article 101, paragraph 2 of the Constitution, and is specifically mandated to "*ensure the respect of the rules and principles governing the civil service […]*".

110. As regards the legal status of the Board, the Court recalls its case-law in which it held that the Board is an independent institution established by the law, in compliance with the Constitution, namely by Article 101 (2) of the Constitution. Therefore, all obligations arising from decisions of this institution, regarding the matters that are under its jurisdiction of this institution, produce legal effects for other relevant institutions, where the status of employees is regulated by the Law on Civil Service of the Republic of Kosovo. The decision of this institution presents final administrative decision, and as such should be enforced by the competent court as proposed for enforcement by a creditor in terms of realization of the right earned in administrative procedure (see cases of the Constitutional Court, KI33/16, Applicant *Minire Zeka*, Judgment of 6 July 2017, par. 56; KI50/12, Applicant *Agush Llolluni*, Judgment of 9 July 2012, par. 36; and KI129/11, Applicant *Viktor Marku*, Judgment of 11 July 2012, para. 42*)*.

111. The Court notes that the challenged law in detail specifies, apart from the competence of the Board to receive complaints from dissatisfied parties with the implementation of civil service legislation by state authorities, the competence to oversee the selection of senior management officers and of the management level. This Law does not distinguish between the personnel of the independent constitutional institutions set out in Chapter VIII and XII of the Constitution and other state administration institutions.

112. The Court also notes that Article 19 of the challenged Law increased the oversight of the selection of civil servants for senior management

positions, while the abrogated Law had established or regulated that one (1) member of the Board "*will participate as an observer*" in the procedure of selection or promotion of the candidates for the position of the management level.

113. The Court notes that in the challenged Law, namely Article 19, paragraphs 5, 6, 7 and 8, unlike the repealed Law, is provided that after the conclusion of the oversight procedure and submission of the report by the member of the Board, who supervised the selection procedure, the Board issues a decision, which according to paragraph 8 of this challenged article is considered as *"a final decision in the administrative procedure and against this decision the parties in the procedure can initiate an administrative conflict"*. While in the previous (repealed) Law, the Board regarding the selection procedure for civil servants in management level positions after submitting the report by the Board member in the capacity of the observer, the Board had the power to issue a recommendation only if "*decisions of appointment committees are taken pursuant to rules and principles set out in Law on Civil Service in the Republic of Kosovo*".

114. Based on the foregoing, the Court notes that the Board, with regard to the selection procedure for senior management and management level, has the power to simultaneously oversee the selection procedure and finally issue a decision, which is final and binding decision in relation to the regularity of the selection procedure, whether or not a complaint is filed in respect of that procedure.

115. In fact, the Court notes that the Board considers that, having regard to the challenged Law and the provisions of the Law on the Ombudsperson, the Board has a full mandate to exercise the constitutional and legal functions towards civil servants employed in the Institution of the Ombudsperson, namely to oversee the respect of the civil service legislation regarding the employment relationship of civil servants of the Ombudsperson and this does not affect the exercise of the constitutional and legal competencies of the Ombudsperson. Thus, according to the Board, the Ombudsperson staff are civil servants and civil service norms are also applicable to them, as well as for other state administration institutions.

116. The Court notes that the challenged Law does not provide for an exception to the Board's scope regarding the exercise of its powers referred to above, towards the independent constitutional institutions nor towards the application of the rules of civil service legislation to the independent constitutional institutions. Consequently, the challenged law does not foresee that in the exercise of its

competencies, special laws of independent institutions and their internal rules will be considered.

General principles concerning the independence of independent constitutional institutions established in Chapter VIII and XII of the Constitution

117. The Court notes that the Applicant challenges the challenged Law also in relation to other independent institutions, including among others the Constitutional Court and the independent institutions included in Chapter XII of the Constitution. The Court notes that in this regard, the Applicant mentions only its independence guaranteed by Article 132 of the Constitution. However, the Court reiterates that it is master of the characterization to be given in law to the facts of the case *vis-à-vis* constitutional norms, and it does not consider itself bound by the characterization given by an applicant (see, among other authorities, *Guerra and Others v. Italy*, ECtHR, Judgment of 19 February 1998, par. 44).

118. The Court also recalls that in case KO73/16, Applicant*, the Ombudsperson*, Constitutional review of Administrative Circular No. 01/2016 issued by the Ministry of Public Administration of the Republic of Kosovo on 21 January 2016, Judgment of 16 November 2016 (hereinafter: Judgment KO73/16), the subject matter was precisely the independence of the independent constitutional institutions, in particular, the independence of the Applicant and the Court.

119. In the abovementioned judgment, the Court stated that *"the Constitution is based on the principle of separation of powers. The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of separation of powers and the checks and balances among them, The separation of powers is one of the bases that guarantees the democratic functioning of a State. In addition to the three branches of government referred to above, the Constitution guarantees a special status to the Office of the Ombudsperson and to the other independent institutions enumerated in Chapter XII of the Constitution. The Constitution also safeguards a special status to the Constitutional Court as the final guarantor and interpreter of the Constitution. The Applicant and the Constitutional Court are not part of the legislative, executive and the regular judiciary. The same applies for the other independent institutions enumerated in Chapter XII of the Constitution"* (see, *mutatis mutandis*, Judgment KO73/16, par. 63, 64, 65. See also Judgment in case KO98/11 of 20 September 2011, Applicant *the Government of*

Kosovo, regarding the immunity of Members of the Assembly of the Republic of Kosovo, President Republic of Kosovo and members of the Government of the Republic of Kosovo, par. 44).

120. In this respect, the Court recalls Article 132. 2 of the Constitution, which provides that "*The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo"* and Article 133 [Office of Ombudsperson], which establishes that *"The Office of the Ombudsperson shall be an independent office and shall propose and administer its budget in a manner provided by law"*.

121. The Court also refers to Law No. 05/L-019 on the Ombudsperson, namely Article 3 [Basic Principles of the Ombudsperson's Activity], paragraph 2, which states that *"The institution of the Ombudsperson enjoys organizational, administrative and financial independence in the implementation of tasks set forth by the Constitution of the Republic of Kosovo and the Law",* as well as Article 32 [Personnel], paragraph 2, which establishes that: *"The provisions of the Law on Civil Service shall apply to employees of Ombudsperson Institution, to that extend that there is no infringement of constitutional independence of the Institution"*.

122. The court also recalls that under Article 37 [Regulations of the Institution] of the Law on Ombudsperson*, "The Ombudsperson issues the Rules of Procedure, Regulation for internal organization and systematization of job positions, decision making processes and other organizational issues in accordance with the Law"*.

123. The Court in Judgment KO73/16, noted that *"The Court notes that the Office of Ombudsperson is an independent institution which was created to ensure accountability from the public authorities vis-a.-vis the rights and freedoms of individuals. In fulfilling this role, the Institution independently exercises its mandate without accepting any instructions or intrusions from any other state authority. Additionally, the Constitution places an obligation on the organs of state through legislative and other means to ensure the independence, impartiality, dignity and effectiveness of the Office of the Ombudsperson and the other independent institutions"* (See Judgment KO73/16, par. 68 and 69).

124. In addition, the Court emphasized that all institutions are obliged by the Constitution to respect the independence of the Office of Ombudsperson. The Court also emphasized that the Ombudsperson is

obliged to ensure its independence by issuing regulations, orders or other legal acts in such a manner that they do not curtail its functional, organizational and financial independence. (See, *mutatis mutandis*, Judgment KO73/16, par. 69).

125. The Court, in the abovementioned judgment, regarding the Constitutional Court, referred to Article 112, paragraph 2 of the Constitution [General Principles] where it is foreseen that *"The Constitutional Court is fully independent in the performance of its responsibilities",* and Article 115 [Organization of the Constitutional Court] specifying that *"The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law" (*see Judgment KO73/16).

126. In addition, The Law on the Constitutional Court provides in Article 14 [Budget] that *"Notwithstanding provisions of other laws, the Constitutional Court shall prepare its annual budget proposal and forward the said budget proposal to the Assembly of the Republic of Kosovo [...] The budget proposed by the Constitutional Court shall be included in its entirety in the Republic of Kosovo Consolidated Budget submitted to the Kosovo Republic Assembly of for adoption".* This Article also specifies that*, "The Constitutional Court shall manage its budget independently and shall be subject to internal audit as well as external audit by the General Auditor of Republic of Kosovo (*see Judgment KO73/16, paragraph 90).

127. Article 12, paragraph 5 of the Law on Constitutional Court also stipulates that legal provisions on civil servants shall apply to employees of the Secretariat. In addition, Rule 20 [Staffing of the Secretariat], paragraph 4 of the Rules of Procedure of the Court provides that*"The legal provisions foreseen for civil servants, as referred by Article 12 of the Law shall be applied to the constitutional administrative staff only to the extent that such legal provisions do not impact on the independence of the Court as guaranteed in Article 112.2 of the Constitution and Article 2 of the Law*".

128. Similarly to the Applicant, as to the Constitutional Court, in its Judgment KO73/16, the Court found that the mandate to issue its own rules of procedure was established within the exclusive competence of the Court, reasoning also the purpose of this the definition as follows:*"[Evidently the authors of the Constitution aimed at securing the independence and efficiency of the Constitutional Court by enabling the Court itself to create its own rules of procedure and thereby prevent any interference with the exercise of its assigned*

responsibilities. This also shows and confirms that the Court has a special position and authority according to the Constitution and within the system of the state institutions. Accordingly the independence of the Court requires it to be governed by specific rules, moreover, of constitutional values, and obliges the Government and its branches to respect them" (See Judgment KO73/16, par.79 and 80).

129. The Court also emphasized that it should be able to decide for itself on its internal organization and to achieve efficient functioning. It is up to the Assembly to determine and approve the budget of the institutions of the Republic of Kosovo, but in accordance with the Constitution. The Constitution obliges the lawmaker and the executive to not violate the independence of the Court (See, for example, *Decision on the admissibility and merits of the Constitutional Court of Bosnia and Herzegovina* in case No. U. 6/06 of 29 March 2008).

130. This special status of the Applicant and of the independent constitutional institutions set forth in Chapter VIII and XII of the Constitution is further reflected in Law No. 03/L-149 on Civil Service of the Republic of Kosovo, namely, paragraph 4 of Article 1 [Purpose and Scope] that stipulates that *"The institutions of the public administration that regulated by special law shall be subject to the provisions of this law [Law on Civil Service], except in cases where the special law contains provisions that are different from this law"* and Article 3 [The Civil Service of the Republic of Kosovo] which establishes that *"[During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected"*.

131. The Court also notes that in its Judgment KO73/16, in which it assessed the Government Circular on classification of positions in the civil service, it stated that *"the implementation of laws and state policies is one of the constitutional duties of the Government. However, the Government is to take into account the special status of the Ombudsperson, the Court and the other independent institutions in accordance with the constitutional guarantee of their independence as outlined above. Accordingly the preparation, the content and the applicability of any norms related to their functioning and internal job descriptions and remuneration has to be adequately and appropriately developed and determined. The Government cannot suffice by applying identical criteria to those applied to the governmental agencies to be applied in the same manner to the independent institutions defined in the Constitution"* (Shih, *mutatis mutandis*, Judgment KO73/16, par. 69).

132. The Court in case KO73/16, as to the independence of the constitutional institutions, the Constitutional Court of Albania in Decision (V-19-07) in Case. No. 43/13 of 3 May 2007 reasoned:

> "*The notion of independence does not and cannot have the same substance or meaning in reference to all constitutional organs and institutions, That notion varies depending on th e nature of the organ and its constitutional duties and junction, However', generally speaking, it must be emphasized that their' independence as guaranteed by the Constitution and the respective organic laws, has as its component or inherent element organizational, functional and financial independence, Beside questions of election, appointment or dismissal o manager's and other high officials of constitutional organs and institutions, among other's, the organizational independence is also valid with regard to their' entitlement to draft and appoint, in compliance with certain criteria, their structure and organogram, including the right to appoint directors and advisors, the quantity and the set up of officials of supporting cabinets, appointment of officials of lower positions, recruitment of personnel of different levels, etc, The functional independence of the constitutional organs and institutions is closely knit with the substance of the work that they discharge, which is directly regulated for and has its foundations in the respective constitutional provisions [...] no other organ or' institution, whether it a part of one of the three branches of the government, cannot interfere in treatment and solving of questions, as the case may be, would make up the central object of the work of other constitutional organs and institutions ... while, on the other hand, the constitutional provisions and organic laws patently establish that management of the budget in accordance with the law should be left at the hand of these organs themselves. Surely, they know and assess their requests and problems, needs for investment, objectives that they want to reach, etc better than anyone else" (*see Decision (V-19-07) in case no. 43/13, of 3 May 2007, of the Constitutional Court of Albania).

133. Therefore, as regards the status of the personnel of the independent constitutional institutions, in particular the Applicant and the Constitutional Court, as it established from the Constitution and the special laws, the Court notes that:

a) the provisions of relevant legislation, including civil service legislation, do not specifically refer to the staff of independent

constitutional institutions as civil servants, but foresee the application of the civil service legislation;

b) civil service legislation, including the challenged Law, applies to the staff of these independent constitutional institutions only to the extent that they do not violate their independence;

c) The Constitution and the special laws authorize and oblige the independent institutions, in particular the Applicant and the Court, to issue regulations, orders and other legal acts to regulate the specifics related to the employment relationship of their staff, which differ from the general norms set by other laws, including the challenged Law, in such a way as to ensure their functional and organizational independence, but only to the extent necessary to ensure their independence as provided for by the Constitution and special laws.

d) the regulations and other legal acts of the independent constitutional institutions that regulate the specifics related to the employment relationships of the staff of independent institutions deriving from the Constitution and the special laws must be respected by all institutions including the executive and other institutions , such as the Board, and have priority over other laws.

134. On the other hand, the Court emphasized that the independent institutions, including the Applicant, cannot act in vacuum in relation to the legal framework. The Court considers that the independence of the Applicant and the Court is also subject to some limitations and control. These are included in Article 14.3 of the Law on the Constitutional Court that provides: "*The Constitutional Court shall manage its budget independently and shall be subject to internal audit as well as external audit by the General Auditor of Republic of Kosovo". In a similar way, Article 35-4 of the Law on Ombudsperson Institution provides: "The Ombudsperson Institution independently manages with its own budget and is subject to internal and external audit by the Auditor General of the Republic Kosovo"* (see Judgment KO73/16, par. 90).

135. In addition, the Court notes that according to Article 137 of the Constitution [Competencies of the Auditor-General of Kosovo], the Auditor General of the Republic of Kosovo is the only authority established by the Constitution that can audit the economic activity of the Applicant and the Court, as well as of all other public institutions in the Republic of Kosovo (see Judgment KO73/16, par. 91).

136. The Court further recalls that in accordance with Article 32 [Right to Legal Remedies] of the Constitution, "*every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.*".

137. Therefore, even the constitutional independent institutions cannot be exempted from the obligation that in the regulations and other legal acts regulate the specifics regarding the employment relationship of their staff, to ensure that the right to use remedies is not violated to anyone against their administrative decisions, as guaranteed by Article 32 of the Constitution.

Constitutional review of the provisions of the challenged Law with respect to independent constitutional institutions and other public institutions

138. The Court initially notes that the challenged Law does not provide for an exception to the scope of the Board in Article 2 [Scope] or any other provision thereof with regard to the independent constitutional institutions included in Chapter VIII and XII of the Constitution, special laws and the Law on Civil Service.

139. However, assessing the constitutionality of Article 2 of the challenged Law, where it explained that the expression "Civil Service" as read and interpreted by Article 101 of the Constitution must be understood in its context and the purpose of the drawer, a purpose which is expressed in Article 1 of the Law on Civil Service, together with the limitations of the scope provided for in paragraph 4 of Article 1 of the LCS, stipulating that the central administration institutions will be subject to the provisions of the Law on Civil Service, unless the special law contains provisions other than the Law on the Civil Service, thus avoiding the possibility of misinterpretations or technical interpretations of the norm in question.

140. Furthermore, the Board, in accordance with Article 4 of the challenged Law, (and as interpreted by the Board itself in its response addressed to the Court), carries out its functions, based solely on the implementation of civil service legislation but not on the internal rules of independent constitutional institutions, issued based on the Constitution and special laws, and considers the employees of independent institutions as civil servants with automation.

141. The Court recalls that the competencies of the Board include, *inter alia*:
- reviewing and taking binding and final decisions on complaints of civil servants (Article 6 (1.1), Article 18);
- supervising the selection procedure, of management level and senior management level of civil servants, without any complaint from interested parties (Article 6 (1.2), Article 19) by issuing a binding decision regarding them; and
- regular annual and extraordinary monitoring of public administration institutions employing civil servants (Article 6 (1.3) and Article 20) and issuing binding recommendations in relation to them;

142. The Court further notes that the Board is entitled, under Article 24 of the challenged Law, to impose sanctions for non-implementation of Board's decisions and recommendations and, according to Articles 7 and 25 of the challenged Law, to request all institutions to cooperate with the Board, access to each file and document regarding the implementation of the rules and principles of civil legislation, interviewing any civil servant and other information.

143. The Court considers that the challenged Law foresees a uniform approach to assess the implementation of civil service laws to all public institutions including independent constitutional institutions.

144. The Court recalls once again that according to the Constitution and the special laws on the staff of independent constitutional institutions, the rules of civil service apply unless they do not violate their independence. This also means the laws that regulate the oversight of the implementation of these laws such as the challenged Law. However, as it derives from the Constitution and the special laws, the independent institutions, in particular, the Applicant and the Court, are authorized to issue regulations, orders and other legal acts to regulate the specifics regarding the employment relationship of staff which differ from the general norms set by other laws, including the challenged Law, in such a way as to ensure their functional and organizational independence. These special norms should be respected by all institutions including the Board.

145. Therefore, the Court considers that, in the implementation of the challenged law, the functions and the specific authority of the independent constitutional institutions is to be recognized, *inter alia*, in the issuance and application of their internal rules to protect their independence as established in the Constitution and special laws, to the extent necessary to protect their organizational, functional and

budgetary independence, as required by the principles outlined above, including the internal rules of these institutions and the specifics of the work of their staff.

146. The Court therefore concludes that the competencies of the Board envisaged by the challenged Law apply to the independent constitutional institutions, as long as this does not affect their independence guaranteed by the Constitution, and that this independence is reflected in the issuance of internal acts of these institutions, based on their competences foreseen by the Constitution and special laws, to protect their independence.

147. In addition, the Court considers that the issues raised by the Applicant regarding the challenged provisions extend to other public institutions that have employed civil servants, in addition to the independent institutions.

148. In this regard, the Court reiterates once more that it is master of the characterization to be given in law to the facts of the case *vis-à-vis* constitutional norms, and that it does not consider itself bound by the characterization given by an applicant (See, among other authorities, *Guerra and Others v. Italy*, ECtHR, Judgment of 19 February 1998, para. 44).

149. Therefore, the Court will further assess with individual assessment of the constitutionality of the challenged articles of the Law, regarding their application in all public institutions, other than Articles 2 and 11 (paragraph 3) which are separately treated as part of the Applicant's specific claims.

Constitutionality of Article 3 (paragraphs 2, 3 and 4) of the challenged Law

150. The Court refers again to Article 3 (paragraphs 2, 3 and 4) of the challenged Law, which provides that:

"Article 3
Definitions

1. Terms used in this law shall have the following meaning: […]
1.2. Civil Servant- the civil servant as defined in the Law on Civil Service;
1.3. Senior Civil Servant of the management level – the civil servants of the senior management level as defined by the Law on Civil

Service;
1.4. Civil Servants of the management level - the civil servants of the management level as defined by the Law on Civil Service;

[…]".

151. The Court notes that the definitions laid down by the abovementioned provisions are the same as the definitions laid down in the Law on Civil Service.

152. Therefore, the Court finds that Article 3, paragraphs 2, 3 and 4 of the challenged Law do not limit and violate the essence of any specific provision of the Constitution. Accordingly, these provisions are in compliance with the Constitution.

Constitutional review of Article 4 (paragraph 1) of the challenged Law in conjunction with Articles 3 (paragraph 1.1) of the challenged Law

153. The Court recalls Article 3 (paragraph 1.1) and Article 4 (paragraph 1) of the challenged Law, which provides that:

"Article 3
Definitions

1. Terms used in this law shall have the following meaning:
1.1 Independent Oversight Board of Civil Service of Kosovo- the independent
constitutional institution which ensures the compliance with the rules and principles governing the civil service;
[…]

Article 4
Independent Oversight Board of the Civil Service of Kosovo

1. The Board is an autonomous constitutional body that ensures the compliance with the rules and principles governing the civil service.
[…]"

154. The Court notes that the Applicant challenges Article 4, paragraph 1 of the challenged Law, which is directly related to Article 3, paragraph 1.1, where, according to the abovementioned provisions, the Board has been given the status of an independent constitutional institution. Therefore, the Court will deal with the constitutional review of Article

4, paragraph 1 in conjunction with Article 3, paragraph 1.1 of the challenged Law.

155. In this regard, the Court recalls that the Constitution explicitly defined in its Chapter XII, the independent constitutional institutions, defining their role and their status.

156. The Court also notes that in Chapter XII, Article 142 of the Constitution, has established the legal basis for the establishment of independent agencies, determining that:

> *"Independent agencies of the Republic of Kosovo are institutions established by the Assembly based on the respective laws that regulate their establishment, operation and competencies. Independent agencies exercise their functions independently from any other body or authority in the Republic of Kosovo".*

157. The Court notes that the independent agencies established under Article 142 of the Constitution do not have the same status as that of the independent constitutional institutions expressly mentioned in Chapter XII of the Constitution. This is because the establishment, role and status of the independent constitutional institutions is expressly regulated by Chapter XII of the Constitution, due to the importance and the specifics of the constitutional powers they exercise. However the role, status and competencies of independent agencies are regulated by law approved by Assembly based on the criteria set forth in Article 142 of the Constitution.

158. Chapter XII of the Constitution does not authorize the Assembly of Kosovo to establish by law other independent constitutional institutions with the same status of independent institutions included in Chapter XII, but only independent agencies giving the powers established in Article 142 of the Constitution.

159. Therefore, the Court considers that the Board cannot be categorized as an independent institution under the Chapter XII of the Constitution.

160. For these reasons, the Court finds that Article 4, paragraph 1, in conjunction with Article 3.1, subparagraph 1.1 of the challenged Law, is not in accordance with Chapter XII of the Constitution. Accordingly, these provisions are not in compliance with the Constitution.

Constitutional review of Article 6 of the challenged Law

161. The Court recalls Article 6 of the challenged Law, which establishes:

> *"Article 6*
> *Functions of the Board*
>
> *1. For the supervision of the implementation of rules and principles of the Civil Service legislation, the Board shall have the following functions:*
> *1.1. reviews and determines appeals filed by civil servants and candidates for admission to the civil service;*
> *1.2. supervises the selection procedure and determines whether the appointments of civil servants of high executive and management level have been conducted in accordance with the rules and principles of civil service legislation;*
> *1.3. monitors public administration institutions employing civil servants regarding the implementation of the rules and principles of civil service legislation".*

162. The Court recalls that the competencies of the Board under Article 6 include:
- reviewing and taking binding and final decisions on complaints of civil servants;
- supervising the selection procedure, of management level and senior management level of civil servants, without any complaint from interested parties by issuing a binding decision regarding them; and
- regular annual and extraordinary monitoring of public administration institutions employing civil servants.

163. In this regard, the Court recalls once more that in Case KI33/16 it stated that the Board enjoys the prerogatives of a court within the meaning of Article 31 of the Constitution and Article 6 of the ECHR and that a "tribunal" is categorized in the substantive sense of the term by its judicial function, that is to say determining of matters within its competence on the basis of the rules of law and following the proceedings conducted in a prescribed manner [...]", stating that the decisions of the Board are "final, binding and enforceable" and that the Board, from the point of view of Article 31 of the Constitution and Article 6 of the ECHR, is independent as (a) it is independent of the executive and (b) has full jurisdiction to decide on the issues before them as required by Article 31 of the Constitution and Article 6 of the ECHR (See, *mutatis mutandis*, case KI33/16, *Minire Zeka*, cited above, paragraph 59. Regarding the independence of an "independent

tribunal" see case KO12/17, Applicant *The Ombudsperson*, Judgment of the Constitutional Court of 9 May 2017 par. 75).

164. The Court recalls that the applicability of Article 31 of the Constitution and Article 6, paragraph 1 of ECHR, depends on the existence of a "dispute". According to this concept, the dispute must be genuine and serious and be related not only to the actual existence of the right, but also to the scope and manner of exercising that right (see ECtHR case, *Denisov v. Ukraine*, No. 76639/11, Judgment of 25 September 2018, para 44).

165. In this respect, the Court notes that the Board is regarded as a "*quasi-judicial*" institution, namely as a tribunal regarding the civil service (the name "tribunal" is widely used in the ECtHR discourse). As such it enjoys the prerogatives of a court precisely because of the independence of the executive, and as an institution having full jurisdiction and issuing binding decisions in relation to the dispute between civil servants or civil servants or the candidates on one hand, and institutions employing civil servants on the other.

166. Therefore, delegating competences to the Board for certain positions to decide on the selection of civil servants, becoming part of the decision-making without taking into account whether there is a dispute or not in relation to a particular position, and in the end of this process to issue a binding decision on the legality of the selection, contradicts its role as a "*quasi-judicial*" institution that has the prerogatives of a "*tribunal*", independent of the executive, which decides on the complaints of the authorized parties, as it is already defined in the case law of the Constitutional Court.

167. The Court considers that the primary function of the Independent Oversight Board is the resolution of disputes arising between civil servants or candidates for civil servants on one hand and institutions employing civil servants on the other. Taking over the executive functions by the Independent Oversight Board in the selection procedure of candidates is directly in contradiction with its "quasi-judicial" role, which is the primary function of the Independent Oversight Board.

168. The Court also notes that, with regard to the review of civil servants' complaints and regular annual monitoring, the Board has the competence in relation to all civil servants without exception. Whereas, with regard to overseeing the selection procedure for civil servants, the competencies of the Board are limited only to management level and senior management level positions. This

competence of the Board does not include oversight of the selection procedure in relation to the rest of the civil servants, resulting in different treatment of civil servants in relation to the competencies of the Board.

169. In this regard, the Court refers to Article 24 of the Constitution, which establishes that all are equal before the law and that all enjoy the right to equal legal protection.

170. The Court refers to the case-law, which emphasizes that only differences in treatment based on an identifiable characteristic *or status*, may represent unequal treatment within the meaning of Article 24 of the Constitution and Article 14 of the ECHR. In addition, in order for an issue to be raised under Article 24, there must be a difference in the treatment of persons in analogous situations or similar situations (See, *mutatis mutandis, Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Application No. 5095/71, 5920/72 and 5926/72, 7 December 1976, par. 56, *Carson and Others v. United Kingdom*, Application No. 42184/05, 16 March 2010, par. 61).

171. The Court considers that, for the purposes of interpreting Article 24 of the Constitution and Article 14 of the ECHR, a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or 2) if there is not a reasonable relationship (namely proportionality) between the means employed and the aim sought to be realised (See, *mutatis mutandis, Abdulaziz, Cabales and Balkandali v. United Kingdom*, Application no. 9214/80; 9473/81 and 9474/81, 24 April 1985, paragraph 72).

172. The Court emphasizes that the Government and the Assembly enjoy a margin of appreciation, respectively a discretionary space, in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin varies according to the circumstances, according to the subject matter and the history of the case. A wide margin is usually allowed when it comes to general measures of the economic or social strategy, unless they are clearly without any reasonable grounds (See, *mutatis mutandis, Burden v. United Kingdom*, Application No. 13378/05, 29 April 2008, paragraph 60; *Khamtokh and Aksenchik v. Russia*, cited above, paragraph 64).

173. Therefore, the Court will specifically assess whether Article 6, paragraph 1.2 of the challenged Law is in compliance with the rights to equality before the law under Article 24 of the Constitution.

a. Unequal treatment

174. The Court first determines whether there is a difference in the treatment of civil servants in analogous situations or in similar relevant situations.

175. The Court notes that, under paragraph 1.2 of Article 6 of the challenged Law, the Board oversees the selection of civil servants of the management level and senior management level, and issues a binding decision on the legality of their selection, which is the final decision in the administrative procedure. The dissatisfied parties then have the opportunity to challenge this decision through the opening of the administrative conflict. While, with regard to the rest of civil servants, such monitoring is not foreseen, but it is allowed the possibility of a complaint to the Board for dissatisfied parties, and then the parties dissatisfied with the Board decisions have the right to initiate the administrative conflict.

176. The Court notes that from what was said above, it follows that the civil servants of the management level and senior management level have the oversight of the Board for their selection which issue binding decisions, but to other civil servants, this obligation is not foreseen but only the possibility of appeal to the Board.

177. The Court considers that the two categories, both management level and senior management level civil servants, on one hand, and other civil servants on the other, are in an analogous situation or in a relatively similar situation: namely they are all civil servants. However, due to their level of position, they are in a different substantive situation regarding the selection process.

178. Therefore, the Court considers that the difference in the manner of their selection and the role of the Board in their selection was made depending on their position in the civil service. As a result, the Court concludes that there is a difference in the treatment of civil servants who are in an analogous situation or in a similar relevant situation, which constitutes a limitation on the right to be selected in the civil service.

b. Legitimate and proportionate

179. The Court recalls what was said above that unequal treatment is not in compliance with Article 24 of the Constitution if it does not pursue a legitimate aim or if there is no reasonable relationship of

proportionality between the means used and the aim sought to be realized.

180. In this connection, the Court will analyze whether,:

(1) The limitation is foreseen by law;
(2) There is a legitimate aim that to be realized by limitation; and
(3) There is a relationship of proportionality between the limitation of the right and aim sought to be achieved

181. Regarding the criterion (1), the Court notes that the competence of the Board for supervision of selection of civil servants of the management level and senior management level is foreseen by Article 6, paragraph 1.2 of the challenged Law adopted by the Assembly, which is the state institution which the Constitution has vested with the exercise of legislative power. The Court concludes that the limitation of the right to equality before the law is foreseen by law.

182. With respect to the criterion (2), the Court notes that Article 1 of the challenged Law establishes that the purpose of issuing this law is to determine the functions, competences and organization of the Board.

183. However, the Court notes that from the provisions of the challenged Law, it cannot be determined which was the purpose of the provision by which the supervisory role of the Board was defined solely for the management level and senior management level positions, and not for other categories of civil service.

184. Therefore, the Court concludes that there is no legitimate aim sought to be achieved with the different treatment of candidates/civil servants.

185. The Court refers to its case law (see Judgment in cases KO01/17 and KO157/18) when it found that the inexistence of a legitimate aim, of unequal treatment rendered unnecessary the analysis of proportionality between the means employed and the aim sought to be achieved.

186. Accordingly, the Court considers that the unequal treatment of civil servants in relation to the competence of the Board for overseeing the selection of civil servants, as defined by Article 6, paragraph 1.2 of the challenged Law, is not in compliance with Article 24 [Equality Before the Law] of the Constitution.

Constitutionality of Article 7 (paragraph 1, subparagraphs 2, 3 and 4) of the challenged Law

187. The Court recalls Article 7 (paragraph 1, subparagraphs 2, 3 and 4) of the challenged Law, which provides that:

"Article 7
Powers of the Board

1. For the purpose of exercising its functions, the Board has the right to:
[...]
1.2. obtain access and examine files and any document regarding the implementation of the rules and principles of the civil service legislation;
1.3. interview any civil servant who may possess information of direct relevance to the carrying out of the Board's functions;
1.4. requires and obtains from institutions any information necessary for the performance of its duties;
[...]"

188. In this regard, having in mind what was said in relation to the powers of the Board to decide on the selection of a category of civil servants, the Court emphasizes that the competencies of the Board provided for in this article, relate only to the functions of the Board with respect of the assessment of complaints and its monitoring role for the implementation of the principles and rules of civil service legislation.

189. Therefore, the Court finds that Article 7, paragraph 1, subparagraphs 2, 3 and 4 of the challenged Law do not limit and violate the core of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

Constitutional review of Article 18 of the challenged Law

190. The Court recalls Article 18 of the challenged Law, which provides that::

"Article 18
Deciding on complaints

1. College of the Board which reviews complaints, decides in the following way:
1.1. leaves the administrative act in force and rejects the complaint;

1.2. repeals or annuls the administrative act and approves the complaint;
1.3. changes the administrative act by partially approving the complaint;
1.4. obliges the competent administrative body to issue an administrative act when its issuance was unrightfully rejected;
1.5. ends the administrative proceeding;
1.6. returns for review;
1.7. dismisses the complaint;
1.8. declares not competent;
1.9. suspends the proceedings.
2. Colleges of the Board reviewing the complaints, based on paragraph 1., sub-paragraph 1.3. of this Article, have the right to change the disciplinary measures in cases when it is confirmed that the civil servant has made a breach, but the employing authority has not set the disciplinary measure corresponding to the breach.

191. In this respect, the abovementioned competences relate only to the functions of the Board in relation to complaints when there is a "*dispute*".. Also, given what was explained above, that the Council enjoys the prerogatives of a court within the meaning of Article 31 of the Constitution, the Board, in addition to independence from the executive, should have this "*full jurisdiction*" to decide on what is before it, that include the power to quash in all respects, on questions of fact and law, the decisions of the body issuing that decision or that is required to issue such decision. *(*See *Schmautzer v Austria*, cited above, paragraph 36; *Gradinger v Austria*, cited above, paragraph 44; and *Terra Woningen B. V. v. The Netherlands*, cited above, paragraph 52*).*

192. The competences listed in Article 18 of the challenged Law also serve this purpose. Therefore, the Court finds that Article 18 of the challenged Law does not limit the essence of any specific provision of the Constitution. Accordingly, these provisions are in accordance with the Constitution.

Constitutionality of Article 19 (paragraphs 5, 6, 7 and 8) of the challenged Law

193. The Court recalls that Article 19 (paragraphs 5, 6, 7 and 8) of the challenged Law, establish that:

Article 19
Oversight procedure for the selection of senior management and management level

Civil Servants

[...]

5. After reviewing the report, the Board issues a decision and decides to:

5.1. approve the election procedure, when determined it was developed in accordance with rules and principles of the legislation on Civil Service;

5.2. to annul the election procedure, when it determines that it was developed in violation of the rules and principles of legislation for Civil Service.

6. The Board is obliged to issue a decision for the procedure of election of senior management and management level Civil Servants, within the thirty (30) days deadline from receiving the complete file from the employing authority.

7. If the development of the procedure for election of senior management and management
level Civil Servants, is done without notifying the Board for participating in the oversight, the procedure is considered invalid and according to its official duty the Board issues a decision for annulment of the procedure.

8. The decision of the Board about the procedure for election of senior management and
management level Civil Servants, is a final decision in the administrative procedure and against this decision the parties in the procedure can initiate an administrative conflict, in accordance with the provisions of the law on administrative conflict".

194. In this regard, having in mind that Article 6, paragraph 1.2 of the challenged Law, which provides for the competence of the Board to decide by a binding decision without any complaint and without a "dispute" with regard to the legality of the supervision of civil servants of the senior management level and management level, was declared by the Court to be in contradiction with its "quasi-judicial" role, which is the primary function of the Independent Oversight Board, and that the latter is not in compliance with Article 24 [Equality Before the Law] of the Constitution.

195. Therefore, the Court finds that Article 19, paragraphs 5, 6, 7 and 8 of the challenged Law, as they govern the issue of binding decision regarding the selection of a category of civil servants, are also not compatible with Article 24 [Equality Before the Law] of the Constitution. Therefore, these provisions are not in compliance with the Constitution.

Constitutional review of Article 20 (paragraph 5) of the challenged Law

196. The Court recalls that Article 20 (paragraph 5) of the challenged Law provides that::

"Article 20
Monitoring of public administration institutions regarding the implementation of rules and principles of the legislation for Civil Service
[...]

5. Relevant institution of the public administration is obliged to implement the recommendations of the Board, within the deadline set with the Board decision".

197. The Court notes that, having in mind that the Court has not found a violation of Article 6, paragraph 1.3, where it assessed Article 6 of the challenged Law which foresees the competence of the Board for monitoring of public administration institutions employing civil servants.

198. Therefore, for these reasons, the Court finds that Article 20, paragraph 5 of the challenged Law also does not limit and infringe the core of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

Constitutional review of Article 21 of the challenged Law

199. The Court recalls Article 21 of the challenged Law, which establishes:

Article 21
Board's decision
"1. Board's decision is a final administrative decision and is implemented by the senior management level official or the responsible person from the institution that made the first decision towards the party.

2. Implementation of the decision should be done within fifteen (15) days deadline from the receipt of the Board decision.
3. Non-implementation of the Board decision by the responsible person from the institution, constitutes serious breach of the work duties.

200. The Court notes that, having regard to what was said in relation to Article 6, paragraph 1.2 of the challenged Law, the Court notes that the competencies of the Board as established in this Article, relate only to the functions of the Board with regard to the assessment of complaints where there is a "*dispute*" and its monitoring role for the implementation of the principles and rules of civil service legislation.

201. Therefore, for these reasons, the Court finds that Article 21 of the challenged Law does not limit and violate the core of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

Constitutional review of Article 22 of the challenged Law

202. The Court recalls Article 22 of the challenged Law, which establishes:

Article 22
Initiation of the administration conflict

1. The party which is unsatisfied, and claims that the Board decision is not lawful may initiate an administrative conflict against the Board decision at the competent court, within the deadline set in the provision of the law on administrative conflict.
2. Initiating an administrative conflict does not stop the execution of the Board decision.

203. The Court notes that this Article of the challenged Law is also related to Article 22 of Law No. 03/L-202 on Administrative Conflict, establishing that *"The indictment does not prohibit the execution of an administrative act, against which the indictment has been submitted, unless otherwise provided for by the law"*. In addition, Article 22 of the challenged Law confirms the judicial protection of the parties dissatisfied with the decisions of the Board.

204. Therefore, for these reasons, the Court finds that Article 22 of the challenged Law does not limit the violate the core of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

Constitutional review of Article 23 of the challenged Law

205. The Court recalls Article 23 of the challenged Law, which stipulates:

Article 23
Procedure in case of non-implementation of the Board decision

1. If the responsible person from the institution does not implement the Board decision within the deadline foreseen in Article 21 of this Law, in all such cases, Chairperson of the Board should inform in written the President of the Assembly, relevant Committee on Public Administration and the immediate supervisor of the person responsible for non-implementation, within fifteen (15) days from the day of expiry of the execution deadline.
2. In cases when the person responsible for implementation of the Board decision is within the executive branch, the Prime Minister of the Republic of Kosovo should be informed in written about the non-implementation of the decision.
3. In cases when the person responsible for implementation of the Board decision is the Mayor of the Municipality, the relevant minister for local government and the Prime Minister of the Republic of Kosovo should be informed in written about the non-implementation of the decision.
4. 4. Notice from paragraph 1. and 2. of this Article is considered as a request for initiating a disciplinary procedure against the person responsible for implementation, a procedure which is developed in accordance with the provisions foreseen by the legislation in force.
5. Prime Minister or the responsible supervisor is obliged to initiate the disciplinary procedure towards the person responsible for implementation, within the thirty (30) days deadline from the receipt of the notice by the Chairperson of the Board.
6. In case the actions foreseen under paragraph 5. of this article are not taken, Chairperson of the Board informs the President of the Assembly and the relevant Committee for Public Administration in written. President of the Assembly requires in written from the Prime Minister
or the responsible supervisor of the institution, to take all the necessary actions for immediate implementation of the Board decision and take the necessary measures towards the responsible person in accordance with the provisions foreseen by the legislation in force.
7. Within thirty (30) days deadline from the expiry of the Board decision implementation deadline, party can initiate the enforcement procedure for the Board decision at the competent court, in accordance with the provisions of the Law on Enforcement Procedure.

206. The Court notes that the competences of the Board set out in this article, relate solely to the functions of the Board with regard to assessment of the complaints where there is a "*dispute*" and its monitoring role for the application of the principles and rules of civil service legislation.

207. Therefore, for these reasons, the Court finds that Article 23 of the challenged Law does not limit and violate the core of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

Constitutional review of Article 24 of the challenged Law

208. The Court recalls Article 24 of the challenged Law, which establishes:

Article 24
Administrative sanctions for non-implementation of the Board decision

1. In cases of non-implementation of the Board decision according to Article 21 of this law, Chairperson of the Board issues a decision for withholding fifty percent (50%) of the monthly salary of the responsible person, until the implementation of the Board decision.
2. According to paragraph 1. of this Article, the decision is sent for implementation to the main administrative official of the relevant ministry for managing payrolls, who is obliged to implement the decision within fifteen (15) days deadline from the receipt of the decision and inform in written the Board about the implementation of the decision.
3. Against the decision for withholding fifty percent (50%) of the monthly salary, the unsatisfied party has the right to initiate an administrative conflict at the competent court for administrative issues, in accordance with the provisions of the Law on Administrative Conflict.
4. Initiation of an administrative conflict does not stop the execution of the Board decision.
5. In cases of non-implementation of the decision of the Chairperson of the Board on withholding fifty percent (50%) of the monthly salary, the Board may initiate the enforcement procedure for the decision at the competent court, in accordance with the provisions of the law on enforcement
procedure within thirty (30) days deadline from the expiry of the implementation deadline.

209. The Court notes that the competencies of the Council set out in this article, aim at establishing a mechanism for the enforcement of its decisions. Such competencies for the enforcement of its decisions are also provided by other administrative institutions. In this regard, the Court also refers to Law No. 2002/09, for Labor Inspectorate in Kosovo, amended and supplemented by Law No. 03/L-017 on Amending and Supplementing the Law on the Labor Inspectorate No. 2002/9, which provides that the Chief Labor Inspector shall supervise executions of decisions on violations relating to labor law, protection and safety work rules, and related sanctions taken. The Court also refers to Article 92 of the Law on Labor no. 03/L-212 which establishes that, *"1. Any natural or legal person who disregards the provisions of this Law, in a legal procedure, shall be fined from one hundred (100) up to ten thousand (10,000) Euro. 2. This law also provides that where the offence is committed against an employee who is under eighteen (18) years of age, the employer shall be liable to twice the height of the fine specified in paragraph 1 of this Article".*

210. The Court recalls that in the event of non-implementation of its decisions, the Board has the right to initiate the enforcement procedure under the Law on Enforcement Procedure. Article 24 of the contested Law also provides for the judicial protection of persons dissatisfied with the decisions of the Board.

211. Therefore, for these reasons, the Court finds that Article 24 of the challenged Law does not limit and the violate the core of any specific provisions of the Constitution. Therefore, these provisions are in accordance with the Constitution.

Constitutional review of Article 25 of the challenged Law

212. The Court recalls Article 25 of the challenged Law, which establishes:

"Article 25
Cooperation with public administration institutions

[...]
2. Public administration institutions with Civil Servants employed, as well as all other public officials or Civil Servants, that have competencies in administration of the civil service, or are informed about this field, are obliged to cooperate with the Board.
3. In cases when the employing authority or the responsible person does not cooperate, the Board reports to the Assembly

about this non-cooperation, which shall then forward this notice to the Prime Minister or the immediate supervisor of the responsible person".

213. In this regard, the Court emphasizes that the competences of the Board set out in this article, relate solely to the functions of the Board with regard to assessment of the complaints where there is a "*dispute*" and its monitoring role for the application of the principles and rules of civil service legislation.

214. For these reasons, the Court finds that Article 25, paragraphs 2 and 3 of the challenged Law do not limit and violate the essence of any specific provision of the Constitution. Therefore, these provisions are in compliance with the Constitution.

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(iii) Regarding the allegation of immunity from criminal prosecution, civil lawsuit or dismissal, regarding the performance of Board functions

215. The Court notes that the Applicant also challenges Article 11 [Term of office for members of Board] paragraph 3 of the challegned law with regard to the immunity of members of the Board, defining:

"3. Regarding the decision-making within the constitutional and legal functions of the Board, the Chairperson and members of the Board enjoy immunity from prosecution, civil lawsuit or discharge".

216. In this regard, the Court recalls the Applicant's allegations, stating that the immunity of the members of the Board has no basis in the Constitution as it clearly specifies the state officials who enjoy immunity. He states that under the Constitution, only the deputies of the Assembly, members of the Government, judges of regular courts, judges of the Constitutional Court and the Ombudsperson enjoy immunity.

217. The Applicant, referring to Judgment KO98/11 of the Court, the Applicant, *the Government of the Republic of Kosovo*, concerning the immunity of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, and Members of the Government of the Republic of Kosovo, Judgment of 20 September 2011 (hereinafter: case KO98/11), claims that this type of immunity can not be granted by other legal acts unless it is provided for by the Constitution itself.

218. The Court notes that the Board, on the other hand, bases its justification for immunity also on the basis of the Judgment of the Constitutional Court, KI33/16, cited above, whereby the Court stated that the Board enjoys the prerogatives of a "*court*" within the meaning of Article 6 of the ECHR.

219. The Court notes that the Board alleges that its members should enjoy immunity as they enjoy the prerogatives of a "*court*" and as such should have the same immunity as judges of regular courts.

220. Therefore, the Court will initially assess whether the members of the Board can enjoy the immunity enjoyed by judges.

221. The Court recalls that in case KI33/16, it stated that the Board *"gëzon prerogativat e një gjykate në kuptim të nenit 6 të KEDNJ-së"* dhe se *"gjykata" kategorizohet në kuptimin substancial të termit nga funksioni i saj gjyqësor, që do të thotë vendosja e çështjeve brenda kompetencave të saj në bazë të rregullave të së drejtës dhe pas procedurave të kryera në mënyrë të paraparë*

it stated that the Board "*enjoys the prerogatives of a court within the meaning of Article 31 of the Constitution and Article 6 of the ECHR*" and that a "*tribunal*" *is categorized in the substantive sense of the term by its judicial function, that is to say determining of matters within its competence on the basis of the rules of law and following the proceedings conducted in a prescribed manner [...]".*

222. In this regard, the Court notes that in Case KI33/16, the reference to Article 6 of the ECHR was made in order to emphasize that the decisions of the Board are "*final, binding and enforceable*" *and that the Board, from the point of view Article 6 of the ECHR, is independent as (a) it is independent of the executive and (b) has full jurisdiction to decide on the issues before them as required by Article 31 of the Constitution and Article 6 of the ECHR* (See, *mutatis mutandis*, case KI33/16, *Minire Zeka*, cited above, paragraph 59. Regarding the independence of an "*independent tribunal*" see case KO12/17, Applicant *The Ombudsperson*, Judgment of the Constitutional Court of 9 May 2017 par. 75).

223. Accordingly, Case KI33/16 can not be used as a basis for categorizing the Board as a "court" within the meaning of what has already been provided by the Constitution in paragraph 1 of Article 102 [General Principles of the Judicial System] which stipulates that "*the judicial power in the Republic of Kosovo is exercised by the courts*".

224. In this regard, the Court considers that the existence of factors which make the rights of the parties to a certain proceedings necessary does not automatically give the privileges of a "*court*" to the authority/body that is competent to develop that administrative procedure , namely the Board in the present case.

225. Therefore, the Court notes that, based on the finding that the Board is not a court within the meaning of Article 102 of the Constitution, and on the fact that referral to the "court" and Article 6 of the ECHR in case KI33/16, was done in a limited manner and solely for the purpose of giving the parties a wider legal protection before the Board and in relation to the legal effects of the decisions of the Board, the members of the Board may not benefit from such status. The use of the precedent in case KI33/16, in order to increase the status privileges of the members of the Board, is not contrary to the very spirit of the case in question.

226. The argument of the Board that it is an independent body under the Constitution should not be confused with the type of independence it carries and is guaranteed to the bodies of the judicial power, which fall in their entirety within the framework of Article 6 of the ECHR. Independent bodies of the final administrative instance, which decisions are subject to the same procedural guarantees for the parties, are numerous, but they should not be confused with the judicial power and the characteristics associated with such power in the prism of freedoms and rights guaranteed by the Constitution and the ECHR.

227. Consequently, the Court considers that the members of the Board cannot be considered "judges"" within the meaning of the Constitution and the immunities enjoyed by the judges pursuant to Article 107 of the Constitution.

228. The Court will further assess whether Article 11, paragraph 3 of the challenged Law violates the provisions of the Constitution as alleged by the Applicant.

229. In this regard, the Applicant referred to the articles of the Constitution which provide for immunity for the President of the Republic, deputies of the Assembly, members of the Government, judges of regular courts, judges of the Constitutional Court and the Ombudsperson.

230. In this regard, the Court notes that the articles of the Constitution which establish immunity for the above mentioned officials, which the Applicant referred to, are not exhaustive in so far as they regulate

immunity for the above mentioned officials but do not restrict or prohibit expressly that immunities for other officials be assigned by special laws. This issue is not regulated either in Article 101, paragraph 2 of the Constitution, which defines the Board as an institution to oversee the rules and principles of civil service.

231. The practice of granting immunity through law, even though the Constitution has not explicitly envisaged such a thing, is also known in other countries and the granting of immunity regarding several state institutions is also encouraged by the European Commission for Democracy through Law, known as the "Venice Commission". The Venice Commission in the compilation of the Venice Commission regarding the Ombudsperson Institution has assessed the laws of different states which have foreseen functional immunity for the Ombudsperson, his deputies, but also for the supporting staff of the Ombudsperson Institution.

232. In this regard, the Venice Commission, evaluating the Armenian Law on the Ombudsperson, stated that the Ombudsperson and supporting staff should be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity – functional immunity (see Compilation of the Venice Commission Opinions concerning the Ombudsman Institution, CDL-PI (2016) 001, of 5 February 2016, p. 14).

233. A similar assessment of granting immunity through law not only for the Ombudsperson and his deputies, but also for the supporting staff of these institutions, the Venice Commission also made when assessing the laws pertaining to the institutions of Ombudsperson of Moldova, Montenegro and Serbia, which not necessarily had the immunity regulated by the Constitution (see Compilation of the Venice Commission Opinions concerning the Ombudsman Institution, CDL-PI (2016) 001, of 5 February 2016, page 14).

234. The granting of immunity through laws has been assessed by the Venice Commission even in the case of the immunity of prosecutors (see summary of Opinions relating to Prosecutors, CDL-PI (2018) 001 of 11 November 2017).

235. However, what needs to be assessed is whether granting immunity to the members of the Board violates any of the rights set forth in the Constitution.

236. In this respect, the Court recalls that the issue of immunity of public officials is linked to the right to a fair and impartial trial guaranteed by

Article 31 of the Constitution and Article 6 of the Convention. Therefore, the Court refers to the provisions of Article 31 of the Constitution and Article 6 of the ECHR, which define:

"Article 31 [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]"

Article 6 (Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
[...]".

237. The Court also reiterates that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution: *"human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

238. With regard to immunities, the ECtHR has emphasized that immunity may be granted to certain categories of state officials and this may be in accordance with the requirements of Article 6, paragraph 1 of the ECHR (see, *mutatis mutandis, Gryzanov v. Russia*, No. 19673/03, Judgment of 12 June 2012)

239. The Court reiterates that, the ECtHR found that Article 6, paragraph 1 guarantees the "right to a court", of which the "right of access", that is, the right to institute proceedings before a court in civil matters, constitutes one aspect, as an essential part of the right to a fair trial. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the "right of access" by its very nature calls for regulation by the states. In this respect, the states enjoy a certain margin of appreciation, although the final decision as to the observance of the requirements of the right to a fair trial rests with the Court (see, *mutatis mutandis,* ECtHR case, *Osman v. United*

Kingdom, No. 87/1997/871/1083, Judgment of 28 October 1998, par. 147; see ECtHR case, *Prince Hans-Adam II of Liechtenstein v. Germany,* nr. 42527/98, Judgment of 12 July 2001, paragraph 44).

240. The Court should assess whether the limitations applied do not restrict or reduce the access to the court left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 paragraph 1 of the ECHR if it does not pursue an objective aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, *mutatis mutandis,* ECtHR case, *Osman v. United Kingdom*, No. 87/1997/871/1083, Judgment of 28 October 1998, par. 147; see ECtHR case, *Prince Hans-Adam II of Liechtenstein v. Germany,* nr. 42527/98, Judgment of 12 July 2001, paragraph 44).

241. Accordingly, the Court in the present case will assess whether the immunity provided to the members of the Board under the challenged Law (i) pursues a legitimate aim, and (ii) is proportionate in that the applicants have a reasonable alternative to protect in effective manner their rights under the Board decisions.

242. The Court recalls that the immunity of the members of the Board under Article 11 paragraph of the challenged Law provides immunity as to the decision-making within the constitutional and legal functions in respect of which members of the Board enjoy immunity from criminal prosecution, civil lawsuit or discharge.

243. Thus, immunity for the members of the Board is a functional immunity, as clarified by the Court in case KO98/11, regarding the immunity of the President, deputies of the Assembly and members of the Government, which means that members of the Board are exempt from liability of any nature over the opinions expressed, votes cast or decisions taken in their work as member of the Board and other actions taken while performing their duties. This type of immunity extends after their mandate comes to the end and it is of unlimited duration. They will never be liable to answer to anyone or any court for such actions or decisions (see, case KO98/11, cited above, paragraph 54).

244. However, the functional immunity guaranteed to members of the Board under the challenged Law is limited and they do not have special protection for actions beyond their scope as members of the Board or if they are accused of criminal offenses that are not simply related with the fact that they have exercised their functions in relation

to the views expressed, the manner of voting or the decisions taken during their work. They also have no immunity from arrest.

245. The Court notes that the challenged Law does not foresee other immunity for the members of the Board, except the functional immunity that was explained above, which has to do with inviolability for actions outside the scope of their responsibilities as members of the Board. Therefore, in their capacity as ordinary citizens, members of the Board are treated the same as all other citizens.

246. With regard to the aim sought to be achieved with the immunity, the Court also recalls its Judgment in case KO98 11, and by which the Court emphasized that *"[...] those that implement power and exercise duties in the State have immunities and special status in order to ensure their independence so that they can do their work effectively, to ensure that other powers are stopped from interfering with their work and to prevent abuse"* (see case KO98/11, cited above, paragraph 47).

247. Accordingly, in the present case also, the Court notes that the purpose of the immunity is that the members of the Board are free to exercise their functions with independence and without fear of the consequences for the performance of their functions, therefore the immunity serves this purpose and the Court considers that it is legitimate.

248. In this respect, the ECtHR in the case of *Gryaznov v. Russia* has elaborated that immunity is in the public interest, in which interest is that judges are free to exercise their functions with independence and without fear of consequences, while the litigating parties can defend themselves from judicial errors by having the opportunity to submit their appeals to a court of appeals without being instructed to claims for personal liability (see, *mutatis mutandis*, ECtHR case *Gryaznov v. Russia*, no. 19673/03 Judgment of 12 June 2012, par. 78).

249. Therefore, what is important is whether the parties have the right to use legal remedies, against the decisions of the Board without having to raise their personal liability.

250. In this connection, the Court recalls Article 22 [Initiation of the administration conflict] of the challenged Law, which provides that *"The party which is unsatisfied, and claims that the Board decision is not lawful may initiate an administrative conflict against the Board decision at the competent court, within the deadline set in the provision of the law on administrative conflict"*.

251. Therefore, dissatisfied parties have a reasonable alternative and may exercise their rights towards the decisions of the Board by initiating an administrative conflict before the courts to protect their rights.

252. Therefore, having regard to the limited immunity guaranteed to members of the Board by Article 11, paragraph 3 of the challenged Law, and the fact that against the decisions of the Board, the parties have the right to initiate an administrative conflict, the Court considers that the measure employed is proportionate to the aim sought to be achieved as the interested parties are able to effectively protect their rights against the decisions of the Board by initiating an administrative conflict.

253. Therefore, the Court finds that Article 11, paragraph 3 of the challenged Law is in compliance with the right of access to court as an integral part of the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the Convention. Accordingly, this article is in compliance with the Constitution.

Request for interim measure

254. The Court recalls that the Applicant also requests the Court to impose interim measure, namely the suspension of the application of the provisions of the challenged Law *"or at least to suspend the application of these provisions in relation to the Ombudsperson"*, until the final decision of this Court.

255. Given that the Court has decided on the merits of the case, it does not consider necessary to review the Applicant's request for the imposition of the interim measure.

Conclusion

256. Taking into account and referring to the reasons elaborated above, the Court, regarding the Applicant's allegation of exceeding the narrow scope of the Board as set out in Chapter VI (Government of the Republic of Kosovo) of the Constitution, concludes that:

    i. Article 2 of the challenged Law does not limit and violate the essence of Article 101 [Civil Service] of the Constitution. Consequently, Article 2 of the challenged Law is in compliance with Article 101 [Civil Service], paragraphs 1 and 2 of the Constitution and the latter must be interpreted by all public

authorities in accordance with the interpretation presented in this Judgment.

257. The Court, as regards the assessment of the constitutionality of the provisions of the challenged Law in relation to the independent constitutional institutions and other public institutions, concludes that:

ii. during the implementation of the challenged Law, the functions and the specific authority of the independent constitutional institutions should be recognized, which is reflected, *inter alia,* in the issuance and application of their internal rules to protect their independence as established by the Constitution and specific laws, to the extent necessary to protect their organizational, functional and budgetary independence, including the specifics of the work of their personnel

iii. Article 3, paragraphs 2, 3 and 4 of the challenged Law do not limit and violate the essence of any specific provision of the Constitution. Therefore, the provisions in question are in compliance with the Constitution,

iv. Article 4, paragraph 1, in conjunction with Article 3.1, subparagraph 1.1. of the challenged Law are not in compliance with Chapter XII of the Constitution,

v. Article 6, paragraph 1.2 of the challenged Law with respect to the competence of the Board to decide whether the appointment of civil servants of senior management level and, in cases when there is no "*conflict*", represents unequal treatment of civil servants, is not in compliance with Article 24 [Equality Before the Law] of the Constitution,

vi. Article 7, paragraph 1, subparagraphs 2, 3 and 4 of the challenged Law do not limit and violate the essence of any specific provision of the Constitution. Therefore, the provisions in question are in compliance with the Constitution,

vii. Article 18 of the challenged Law does not limit and violate the essence of any specific provision of the Constitution. Therefore, the provisions in question are in compliance with the Constitution,

viii. Article 19, paragraphs 5, 6, 7 and 8 of the challenged Law, as they regulate the issue of binding decision regarding the selection of a category of civil servants even in cases where there is no "*conflict*", are also not in compliance with Article 24 [Equality Before the Law] of the Constitution,

ix. Article 20, paragraph 5 of the challenged Law does not limit and violate the essence of any specific provision of the Constitution.

Therefore, the article in question is in compliance with the Constitution,

x. Article 21 of the challenged Law does not limit and violate the essence of any specific provision of the Constitution. Therefore, the latter are in compliance with the Constitution,

xi. Article 22 of the challenged Law does not limit and violate the essence of any specific provision of the Constitution. Consequently, the provisions in question are in compliance with the Constitution,

xii. Article 23 of the challenged Law does not limit and violate the essence of any specific provision of the Constitution. Therefore, the provisions in question are in compliance with the Constitution,

xiii. Article 24 of the challenged Law does not limit and violate the essence of any specific provisions of the Constitution. Therefore, the provisions in question are in compliance with the Constitution,

xiv. Article 25, paragraphs 2 and 3 of the challenged Law do not limit or violate the essence of any specific provision of the Constitution. Therefore, the latter are in are in compliance with the Constitution.

258. The Court, as regards the Applicant's allegation of immunity from criminal prosecution, civil lawsuit or dismissal, in relation to the performance of the Board functions, concludes that:

xv. Article 11, paragraph 3 of the challenged Law is in compliance with the right of access to the court as an integral part of the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the Convention. Therefore, the article in question is in compliance with the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.2 of the Constitution, Articles 20 and 27 of the Law and Rules 56, 57 and 59 of the Rules of Procedure, on 25 April 2019

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, unanimously, that Article 4 (paragraph 1) in conjunction with Article 3 (paragraph 1.1), Article 6

(paragraph 1.2) and Article 19 (sub-paragraphs 5, 6, 7 and 8) of Law No. 06/L-048 on Independent Oversight Board for Civil Service of Kosovo, are not in compliance with the Constitution;

III. DECIDES, unanimously, in accordance with Article 116.3 of the Constitution, that Articles 3 (paragraph 1.1), 4 (paragraph 1), 6 (paragraph 1.2) and 19 (sub-paragraphs 5, 6, 7 and 8) of Law No. 06/L-048 on Independent Oversight Board for Civil Service of Kosovo, are invalid from the date this Judgment becomes effective;

IV. TO HOLD, unanimously, that articles 2, 3 (paragraphs 1.2, 1.3, 1.4), 7 (paragraph 1, subparagraphs 2, 3 and 4), 18, 20 (paragraph 5), 21, 22, 23 and 25 (paragraphs 2 and 3) of Law No. 06/L-048 on Independent Oversight Board for Civil Service of Kosovo are in compliance with the Constitution;

V. TO HOLD, with majority of votes, that articles 11 (paragraph 3) and 24 of Law No. 06/L-048 on Independent Oversight Board for Civil Service of Kosovo, are in compliance with the Constitution;

VI. TO REJECT the request for interim measure;

VII. TO NOTIFY this Judgment to the Parties;

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

IX. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KO43/19, Applicant: Albulena Haxhiu, Driton Selmanaj Selmanaj and thirty other deputies of the Assembly of the Republic of Kosovo, Constitutional review of Law No. 06/L-145 on the Duties, Responsibilities and Competences of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia

KO43/19, Judgment of 13 June 2019, published on 27 June 2019

Keywords: institutional referral, the competences of the Assembly, the competences of the Government and the competencies of the Prime Minister, the separation of power, democratic values and the rule of law,

The Referral was submitted by thirty and two (32) deputies of the Assembly of the Republic of Kosovo based on Article 113 paragraph 5 of the Constitution. The subject matter was the constitutional review of Articles 1, 2, 4, 10 (paragraph 4 sub-paragraphs 1 and 2) and 11 (paragraph 3) of Law No. 06/L-145 on the Duties, Responsibilities and Competences of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia (the challenged Law). The Applicants alleged that the challenged Law, in its entirety is not in compliance with the Constitution, namely is not in compliance with Article 2 [Sovereignty], Article 4 [Form of Government and Separation of Power], Article 7 [Values], Article 18 [Ratification of International Agreements], Article 20 [Delegation of Sovereignty], Article 65 [Competencies of the Assembly], Article 93 [Competencies of the Government], and Article 94 [Competencies of the Prime Minister] of the Constitution.

Within the challenged Law, the establishment of the state delegation and its scope was foreseen, as well as the institutional hierarchy and decision-making procedures in the process of dialogue with the Republic of Serbia. Further this Law governed the functioning of the state delegation of the Republic of Kosovo for the dialogue with Serbia, and the latter provided for the organizational structure, activity, and the competences and responsibilities of the state delegation.

The Applicants in essence had three main allegations before the Court: *(i) determining and changing the institutional constitutional and decision-making hierarchy in the dialogue with Serbia; (ii) the legal competences of the state delegation directly interfere with the constitutional competences of the executive and legislative powers, as well as (iii) giving the lex specialis character to the challenged Law*. The Applicants also requested the imposition of interim measure.

The Court assessed that the Applicants' Referral is admissible based on the criteria established by the Constitution, the Law on the Constitutional Court and the Rules of Procedure of the Constitutional Court. In elaborating the merits of the Referral, the Court assessed the Applicants' allegations of *(i) determining and changing the institutional constitutional and decision-making hierarchy in the dialogue with Serbia,* and *(ii) the legal competences of the state delegation directly interfere with the constitutional competences of the executive and legislative powers,* the Court found as follows:

The Court found that the State Delegation, which was established by the challenged Law, is not foreseen by the Constitution, and is not foreseen within the form of government and separation of power. As such, the state delegation cannot be involved in the interaction of separation, control and balance of powers and cannot interfere in the form of governance, namely the structure of separation of power, as defined by Article 4 of the Constitution.

The Court further found that the transfer of competences of the constitutional institutions to the "special mechanism" established in the challenged Law is an interference with the exercise of competences of the constitutional institutions provided by the Constitution. The transfer of competences to the "special mechanism" represents interference in the form of governance, separation of power, and is not in compliance with the democratic values and the rule of law, as set forth in Article 7 of the Constitution, because it vests in the state delegation the functions which do not comply with constitutional norms.

The Court also found that the constitutional norms, expressly envisaged an obligation regarding the exercise of constitutional competencies in the sphere of foreign policy for the competent institutions. The power to dialogue with a third country cannot be transferred to the state delegation as a "special mechanism" through a lower legal act such as the challenged Law.
In addition, the Court found that the Assembly of the Republic of Kosovo is obliged to oversee the foreign policy within the constitutional competences foreseen under paragraph 12 of Article 65 of the Constitution. The Court also emphasized that paragraph 1 of Article 93 of the Constitution determines the competences of the Government to *"propose and implement the internal and foreign policies of the country",* and paragraphs 1 and 9 of Article 94, provide that the Prime Minister as the head of the Government "*represents and leads the Government"* and *"Consults with the President on the implementation of the foreign policy of the country"*.

Therefore, the Court concluded that the representation in the sphere of the foreign policy is the duty of the constitutional institutions of the Republic of

Kosovo. This competence is defined by the Constitution, and means, first of all, that any negotiation or other action related to the conclusion of international agreements on behalf of the Republic of Kosovo, must be within the constitutional obligations of the institutions of the Republic of Kosovo. The Court also concluded that the competence to reach international agreements cannot be carried over or transferred from the constitutional institutions to a "special mechanism" as provided by the challenged Law.

The Court, unanimously decided that Articles 1 (paragraph 1), 2, 4, 10 (paragraph 4, sub-paragraphs 1 and 2), and Article 11 (paragraph 3) of Law No. 06/L-145 on the Duties, Responsibilities and Competencies of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia, are not in compliance with paragraphs 1, 2, 3 and 4 of Article 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], paragraph 12 of Article 65 [Competencies of the Assembly], paragraph 1 of Article 93 [Competencies of the Government], and paragraphs 1 and 9 of Article 94 [Competencies of the Prime Minister] of the Constitution.

Therefore, the Court found that as the essential Articles of Law No. 06/L-145 on the Duties, Responsibilities and Competencies of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia, are not in compliance with the Constitution, the latter, in its entirety, is incompatible with the Constitution.

JUDGMENT

in

Case No. KO43/19

Applicant

Albulena Haxhiu, Driton Selmanaj and thirty other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Law No. 06/L-145 on the Duties, Responsibilities and Competences of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia

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 Avdullah Hoti, Glauk Konjufca, Vjosa Osmani-Sadriu, Albulena Haxhiu, Ismet Beqiri, Saranda Bogujevci, Lumir Abdixhiku, Arbërie Nagavci, Armend Zemaj, Arbër Rexhaj, Doruntina Maloku, Ali Lajçi, Arben Gashi, Drita Millaku, Hykmete Bajrami, Xhelal Sveçla, Lutfi Zharku, Ismajl Kurteshi, Besa Gaxheri, Fitore Pacolli, Arban Abrashi, Shemsi Syla, Lirije Kajtazi, Valon Ramadani, Kujtim Shala, Salih Zyba, Haxhi Avdyli, Liburn Aliu, Mirjeta Kalludra, Albin Kurti, Driton Selmanaj and Anton Quni (hereinafter: the Applicants), all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

2. The Applicants authorized the deputies of the Assembly, Albulena Haxhiu and Driton Selmanaj, to represent them in the proceedings

before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

Challenged law

3. The Applicants specifically challenge Articles 1, 2, 4, 10 (paragraph 4 sub-paragraphs 1 and 2) and 11 (paragraph 3) of Law No. 06/L-145 on the Duties, Responsibilities and Competences of the State Delegation of the Republic of Kosovo in the Dialogue Process with the Republic of Serbia (hereinafter: the challenged Law), adopted by the Assembly on 7 March 2019.

4. The Applicants explain that the aforementioned articles are not in compliance with the Constitution and because of the incompliance of these articles with the Constitution, the challenged Law, in its entirety, is incompatible with the Constitution.

Subject matter

5. The subject matter is the constitutional review of the challenged Law, which allegedly in its entirety is not in compliance with Article 2 [Sovereignty], Article 4 [Form of Government and Separation of Power], Article 7 [Values], Article 18 [Ratification of International Agreements], Article 20 [Delegation of Sovereignty], Article 65 [Competencies of the Assembly], Article 93 [Competencies of the Government], and Article 94 [Competencies of the Prime Minister] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

6. The Applicants also request the imposition of an interim measure, on the grounds that *"The implementation of the challenged Law would create a dangerous precedent in relation to the principle of separation of powers, because it would allow an unconstitutional body to interfere with the competences of the Assembly and the Government [...]"*.

7. The Applicants also requested the holding of a hearing.

Legal basis

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

to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

9. On 15 March 2019, the Applicants submitted to the Court the Referral with the attached documents.

10. On 15 March 2019, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

11. On 18 March 2019, the Court notified the Applicants about the registration of the Referral.

12. On 18 March 2019, the Court notified the President of the Republic of Kosovo about the registration of the Referral, reminding him that, in accordance with paragraph 2 of Article 43 [Deadline] of the Law, the challenged Law cannot be decreed, enter into force, or produce legal effects, until the Court finally decides on the matter raised before it. The Court also requested the President to submit his comments to the Court, if any, by 1 April 2019.

13. On 18 March 2019, the Court notified the President of the Assembly of the Republic of Kosovo about the registration of the Referral and requested the President of the Assembly of Republic of Kosovo to provide a copy of this notice to each deputy of the Assembly so that they are able to submit to the Court their comments, if any, regarding the aforementioned referral by 1 April 2019.

14. On 18 March 2019, the Court notified the Prime Minister of the Republic of Kosovo about the registration of the Referral and requested him to submit to the Court his comments, if any, by 1 April 2019.

15. On 18 March 2019, the Court notified the Secretariat of the Assembly of the Republic of Kosovo, requesting it to submit to the Court, no later than 1 April 2019, all relevant documentation relating to the Referral.

16. On 27 March 2019, the Secretariat of the Assembly submitted to the Court the following documents:

a) Minutes of the Functional Committee on Foreign Affairs, Diaspora and Strategic Investments, review in principle of the challenged Law;
b) Report to the Functional Committee on Foreign Affairs, Diaspora and Strategic Investments, review in principle of the challenged Law;
c) The invitation and agenda for the plenary session of the Assembly of the Republic of Kosovo, the first reading of the challenged law;
d) Transcript of the Plenary Session, first reading of the challenged law, of 2 and 3 February 2019;
e) Minutes of the Plenary Session, first reading of the challenged Law, of 2 and 3 February 2019;
f) Decision of the Assembly on the approval in principle of the challenged Law of 12 February 2019;
g) The request of the Prime Minister of the Republic of Kosovo, Mr. Ramush Haradinaj, to hold the Extraordinary Plenary Session of the Assembly of the Republic of Kosovo on 7 March 2019, at 10:00 hrs, the second reading of the challenged Law;
h) Invitation and agenda for the Extraordinary Plenary Session of the Assembly of the Republic of Kosovo, second reading of the challenged Law of 7 March 2019;
i) Minutes of the Functional Committee on Foreign Affairs, Diaspora and Strategic Investments, review of the challenged Law of 6 March 2019;
j) Report with amendments of the Functional Committee on Foreign Affairs, Diaspora and Strategic Investments, proceeded for consideration at the standing committees, on 6 March 2019;
k) Minutes of the Functional Committee on European Integration, review of the challenged Law of 6 March 2019;
l) Report of the Committee on European Integration of 6 March 2019;
m) Minutes of the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency, review of the challenged Law of 6 March 2019;
n) Report of the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and the Oversight of the Anti-Corruption Agency, of 6 March 2019;
o) Minutes of the Committee on Budget and Finance, review of the challenged Law, of 6 March 2019;
p) Report of the Committee on Budget and Finance of 6 March 2019;

q) Minutes of the Committee on the Rights, Interests of the Communities and Return, review of the challenged Law of 6 March 2019;
r) Report of the Committee on the Rights and Interests of Communities and Return of 7 March 2019;
s) Minutes of the Functional Committee on Foreign Affairs, Diaspora and Strategic Investments, review of the Final Report of the challenged Law, of 6 March 2019;
t) Final report with amendments of the Functional Committee on Foreign Affairs, Diaspora and Strategic Investments, proceeded for consideration in plenary session of 7 March 2019;
u) Transcript of the Extraordinary Plenary Session of the Assembly, second reading of the challenged Law of 7 March 2019;
v) Decision of the Assembly on adopting the challenged Law, of 7 March 2019;
w) Challenged Law, Law No. 06/L-145 on the Duties, Responsibilities and Competencies of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia.

17. In the deadline given by the Court, the President, the President of the Assembly, the Prime Minister and the deputies did not submit any comments to the Court.

18. On 13 June 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

19. On 13 June 2019, the Court voted for the admissibility of the Referral, and unanimously decided that the challenged Law in its entirety, is not in compliance with the Constitution.

Summary of facts

20. On 24 December 2018, the Government of the Republic of Kosovo, by Decision No. 02/81, approved the challenged Law (draft law), submitting it to the Assembly, in order for it to be reviewed and approved in accordance with the established procedure.

21. On 30 January 2019, the Functional Committee on Foreign Affairs, Diaspora and Strategic Investment reviewed and approved the challenged Law in principle with 6 (six) votes for and 3 (three) votes against. On the same date, the Functional Committee on Foreign Affairs, Diaspora and Strategic Investments found that the challenged

Law meets the requirements to proceed to the Assembly for review and approval.

22. On 2 February 2019, the Assembly, in the session, adopted the challenged law in principle at first reading, with 61 (sixty-one) deputies present and 61 (sixty-one) deputies voted for, with no vote against and nor abstentions.

23. On 2 February 2019, the Assembly by Decision No. 06-V-315, following the approval in principle in the first reading of the challenged Law, assigned and obliged to submit reports with recommendations for review of the challenged Law, the following Committees:

    1. Committee on Foreign Affairs, Diaspora and Strategic Investments;
    2. Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency;
    3. Committee on Budget and Finance;
    4. Committee on the Rights and Interests of the Communities and Return;
    5. Committee for European Integration.

24. On 6 March 2019, the Prime Minister of the Republic of Kosovo, by a letter with no. 2345/2019, requested the President of the Assembly to hold an extraordinary session for the second reading of the challenged Law.

25. On 6 March 2019, the Functional Committee on Foreign Affairs, Diaspora and Strategic Investments, at its meeting, reviewed and approved the two proposed amendments to the challenged Law.

26. On 6 March 2019, the Committee on Legislation, Mandates, Immunities, the Rules of Procedure of the Assembly and the Oversight of the Anti-Corruption Agency reviewed the challenged Law with the proposed amendments and assessed that the challenged Law and the proposed amendments are in compliance with the Constitution and can proceed to the Assembly.

27. On 6 March 2019, the Committee on European Integration, in the meeting, reviewed the challenged Law and the recommendations of the Functional Committee on Foreign Affairs, Diaspora and Strategic Investment, and assessed that the "*Draft Law No. 06/L-145 on the Duties, Responsibilities and Competencies of the State Delegation of*

the Republic of Kosovo in the Dialogue Process with the Republic of Serbia, with the amendments of the Functional Committee, is not in contradiction with the EU legislation, therefore it may be recommended for adoption in the Assembly".

28. On 6 March 2019, the Committee on Budget and Finance reviewed the challenged Law with the proposed amendments and assessed that the challenged Law and the proposed amendments do not have additional budgetary implications.

29. On 7 March 2019, the Committee on the Rights and Interests of Communities reviewed the challenged Law with the proposed amendments and assessed that the latter does not infringe and affect the rights and interests of communities and recommended that the challenged Law be proceeded in the Assembly.

30. On 7 March 2019, the Functional Committee on Foreign Affairs, Diaspora and Strategic Investments, in the meeting, approved the report with recommendations from the above-mentioned committees for the challenged Law. On the same date, the Functional Committee on Foreign Affairs, Diaspora and Strategic Investments forwarded the report with recommendations to the Assembly's deputies.

31. On 7 March 2019, the Assembly, in the session, adopted the challenged Law at second reading, with a total of 61 (sixty-one) deputies voting, of which 58 (fifty eight) deputies voted for, while 3 (three) deputies abstained.

32. Therefore, on 7 March 2019, the Assembly by Decision No. 06-V-336, approved the challenged Law and decided that the challenged Law should be sent to the President of the Republic of Kosovo for decreeing and promulgation.

Applicant's allegations

33. The Court recalls the Applicants' allegations that the challenged Law in its entirety does not comply with Article 2 [Sovereignty], Article 4 [Form of Government and Separation of Power], Article 7 [Values], Article 18 [Ratification of the International Agreements], Article 20 [Delegation of Sovereignty], Article 65 [Competencies of the Assembly], Article 93 [Competencies of the Government], Article 94 [Competencies of the Prime Minister] of the Constitution.

34. The Applicants allege that "*The draft law contains a number of constitutional violations based on the following points:*

1. *Determination and change of the institutional constitutional and decision-making hierarchy in the dialogue with Serbia;*
2. *The legal competencies of the State Delegation directly interfere with the constitutional competences of executive and legislative powers;*
3. *The Draft Law on the Duties, Responsibilities and Competencies of the State Delegation of the Republic of Kosovo in the Dialogue Process with the Republic of Serbia has been given a lex specialis character so that the provisions of this Draft Law shall prevail in case of collision with other laws."*

(i) The Applicants' arguments regarding the "determination and change of the institutional constitutional and decision-making hierarchy in the dialogue with Serbia"

35. The Applicants allege that a number of the provisions of the challenged Law *"seriously affect the institutional hierarchy foreseen by the Constitution of the Republic of Kosovo, and in particular, the competencies clearly foreseen for these institutions."*

36. The Applicants referring to Article 1 [Scope of the Law], Article 2 [Objective and Purpose], Article 4 [Procedure for establishing the State Delegation], Article 10.4 [Competencies of State Delegation] and paragraph 3, Article 11 [Relation of State Delegation with Constitutional Institutions] of the challenge Law allege that *"[…] the exercise of people's sovereignty is an explicit authorization for the people's representatives that a parliamentary system such as that of the Republic of Kosovo materializes in the institution of the Assembly of Kosovo. The draft law, as it can be found through a careful reading of its purpose, aims at alienating the mandate of the Assembly as a representative of the people's sovereignty by transferring it to the State delegation, and at the same time to open the way to the so-called "other constitutional institutions", to further interfere with the exclusivity of the Assembly to shape political will in relation to what can and cannot be negotiated in the Dialogue with Serbia".*

37. The Applicants further allege that "*The Constitution thus clarified the institutional hierarchy, envisioning the Assembly as the highest representative and legislative power, which, among other things, defines foreign policy orientations (through the laws it adopts) and oversees that policy through parliamentary oversight instruments on the executive, that is, the Government, which builds and implements foreign policy. To authorize 'Delegation' as an unconstitutional body to negotiate and reach an Agreement with*

Serbia which, according to public statements, may also touch upon issues of sovereignty, territorial integrity, peace and other political issues outside the definition of what should be considered to be the shaping of the political will of the sovereign, which is the essential constitutional prerogative of the Assembly, is in open contradiction with Article 65 of the Constitution".

38. The Applicants allege that *"By establishing the State Delegation above the Assembly and the Government, this draft law violates the balance and control of powers and gives this unconstitutional body the right to control the actions of the Government and Assembly in relation to other states and to represent the manner of representation contrary to the Constitution".*

39. The Applicants emphasize that *"The Constitution of Kosovo allows the transfer of state powers to international organizations only in accordance with Article 20, when it is done through the ratification of international agreements by 2/3 of the votes of all deputies. Thus, no constitutional provision allows the transfer of powers to new bodies created by a simple majority in the Assembly."*

(ii) The Applicants' arguments regarding the allegation concerning "*The legal powers of the State Delegation directly interfere with the constitutional competencies of the executive and legislative powers"*

40. The Applicants allege that "*Article 93 par. 1 of the Constitution defines as the first competence of executive power (government) the proposal and implementation of internal and external policy". The Government of the Republic of Kosovo has primary and exclusive competence in terms of the nature, the proposal and the implementation of internal and external policy. [...] The specification of Article 93 paragraph 1 of the Constitution of Kosovo defines Article 4 of Law No. 04/L-052, which states that the right of the initiative to conclude international agreements have state bodies of the Republic of Kosovo in compliance with the Constitution [...]."*

41. The Applicants further claim that *"As Article 94, par 1 states that the government is represented and led by the Prime Minister of Kosovo, the dialogue with Serbia should be led by the representative and the head of the Government of the Republic of Kosovo". In this respect, the Assembly of Kosovo, with the approval of this Draft Law, has given the state delegation the power to lead and represent the state in the dialogue (negotiations) with Serbia, seriously infringing Article 4, paragraphs 1 and 4 in conjunction with Article 7, 93, par 1*

in conjunction with Article 94, paragraph 1 of the Constitution of Kosovo".

(iii) The Applicants' arguments as to the allegation that the challenged Law "*has been given lex specialis character in order that the provisions of this Draft Law prevail in case of collision with other laws*"

42. The Applicants allege that "*paragraph 5 of Article 18, which sets out the principles and procedures for ratifying and contesting international agreements are regulated by law. In the extensive meaning of Article 18 and specifically within the meaning of Article 18, paragraph 5 derives Law no. No. 04 L-052 on International Agreements [...] The purpose of the Law on International Agreements and most of the terms of this law, under Article 18 of the Constitution, makes the law entirely derived from the spirit of Article 18 of the Constitution and at the same time makes it a general law which can in no way be sent by a special law as foreseen in Article 1, par. 2 of the draft law that is the subject of the dispute [...].*"

43. The Applicants refer to Judgment KO97/12 of 12 April 2012 of the Court, submitted by the Ombudsperson, where the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, Law No. 04/L-093 was challenged. The Applicants state paragraph 128 to be noted "*The Court is aware of the existence of the principle of lex specialis, which means that the special law prevails over the general law and, in this respect, a new law cannot overrule provisions of an existing law without amending the relevant provisions, which set out the general principles because this would put at stake the principles of legal certainty and rule of law.*"

Regarding the request for interim measure

44. The Applicants also request the imposition of an interim measure, stating three reasons: " *in order to prevent the implementation of the Draft Law on the Duties, Responsibilities and Competences of the State Delegation, through which it is attempted to delegate and transfer non-transferable constitutional powers; secondly, because through the interim measure the application of this draft law which violates the principle of the separation of powers would be prevented and deprives the Assembly and the Government of Kosovo from exercising its constitutional rights; thirdly, because through this draft law the constitutional order and the institutional hierarchy of the Republic of Kosovo are violated; and fourthly, because this delegation, through the decisions it would take and the agreements it*

would reach with the Republic of Serbia, would cause irreparable consequences through international obligations for Kosovo".

Relief sought

45. Finally, the Applicants request the Court:

I. To declare this referral admissible;
II. To immediately impose an interim measure on the Draft Law;
III. To declare the Draft Law on the Duties, Responsibilities and Competencies of the State Delegation of the Republic of Kosovo in the Dialogue Process with the Republic of Serbia, in contradiction with the Constitution of the Republic of Kosovo;
[...].

Relevant legal provisions

THE CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 2
[Sovereignty]

"1. The sovereignty of the Republic of Kosovo stems from the people, belongs to the people and is exercised in compliance with the Constitution through elected representatives, referendum and other forms in compliance with the provisions of this Constitution".

Article 4
[Form of Government and Separation of Power]

1. Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution..
2. The Assembly of the Republic of Kosovo exercises the legislative power.
3. The President of the Republic of Kosovo represents the unity of the people. The President of the Republic of Kosovo is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution

4. The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentarian control.

Article 7
[Values]

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

Article 18
[Ratification of International Agreements]

1. International agreements relating to the following subjects are ratified by two thirds (2/3) vote of all deputies of the Assembly:
(1) territory, peace, alliances, political and military issues;
(2) fundamental rights and freedoms;
(3) membership of the Republic of Kosovo in international organizations;
(4) the undertaking of financial obligations by the Republic of Kosovo.
2. International agreements other than those in paragraph 1 are ratified upon signature of the President of the Republic of Kosovo.
3. The President of the Republic of Kosovo or the Prime Minister notifies the Assembly whenever an international agreement is signed.
4. Amendment of or withdrawal from international agreements follows the same decision making process as the ratification of such international agreements.
5. The principles and procedures for ratifying and contesting international agreements are set forth by law.

Article 20
[Delegation of Sovereignty]

1. The Republic of Kosovo may on the basis of ratified international agreements delegate state powers for specific matters to international organizations.
2. If a membership agreement ratified by the Republic of Kosovo for its participation in an international organization explicitly

contemplates the direct applicability of the norms of that organization, then the law ratifying the international agreement must be adopted by two thirds (2/3) vote of all deputies of the Assembly, and those norms have superiority over the laws of the Republic of Kosovo.

[...]

Article 65
[Competencies of the Assembly]

The Assembly of the Republic of Kosovo:
(1) adopts laws, resolutions and other general acts;

[...]

(12) oversees foreign and security policies;

Article 93
[Competencies of the Government]

The Government has the following competencies:

(1) proposes and implements the internal and foreign policies of the country;
[...]

Article 94
[Competencies of the Prime Minister]

The Prime Minister has the following competencies:

(1) represents and leads the Government;;
[...]
(9) consults with the President on the implementation of the foreign policy of the country;

Respective provisions of the challenged Law:

Article 1
Scope of the Law

1. This law determines the institutional hierarchy and the decision-making procedure in the Dialogue Process with the Republic of Serbia (hereinafter: the Dialogue). Furthermore, this law regulates the functioning of the State Delegation of the Republic of Kosovo in the Dialogue with Serbia (hereinafter: State Delegation) by determining the organizational structure, activities, competences and responsibilities of the State Delegation. The law clearly defines, inter alia, the relation that the State Delegation shall maintain with other constitutional institution of the Republic of Kosovo.
2. This law shall have the statute of Lex Specialis. The Articles of this law shall prevail should there be any collision with other legal provisions.

Article 2
Objective and Purpose

In accordance with this law, the State Delegation of the Republic of Kosovo for the Dialogue with Serbia is hereby authorized by the Assembly of the Republic of Kosovo to negotiate and enter an agreement under the Dialogue process, in consultation with Constitutional Institutions of the Republic of Kosovo.

Article 4
Procedure for establishing the State Delegation

The State Delegation for the dialogue with the Republic of Serbia will be mandated by the Assembly of the Republic of Kosovo. The State Delegation shall be the sole body authorized to lead the Dialogue. In this regard, the Delegation shall consult with the Constitutional Institutions of the Republic of Kosovo.

Article 10
Competencies of State Delegation

4. State Delegation shall
4.1. chair the process of dialogue with Serbia;
4.2. represent the Republic of Kosovo in dialogue;

Article 11
Relation of State Delegation with Constitutional Institutions

Constitutional Institutions of the Republic of Kosovo shall be engaged in Dialogue according to their constitutional mandate and always in coordination and agreement between relevant institutions of the Republic of Kosovo and State Delegation.

Assessment of the admissibility of the Referral

46. In order to be able to examine the Applicants' Referral, the Court should first to assess whether the Applicants have met the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.

47. In this respect, the Court refers to paragraph 1 of Article 113 of the Constitution, which states that *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".*

48. With respect to these criteria, the Court notes that the Applicants filed their Referral based on Article 113.5 of the Constitution, which provides as follows:

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

49. In the present case, the Court notes that the Referral was filed by 32 (thirty two) deputies the Assembly of Kosovo, which is more than the minimum required by Article 113.5 of the Constitution and, therefore, the requirements for an authorized party has been met.

50. In addition, the Court takes into account Article 42 [Accuracy of the Referral] of the Law governing the filing of a Referral pursuant to Article 113.5 of the Constitution, and which requires the following information to be submitted:

"1.1. names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;
1.2. provisions of the Constitution or other act or legislation relevant to this referral; and
1.3. presentation of evidence that supports the contest".

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

> *"[...]*
>
> *(2) In a referral made pursuant to this Rule, the following information shall, inter alia, be submitted:*
>
> *(a) names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;*
>
> *(b) provisions of the Constitution or other act or legislation relevant to this referral; and*
>
> *(c) evidence that supports the contest.*
>
> *(3) The applicants shall attach to the referral a copy of the contested law or decision adopted by the Assembly, the register and personal signatures of the Deputies submitting the referral and the authorization of the person representing them before the Court."*

52. The Court finds that, in addition to the names and signatures of the deputies who filed the referral, they also stated the challenged law and the relevant provisions of the Constitution, and presented evidence and proof to substantiate their allegations. Therefore, the Court considers that the criteria set out in Article 42 of the Law and further specified in Rule 74 of the Rules of Procedure have been met.

53. As regards the time limit, the Court notes that the challenged Law was adopted by the Assembly on 7 March 2019 (Decision No. 06-V-336), whereas the Referral was submitted to the Court on 15 March 2019.

54. Taking into account Rule 30 (1) of the Rules of Procedure, the final deadline for submitting the referral is calculated as follows: "*when a period is expressed in days, the period is to be calculated starting from the following day after an event takes place"*. Setting from this, the Court finds that the Referral was filed within the foreseen constitutional deadline of 8 (eight) days.

55. Therefore, the Court finds that the Referral of the Applicants meets all the admissibility requirements under the Constitution, the Law and

the Rules of Procedure and at the same time the Applicants' allegations raise important issues of constitutionality requiring treatment in the merits of the Referral.

Merits

56. The Court firstly recalls that the Applicants challenge only the substantive aspect of the challenged Law and not the procedure followed during its adoption.

57. The Court notes that the challenged Law contains 19 (nineteen) Articles, is divided into four chapters, regulating its scope; definitions; the procedure for establishing the state delegation; composition of the state delegation; establishment of the working commissions; functioning as well as the competencies and decision-making of the state delegation. The Court also notes that the challenged Law also contains other provisions relating to the administration of the state delegation, the budget and final provisions.

58. The Court notes that the Applicants have elaborated only the allegations relating to Articles 1, 2, 4, 10 (paragraph 4 subparagraph 1 and 2), 11 (paragraph 3) of the challenged Law, emphasizing that these articles are not in compliance with Articles 2, 4, 7, 18, 20, 65, 93 and 94 of the Constitution. The Court notes that in fact the Applicants allege that the challenged Law in its entirety is not in compliance with the Constitution.

59. The Applicants have grouped their allegations into three categories: (i) *determining and changing the institutional constitutional and decision-making hierarchy in the dialogue with Serbia; (ii) the legal powers of the state delegation directly interfere with the constitutional competences of the executive and legislative powers; and (iii) giving the lex specialis character to the challenged Law.*

60. In the light of the Applicants' allegations the Court will make the interpretation of the constitutional provisions within its authority, which is based on Article 112 of the Constitution, In this case, the Court will respect the letter and spirit of the Constitution and the principles of democracy and democratic governance (see, *mutatis mutandis,* case of the Constitutional Court, KO103/14, Applicant *President of the Republic of Kosovo,* Concerning the assessment of the compatibility of Article 84 (14) [Competencies of the President] with Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo, paragraph 58).

A. As to the Applicants' allegations regarding "determining and changing the institutional constitutional and decision-making hierarchy in the dialogue with Serbia"

61. The Court recalls the Applicants' arguments concerning the first category of the allegations. The Applicants in essence claim that the challenged Law has violated the people's sovereignty as an express authorization for the people's representatives, which is materialized in the Assembly. According to the Applicants, it is inconsistent with the Constitution to establish a state delegation in the institutional hierarchy of the Government and the Assembly, in the issue of negotiating and reaching an agreement with another state.

62. In addressing the aforementioned allegations of the Applicants, in relation to the articles of the Constitution, the Court in joint reading will elaborate on the general principles pertaining to the form of governance and the separation of power as well as the democratic values enshrined in the Constitution.

63. The Constitution stipulates that the Assembly is the highest institution in the legal system of the Republic of Kosovo. Legitimacy of the Assembly, as the highest institution, directly derives from the will of the people of the Republic of Kosovo, expressed through the general parliamentary elections.

64. The link between the powers that the people give to the elected representatives is confirmed in the case-law of the Court in which it was stated that "*Democracy, "vox populi" (voice of the people), requires the election of those who are going to represent the people's voice in the legislative body of the state. In a parliamentary democracy this is the supreme governing entity vested with a variety of competencies, at the same time subordinate to the principle of separation of powers and check and balances. One of the main responsibilities of the parliament is to decide by voting whom to empower with executive functions [...]*" (see, *mutatis mutandis,* case of the Constitutional Court, KO103/14, Applicant *President of the Republic of Kosovo,* Concerning the assessment of the compatibility of Article 84 (14) [Competencies of the President] with Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo, paragraph 49).

65. The Court notes that in a country with representative democracy, the role of the Assembly is manifested through its legislative activity. However, the Court emphasizes that the Assembly as a legislative body, when adopting laws, must protect the spirit and letter of the

Constitution, taking into account the principle of the separation of powers as an essential attribute of the democratic governance.

66. In this case, the Court finds that the Assembly is the highest body in the Republic of Kosovo, which has the authority to represent the people and exercising of the legislative power. Based on the text of the Constitution, the Assembly as the highest state institution is at the same time vested with a variety of competencies. In the exercise of its powers, the Assembly is subject to the democratic principle of the separation of powers, checks and balances among them.

67. The Court notes that the constitutional order of the Republic of Kosovo, *inter alia*, is based on the democratic values of separation of power and the rule of law. Accordingly, the trust of the people on democratic values and the rule of law represents the core of the functioning of the representative democracy in the country. The Court also recalls its previous case law, stating that the Assembly is the institution that has the responsibility to exercise the legislative power, whereas the Government exercises the executive power based on the Constitution and the laws adopted by the Assembly (see, Constitutional Court of the Republic of Kosovo: Case KO12/18 Applicant: *Albulena Haxhiu and 30 other deputies of the Assembly of the Republic of Kosovo*, Judgment of 29 May 2018, paragraph 104).

68. The Court emphasizes that democratic principles are based on the functioning of a range of institutional mechanisms foreseen by the Constitution and by the laws adopted by the Assembly. In this case, the Court considers that the Assembly may by law establish bodies/institutions that have a certain mandate under the law, but that competence should always be exercised based on the Constitution, respecting the principle of separation of power and not violating competencies already defined by the Constitution for the respective institutions.

69. The Court reiterates that within the constitutional legal system all other norms are subject to the supremacy of the constitutional norm. The Court considers that, when a matter is prescribed by the Constitution, it cannot be amended, undermined, or transformed through an act with the lower legal power as the law. Based on the supremacy of the constitutional norm, the Court recalls that all other legal acts should be in compliance with it.

70. The Court, within the first allegation, will assess the constitutionality of Article 1 (paragraph 1) of the challenged Law, whether the latter is in compliance with the principles of separation of power and the form

of governance [Article 4], as well as values [Article 7] of the Constitution.

Constitutionality of Article 1 (paragraph 1) of the challenged Law

Article 1
[Scope of the Law]

1. This law determines the institutional hierarchy and the decision-making procedure in the Dialogue Process with the Republic of Serbia (hereinafter: the Dialogue). Furthermore, this law regulates the functioning of the State Delegation of the Republic of Kosovo in the Dialogue with Serbia (hereinafter: State Delegation) by determining the organizational structure, activities, competences and responsibilities of the State Delegation. The law clearly defines, inter alia, the relation that the State Delegation shall maintain with other constitutional institution of the Republic of Kosovo".

71. The Court notes that the challenged Law, paragraph 1 of Article 1 foresees three issues: (i) determining an institutional hierarchy with a special decision-making procedure "in the process of dialogue with the Republic of Serbia"; (ii) regulating the functioning of the state delegation of the Republic of Kosovo for the Dialogue with Serbia (state delegation); and (iii) defining the interconnection that the state delegation holds with other constitutional institutions.

72. In light of the above, the Court notes that the challenged Law sets out the parameters upon which a state delegation has been normed, which the Applicants qualify as the new institutional hierarchy, which stands above the Government and the Assembly. In the present case, the Court notes that the separation of power, the form of governance, checks and balances of power, is laid down in paragraph 1 of Article 4 of the Constitution.

73. The Court recalls that within the framework of Article 4 of the Constitution, which defines the form of governance and the separation of power, the Assembly as a representative of the people, in accordance with paragraph 2 of Article 4 of the Constitution, is at the same time the highest body exercising legislative power; in accordance with paragraph 3 of Article 4 of the Constitution, the President of the Republic of Kosovo represents the unity of people, as well as a legitimate representative of the country inside and outside, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as well as in accordance with paragraph 4 of

Article 4 of the Constitution, the Government of the Republic of Kosovo is responsible for the implementation of laws and state policies and is subject to parliamentary control by the Assembly. In this regard, the Court notes that the principle of the separation of powers represents a democratic value, within the framework of the constitutional order in the Republic of Kosovo.

74. Within the elaboration of the form of governance and the separation of powers, as well as by linking them with the Applicants' allegations, and on the basis of the competences defined by the Constitution, the Court shall be limited only to the mandate of the constitutional institutions which have authorizations directly related to foreign policy. The Court points out that the institutional organization in the Republic of Kosovo is based on the form of democratic governance, separation and control of power, and rule of law.

75. The Court emphasizes that the "state delegation" as defined by the challenged Law, not being foreseen by the Constitution, also by not being foreseen within the form of governance and the separation of power, cannot be involved in the interaction of separation, control and balance of powers. From the above, it follows that the state delegation foreseen by the challenged Law, is not foreseen by the Constitution, and cannot interfere with the form of governance, namely the structure of separation of power as established in Article 4 of the Constitution.

76. The Court also notes that the challenged Law "*regulates the functioning of the State Delegation of the Republic of Kosovo in the Dialogue with Serbia"* as a "special mechanism" in order to reach an agreement with a third country.

77. In this regard, the Court considers that each branch of the state power must act in compliance with the Constitution and within the constitutional scope, thus guaranteeing the principle of the separation of powers and democratic values of the governance. The Court reiterates that the Assembly, as a legislative body and as a pillar of separation of powers, has the mandate to issue laws in the areas and matters that it considers important to be regulated by law. Here also can enter the issue of negotiating and concluding international agreements with different states. However, when drafting laws, the Assembly should take care that the laws issued are in accordance with the scope of constitutional institutions.

78. Further, the challenged Law requires "*the liaison of the state delegation with other constitutional institutions*", however, the Court

emphasizes that the creation of the interdependence of the constitutional institutions in relation to the state delegation, carries the responsibility of the competent institutions to contradict the constitutional norm with a "special mechanism" such as the state delegation.

79. The Court finds that the transfer of powers of the constitutional institutions to the "special mechanism" established in the challenged Law is an interference with the exercise of the powers of constitutional institutions in the sphere of foreign policy.

80. The Court concludes that Article 1 (paragraph 1) of the challenged Law interferes in the form of governance, separation of power, and violates the democratic values and the rule of law, because it vests in the state delegation the functions which do not comply with constitutional norms, and also creates the interdependence of constitutional institutions in relation to a legal mechanism, respectively with the state delegation. Therefore, the Court finds that Article 1 (paragraph 1) of the challenged Law in all three elaborated issues, is not in compliance with the general constitutional principles embodied in paragraphs 1, 2, 3 and 4 of Article 4 and paragraph 1 of Article 7 of the Constitution.

81. In the light of the foregoing, the Court concludes that Article 1, paragraph 1 of the challenged Law is incompatible with paragraphs 1, 2, 3 and 4 of Article 4 and paragraph 1 of Article 7 of the Constitution.

B. With regard to the allegations that "the legal competences of the State Delegation directly interfere with the constitutional competences of executive and legislative power"

82. The Court recalls that the Applicants allege that the legal competences of the State Delegation directly interfere with the constitutional competences of the executive and legislative powers, namely within the competences of the Assembly, the Government and the Prime Minister.

83. Within this group of allegations, the Court assesses the constitutionality of Articles 2, 4, 10 (paragraph 4 sub-paragraphs 1 and 2), and 11 (paragraph 3) of the challenged Law.

Constitutionality of Article 2 of the challenged Law

Article 2
[Objective and Purpose]

> *In accordance with this law, the State Delegation of the Republic of Kosovo for the Dialogue with Serbia is hereby authorized by the Assembly of the Republic of Kosovo to negotiate and enter an agreement under the Dialogue process, in consultation with Constitutional Institutions of the Republic of Kosovo.*

84. The Court notes that Article 2 of the challenged Law provides for the authorization which the Assembly of the Republic of Kosovo vests in the state delegation for negotiating and reaching an agreement with a third country.

85. In addressing the allegations of the Applicants, who claim that the state delegation interferes with the concrete competences of the Government, the Prime Minister and the Assembly in the field of foreign policy, the Court will refer to the relevant provisions, as explicitly provided for in the Constitution.

86. The Court recalls that concrete competences for the constitutional institutions are laid down in the Constitution, including their competencies in the sphere of foreign policy. Specifically, paragraph 1 of Article 93 [Competencies of the Government] in the sphere of foreign policy obliges the Government to exercise its competence in "*proposing and implementing the internal and foreign policies of the country*".

87. Furthermore, the Court notes that within the framework of Article 94 [Competencies of the Prime Minister], paragraph 1 states that the Prime Minister *"represents and leads the Government"* and paragraph 9 establishes that the Prime Minister *"consults with the President on the implementation of the foreign policy of the country"*. Therefore, within the constitutional competences envisaged in Article 93, paragraph 1 and Article 94, paragraphs 1 and 9 of the Constitution, it is expressly foreseen that the Government/Prime Minister in consultation with the President implements the foreign policy of the country.

88. The Court notes that the obligation of exercising competences in foreign policy are entrusted to constitutional institutions, including the conclusion of international agreements. This competence in the framework of foreign policy cannot be transferred to a body as the

"state delegation" through a lower legal act, such as the challenged Law.

89. With regard to the external representation of the Republic of Kosovo by its constitutional institutions, the Court emphasizes the obligation of the institutions concerned, namely the Assembly, the President and the Government, to exercise their competences in foreign policy within their constitutional mandate. First of all, this means that any negotiation or other action related to the conclusion of international agreements on behalf of the Republic of Kosovo, must be within the constitutional obligations of the Assembly, the President and the Government to exercise their powers within the spirit and letter of the Constitution.

90. The Court considers that the transfer of competences foreseen by paragraph 1 of Article 93, and paragraphs 1 and 9 of Article 94 of the Constitution to the state delegation as a "special mechanism" is in contradiction with the concrete competences of the institutions established by the Constitution. The institutions defined by the Constitution are competent at all stages of the dialogue to reach international agreements, and such a competence cannot be carried over or transferred. Consequently, the Court finds that Article 2 of the challenged Law is incompatible with the concrete competences of the constitutional institutions provided for in paragraph 1, Article 93 and paragraphs 1 and 9 of Article 94 of the Constitution, which cannot be transferred to the state delegation.

91. The Court further considers the Applicants' allegation that Article 2 of the challenged Law is contrary to Article 65 paragraph 12 of the Constitution relating to the competence of the Assembly in the oversight of foreign and security policy.

92. The Court notes that, within its functions, the Assembly is empowered to exercise the function of overseeing foreign and security policy. In the present case, the Assembly within the challenged Law has established a "special mechanism" which is not subject to parliamentary control and oversight as foreseen by the Constitution. In this case, the function and duty of parliamentary oversight in the field of foreign policy, is a constitutional competence of the Assembly, which is exercised towards the institutions foreseen by the Constitution.

93. The Court finds that Article 2 of the challenged Law is not in compliance with the mandate of the Assembly, which is obliged to exercise parliamentary control over the executive power. The Court

concludes that Article 2 of the challenged Law is not in compliance with Article 65 paragraph 12 of the Constitution.

94. Therefore, the Court concludes that the legal competences foreseen by Article 2 of the challenged Law are not in compliance with the constitutional competences of the institutions foreseen by the Constitution, namely Article 65, paragraph 12, Article 93, paragraph 1, and Article 94, paragraphs 1 and 9 of the Constitution.

Constitutionality of Articles 4 and 10 (paragraph 4 subparagraphs 1 and 2) of the challenged Law

Article 4
[Procedure for establishing the State Delegation]

The State Delegation for the dialogue with the Republic of Serbia will be mandated by the Assembly of the Republic of Kosovo. The State Delegation shall be the sole body authorized to lead the Dialogue. In this regard, the Delegation shall consult with the Constitutional Institutions of the Republic of Kosovo.

Article 10
[Competencies of State Delegation]

4. State Delegation shall:
4.1. chair the process of dialogue with Serbia;
4.2. represent the Republic of Kosovo in dialogue;

95. The Court notes that Article 4 and Article 10 (paragraph 4, subparagraph 1 and 2) of the challenged Law appoints the state delegations as *"the sole body authorized to lead the Dialogue"* and gives to it the competence to "*represent the Republic of Kosovo in dialogue*".

96. The Court finds that the state delegation foreseen by the challenged Law cannot be attributed the competence as the only body authorized to lead the dialogue. The authorization given by the challenged Law to the state delegation is a direct intervention on the concrete powers of the Government under paragraph 1 of Article 93 of the Constitution and the Prime Minister under Article 94 paragraph 1 and 9 of the Constitution.

97. Furthermore, the Court considers that the representation of the Republic of Kosovo within the meaning of paragraph 1 of Article 93 determines as the competence of the Government to *"propose and*

implement the internal and foreign policies of the country" and within the paragraphs 1 and 9 of Article 94 of the Constitution, the Prime Minister "*represents and leads the Government"* and *"consults with the President on the implementation of the foreign policy of the country".*

98. It is clear from the elaborated articles of the Constitution that authorized institutions in the field of foreign policy under the Constitution, namely pursuant to paragraph 1 of Article 93 and paragraphs 1 and 9 of Article 94, are the Government, the Prime Minister in consultation with the President.

99. Therefore, the Court finds that Articles 4 and 10 (paragraph 4 subparagraphs 1 and 2) of the challenged Law are not in compliance with paragraph 1 of Article 93 and paragraphs 1 and 9 of Article 94 of the Constitution.

Constitutionality of Article 11 (paragraph 3) of the challenged Law

Article 11
[Relation of State Delegation with Constitutional Institutions]

3. Constitutional Institutions of the Republic of Kosovo shall be engaged in Dialogue according to their constitutional mandate and always in coordination and agreement between relevant institutions of the Republic of Kosovo and State Delegation.

100. The Court notes that this Article of the challenged Law imposes mutual coordination and consent between constitutional institutions on one hand, and the state delegation as a "special mechanism" determined by law, on the other hand. The Court also notes that by this article, the constitutional institutions are conditioned in their actions regarding the dialogue to be dependent on the approval of the state delegation as a "special mechanism".

101. However, the Court emphasizes that the constitutional institutions have the specific duties and competences laid down in the Constitution. Whatever the creation of interdependence established by law for mutual approval infringes the competence and mandate of constitutional institutions as foreseen by the Constitution.

102. The Court recalls that the constitutional institutions competent in the sphere of foreign affairs, namely, the Government/Prime Minister and the President, are obliged to act in inter-institutional consultation

between them. But, this obligation of coordination/consultation does not extend to other bodies which are not foreseen by the Constitution, such as the state delegation.

103. The Court reiterates that the obligation to adopt acts in a bilateral manner between the state delegation and the constitutional institutions cannot either oblige the Assembly as the highest institution of the Republic of Kosovo. In this regard, the Court concludes that a mechanism that is not foreseen by the Constitution and does not have a constitutional mandate, cannot condition the coordination and approval with the constitutional institutions of the Republic of Kosovo.

104. Therefore, the Court finds that Article 11 (paragraph 3) is not in compliance with paragraph 12 of Article 65, paragraph 1 of Article 93, and paragraphs 1 and 9 of Article 94 of the Constitution.

C. Regarding the Applicants' allegation that the challenged Law is "given a lex specialis character in order that the provisions of this draft law may prevail in case of collision with other laws".

105. On this occasion, the Court recalls that the Applicants allege that the challenged Law in paragraph 2 of Article 1, in being determined as a *lex specialis,* puts at stake the principle of legal certainty. Further, the Applicants argue that "*paragraph 5 of Article 18 [of the Constitution], which sets out the principles and procedures for ratifying and contesting international agreements are regulated by law",* claiming that, in fact, the organic law is the Law on the International Agreements.

106. However, as the Court found a constitutional violation in the essential articles of the challenged Law, namely the articles which have regulated: Scope; Objective and Purpose; Procedure for establishment of the State Delegation; Competences of the State Delegation; and the Relation of the State Delegation with Constitutional Institutions, the Court emphasizes that it does not consider it necessary to deal with the third allegation of the Applicants.

Conclusion

107. From the constitutional review of the articles of the challenged Law, as referred to above, the Court finds that Articles 1 (paragraph 1), 2, 4, 10 (paragraph 4, sub-paragraphs 1 and 2), and Article 11 (paragraph 3) are not in compliance with paragraphs 1, 2, 3 and 4 of Article 4 [Form

of Government and Separation of Power], paragraph 1 of Article 7 [Values], paragraph 12 of Article 65 [Competencies of the Assembly], paragraph 1, of Article 93 [Competencies of the Government] and paragraphs 1 and 9 of Article 94 [Competencies of the Prime Minister] of the Constitution.

108. As the Court found the incompatibility of the main articles of the challenged Law with the relevant articles of the Constitution, the Court declares that the challenged Law, in its entirety, is incompatible with the Constitution.

109. As the challenged Law was declared incompatible with the Constitution in entirety, namely with Articles 4, paragraph 1, 2, 3 and 4, Article 7 paragraph 1, Article 65 paragraph 12, Article 93 paragraph 1 and Article 94 paragraphs 1 and 9 of the Constitution, the Court will not enter into further assessment of the constitutionality of the challenged Law, in relation to Articles 2, 18 and 20 of the Constitution.

Request for interim measure

110. The Court recalls that the Applicants also request the Court to render a decision on the imposition of an interim measure on the grounds that *"The implementation of [the challenged law] would create a dangerous precedent in relation to the principle of separation of powers, because it would allow an unconstitutional body to interfere with the competences of the Assembly and the Government [...]."*

111. The Court has concluded above that the challenged Law, in its entirety, is not in compliance with paragraphs 1, 2, 3 and 4 of Article 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], paragraph 12 of Article 65 [Competencies of the Assembly], paragraph 1 of Article 93 [Competencies of the Government], and paragraphs 1 and 9 of Article 94 [Competence of the Prime Minister] of the Constitution. In addition, when a law is challenged under Article 113, paragraph 5, the Court notifies the President by recalling that, in accordance with paragraph 2 of Article 43 [Deadline] of the Law, the challenged Law cannot be decreed, enter into force, or produce legal effects, until the Court finally decides on the issue raised before it.

112. The Court on 18 March 2019 had notified the President and as a result, the law could not produce legal effects.

113. Therefore, the Court, in accordance with the foregoing and in accordance with Article 27.1 [Interim Measures] of the Law and Rule 57 [Decision on Interim Measures] of the Rules of Procedure, the

request for interim measure is without subject of review and, as such, is rejected.

Request for a hearing

114. The Court also recalls that the Applicants requested the holding of a hearing.

115. The Court recalls Rule 42 [Right to Hearing and Waiver] paragraph 2 of the Rules of Procedure which states that *"The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law."*

116. The Court notes that the abovementioned Rule of the Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file are sufficient, beyond any doubt, to reach a decision on merits in the case under consideration (see Case Constitutional Court, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110 – where it is stated that "*The Court considers that the documents contained in the Referral are sufficient to decide this case [...]*").

117. In the present case, the Court does not consider that there is any uncertainty regarding the *"facts or law"* and therefore does not consider it necessary to hold a hearing. The documents contained in the referral are sufficient to decide the merits of this case.

118. Therefore, the Court unanimously rejects the Applicants' request to schedule a hearing as ungrounded.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.5 and 116.2 of the Constitution, Articles 20 and 42 of the Law and pursuant to Rule 59 (1) (a) of the Rules of Procedure, on 13 June 2019

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, unanimously, that Articles 1 (paragraph 1), 2, 4, 10 (paragraph 4, sub-paragraphs 1 and 2), and Article 11

(paragraph 3) of Law No. 06/L-145 on the Duties, Responsibilities and Competencies of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia, are not in compliance with paragraphs 1, 2, 3 and 4 of Article 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], paragraph 12 of Article 65 [Competencies of the Assembly], paragraph 1 of Article 93 [Competencies of the Government], and paragraphs 1 and 9 of Article 94 [Competencies of the Prime Minister] of the Constitution.

III. TO HOLD, unanimously, that as the essential Articles of Law No. 06/L-145 on the Duties, Responsibilities and Competencies of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia, are not in compliance with the Constitution, accordingly, the Court declares that Law, in its entirety, incompatible with the Constitution.

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

V. TO REJECT, unanimously, the request for a hearing;

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

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

VIII. This Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi

KO58/19 , Applicant: Bilall Sherifi and 29 other deputies of the Assembly of the Republic of Kosovo Constitutional review of decisions No. 57/2019, No. 58/2019, No. 59/2019, No. 60/2019, No.61/2019, No.62/2019, No. 63/2019 and No. 65/2019 of the President of the Republic of Kosovo, of 28 March 2019

KO58/19, Judgment adopted on 29 July 2019, published on 14 August 2019

Key words*: Institutional referral, Central Election Commission (CEC), parliamentary groups, constitutional question*

The Referral was submitted by thirty (30) deputies of the Assembly of the Republic of Kosovo based on Article 113, paragraph 2, subparagraph 1, of the Constitution. Subject matter of the Referral was constitutional review of decisions of the President of the Republic of Kosovo for appointment of the members of the CEC of the Republic of Kosovo, namely:

1. Decision No. 57/2019, of 28 March 2019, for the appointment of Mr. Čemajl Kurtiši as a member of the CEC from the Bosnian community;

2. Decision No. 58/2019, of 28 March 2019, for the appointment of Mr. Stevan Veselinović as a member of the CEC from the Serbian community;

3. Decision No. 59/2019, of 28 March 2019, for the appointment of Mr. Ercan Şpat as a member of the CEC from the Turkish community;

4. Decision No. 60/2019, of 28 March 2019, for the appointment of Mr. Alfred Kinolli as a member of the CEC from the Roma, Ashkali and Egyptian community;

5. Decision No. 61/2019, of 28 March 2019, for the appointment of Mrs. Nazlie Bala as a member of the CEC;

6. Decision No. 62/2019, of 28 March 2019, for the appointment of Mr. Adnan Rrustemi as a member of the CEC;

7. Decision No. 63/2019, of 28 March 2019, for the appointment of Mr. Florian Dushi as a member of the CEC;

8. Decision No. Decision No. 65/2019, of 28 March 2019, for the appointment of Mr. Sami Hamiti as a member of the CEC.

The Applicants alleged that the above-mentioned decisions are not in compliance with paragraph 4 of Article 139 [Central Election Commission] of the Constitution of the Republic of Kosovo.
The Applicants, in essence, before the Court raised the following main allegations:

The first objection concerned with the form of appointment of the CEC members from the parliamentary groups that emerged from the political entities that won the elections for the Assembly of Kosovo. The Applicants considered the need to put emphasis on the terminology used by the Constitution of Kosovo in the relevant provision of Article 139, paragraph 4, of the Constitution, which reads: "*Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly*". Thus, the Applicants allege that the term "represented" has the of a post-festum character, which in itself implies that "*it is not necessary that a political entity that has won certain seats in the Assembly be represented at the level of a parliamentary group with that number of deputies with a mandate*".
They also allege that it is the provision of Article 70, paragraph 1, of the Constitution that provides the freedom to exercise the function of deputy within the scope of his/her mandate, without being subject to any other binding mandate. According to the Applicants, "*the appointment of CEC members, taking into account the structure of parliamentary groups according to the result of the election of political entities, would preserve political freedom of representation in the Assembly of Kosovo and would deny political initiatives in the form of parliamentary groups of deputies*".
The Applicants allege that the President, by interpreting the "largest parliamentary groups" as a party, coalition, civic initiative that emerged from political entities that won the elections for the Assembly of Kosovo and appointing CEC members by challenged acts, according to that interpretation, violated the constitutional provisions. This is because "the largest parliamentary groups", according to Article 139, paragraph 4 of the Constitution, are those groups that are formed after the constitution of the Assembly of the Republic of Kosovo, and exist as such at the moment when the President appoints the CEC members.
The Court considered that the Referral of the Applicants is admissible based on the requirements established by the Constitution, the Law on the Constitutional Court and the Rules of Procedure of the Constitutional Court. In elaborating the merits of the Referral, the Court reviewed the allegations of the Applicants. In this respect, the Court finds that the challenged decisions meet the requirements to be considered by the Court under Article 113, paragraph 2, subparagraph 1 of the Constitution. This is because the Court considers that the challenged decisions, regardless of their name, are binding in nature and concern the appointment of members of the CEC, which is an independent constitutional institution mandated to organize and monitor elections in Kosovo on the basis of the powers conferred on it based on the Constitution and the Law on General Elections in Kosovo (hereinafter: Laws on Elections).
The Court recalls, first of all, that the Constitution, apart from specifying the manner of appointment of CEC members and from what parliamentary groups are appointed, does not contain any specific definition as to whether the parliamentary groups for the purpose of appointing CEC members are

those parliamentary groups: *i)* that emerged from political entities that won the elections for the Assembly of Kosovo, or, *ii)* those that were established after the constitution of the Assembly of the Republic of Kosovo.

In this regard, the Court assessed the constitutional and other provisions pertaining to the parliamentary groups of the Assembly, having regard to (i) the constitutional role of the CEC as an independent institution for the management of elections and referendums, (ii) the manner of appointing CEC members; (iii) the duration of a mandate and (iv) the time of their appointment.

The Court recalls that CEC members are not mandated for a fixed term. Their mandate is related to the mandate of the election cycle and, in principle, begins no later than 60 (sixty) days after the election results are confirmed, with the exception of the exceptions provided for in Article 61, paragraph 3, subparagraph (e) of the Law on Elections.

Therefore, pursuant to the abovementioned provisions, the election of CEC members is not related to the issue of constitution of the Assembly, which may or may not take place within 60 (sixty) days from the date of confirmation of the election results, or with parliamentary groups in the narrow sense, which are formed after the constitution of the Assembly, when parliamentary life begins in the full sense of the word, which enables the organization of deputies into the parliamentary groups that can be distinguished from parties or coalitions that have emerged from the elections.

The appointment of CEC members based on the results of general elections ensures that there is no institutional vacuum in the CEC, regardless of the time of the establishment of the Assembly. This means that the President, based on Article 61.4 of the Law on Elections, may exercise his/her duty of appointing CEC members within 60 (sixty) days from the date of confirmation of the elections by parliamentary groups political entities based on the results of the elections for the Assembly.

Therefore, the Court finds that the largest parliamentary groups represented in the Assembly, for the purposes of Article 139 paragraph 4 of the Constitution, are those 6 (six) parties, coalitions, citizens' initiatives, which have more seats in the Assembly than any other party, coalition, citizens' initiatives that participated in the elections for the Assembly as such.

Therefore, the Court considers that the challenged acts do not violate the provisions of the Constitution, namely paragraph 4 of Article 139 [Central Election Commission] of the Constitution.

JUDGMENT

in

Case No. KO58/19

Applicant

Bilall Sherifi and 29 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of decisions No. 57/2019, No. 58/2019, No. 59/2019, No. 60/2019, No.61/2019, No.62/2019,No. 63/2019 and No. 65/2019 of the President of the Republic of Kosovo of 28 March 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

Applicants

1. The Referral was submitted by: Bilall Sherifi, Aida Dërguti, Besa Baftiu, Dardan Sejdiu, Dardan Molliqaj, Driton Çaushi, Dukagjin Gorani, Faton Topalli, Fisnik Ismaili, Frashër Krasniqi, Salih Salihu, Shqipe Pantina, Visar Ymeri, Muharrem Nitaj, RasimSelmanaj, Bekë Berisha, Teuta Haxhiu, Shkumbin Demaliaj, DautHaradinaj, Donika Kadaj-Bujupi, Gani Dreshaj, AhmetIsufi, Labinot Tahiri, Time Kadrijaj, Blerim Kuçi, Haxhi Shala, Albulena Balaj-Halimaj, Enver Hoti, Zafir Berisha and Ilir Deda (hereinafter: the Applicants), all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

2. The Applicants authorized Mr. Bilall Sherifi to represent them before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

Challenged decision

3. The Applicants challenge the decisions of the President of the Republic of Kosovo (hereinafter: the President) on the appointment of members of the Central Election Commission of the Republic of Kosovo (hereinafter: the CEC), namely:

    1. Decision No. 57/2019 of 28 March 2019 on the appointment of Mr. Qemajl Kurtishi as a CEC member from the Bosnian community;
    2. Decision No. 58/2019 of 28 March 2019 on the appointment of Mr. Stevan Veselinović for a CEC member from the Serb community;
    3. Decision No. 59/2019 of 28 March 2019 on the appointment of Mr. Ercan Şpat for a CEC member from the Turkish community;
    4. Decision No. 60/2019 of 28 March 2019 on the appointment of Mr. Alfred Kinolli as a CEC member as representative of the Roma, Ashkali and Egyptian communities;
    5. Decision No. 61/2019 of 28 March 2019 on the appointment of Ms Nazlie Bala as a member of the CEC;
    6. Decision No. 62/2019 of 28 March 2019 on the appointment of Mr. Adnan Rrustemi as a CEC member;
    7. Decision No. 63/2019 of 28 March 2019 on the appointment of Mr. Florian Dushi as a CEC member;
    8. Decision No. 65/2019 of 28 March 2019 on the appointment of Mr. Sami Hamiti as a CEC member.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged decisions, which according to the Applicants' allegation are not in compliance with paragraph 4 of Article 139 [Central Election Commission] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on Article 113, paragraph 2, subparagraph 1 [Jurisdiction and Authorized Parties] of the Constitution, Articles 29 [Accuracy of the Referral] and 30 [Deadlines] Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law)

and Rules 32 [Filing of Referrals and Replies] and 7 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure] Constitutional Court of the Republic of Kosovo no. 01/2018 (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 8 April 2019 the Applicants submitted the Referral to the Court, challenging the President's Decree regarding the appointment of the CEC members.

7. On 8 April 2019, the President of the Court appointed Judge Remzie Istrefi-Peci as Judge Rapporteur and the Review Panel, composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.

8. On 12 April 2019, the Court notified the Applicants about the registration of the Referral.

9. On 12 April 2019, the Referral was submitted to the President and he was notified that he could submit his comments regarding the Referral by 26 April 2019. The Court also requested the Office of the President to provide copies of the President's Decree on the appointment of the CEC members.

10. On 12 April 2019, the Court notified the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister), the Ombudsperson and the CEC President about the registration of the Referral.

11. The President of the Assembly was asked to provide one copy of the Referral to all deputies of the Assembly, and all deputies were invited to submit their comments regarding the Referral, if any, by 26 April 2019.

12. On 16 April 2019, the Applicants supplemented the Referral by submitting the challenged decisions to the Court.

13. On 26 April 2019, the Parliamentary Group of the Self-Determination Movement! (hereinafter: the SDM) submitted its comments to the Court regarding the allegations filed in the Referral.

14. On 26 April 2019, the Office of the President of Kosovo submitted to the Court comments regarding the allegations filed in the Referral.

15. On 8 May 2019, the Court notified the Applicants about the comments received regarding the Referral and invited them to submit their comments, if any, by 21 May 2019.

16. On the same date, the Court also notified the President, the President of the Assembly, the Prime Minister, the Ombudsperson and the President of the CEC about the comments received regarding the Referral. The President was notified that he may submit his comments, if any, by 21 May 2019. The President of the Assembly was asked to provide copies of all comments to all deputies of the Assembly and to inform them they could submit their comments, if any, by 21 May 2019. The Court did not receive any comments from the interested parties.

17. On 26 July 2019, Judge Bajram Ljatifi requested the President of the Court to be excluded from the review of Referral No. KO58/19 because he was previously part of the CEC.

18. On 26 July 2019, the President, in accordance with Article 18.1 (1.3) of the Law and Rule 9 (4) of the Rules of Procedure, approved a decision on the request for recusal from the process of review and decision making in case KO58/19.

19. On 29 July 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

20. On 29 July 2019, the Court voted on the admissibility of the Referral and unanimously decided that the challenged acts are not in contradiction with the Constitution.

Summary of facts

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

22. On 8 July 2017, the CEC confirmed the election results for the Assembly, based on the following list of election results:

    a. Kosovo Democratic Party, Alliance for the Future of Kosovo, Kosovo Initiative, Justice Party, Unity Movement, Albanian Democratic Christian Party of Kosovo, Kosovo Conservative Party, Democratic Alternative of Kosovo, Republicans of Kosovo, Front Party, Social Democratic Party, Kosovo National Front (hereinafter: DPK, ABK and Initiative), 39 deputies;

b. SDM, 32 deputies;
c. Kosovo Democratic Alliance and the New Kosovo Alliance (hereinafter: the KDA and the NKA), 29 deputies;
d. Citizens' Initiative Srpska Lista, 9 deputies;
e. Kosovo Democratic Party of Turks (Kosovo Democrat Tyrk Partisi), 2 deputies;
f. Coalition "Vakat", 2 deputies;
g. New Democratic Party, 1 deputy;
h. Independent Liberal Party, 1 deputy;
i. Kosovo Democratic Party of Ashkali, 1 deputy;
j. Liberal Party of Egyptians, 1 deputy;
k. United Gorani Party, 1 deputy;
l. Ashkali Party for Integration, 1 deputy, and
m. United Roma Party of Kosovo, 1 deputy.

23. On 3 August 2017, the Assembly held a constituent session and, *inter alia*, established an *Ad hoc* committee for the verification of quorum and mandates (hereinafter: *Ad hoc* committee).

24. On the same date, the *Ad hoc* committee submitted a report based on the list of confirmed election results and established mandates based on the confirmed results.

25. On 7 September 2017, the Assembly was constituted by the election of the President and the Vice-President.

26. In September 2017, a number of deputies informed the President of the Assembly about the establishment of a new parliamentary group - the Social Democratic Initiative.

27. In September 2017, a number of deputies informed the President of the Assembly about the establishment of a new parliamentary group - the Alliance for the Future of Kosovo (hereinafter: the AFK).

28. On 14 March 2018, 12 (twelve) deputies notified the President of the Assembly about the establishment of a new parliamentary group - the Group of Independent Deputies, which was subsequently registered as a parliamentary group, the Social Democratic Party (hereinafter: the SDP).

29. On 27 March 2018, the President addressed the President of the Assembly requesting that the parliamentary groups with the right to appoint a member (members) to the CEC and representatives of other non-majority communities in Kosovo with guaranteed seats be

informed to propose/appoint a name (names) of the members for the CEC.

30. On 7 June 2018, the President, pursuant to paragraph 9 of Article 84 of the Constitution, submitted to the Court Referral KO79/18, requesting the Court to interpret paragraph 4 of Article 139 [Central Election Commission] of the Constitution.

31. On 3 December 2018, the Court published the Resolution on Inadmissibility in case KO79/18. In that case, the Court declared the Referral inadmissible and held that Article 84.9 of the Constitution was not independent of Article 113 of the Constitution and that the constitutional issues must be referred to the Court only based on Article 113 of the Constitution.

32. On 14 December 2018, the Office of the President addressed the parliamentary groups represented in the Assembly of Kosovo to nominate candidates/ nominees of the parliamentary groups for CEC members, to be appointed by the President. The request of the Office of the President was based on Article 139.4 of the Constitution of the Republic of Kosovo and Articles 61 and 62 of Law No. 03/L-073 on General Elections in the Republic of Kosovo (hereinafter: the Law on Elections).

33. In the period between 15 and 26 December 2018, the parliamentary groups of deputies submitting this Referral, the SDP, the ABK and the Initiative, submitted their nominations for the CEC members.

34. Between 18 and 26 December 2018, the Office of the President addressed the contact persons of the parliamentary groups with information that the nominations for CEC members were received for review. Also, it was requested to submit additional documents for persons who were nominated for CEC members.

35. Between 20 December 2018 and 9 January 2019, the parliamentary groups of deputies submitting this Referral submitted additional documentation to the Office of the President.

36. On 28 March 2019, the President by decisions No. 57/2019, No. 58/2019, No. 59/2019, No. 60/2019, No. 61/2019, No. 62/2019, No. 63/2019 and No. 65/2019 of 28 March 2019, nominated CEC members from political parties, pre-election coalitions and citizen initiatives that won the majority seats according to the results of the Assembly elections of 11 June 2017. The President did not nominate

the persons who proposed SDP, ABK and the Initiative as CEC members.

Applicant's allegations

37. The Applicants allege that the challenged decisions are contrary to the provisions of paragraph 4 of Article 139 [Central Election Commission] of the Constitution.

38. The Applicants challenge the President's decisions in its entirety. They challenge the President's interpretation that the parliamentary groups, based on paragraph 139 of the Constitution, are those political parties, coalitions or citizens' initiatives that have won the majority of seats in the Assembly according to the election results.

39. The Applicants base their allegation on the recognition of the "*current and factual situation, including here the legal situation"* in the Assembly, because, according to their allegations*, "in this present case we are dealing with the current status of representation in the Assembly of Kosovo*".

40. The Applicants' first objection concerns the form of appointment of the CEC members from the parliamentary groups that emerged from the political entities that won the elections for the Assembly of Kosovo. The Applicants emphasize the need to put emphasis on the terminology used by the Constitution of Kosovo in the relevant provision of Article 139 paragraph 4 of the Constitution, which reads: "*Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly"*. The term "represented" has the of a *post-festum* character, which in itself implies that "*it is not necessary that a political entity that has won certain seats in the Assembly be represented at the level of a parliamentary group with that number of deputies with a mandate*".

41. The Applicants state that the nomination of members for representation in the CEC "*is closely related to the constitutional powers with regard to the morphology of the constitutional mandate of deputy, as members of the highest constitutional body of a legislative character"*. They also allege that the *"provision of Article 70 paragraph 1 provides [...] the freedom to exercise the function of deputy within the scope of his/her mandate, without being subject to any other binding mandate*".

42. The Applicants also allege that "*the strengthening of the freedom of political choice within the political structure of deputies as members*

of the Assembly is linked [...] to the very nature of representation. Representation is a dynamic concept. Thus, it is changeable. Its changeability is also reflected in the limitation of a mandate in terms of time. These are even one of the basic advantages of representative democracy, as it promotes the dynamism of representation beyond the time limit of the mandate". On this ground, according to the Applicants, "*the appointment of CEC members, taking into account the structure of parliamentary groups according to the result of the election of political entities, [...] [...] would preserve political freedom of representation in the Assembly of Kosovo and [...] deny political initiatives in the form of parliamentary groups of deputies*".

43. In addition, the Applicants emphasize that "*the important issues such as the mandate and requirements for the appointment of CEC members are not at all specified in the constitutional provisions. On the other hand, since the entry into force of these provisions, the provisions of the Law on General Elections have revived the implementation of the constitutional norms of Article 139 of the Constitution of Kosovo"*. According to their allegations, Article 61, paragraph 3 of the aforementioned Law regulates the deadline for the appointment of CEC members. Accordingly, according to their allegations, this provision contains a standard of recognition of the *post festum* factual and legal status.

44. The Applicants further state that, although Article 18 of the Law on General Elections recognizes only pre-election coalitions, paragraph 3 of Article 18 emphasizes that after the dissolution of the coalition, each of the registered political parties that were a member of the coalition was jointly and severally liable with debts and imposed possible fines.

45. According to the Applicants' allegations, the President did not comply with the provisions of the Rules of Procedure of the Assembly "*which obliges him, beforehand, after a certain cycle of general elections for the Assembly of Kosovo, to issue an official letter and EX OFFICIO requesting the correct and official answer, how many parliamentary groups has the Assembly of Kosovo, at that moment: in order, at a later date, on the basis of a factual, realistic and accurate situation, to request that these parliamentary groups - of certain political entities - within 21 days, in full compliance with the provisions of paragraph 4 of Article 139 of the Constitution of Kosovo, and in accordance with the principle of representation - democratic representation and proportionality, nominate their potential candidates for the members of the Central Election Commission of Kosovo. In the previous practice, the President has always addressed the Assembly, through the President of the Assembly, with the*

question of what are the six existing parliamentary groups in the Assembly regarding the process of appointing CEC members. In this regard, a request was sent to the Assembly, but the reply was never sent to the President".

46. The Applicants also allege that the Office of the President erroneously applies the principles of Judgment KO119/14 which *"[...] had to do with a completely different matter, not with the implementation of the provisions of Article 139, paragraph 4 of the Constitution of Kosovo [...]. According to this judgment, it is clear that the answer to the question asked was given. Therefore, parliamentary groups resulting from the elections cannot create new groups until institutions are constituted and it clarifies what institutions, therefore, it is not said all institutions, but in the case of the Assembly (the Presidency with the President and the Government). The norm applied to parliamentary groups, which is Article 139 of the Constitution, is not related to the judgment of the Court on the establishment of institutions... ".* Therefore, according to the Applicants,*"[...] Article 139 is an original/source norm that states that each parliamentary group has the right to send a member to the CEC. Judgment KO119/14 only has to do with a special legal situation, a special situation that was initiated at that time [...] ".*

47. The Applicants are also refer to the process of election of the Constitutional Court judges with members of the CEC, stating that *"[...] the process of election, interviewing and overall parliamentary procedure for Constitutional Court judges does not fall within the parliamentary groups that have stemmed since the last election, but from the heads of an existing parliamentary group in the Assembly (Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, Article 6, paragraph 2, subparagraph 2.2) ".*

48. Finally, the Applicants state that the method of appointment of the CEC members, based on the identification of parliamentary groups resulting from the election result, is absurd, because it does not provide a solution in cases of dissolution of a parliamentary group or political entity that has nominally won seats in the Assembly of Kosovo, and which, although in the meantime the deputies won seats under the candidate list of the relevant political entity, ceased to exist.

49. In conclusion, the Applicants request the Court to declare the Referral admissible and to quash the decisions of the President on the appointment of CEC members on the grounds of erroneous application of paragraph 4 of Article 139 of the Constitution.

Comments submitted by the SDM Parliamentary Group

50. With respect to the allegations made in the Referral, the SDM Parliamentary Group initially describes the composition, forms of organization and functions of the Central Election Commissions. They emphasize three forms of organization of central election commissions: a) those composed of judges or experts recruited through competition; b) those composed of exclusively registered political parties participating in the elections; and c) mixed commissions with partly political-party composition and partly composed of experts or judges.

51. The SDM further states that Kosovo has opted for a purely political-party model, with the exception of the CEC chairman coming from the judicial system, and his appointment is the sole responsibility of the President of the Republic of Kosovo. According to their allegations, the role of the President in appointment of other CEC members is solely of the nature of confirming nominations of political entities after the Office of the President is satisfied that the criteria and conditions for eligibility of candidates are met.

52. They further state that paragraph 4 of Article 61 of the Law on General Elections sets a deadline for the beginning of the term of office of the CEC members, which is related to the date of confirmation of the election results and not to the date of constitution of the Assembly. Therefore, according to them, the functioning of the CEC has nothing to do with the constitution of the Assembly, which may be longer than a period of 60 (sixty) days from the date of confirmation of the election results.

53. The SDM also states that paragraph 118 of the judgment of the Court No. KO119/14, produced legal consequences regarding the interpretation of the concept of a parliamentary group by entitling parliamentary groups, as set out in that paragraph, to nominate candidates in accordance with the Law on Elections in a capacity of the CEC member.

54. With regard to the Rules of Procedure of the Assembly of Kosovo, which allows for the permanent establishment of parliamentary groups, the SDM considers that the composition of the CEC cannot monitor the internal dynamics of the Assembly of Kosovo. According to their allegations, *"... such parliamentary groups have no constitutional or legal right to delegate certain individuals to constitutional institutions, including members of the CEC*".

55. Finally, the SDM emphasizes that when it comes to the composition of the CEC, the spirit of Article 139 (4) of the Constitution implies parliamentary groups in terms of political entities that have passed the electoral threshold, which applies only to political entities that participated in the elections and which name is on the ballot.

Comments submitted by the President of Kosovo

56. With regard to the Applicants' allegations, the President describes the logic and legal basis for rendering the challenged decisions.

57. At the outset, the President provides a historical background of the appointment of CEC members in past convocations. As for the appointment of CEC members in the current, the following actions preceded: a) a letter addressed to the President of the Assembly of 27 March 2018 requesting to notify parliamentary groups with the right to nominate members to the CEC; b) following the nomination of candidates by parliamentary groups, the president encountered legal dilemmas as to which parliamentary groups from which candidates should be nominated the CEC members. On this basis, the President emphasizes that he requested the Constitutional Court to interpret Article 139 paragraph 4 of the Constitution by clarifying issues concerning the appointment of CEC members, and (c) On 21 November 2018, the Court declared inadmissible the request for interpretation of Article 139 paragraph 4 of the Constitution (Resolution on Inadmissibility in case KO79/18) emphasizing that the Court is restricted from taking the consultative and advisory role. Consequently, the question raised by the President remained unanswered.

58. The President further mentions applicable legislation concerning the election of CEC members, citing Article 139 paragraph 4 of the Constitution, Articles 61 and 62 of Law No. 03/L-073 on General Elections in the Republic of Kosovo, as well as problems with applicable legislation regarding the appointment of CEC members.

59. The Office of the President also refers to the judgment of the Court in case KO119/14, and refers to the conclusions drawn from that judgment. According to paragraph 118 of Judgment KO119/14 of the Constitutional Court, parliamentary groups represented in the Assembly shall mean those parliamentary groups elected by the people on the basis of voters' lists and ballots, as they participated in general elections.

60. Finally, the President emphasizes that the appointment of CEC members was conducted in accordance with Article 139 paragraph 4 of the Constitution, taking into account the parliamentary groups that were represented at the first session of the Assembly, because the parliamentary groups subsequently formed, and in addition to being formed on the basis of the Rules of Procedure of the Assembly, do not represent the will of the people expressed in the free elections held in 2017.

Admissibility of the Referral

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

62. In this respect, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes: *" The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties "*.

63. In addition, the Court also refers to paragraph 2 (1) of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes as follows:

> *"2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:*
>
> *(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;*
> *[...]".*

64. In this regard, the Court also refers to Articles 29 [Accuracy of the Referral] and 30 [Deadlines] of the Law, which provide:

> Article 29
> Accuracy of the Referral
>
> *"1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo [...].*
>
> *2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia,*

whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution;.

3. A referral shall specify the objections put forward against the constitutionality of the contested act. ".

Article 30
Deadlines

"A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force".

65. The Court also refers to Rule 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure, which stipulates:

"(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.

(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.

(3) The referral shall specify the objections put forward against the constitutionality of the contested act.

(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act".

66. In the light of the abovementioned normative framework, it follows that any request made by the Assembly pursuant to paragraph 2 (1) of Article 113 [Jurisdiction and Authorized Parties] of the Constitution must fulfill the following requirements in order to be admissible:

a. that it is submitted by at least one quarter (1/4) of the deputies of the Assembly;
b. that it was submitted in connection with the question of compatibility of laws, decrees of the President and the Prime Minister and regulation of the Government with the Constitution;

c. to specify whether the entire challenged act or specific parts of that act are considered incompatible with the Constitution;
d. to specify all issues concerning the unconstitutionality of the challenged act;
e. that it was submitted within 6 (six) months from the effective date of the challenged act.

67. With regard to the requirement set out in subparagraph *a)*, the Court notes that the referral was signed by 30 (thirty) deputies of the Assembly and submitted by the Applicants' representatives on the basis of the authorizations given by them. Accordingly, the Court finds that the Referral was submitted by one-fourth (1/4) of the Assembly deputies in accordance with Article 113, paragraph 2, subparagraph 1 of the Constitution, in conjunction with Article 29, paragraph 1 of the Law. Consequently, the Applicants are the authorized party.

68. The Court also notes that the Applicants, with respect to the requirement set out in subparagraph (b), have specified acts which constitutionality they challenge before the Court, namely the following decisions of the President: Decision No. 57/2019, Decision No. 58/2019, Decision No. 59/2019, Decision No. 60/2019, Decision No. 61/2019, Decision No. 62/2019, Decision No. 63/2019 and Decision No. 65/2019 of 28 March 2019.

69. In this regard, Article 113, paragraph 2, subparagraph 1 constitutes the main point of reference in order to assess what acts of the President may be challenged by the Assembly before the Constitutional Court, stating expressly: the decrees of the President.

70. The decisions of the President are not specifically mentioned in Article 113 (2), subparagraph 1 of the Constitution. However, the Court recalls that in its case law it considered the constitutionality of other acts of the Government and the Prime Minister, although they are not explicitly mentioned in Article 113 (2), subparagraph 1 of the Constitution.

71. Thus, in Decision KO73/16, the Court held that "*Administrative Circular [No. 01/2016] issued by the Ministry of Public Administration of the Republic of Kosovo, regardless of its name, is of a mandatory nature and indeed touches upon the constitutional status of the independent institutions*", therefore, it found that it constituted a legal act which constitutionality could be assessed by the Court (see, the Constitutional Court of the Republic of Kosovo: Case No. KO73/16, submitted by the Ombudsperson, Judgment of 8 December 2016, paragraph 58).

72. Likewise, in Case KO12/18, the Court decided that: *"the decisions of the Government may be admitted for constitutional review by the Constitutional Court, only when it is substantiated that they raise important constitutional matters. [...] The Court notes that the essential issue, over which the Applicants and the Government submit opposing allegations, concerns the relationship between the decision of the Government to raise the salaries and the Law on Budget for 2018. [...] In this regard, the Court considers that the decision concerned raises important constitutional matters that deal with the exercise of the constitutional competences by the Assembly and the Government"* and can be assessed by the Court even though „decisions" as legal acts are not specifically mentioned in Article 113 paragraph 2 (1) of the Constitution (see, Constitutional Court of the Republic of Kosovo: Case No. KO12/18, Applicant *Albulena Haxhiu and 30 other deputies of the Assembly of the Republic of Kosovo*, judgment of 29 May 2019, paragraphs 88, 89 and 90).

73. In this respect, the Court considers that, based on its earlier abovementioned practice in relation to the acts of the Government, and other legal acts of the President, whether or not they are addressed as "decrees", they may be assessed by the Court if they fulfill the requirements set out above and if they raise constitutional issues.

74. Therefore, in the present case, the Court notes that the President's decisions are individual legal acts of a binding nature governing an individual situation and are rendered on the basis of the powers vested in the President directly by the Constitution or by law.

75. In this respect, the Court finds that the challenged decisions meet the requirements to be considered by the Court under Article 113, paragraph 2, subparagraph 1 of the Constitution. This is because the Court considers regardless of their name, the challenged decisions are binding in nature and concern the appointment of members of the CEC, which is an independent constitutional institution mandated to organize and monitor elections in Kosovo on the basis of the powers conferred on it based on the Constitution and the Law on General Elections in Kosovo.

76. In addition, the issues raised by the Applicants are of constitutional importance related to the right of parliamentary groups represented in the Assembly to nominate CEC members in accordance with Article 139 paragraph 4 of the Constitution.

77. With respect to the requirement foreseen under item *c)* and *d)*, the Applicants specified that they challenge the challenged acts in their entirety and raised questions concerning the unconstitutionality of the challenged acts in accordance with Article 113, paragraph 2, subparagraph 1 of the Constitution, Article 29, paragraph 2 and 3 of the Law and Rule 67 paragraph 2 and 3 of the Rules of Procedure. The Court also finds that the Referral was submitted within the time limit laid down in Article 30 of the Law and Rule 67 paragraph 4 of the Rules of Procedure.

78. Therefore, the Applicants' Referral is admissible for review on merits.

Merits of the Referral

79. The Court recalls that the essence of the Applicants' Referral relates to the allegation that by the challenged acts on the appointment of CEC members, the President violated Article 139 paragraph 4 of the Constitution, which provides:

> *"Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats [...]."*

80. The Applicants allege that the President, by interpreting the "largest parliamentary groups" as a party, coalition, civic initiative that emerged from political entities that won the elections for the Assembly of Kosovo and appointment of CEC members by challenged acts, according to that interpretation, violated the constitutional provisions. This is because "the largest parliamentary groups", according to Article 139, paragraph 4 of the Constitution, are those groups that are formed after the constitution of the Assembly of the Republic of Kosovo, and exist as such at the moment when the President appoints the CEC members.

81. They relate their arguments regarding the referral to the fact that, when the Law on General Elections came into force, it was envisaged that CEC members would be appointed 10 (ten) days after the Law comes into force, even though the elections were held 7 (seven) months earlier. They argue that the intention was to propose the CEC members by existing parliamentary groups at the time of the appointment, not political entities that arose as a result of the elections.

82. In addition, according to them, the way the term "parliamentary group" is interpreted by the President of the Republic, in addition to

contravening Article 139 (4) of the Constitution, also denies free political initiatives to form parliamentary groups of deputies.

83. The Applicants also mention the procedure for considering candidates for appointment to the Constitutional Court, noting that the process is managed by existing parliamentary groups in the Assembly.

84. The Court recalls, first of all, that the Constitution, apart from specifying the manner of appointment of CEC members and from what parliamentary groups are appointed, does not contain any specific definition as to whether the parliamentary groups for the purpose of appointing CEC members are those parliamentary groups: *i)* that emerged from political entities that won the elections for the Assembly of Kosovo, or, *ii)* those that were established after the constitution of the Assembly of the Republic of Kosovo.

85. Within its jurisdiction, pursuant to Article 112 of the Constitution, the Court, taking into account the specific issues raised by the Applicants, will give the necessary interpretation of Article 139 paragraph 4 of the Constitution, respecting the letter and spirit of the Constitution and the principles of democracy, in conjunction with other relevant legal provisions.

86. In this respect, the Court will assess the constitutionality of the appointment of 6 (six) CEC members from parliamentary groups represented in the Assembly who are not entitled to participate in the distribution of reserved seats. Election of CEC members proposed from the ranks of parties or coalitions holding reserved seats, namely the constitutionality of decision no. 57/2019, decisions no. 58/2019, decisions no. 59/2019 and decisions no. 60/2019, are not the subject of consideration of this referral.

87. The Court recalls that the term "largest parliamentary group" used in Article 139 (4) of the Constitution is also used in Article 67 paragraphs 2 and 3 in connection with the election of the President and Vice-President of the Assembly, that is, "political party or coalition" in Article 84, paragraph 14, and Article 95, paragraph 1 of the Constitution, in conjunction with the appointment of the mandator to form the Government.

88. In this regard, the Court recalls its judgment in Case KO119/14, in which it found that*: "in relation to the election of President and Deputy Presidents of the Assembly and the formation of the Government, the Constitution uses different expressions for one and the same reality. The different expressions are, namely: the seats (...)*

are distributed (...) in proportion to the number of valid votes received (...) [Article 64 (1) of the Constitution]; the largest parliamentary group [Article 67 (2) of the Constitution]; the political party or coalition holding the majority in the Assembly [Article 84 (14) of the Constitution]; the political party or coalition that has won the majority in the Assembly [Article 95 (1) of the Constitution" (see judgment in case KO119/14, *Xhavit Haliti and 29 other deputies of the Assembly of the Republic of Kosovo*, Constitutional review of Decision No. 05-V-001, voted by 83 deputies of the Assembly of the Republic of Kosovo on the election of the President of the Assembly of the Republic of Kosovo, of 17 July 2014, judgment of 26 August 2014, paragraph 104).

89. In accordance with that judgment, *"as the largest parliamentary group according to Article 67 (2) of the Constitution is to be considered the party, coalition, citizens' initiatives and independent candidates that have more seats in the Assembly, in the sense of Article 64 (1) of the Constitution, than any other party, coalition, citizens' initiatives and independent candidates that participated as such in the elections. [...]" (*see judgment in Case KO119/14, *Xhavit Haliti and 29 other deputies of the Assembly of the Republic of Kosovo*, cited above, paragraph 116).

90. As regards the use of terms "*political party or coalition*" referred to in Articles 84 (14) and 95 (1) of the Constitution, the Court recalls its judgment in case KO103/14, in which it decided that *"[...] the political party or coalition can only be the one that has won the highest number of votes in the elections, respectively most of the seats in the Assembly"* (see case KO103/14, Applicant *President of the Republic of Kosovo*, Judgment of 1 July 2014, paragraph 86).

91. Accordingly, it follows from the above judgments that, pending the constitution of the Assembly and for the purpose of its constitution, pursuant to Article 67 of the Constitution, the parliamentary groups reflect the composition of political parties, coalitions or citizens' initiatives arising from elections. The same definition applies to a party or coalition that won the election and has the right to nominate a mandator to form the Government under Article 84, paragraph 14, and Article 95, paragraph 1 of the Constitution. The Court emphasizes that this interpretation applies only to the constitution of the Assembly, that is, to determine the mandate for forming the Government.

92. The Court also recalls its case law in which it held that "*a parliamentary group, in the strictest sense of the word (in stricto*

sensu) and according to the Rules of Procedure of the Assembly and its Annexes, can only be registered after the constitution of the Assembly, i.e. after the election of the President and Deputy Presidents of the Assembly. At the moment of conveying the Constitutive Session of the Assembly, a parliamentary group is composed of the candidates that were elected as member of the Assembly on the ballot of the party, coalition, citizens' initiatives and independent candidates that were registered in the election, participated in them, passed the legal threshold and acquired seats in proportion to the number of valid votes received by them in the election to the Assembly " (see judgment in Case KO119/14, *Xhavit Haliti and 29 other Members of the Assembly*, cited above, paras. 117 and 118).

93. In this connection, the Court refers to paragraph 1 of Article 70 [Mandate of the Deputies] of the Constitution which provides:*"Deputies of the Assembly are representatives of the people and are not bound by any obligatory mandate*", as well as Article 74 [Exercise of Function] of the Constitution according to which: „*Deputies of the Assembly of Kosovo shall exercise their function in best interest of the Republic of Kosovo and pursuant to the Constitution, Laws and Rules of Procedure of the Assembly ".*

94. The Court also recalls Article 20 paragraphs 1 and 2 of the Rules of Procedure of the Assembly, which provides:

> *"1. Members of Assembly may establish a parliamentary group on account of their political affiliation or programme determination.*
>
> *2. The Member of Assembly shall have the right to take part equally in a parliamentary group, leave the group, form a new parliamentary group, join another group or act as an independent Member of Assembly. In each case, the Member of Assembly shall be obliged to notify the President of the Assembly on his decision in writing.*
> *[...]"*

95. Based on the foregoing, upon constitution of the Assembly, the deputies are free to form parliamentary groups, to leave a particular parliamentary group, or to join another parliamentary group and to exercise their rights as a parliamentary group, in accordance with the Constitution and the Rules of Procedure.

96. This interpretation is also consistent with the practice established by the Assembly, which allows changes in the number of members of a parliamentary group to be reflected in the membership of the standing committees and *ad hoc* committees of the Assembly. In this connection, the Court refers to the decision of the Assembly 06-V-006 on the formation of fourteen (14) parliamentary committees, of 3 October 2017; Decision of the Assembly 06-V-011 on amending and supplementing Decision No. 06-V-006, of 26 October 2017; and Assembly Decision 06-V-032 amending and supplementing Decision no. 06-V-006, dated 26 October 2017.

97. However, with regard to the issues raised by the Applicants, the Court will assess whether the parliamentary groups for the purpose of appointing CEC members, pursuant to paragraph 4 of Article 139 of the Constitution, are those emerging from the elections from the Assembly, or parliamentary groups that are formed after the constitution of the Assembly.

98. In this regard, the Court will assess the constitutional and other provisions pertaining to the parliamentary groups of the Assembly, having regard to (i) the constitutional role of the CEC as an independent institution for the management of elections and referendums, (ii) the manner of appointing CEC members; (iii) the duration of a mandate and (iv) the time of their appointment.

99. The Court refers to Article 139 paragraph 1 of the Constitution, which provides:

> *"The Central Election Commission is a permanent body, which prepares, supervises, directs, and verifies all activities related to the process of elections and referenda and announces their results".*

100. Therefore, the CEC is a permanent body mandated to govern elections and referendums in Kosovo, which carries out its functions in a professional and impartial manner, regardless of any political interest. Accordingly, the Constitution attributes to the CEC the nature of a permanent state body and recognizes it as the sole and independent authority to control and confirm the mandate of representative institutions.

101. The Court also recalls its case law in which it assessed the role of the independent constitutional institutions referred to in Chapter XII of the Constitution, and found that independent institutions, including the CEC, are not part of the legislation power, the executive and the

regular judiciary, and that the Constitution hereby guarantees the institutions a special status as regards their independence (see, *mutatis mutandis*, Case KO73/16, Applicant the Ombudsperson, Constitutional review of Administrative Circular No. 01/2016, published on 21 January 2016 by the Ministry of Public Administration of the Republic of Kosovo, Judgment of November 16, 2016, Attitudes 61-65).

102. The Court recalls once again Article 139 paragraph 4 of the Constitution, which provides:

> *"Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats [...]".*

103. The Court also recalls Article 61 paragraphs 3 and 4 of the Law on General Elections in Kosovo, which stipulates:

> *61.3 Appointment of CEC members as provided in article 139(4) of the Constitution of Kosovo shall be done by the following procedures:*
>
> > *a) within 10 days of the coming into force of this law parliamentary groups entitled to appoint a member(s) to the CEC shall notify the President of Kosovo of their appointment. Provided that the individual appointed by the parliamentary group conforms to the requirements of this law, the President of Kosovo shall, within five (5) days confirm the appointment in writing. The appointment shall be effective on the day stipulated in the official appointment by the President of Kosovo;*
> > *[...]*
> > *d) the termination of a mandate shall be on the last calendar day of the same month of the commencement of the mandate;*
> > *e) notwithstanding point (d) of this paragraph mandate that expires 90 or fewer days before an election or up to 90 days following the certification of the results of an election shall be automatically extended to 90 days after the certification of the results of an election.*
>
> *61.4 The mandate of the members of the CEC shall begin no later than sixty (60) days after the certifications of the Assembly elections results.*

104. The Court recalls that under the abovementioned constitutional provisions, CEC members are not mandated for a fixed term. Their mandate is related to the mandate of the election cycle and, in principle, begins no later than 60 (sixty) days after the election results are confirmed, with the exception of the exceptions provided for in Article 61, paragraph 3, subparagraph (e) of the Law on Elections.

105. Based on the foregoing, the intention of the legislator was to appoint the CEC members as soon as possible, after the election for the Assembly is completed, by setting a deadline of 60 (sixty) days, which shall begin to run, not from the date of constitution of the Assembly, but from the confirmation of the election results, and to serve as members of the CEC until the confirmation of the results of the next elections for the Assembly, with the exceptions provided for in Article 61, paragraph 3, subparagraph (e) of the Law on Elections.

106. Therefore, pursuant to the abovementioned provisions, the election of CEC members is not related to the issue of constitution of the Assembly, which may or may not take place within 60 (sixty) days from the date of confirmation of the election results, or with parliamentary groups in the narrow sense, which are formed after the constitution of the Assembly, when parliamentary life begins in the full sense of the word, which enables the organization of deputies into the parliamentary groups that can be distinguished from parties or coalitions that have emerged from the elections.

107. Members of the CEC, although proposed by parliamentary groups, the time of their appointment is associated with the date of confirmation of the elections, and not with the constitution of the Assembly or the organization of parliamentary groups in a narrow sense for the purposes of the work of the Assembly.

108. As regards the procedure for considering candidates for appointment to the Constitutional Court, the Court notes that this process is linked with parliamentary groups after the Assembly is constituted, and thus does not present a situation similar to the process of appointment of CEC members.

109. It can also be seen from the practice of other countries that members of election commissions, when proposed by the Assembly, are mainly proposed by the political parties or coalitions that have emerged from the elections, and that such proposals are submitted by political parties or coalitions representing position and opposition (see practice of Croatia, Slovakia and Bulgaria).

110. It follows from the foregoing that the composition of the CEC is intended to reflect the composition of the Assembly according to the election results, which means that political entities that have participated in the elections and which won the largest number of seats for the Assembly have the right to nominate CEC members who are appointed by the President, and as part of the CEC as a permanent independent body to which the Constitution has given a mandate to govern the electoral process and referendums and have a mandate until the next general elections, subject to the exceptions referred to in Article 61, paragraph 3, subparagraph (e) of the Law on General Elections, when a new CEC composition is appointed.

111. Therefore, CEC members cannot change every time the composition or membership of parliamentary groups within the same legislature changes, as is the case with the composition of parliamentary committees that reflect changes that have occurred in parliamentary groups during a single legislature.

112. The definition or role of parliamentary groups in the narrow sense of the word and for the purposes of the functioning of the Assembly, referred to in other constitutional provisions or as provided for in the Rules of Procedure of the Assembly, cannot apply automatically and be valid in the case of a specific constitutional provision relating to CEC. Such a practice of changing the CEC composition every time the parliamentary groups in the Assembly are changed, in addition to lacking a basis in the Constitution and law, would also impair the institutional stability of the CEC functioning as provided by the Constitution.

113. Moreover, such a dynamic practice of continuous change within a single mandate is not supported either by the previous institutional practices of the CEC of Kosovo, but also by the relevant practice of the election commissions of other countries. See the practice of Slovakia, Bulgaria, Albania, Montenegro and Croatia.

114. Such a practice is not favored by either the Venice Commission or the OSCE/ODIHR, which emphasize that the Central Election Commission must have a permanent character and that the bodies appointing the members of these commissions should not be free to dismiss them because it would jeopardize their independence (see the *Code of Good Practice in Electoral Matters*, adopted by the Venice Commission at its 52nd Plenary Session, held on 18-19 October 2002, p. 10 and 26, and the Election *Law, Venice Commission*, CDL-EL(2013)006, of 3 July 2013, p. 17 and 18. See also *Guidelines for*

Reviewing Legal Framework for Elections, Second Edition, OSCE/ODIHR 2013, p. 29).

115. The appointment of CEC members based on the results of general elections ensures that there is no institutional vacuum in the CEC, regardless of the time of the establishment of the Assembly. This means that the President, based on Article 61.4 of the Law on Elections, may exercise his/her duty of appointing CEC members within 60 (sixty) days from the date of confirmation of the elections by parliamentary groups political entities based on the results of the elections for the Assembly.

116. Accordingly, based on the above, the Court considers that, based on Article 139 paragraph 4 of the Constitution, as well as other legal provisions related to Article 139 of the Constitution, the CEC members are appointed from parliamentary groups, directly deriving from political parties, coalitions or citizens' initiatives as a result of general elections and consequently won the largest number of seats in the Assembly. Considering the role of the CEC as defined by the Constitution as a permanent election management institution, the fact that the mandate of the CEC members is related to the cycle of elections for the Assembly, the specific manner of their appointment, and especially the time of appointment CEC members, which is not connected with time of the constitution of the Assembly, nor with the manner in which the Assembly functions, but with the date of confirmation of the election results.

117. Therefore, the Court finds that the largest parliamentary groups represented in the Assembly, for the purposes of Article 139 paragraph 4 of the Constitution, are those 6 (six) parties, coalitions, citizens' initiatives, which have more seats in the Assembly than any other party, the coalition, citizens' initiatives that participated in the elections for the Assembly as such.

118. Therefore, the Court considers that the challenged acts do not violate the provisions of the Constitution, namely paragraph 4 of Article 139 [Central Election Commission] of the Constitution.

119. The Court finds that the interpretation of parliamentary groups for the purposes of Article 139 paragraph 4 of the Constitution does not violate the free initiative and internal organization of political parties, individuals or other initiatives in the Assembly, as it applies only for the purposes of this provision. According to the Constitution and the Rules of Procedure of the Assembly, the deputies are free and have the right to organize themselves in parliamentary groups, and that

organization, including the formation or change of parliamentary groups, reflects, in accordance with the Constitution and law, on the daily work of the Assembly and its bodies throughout the entire legislature.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113, paragraph 2, subparagraph 1 of the Constitution, Articles 29 and 30 of the Law and pursuant to Rules 59 (1) and 67 of the Rules of Procedure, on 29 July 2019:

DECIDES

I. TO DECLARE the Referral admissible for review on merits;

II. TO HOLD that Decision No. 57/2019, Decision No. 58/2019, Decision No. 59/2019, Decision No. 60/2019, Decision No. 61/2019, Decision No. 62/2019, Decision No. 63/2019, Decision No. 65/2019, of 28 March 2019, of the President of the Republic of Kosovo, are not in contradiction with paragraph 4 of Article 139 [Central Election Commission] of the Constitution;

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20 paragraph 4 of the Law; and

V. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Arta Rama-Hajrizi

KO65/19, Applicant: Ombudsperson, Constitutional review of Article 32 (paragraph 1), Article 41 (paragraph 1.3 and 1.4), and Article 76 (paragraph 2), in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the Law no. 06/L-010 on Notary (hereinafter: the challenged law), which entered into force on 26 December 2018.

KO65/19, Judgment of 29 July 2019, published on 23 August 2019

Key words*: ombudsperson, institutional referral, interim measure, protection of property, notary service, languages, legitimate expectations, restriction of rights, retroactive effect of law, retirement, proportionality*

The Applicant challenges Articles 32 (paragraph 1), 41 (paragraphs 1.3 and 1.4), and 76 (paragraph 2), in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged law, stating that the above-mentioned articles are in violation of Article 5 [Languages] and paragraphs 1 and 3 of Article 46 [Protection of Property] of the Constitution.
With regard to Article 32 (1), the Applicant alleged that the article in question is incompatible with Article 5 [Languages] of the Constitution because it allows documents to be issued in other languages that are not official in the Republic of Kosovo.
With regard to Article 41 (1.3) and (1.4), the Applicant alleged that the article in question is incompatible with Article 46 [Protection of Property] because it requires from notaries to carry out several services free of charge.
With regard to Article 76 (2), the Applicant, *inter alia*, alleged that the article in question by retroactive effect has changed the age of retirement of notaries from the age of 70 to 65, whereupon they have been denied legitimate expectations and future benefit which resulted in violation of the right to property guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of the ECHR.
The Court, on the basis of its analysis, concluded:
i) that the Applicant's allegations that Article 32 of the challenged law violates Article 5 [Languages] of the Constitution are ungrounded because no new obligations are imposed on the notary service, but they are rather presented exclusively as "possibility" and that their enforcement and implementation will depend on each notary public official individually The Court concluded that Article 32 of the challenged law is not in contradiction with, and does not violate the rights referred to under Article 5 [Languages] of the Constitution;
ii) that the Applicant's allegations that paragraphs 1.3 and 1.4 of Article 41 of the challenged law are in violation of Article 46 [Protection of Property] of the Constitution are ungrounded because the legislator, following the current trends in a democratic society and, in order to promote and advance the

property rights of both genders, under legal solution in Article 41 (1.3) and (1.4) provided precisely the extent to which the notary public officials should perform certain legal tasks without financial compensation. The Court concluded that paragraphs 1.3 and 1.4 of Article 41 of the challenged law are not in contradiction and do not violate the rights under Article 46 [Protection of Property] of the Constitution.

iii) that the Applicant's allegations that Article 76 (paragraph 2), in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph1.3), of the challenged Law violate Article 46 [Protection of Property] of the Constitution are ungrounded because "legitimate expectations" do not in themselves, in accordance with ECtHR practice, guarantee that the legislator cannot change the law, especially if such a change is proportionate the Court concluded that Article 76 (paragraph 2), in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged Law are not in contradiction and do not violate the rights under Article 46 [Protection of Property] of the Constitution, in conjunction with Article 1 of Protocol no. 1 [Protection of Property] of the ECHR.

iv) finally, the Court explained that the legislature – because of its position and democratic legitimacy – is in a better position than the Court to determine and advance the country's economic and social policies.

iv) furthermore, the Court, taking into consideration its conclusions in relation to Article 76 (paragraph 2), Article 2 (paragraph 7) and Article 22 (paragraph 1.3), of the challenged Law, concluded that there are no legal grounds for further extension of the interim measure which was imposed on 20 May 2019, and extended on 19 July 2019.

JUDGMENT

in

case No. KO65/19

Applicant

The Ombudsperson

Constitutional review of Article 32 (paragraph 1), Article 41 (paragraphs 1.3 and 1.4), Article 76 (paragraph 2), in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of Law No. 06/L-010 on Notary

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the Ombudsperson of the Republic of Kosovo (hereinafter: the Applicant).

Challenged law

2. The Applicant challenges the constitutionality of Article 32 (paragraph 1), Article 41 (paragraphs 1.3 and 1.4), and Article 76 (paragraph 2), in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of Law No. 06/L-010 on Notary (hereinafter: the challenged law), which entered into force on 26 December 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged articles of Law No. 06/L-010 on Notary, which according to the Applicant's allegations are incompatible with Article 5 [Languages] and with paragraphs 1 and 3 of Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

4. The Applicant further requests the Constitutional Court of Kosovo (hereinafter: the Court) to impose an interim measure and suspend the application of the challenged articles until the final decision of this Court, stating that *"the referral is prima facie grounded, and that the challenged articles of the challenged law cause irreparable damage to certain entities ..."*.

Legal basis

5. The Referral is based on paragraph 2, subparagraph 1 of Article 113 (Jurisdiction and Authorized Parties) and paragraphs 1 and 2 of Article 116 (Legal Effect of Decisions) of the Constitution, Articles 22, 27, 29 and 30 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 32, 56 and 57 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 19 April 2019, the Applicant submitted the Referral to the Court.

7. On 24 April 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel, composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Bajram Latifi.

8. On 25 April 2019, the Applicant was notified about the registration of the Referral.

9. On the same date, the Court notified the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo, instructing them to distribute the Referral to all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), the Prime Minister of the Republic of Kosovo and the President of the Notary Chamber of Kosovo about the registration of the Referral, and

requested that they submit all relevant documents and comments regarding the Referral, if any, by 16 May 2019.

10. On the same date, the Court also notified the Secretary of the Assembly of the Republic of Kosovo about the registration of the Referral and requested him to submit to the Court all relevant documents related to the challenged Law by 16 May 2019.

11. On 7 May 2019, the Secretary General of the Assembly of Kosovo submitted the following documents regarding the Referral under consideration: (1) Draft Law No. 06/L-010 on Notary, addressed to the Assembly by the Government on 12 October 2017; (2) the minutes of the Functional Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency, review in principle of the Draft Law on Notary of 14 November 2017; (3) the report of the Functional Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency, review in principle of the Draft Law on Notary of 14 November 2017; (4) invitation and agenda of the plenary session of the Assembly of the Republic of Kosovo, first reading of Draft Law No. 06/L-10 on Notary of 23 November 2017; (5) transcript of plenary session, first reading of the Draft Law on Notary of 23, 24, 29 and 30 November 2017; (6) minutes of the plenary session, first reading of the Draft Law on Notary of 23, 24, 29 and 30 November 2017; (7) Decision of the Assembly of the Republic of Kosovo on the adoption in principle of the Draft Law on Public Notary no. 06-V-025 of November 30, 2017; (8) the minutes of the Functional Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency, review in principle of the Draft Law on Notary of 7 June 2018; (9) report with amendments to the Draft Law on Notary of the Functional Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency, review in principle of the Draft Law on Notary of 7 June 2018; (10) the minutes of the Functional Committee for European Integration, review of the Draft Law on Notary with the amendments of the Functional Committee of 26 June 2018; (11) report of the Functional Committee for European Integration, review of the Draft Law on Notary with the amendments of the Functional Committee of 26 June 2018; (12) minutes of the Committee on Budgets and Finance, Review of the Draft Law on Notary with the amendments of the Functional Committee of 20 June 2018; (13) report of the Committee on Budget and Finance, review of the Draft Law on Notary with the amendments of the Functional Committee of 20 June 2018; (14) minutes of the Commitee on Community Rights

and Interests and Returns, consideration of the Draft Law on Notary Public with the amendments of the Functional Commission of June 20, 2018; (15) report of the Committee on the Rights and Interests of the Communities and Return, review of the Draft Law on Notary with the amendments of the Functional Committee of 20 June 2018; (16) the minutes of the Functional Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency, consideration of the final report on the Draft Law on Notary of 26 June 2018; (17) final report with the proposed amendments to the Draft Law on Notary of the Functional Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency, addressed for consideration at the plenary session of 26 June 2018; (18) invitation and agenda of the plenary session of the Assembly of the Republic of Kosovo, second reading of Draft Law No. 06/L-010 on Notary of 23 November 2018; (19) transcript from the plenary session of the Assembly of the Republic of Kosovo, second reading of the Draft Law on Notary of 13, 14 and 23 November 2018; (20) the minutes of the plenary session, the second reading of the Draft Law on Notary of 13, 14, 20 September, 15 October, 1, 2, 7, 23 November, 21 December 2018, and (22) Law No. 06/L-010 on Notary.

12. On 16 May 2019, the President of the Notary Chamber declared that no further comment was made beyond the referral submitted by the Applicant and fully agrees that the challenged legal provisions are unconstitutional.

13. On 20 May 2019, after reviewing the summary report of the Judge Rapporteur, the Review Panel approved the imposition of an interim measure until 20 July 2019.

14. On 19 July 2019, the Review Panel considered the report of the Judge Rapporteur and made its comments. The full Court also commented on the report of the Judge Rapporteur and decided to extend the interim measure for three months, namely until 21 October 2019.

15. On 29 July 2019, the Judge Rapporteur presented to the full Court the report, including the comments made by the judges in full composition in the previous session.

16. On the same date, the full Court unanimously decided that the Referral is admissible for review.

Summary of facts

17. On 23 November 2018, the Assembly of the Republic of Kosovo adopted the challenged law. The challenged law was published in the Official Gazette of the Republic of Kosovo on 26 December 2018.

18. On 19 April 2019, the Applicant submitted to the Court the referral requesting constitutional review of Article 32 (paragraph 1), Article 41 (paragraphs 1.3 and 1.4) and Article 76 (paragraph 2) in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged law.

19. At the same time, the Applicant requested the Court to impose an interim measure and suspend the application of the challenged articles of the Law in order to avoid causing irreparable damage to certain entities.

Applicant's allegations

20. The Applicant challenges Articles 32 (paragraph 1), 41 (paragraphs 1.3 and 1.4) and 76 (paragraph 2) in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged law, alleging that the abovementioned articles are contrary to Article 5 [Languages] and paragraphs 1 and 3 of Article 46 [Protection of Property] of the Constitution.

21. More specifically, as regards Article 32 (paragraph 1) of the challenged law, the Applicant states that *„the challenged provision of Article 32 (paragraph 1) of Law on Public Notary authorizes holders of public functions to issue documents in languages other than those designated by the Constitution as the official languages, the official language at the municipal level and in official use, depending on the assessment of knowledge of that language by the notary himself. As the Constitution of Kosovo recognizes only Albanian and Serbian as official languages, and Turkish, Bosnian and Roma as official languages at the municipal level and in official use, public documents in the Republic of Kosovo cannot be issued in other languages. Therefore, it seems that Article 32, paragraph 1 of Law on Notary in the second sentence exceeded the constitutional provision on the official languages in the Republic of Kosovo, and is therefore contrary to Article 5 of the Constitution".*

22. With regard to Article 41 (paragraphs 1.3 and 1.4) of the challenged law, the Applicant states the following: *„According to Article 2 (paragraph 4) of the Law on Notary, a notary service, although a*

public service, is an individual business. Therefore, it is not clear on what basis the law requires that a private business with public authority performs certain free activities, which has the effect of reducing the income of private businesses. […] As Article 41 (paragraphs 1.3 and 1.4) of the Law on Notary threatens the income of notaries as an individual business, there is a ground to believe that the article in question constitutes a violation of the property rights of notaries guaranteed under Article 46 (paragraphs 1 and 3) of the Constitution of Kosovo, which guarantees property and prohibits arbitrary deprivation of property".

23. With respect to Article 76 (paragraph 2) in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged law, the Applicant states the following: *„According to the old law on notary, the age until which the function of notary could be exercised was 70 years. The new law (Law No. 06/L-010 on Notary), in Article 2 (paragraph 7), reduces to 65 years of age, and Article 22 (subparagraph 1.3). Article 76 (paragraph 2) determines the retroactive effect of the provision on determining the age of the notary service, providing that only notaries who have reached the age of 65 at the time of entry into force of the law may continue with the notary service for another 2 years. This provision implies that the service to all other notaries will be terminated when they reach the age of 65, including notaries who started working under the old law, which provided for the age of 70 as the age of termination of service. As the notary service is a source of income for the persons performing this service, considering both the material investments and the work of notaries to be certified and to serve as notaries, and their expectations from the moment they applied for notaries, it is clear that such a retroactive provision is in contradiction not only with the principle of retroactive law non-enforcement, which seriously violates the legal certainty of citizens, but also violates the property rights of certified notaries until the new law enters into force.*

24. The Applicant adds, *"that, in accordance with the decision of the Constitutional Court in Case KI 40/09, in accordance with the case law of the European Court of Human Rights, Article 76 (paragraph 2) of the Law on Notary, with retroactive enforcement of restrictions, constitutes a violation of the property rights of licensed notaries in respect of violation their material, financial and work investments as well as their expected income, thereby violating Article 46 (paragraphs 1 and 3) of the Constitution of Kosovo, which guarantees property and prohibits arbitrary deprivation of property".*

Admissibility of the Referral

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

26. Firstly, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes: *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties*".

27. In addition, the Court also refers to subparagraph (1) of paragraph 2 of Article 113 of the Constitution which establishes:

> *"2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:*
>
> *(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government."*

28. The Court refers to paragraph 4 of Article 135 [Ombudsperson Reporting], which stipulates: "*The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution*".

29. In this regard, the Court notes that the Applicant is an authorized party who raises before the Court the issue of the compliance of the challenged Law based on Article 113 paragraph 2 of the Constitution.

30. The Court also takes into account Article 30 [Deadlines] of the Law and Rule 67 paragraph (4) of the Rules of Procedure, which provide that a referral must be filed within a period of six (6) months from the day of entry into force of the challenged act.

31. The Court notes that the challenged Law was published in the Official Gazette of the Republic of Kosovo on 26 December 2018, and that the Applicant submitted his Referral to the Court on 19 April 2019.

32. In addition, the Court takes into account Article 29 [Accuracy of the Referral] of the Law, which provides:

> *"1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies*

of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, the Government or the Ombudsperson.

2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution;.

3. A referral shall specify the objections put forward against the constitutionality of the contested act."

33. The Court also refers to Rule 67 of the Rules of Procedure, which stipulates:

Rules 67
„Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.
(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.
(3) The referral shall specify the objections put forward against the constitutionality of the contested act.
(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act.“

34. The Court notes that the Applicant stated the relevant constitutional provisions which have allegedly been violated, and he also cited the provisions of the challenged Law which he considered to be inconsistent with the Constitution and provided evidence to substantiate his allegations.

35. In conclusion, the Court finds that the Applicant is an authorized party, that he has identified the challenged provisions of the challenged Law, stated his constitutional allegations, submitted supporting evidence and filed the referral within the prescribed time limit.

36. Therefore, the Court declares the Referral admissible.

Assessment of the merits of Referral

37. The Court reiterates that the Applicant challenges the constitutionality of certain provisions of the challenged Law, namely Articles 32 (paragraph 1), 41 (paragraphs 1.3 and 1.4) and 76 (paragraph 2), in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) alleging that they are not in compliance with Article 5 [Languages] and paragraphs 1 and 3 of Article 46 [Protection of Property] of the Constitution.

38. According to the Applicant's allegations, the Court will individually review the constitutionality of each allegation and analyze separately all three articles of the challenged law to determine their merits.

39. At the very outset of the review of the constitutionality of the Applicant's allegations, which he will present separately below in the report, the Court recalls that Article 2 of the challenged law defines what are notary service and notaries:

"Article 2
Notary Service and Notaries

Notary service is a public service, exercised by notaries appointed by the Minister of Justice (hereinafter: Minister) according to the provisions of this Law. Notaries are independent and unbiased in exercising the notary services".

40. The Court notes that Notary Service is not a constitutional category, but that its jurisdiction and rights are governed by law. Notary Service, according to the law, is an unbiased and independent profession in the field of law, entrusted with the public authority to draft documents on legal affairs and other facts relevant to the circulation of money, goods and services, and to carry out as a court commissioner other court proceedings.

Constitutional review of Article 32 (paragraph 1) of the challenged law

41. The Court recalls that, as regards Article 32 (paragraph 1) of the challenged law, the Applicant alleges *„the challenged provision of Article 32 (paragraph 1) of Law on Public Notary authorizes holders of public functions to issue documents in languages other than those designated by the Constitution as the official languages, the official language at the municipal level and in official use, depending on the assessment of knowledge of that language by the notary himself. As*

the Constitution of Kosovo recognizes only Albanian and Serbian as official languages, and Turkish, Bosnian and Roma as official languages at the municipal level and in official use, public documents in the Republic of Kosovo cannot be issued in other languages. Therefore, it seems that Article 32, paragraph 1 of Law on Notary in the second sentence exceeded the constitutional provision on the official languages in the Republic of Kosovo, and is therefore contrary to Article 5 of the Constitution."

42. The Court notes that the challenged Article 32 (paragraph 1) of the challenged Law reads:

Article 32
"Language use in Notarized Deeds

1. All notarized deeds shall be issued in the Albanian or the Serbian language, depending on the language better known by the notary processing the act. Notarized deeds may also be issued in other languages,
[...]"

43. The Court also notes that the provision of Article 5 [Languages] of the Constitution in the relevant part reads:

"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".

44. Having regard to Article 32 paragraph 1 of the challenged Law, the Court first notes that the Applicant considers that the said paragraph 1 is not in accordance with Article 5 [Languages] of the Constitution. However, the Court also notes that the challenged Article 32 of the challenged law contains in its part 3 paragraphs, which together form an integral part of the challenged Article 32 of the Law, and that only by reading all three paragraphs of Article 32 of the challenged law, is given a clear picture of its essence and meaning.

45. In this regard, in order for the Court to be able to respond to the Applicant's referral, the Court finds it necessary to state and analyze all 3 paragraphs of Article 32 of the challenged law:

„Article 32
Language use in Notarized Deeds

1. All notarized deeds shall be issued in the Albanian or the Serbian language, depending on the language better known by the notary processing the act. Notarized deeds may also be issued in other languages, in cases when the notary takes the personal legal liability regarding the knowing of such a language,
2. In municipal level where the languages have a status of official languages or are used for official purposes as provided by Law, the parties may ask the notary to issue a copy in such a language, as they desire. This copy is deemed to be a notarized deed under paragraph 1 of this Article.
3. If one of the parties does not understand the language in which the deed is drafted or if the party requests so, then the translator must participate in preparing the notarized deed. At the end of the notarial deed the notary shall note that translation of the notarial deed has been provided to the party".

46. The Court notes from the cited Article 32 paragraphs 1, 2 and 3 of the challenged law that the legislative authority stated in the very title of Article 32 „*Language use in Notarized Deeds"*, while in paragraphs 1, 2 and 3, it gives guidance, regulates rights and obligations, as well as the way they are exercised.

47. In this regard, the Court notes that for the Applicant in relation to Article 32 is a disputable fact that the legislative authority „*authorizes public officials to issue documents in languages other than those specified in the Constitution as official languages"*.

48. The Court recalls that it is the constitutional authorization of the legislative authority to regulate the rights and obligations, which also implies its power to change the content of rights and obligations, whereby the legislative authority is obliged to comply with the requirements set before it by the Constitution, and in particular those arising from the principles of the rule of law and those that protect certain constitutional goods and values.

49. In view of paragraph 1 of Article 32 of the challenged law, the Court notes that the legislator in the first part of paragraph 1 precisely envisages the issuance of notary documents in the constitutional languages pursuant to Article 5 of the Constitution, while in the second part of paragraph 1 it provides only the "possibility" of issuing a notary document in other languages, but only when the notary takes legal responsibility for issuing it. Accordingly, the Court is of the opinion

that the said paragraph does not violate the rights or impose obligations that fall outside the scope of Article 5 of the Constitution.

50. Further, by reviewing paragraph 2 of Article 32 of the challenged law, the Court also concluded that it was not inconsistent with the spirit of Article 5 of the Constitution, on the grounds that paragraph 2 stipulates the obligation for all notary public officials to issue notarial documents in the languages to which the parties consider themselves entitled under Article 5 of the Constitution.

51. With regard to paragraph 3 of Article 32 of the challenged law, the Court, taking into account the complexity of Article 5 of the Constitution in the form of its implementation in the Republic of Kosovo, notes that the new legal solution provides for a new mechanism in paragraph 3 to create a situation contributing to the principle of respect of rights under Article 5 of the Constitution. More specifically, the legislator in paragraph 3 provides that "*If one of the parties does not understand the language in which the deed is drafted or if the party requests so, then the translator must participate in preparing the notarized deed*".

52. The Court is of the opinion that it is precisely paragraph 3 of Article 32 of the challenged law that provides for a legal obligation for a notary who compiles a notary document that can produce legal consequences, but also legal certainty for a party who does not understand the language in which the document is drafted, is entitled to a translator who will enable the party to understand the contents of the same, thereby putting all parties to the proceedings before the notary public on an equal footing.

53. Such a legal solution under Article 32 of the challenged law is, in the opinion of the Court, and in accordance with Article 5 of the Constitution, which provides for the obligation for notary public officials to issue notary documents in the constitutional languages, Albanian and Serbian, and that if required by the parties, they are also obliged to issue them in Turkish, Bosnian or Roma languages, which have the status of official languages at the municipal level.

54. Based on the foregoing, the Court is of the opinion that paragraphs 1.2 and 3 of Article 32 of the challenged law extend the rights to language, but do not directly impose new obligations on the notary public officials, but that they are presented in Article 32 exclusively as "*a possibility*" and that their enforcement and implementation will depend on each notary public official individually.

55. Based on the above, the Court finds that by a detailed analysis of paragraphs 1, 2 and 3 of Article 32 of the challenged law, the legislator did not limit in any of the abovementioned paragraphs any rights or impose any obligations outside the scope of Article 5 of the Constitution, and accordingly the Court concludes that Article 32 of the challenged law is not contrary to Article 5 of the Constitution.

Constitutional review of Article 41 (paragraphs 1.3 and 1.4) of the challenged law

56. In this regard, the Court recalls that, as regards Article 41 (paragraphs 1.3 and 1.4) of the challenged law, the Applicant states that: *„According to Article 2 (paragraph 4) of the Law on Notary, a notary service, although a public service, is an individual business. Therefore, it is not clear on what basis the law requires that a private business with public authority performs certain free activities, which has the effect of reducing the income of private businesses. […] As Article 41 (paragraphs 1.3 and 1.4) of the Law on Notary threatens the income of notaries as an individual business, there is a ground to believe that the article in question constitutes a violation of the property rights of notaries guaranteed under Article 46 (paragraphs 1 and 3) of the Constitution of Kosovo, which guarantees property and prohibits arbitrary deprivation of property".*

57. With respect to these allegations, the Court first recalls that the law clearly defines notaries as public servants, as clarified by the Court in paragraphs 38 and 39 of the report, therefore, the allegations that it is about a private business are ungrounded and will not be further dealt with by the Court.

58. Further, the Court, having regard to other allegations of the Applicant, that Article 41 paragraphs 1.3 and 1.4 of the challenged Law violates the rights of the notary public officials protected by Article 46 of the Constitution. The Court recalls that the challenged Article 41 (paragraphs 1.3 and 1.4) of the challenged Law reads:

„Article 41
Formalization of documents drafted by a party or its representative

[…]
1.3. giving of the consent by the spouse on non-registration of the joint property in the name of two (2) spouses, shall be done by a special consent, not through the contract, without financial cost;
1.4. giving the recurrent consent, after a certain period of time, for the same property, by the spouse who has previously waived

the registration of the joint property, in the name of two (2) spouses, shall be done without any additional financial tariff, provided that this procedure to be performed for the same case/property, at the same notary and at the same legal representative of the party;
[…]"

59. The Court also recalls that Article 46 [Protection of Property], paragraphs 1 and 3, reads as follows:

„Article 46 [Protection of Property]

1. The right to own property is guaranteed..
[…]
3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated."

60. The Court also recalls the provisions of Article 1 of Protocol 1 to the European Convention on Human Rights (hereinafter: the ECHR), which reads as follows:

Article 1 of Protocol 1 „Protection of Property"

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

61. By examining the challenged paragraphs 1.3 and 1.4, Article 41 of the challenged law, the Court found that the legislator envisaged two types of legal activities for which the notary public officials will not be compensated, that is, they will not be able to be paid for their work according to the financial fee once they have completed them.

62. The Court notes that precisely those legal actions which, pursuant to paragraphs 1.3 and 1.4 of Article 41 of the challenged law, cannot be exercised by the notary public officials, the Applicant considers as grounds for the alleged violation of Article 46 of the Constitution.

63. Moreover, in support of his allegation of violation of Article 46 of the Constitution, the Applicant also mentions the fact that "*the notarial function, although a public service, as an activity is an individual business. Therefore, it is not clear on what basis the law requires that a private business with public authority performs certain free activities, which has the effect of reducing the income of private businesses*".

64. As regards the Applicant's allegations of violation of the right to property, the Court recalls that the European Court of Human Rights (hereinafter: the ECtHR) set out in its numerous decisions the content of the rules which make the right to peaceful enjoyment of property. According to the ECtHR, this right rests on three rules (see ECtHR decisions *James et al. v. United Kingdom*, of 2 February 1986, Series A No. 98, pp. 29-30, paragraph 37, *Asmundsson v. Iceland*, application No. 60669/2000, para. 39), and they are:

> *– the first rule (first paragraph of Article 1, first sentence), which has a general character, establishes the principle of peaceful enjoyment of the property of a natural or legal person;*
>
> *- the second rule (first paragraph of Article 1, second sentence) has as its object the possibility of depriving the right to peaceful enjoyment of property, under certain conditions;*
>
> *- the third rule (second paragraph of Article 1) recognizes EC signatory States, inter alia, the right to control or restrict the use of property in the general interest.*

65. The second and third rules allowing the deprivation or restriction of the right to peaceful enjoyment of property should be interpreted in the light of the general principle that establishes the right of every person (natural or legal) to enjoy the peaceful enjoyment of property.

66. The Court, assessing the grounds of the Applicant's allegations that paragraphs 1.3 and 1.4 of Article 41 of the challenged law violate the rights of notary public officials under Article 46 of the Constitution in respect of the peaceful enjoyment of their possessions as well as Article 1 of Protocol 1 of the ECHR, finds that the Applicant's allegations in

the present case do not qualify into allegations of alleged violation of the right to peaceful enjoyment of property under Article 1 of Protocol 1, paragraph 1 of Article 1 (first sentence), but these allegations could rather be classified as limitations under paragraph 2 of Article 1 of Protocol 1 (first sentence) to the ECHR.

67. Accordingly, in view of the fact that the restrictions of the Applicant's property rights allegedly arose under paragraphs 1.3 and 1.4 of Article 41 of the challenged law, it is necessary to analyze and consider whether the legislator by foreseen legal solution in paragraphs 1.3 and 1.4 of Article 41 of the challenged law diminished/restricted the property rights to notary public officials.

68. The Court recalls the ECtHR case-law, according to which, the restrictions on the right to property, which form the content of the second of the abovementioned basic rules, are justified (legitimate):

„(1) if they are legal, i.e. established by the law of the State Party as it is thus provided rule of law, which must be a principles s inherent in all the Articles of the Convention (thus, for example, the ECtHR reasoned in case Iatridis v. Greece, no. applications 31107/96, para. 58, ECHR 1999-II, Wieczorek v. Poland, no. of application 18176/2005, para.58);

(2) if they are done to achieve a legitimate aim, i.e. in the public or general interest; the notion of "public/general interest is broad and thus the economic and social factors of a given country must be taken into account when limiting certain social benefits (the court recalls that such an explanation of the ECtHR is given in the case of Wieczorek v. Poland, Application no. 18176/2005, para. 59) and

(3) if they are proportional, which means that the individual's right to enjoy the property peacefully must be weighed against the general interest, i.e. with objectives to be attained for the common good: "proportionality will not be attained if the burden is imposed on the individual concerned" (see ECtHR Sporrong and Lönnroth v. Sweden, decision of 23 September 1982, paras 69-74, Series A no. 52, Wieczorek v. Poland, Application No. 18176/2005, para. 60)".

69. In view of the foregoing, the Court notes that, as regards the first rule, whether the alleged restrictions on property rights are in accordance with law, it first notes that the legislator provided in Article 41 of the challenged law that:

„1.3. giving of the consent by the spouse on non-registration of the joint property in the name of two (2) spouses, shall be done by a special consent, not through the contract, without financial cost;

1.4. giving the recurrent consent, after a certain period of time, for the same property, by the spouse who has previously waived the registration of the joint property, in the name of two (2) spouses, shall be done without any additional financial tariff, provided that this procedure to be performed for the same case/property, at the same notary and at the same legal representative of the party;
[...]"

70. It follows that the alleged restrictions stemmed precisely from paragraphs 1.3 and 1.4 of Article 41 of the challenged law, and that they are therefore lawful and not arbitrary.

71. With regard to the second rule, whether the abovementioned restrictions are imposed in order to achieve a legitimate aim, namely, in the public or general interest, the Court states that any interference by a public authority with the peaceful enjoyment of property can only be justified if it serves a legitimate public (or general) interest.

72. Moreover the Court recalls that the national authority, namely the legislator, because of their direct knowledge of their society and its needs are in that position to decide what is "*in the public interest*". However, in determining what is "*in the public interest*," the national authority, namely the legislator, is obliged to make the initial assessment as to the existence of a problem of public concern warranting measures interfering with the peaceful enjoyment of possessions (see *Terazzi Srl v. Italy*, No. 27265/95, § 85, 17 October 2002 and *Elia Srl v. Italy*, number 37710/97, paragraph 77, ECHR 2001-IKS).

73. In the present case, the Court notes that following the current trends in a democratic society and, in order to promote and advance the property rights of both genders, the legislator under legal solution in Article 41 of the challenged law in paragraphs 1.3 and 1.4 provided precisely the extent to which the notary public officials should perform certain legal tasks without financial compensation, which leads to the conclusion that the envisaged legal solution also has a reasonable basis because it pursues a specific aim.

74. With regard to the third rule, whether the alleged restrictions in paragraphs 1.3 and 1.4 of Article 41 of the challenged law are proportional, the Court states that the restrictions provided for in the paragraphs above provide exclusively for the restrictions on the two legal activities that notary public officials are required to carry out in the exercise of their public function they have under the law.

75. Moreover, the legal solution does not provide for the obligation for notary public office holders to perform all legal tasks which they may carry out in accordance with law, without financial compensation. It can be concluded that the foreseen legal solution in paragraphs 1.3 and 1.4 of Article 41 of the challenged law does not represent an excessive burden for the notary public officials, as it is reasonably proportional to the aim pursued.

76. The Court finds that the legal solution of Article 41 paragraphs 1.3 and 1.4 has a proportionality between the general interest and the protection of the rights of the individual, and that the burden imposed on the notary public officials is neither excessive nor disproportionate.

77. On the basis of all the foregoing, the Court concludes that paragraphs 1.3 and 1.4 of Article 41 of the challenged law are not in contradiction and do not violate the rights of notary public officials under Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 to the ECHR.

Constitutional review of Article 76 (paragraph 2) in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged law

78. In this context, the Court notes that the Applicant cites Article 76 (paragraph 2) of the challenged law as the primary violation in the Referral, however, at the same time, he also refers to Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged law.

79. Therefore, the Court recalls that Articles 76 (2), in conjunction with Article 2 (7) and 22 (paragraph 1.3) of the impugned law read as follows:

„Article 76 Sub-legal acts

[...]

2. Upon entry into force of this Law, notaries who have reached the age of sixty-five (65) shall continue to exercise the notary function for two (2) more years.“

„Article 2 Notary Service and Notaries

[...]

“7. Notary may exercise notary duties until the age of sixty-five (65), if causes for terminating notary duties do not appear as per Articles 22, 23, 24 and 25 of this Law ”.

Article 22 Grounds for termination of Notary Service

[...]

“1.3. reaching the age of sixty-five (65) years”.

80. It follows from the foregoing that Article 2 (paragraph 7) of the challenged law deals with the issues of termination of service, as well as the specific reasons that may affect the termination of the service of notaries, while Article 22 (paragraph 1.3) of the challenged law directly determines the age for termination of notary activities.

81. Consequently, the Court finds that all three of the aforementioned articles of the challenged law are mutually conditional and directly related to the substance of the Applicant's appealing allegations, and accordingly, the Court will analyze all three articles of the challenged Law as an integral part of the Applicant's appealing allegations.

82. The Court reiterates the Applicant's allegations regarding Article 76 (paragraph 2) in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) *„According to the old law on notary, the age until which the function of notary could be exercised was 70 years. The new law (Law No. 06/L-010 on Notary), in Article 2 (paragraph 7), reduces to 65 years of age, and Article 22 (subparagraph 1.3). Article 76 (paragraph 2) determines the retroactive effect of the provision on determining the age of the notary service, providing that only notaries who have reached the age of 65 at the time of entry into force of the law may continue with the notary service for another 2 years. This provision implies that the service to all other notaries will be terminated when they reach the age of 65, including notaries who*

started working under the old law, which provided for the age of 70 as the age of termination of service [...] As the notary service is a source of income for the persons performing this service, considering both the material investments and the work of notaries to be certified and to serve as notaries, and their expectations from the moment they applied for notaries, it is clear that such a retroactive provision is in contradiction not only with the principle of retroactive law non-enforcement, which seriously violates the legal certainty of citizens, but also violates the property rights of certified notaries until the new law enters into force".

83. The Applicant adds*, „that, in accordance with the decision of the Constitutional Court in Case KI 40/09, in accordance with the case law of the European Court of Human Rights, Article 76 (paragraph 2) of the Law on Notary, with retroactive enforcement of restrictions, constitutes a violation of the property rights of licensed notaries in respect of violation their material, financial and work investments as well as their expected income, thereby violating Article 46 (paragraphs 1 and 3) of the Constitution of Kosovo, which guarantees property and prohibits arbitrary deprivation of property".*

84. The Court first states that it is not disputable that the old law on notary service regulates that the notaries retire at the age of 70, nor is it disputable for the Court that the new legal solution, the transitional and final provisions, of Article 76, paragraph 2, of the challenged law provide that public notaries retire at the age of 65,. These transitional norms provide for the possibility of extending the function of notaries for another 2 years. These transitional and provisions of Article 76, paragraph 2 apply only to those notaries who have already reached the age of 65 on the date of entry into force of the new Law on Notary. Such transitional norms give the legal possibility that those notaries who are over 65 years of age have the right to work for another 2 years in the functions of notaries, or at most until the age of 70, as foreseen by the old legal solution.

85. Based on all allegations of the Applicant, it can be concluded that the main doubts regarding the violation of the right to property relate to the issue of "legitimate expectations" which the notary public officials had when entering the function of Notary under the old law, and that by the new legal solution in paragraph 2 of Article 76 of the challenged law, as such they will not be exercised, thus violating their rights guaranteed by Article 46 of the Constitution and Article 1 of Protocol 1 to the ECHR, as well as by retroactive application of the new legal solution regarding the retirement age of the notary public officials .

86. Therefore, the Court will next deal separately with the Applicant's allegations concerning i) the concept of "legitimate expectations" regarding the right to property and ii) the retroactive application of the new legal solution as regards the retirement date of the notary public officials.

i) The concept of legitimate expectations regarding the right to property

87. The Court recalls that, based on the case law of the ECtHR, the concept of "*possessions*", which is mentioned in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "*property rights*", and thus as "*possessions*" for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1. (See: case, *Broniowski v. Poland* [VV], complaint no. 31443/96, para. 129).

88. Article 46 of the Constitution and Article 1 of Protocol No. 1 to the ECHR should only be applied to existing assets of a person. Therefore, future benefit cannot be considered as an asset unless it has so far been obtained or is without any "doubt worthwhile". In addition, the hope of reviving long-extinguished property cannot be regarded as a possession; nor can a conditional claim which has lapsed as a result of the failure to fulfill the condition (see case *Gratzinger and Gratzinger v. Czech Republic* (Decision) [GC], appl. No. 39794/98, para. 69).

89. However, in some circumstances, "*legitimate expectation*" of obtaining an "*asset*" may also enjoy the protection provided for in Article 46, and in conjunction with Article 1 of Protocol No. 1. Therefore, where the proprietary interest is in the nature of a claim for the person to whom is given that interest, it may be regarded to have "*legitimate expectation*" only where that interest has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it (See *Kopecky v. Slovakia* [GC], Appl. 44912/98, para 52). However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts *(*Idibem, *Koepecky,* paragraph 50*)*.

90. Based on the foregoing, it follows that the doctrine of legitimate expectation is evoked only when it is evident from the circumstances of the case that the applicant does not have "existing assets" and is then examined as to whether the person has an "asset" against which he can claim that he has a legitimate expectation that he will be able to enjoy it. (See ECtHR judgment *Kopecký v. Slovakia*, of 28 September 2004, application no. 44912/98, paragraphs 40, 41, 42).

91. The Court also states that it can be inferred from ECtHR case law that the doctrine of legitimate expectation is considered in the context of whether legitimate expectations rely on a legal act of the authorities (the basis of legitimate expectations) is justified in the sense that it can assume that the law or norm will not subsequently be annulled (see *mutatis mutandis* ECtHR *Pine Valley Developments Ltd and Others v Ireland).*

92. The Court, having regard to the fact that the Applicant in the present case, as a ground (basis) for alleged legitimate expectations of notary public officials, uses the old law on notaries, finds that the "legitimate expectations" do not in themselves, in accordance with ECtHR practice, guarantee rights of notaries, that the legislator cannot change the law, especially if such a change is proportionate (see *mutatis mutandis* ECtHR *X v. Germany* decision of 1979, application no. 8410/78).

93. In this regard, the Court notes that the amendment of the law on notary is proportionate: (i) because the change is within the discretion of the legislator, (ii) the legislator, within the scope of the retirement policy made a harmonization with the existing legal framework, (iii) the notary profession does not have its own specifics that would lead the legislator to take a special step in departing from the retirement policy envisaged by the existing legal framework in Kosovo.

94. Moreover, the Court notes that the abovementioned legal framework equates the years of retirement, more specifically Article 67, paragraph 1, item 1.4 of Law on Labor No. 03/L-212, provides that "*Employment contract, on legal basis, may be terminated, as follows: When an employee reaches the pension age, sixty- five (65) years of age*". The Court also notes that Article 91 (1) of the Law on Civil Service of the Republic of Kosovo No. 03/L-149, provides that "*Both male and female Civil Servants shall retire at the age of sixty five (65)*". This means that the legislator, by changing the retirement age of the notary from 70 years to 65 years, acted within his own space of assessment and in a proportionate manner because: (i) he harmonized the retirement age in accordance with the relevant legal

provisions; of the labor law; (ii) determining the retirement age of notaries at age 65 does not constitute an individual or excessive burden on them; (iii) the amendment of legal provisions for the retirement of notaries from 70 to 65 years of age - as with other employees in the Republic of Kosovo - does not result to be without a reasonable basis; and (iv) the essence of the right to peaceful enjoyment of the property is not thereby violated.

95. Accordingly, the Court notes that the Applicant did not show that the change of law in any way led to a violation of rights in the context of "legitimate expectations", pursuant to Article 46 of the Constitution and Article 1 of Protocol 1 to the ECHR.

ii) retroactive application of the new legal solution regarding the retirement age of notary public officials

96. The Court recalls that retroactivity in law implies the application of a legal norm to events that occurred before its entry into force. Legal norms apply to the future (*pro futuro*), at the earliest time it is enacted. The retroactive application of legal norms is an exception to the principle that legal norms cannot have retroactive effect.

97. In the present case, the Court notes that the legislator provided that Article 76 of the challenged Law produces legal effect on the date the new Law on Notary came into force, thus concluding that the legislator did not specifically distinguish Article 76 of the challenged law, giving it special, different time limits of its applicability, which would be different from the deadlines for entry into force of the law on notary itself.

98. It can thus be concluded with certainty that Article 76 of the challenged law does not deviate from the entirety of the law with regard to the deadlines for entry into force, and at the same time it, as an integral part of the law, produces a legal effect for the future (*pro futuro*).

99. However, notwithstanding the fact that Article 76 of the challenged law acts (*pro futuro*), the Court notes that it does affect in itself certain notaries of public service, who are of a specific age, namely who did not on the effective date of the challenged law turned 65 years of age.

100. In this regard, the Court adds that the effect produced by Article 76 of the challenged law on the individual notary public officials does not in itself affect the substance of their rights, since the mere restriction of rights does not mean a violation, as already explained by the Court in

paragraphs 74 and 75 of this Judgment. (see *mutatis mutandis* Judgment of the Constitutional Court No. KO 142/16, of 18 July 2017, paragraph 80).

101. The Court wishes to note in particular that the Law, as a general legal act governing certain social relations, is limited in space and time. The retroactive effect of laws, regulations and general acts, in the opinion of the Constitutional Court, exists when the law, other regulation and general act applies to relationships that have already been completed before the regulation came into force. In the legal system of the state, there is a constant need for changes and amendments to existing laws, as well as the need for the adoption of new laws, which differently define legal situations compared to the earlier law. As a general rule, for reasons of legal certainty, the new law applies for the future. The main aim of the constitutional prohibition of the retroactive effect of the law, in the opinion of the Constitutional Court, is to protect the principle of legal certainty, as well as the possibility of an exception to this rule, in order to protect justified social interests.

102. In addition, the Court notes that the Applicant merely states that "*the retroactive change in the retirement age for notaries challenges the property rights of the notary and the principle of legal certainty*".

103. However, the Court has already explained that the abovementioned changes fall within the discretion of the legislator and that the equation of the retirement age of the notary with other employees does not result to be without a reasonable or proportionate basis. The Court also notes that the Applicant has not in any way substantiated any specificity or particularity of the profession of notary - unlike other professions - which could oblige the legislator to allow notaries to perform their duties until the age of 70.

104. Therefore, in the opinion of the Constitutional Court, there is no constitutional-legal impediment that, for the purpose of prevailing public interest, to regulate the legal environment by new legal solution for notary public officials, thereby regulating their rights, obligations, and even the issue of retirement of notary public officials.

105. The Court emphasizes that, in accordance with the case law of the ECtHR, it is not within its scope to alter public policies as defined by the legislator. The principle of separation of powers obliges the Court to respect the policy-making by the legislator. The legislature - because of its position and democratic legitimacy - is in a better position than the Court to determine and advance the country's economic and social

policies (see, *mutatis mutandis, Dubska and Krejzova v. Czech Republic*, [GC], paragraph 175).

106. In the light of the foregoing, the Court considers that change of the retirement age of notaries from 70 years to 65 years does not result to be without a reasonable basis or disproportionate, Therefore, the Court concludes that Article 76 (paragraph 2), in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged law, is not in contradiction with guarantees of Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol No. 1 [Protection of Property] of the ECHR.

Conclusion

107. Based on its analysis, the Court concludes:

i) that the Applicant's allegations that Article 32 of the challenged law violates Article 5 [Languages] of the Constitution are ungrounded. Accordingly, the Court concludes that Article 32 of the challenged law (is not in contradiction), does not restrict the rights under Article 5 [Languages] of the Constitution,

ii) that the Applicant's allegations that paragraphs 1.3 and 1.4 of Article 41 of the challenged law are in violation of Article 46 [Protection of Property] of the Constitution are ungrounded. Accordingly, the Court concludes that paragraphs 1.3 and 1.4 of Article 41 of the challenged law (are not in contradiction) do not restrict the rights under Article 46 [Protection of Property] of the Constitution,

iii) that the Applicant's allegations that Article 76 (paragraph 2), in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged law violate Article 46 [Protection of Property] of the Constitution, are ungrounded. Accordingly, the Court concludes that Article 76 (paragraph 2), in conjunction with Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged law (are not in contradiction) do not restrict the rights under Article 46 [Protection of Property] of the Constitution, and in conjunction with Article 1 of Protocol No. 1 [Protection of Property] of the ECHR.

iv) The Court, taking into account its findings in respect of Article 76 (2), Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of the challenged law, also concludes that there is no legal basis for the interim measure imposed on 20 May 2019, which was extended on 19 July 2019 to remain further effective.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Articles 113.2 (1) and 116.2 of the Constitution, Articles 27 (1), 29 and 30 of the Law and pursuant to Rules 29, 54, 55 and 56 (1) 56, 57 and 59 (1) of the Rules of Procedure, on 29 July 2019,

DECIDES

I. TO DECLARE unanimously the Referral admissible;

II. TO HOLD unanimously that the challenged Articles 32 (paragraph 1), 41 (paragraphs 1.3 and 1.4) in conjunction with Articles 2 (paragraph 7) and 22 (paragraph 1.3) of Law No. 06/010 on Notary, are not in contradiction with Articles 5 [Languages], and 46 [Protection of Property] of the Constitution of the Republic of Kosovo;

III. TO HOLD by a majority vote that the challenged Article 76 (paragraph 2) of Law No. 06/010 on Notary, is not in contradiction with Article 5 [Languages], and Article 46 [Protection of Property] of the Constitution;

IV. TO REPEAL the decision imposing the interim measure of 20 May 2019, extended on 19 July 2019, in conjunction with Article 76 (paragraph 2), Article 2 (paragraph 7) and Article 22 (paragraph 1.3) of Law No. 06/10 on Notary;

V. TO NOTIFY this decision to the Parties;

VI. TO PUBLISH this decision in the Official Gazette in accordance with Article 20.4 of the Law;

VII. This decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KO124/19, Applicant: The Prime Minister of the Republic of Kosovo, Referral for interpretation of the act of resignation of the Prime Minister of the Republic of Kosovo and definition of the competencies and functioning of the Government after the resignation of the Prime Minister

KO124 / 19, Resolution adopted on 4 September 2019, published on 16 September 2019

Key words: *institutional referral, government competencies, constitutional issue, resignation of prime minister, constitutional court jurisdiction, inadmissible referral.*

The Applicant based on Article 93 (10) [Competencies of the Government] of the Constitution submitted a question about the interpretation of the act of resignation of the Prime Minister of the Republic of Kosovo and the definition of the competences and functioning of the Government after the resignation of the Prime Minister.
The Court first referred to its newest jurisprudence with respect to the legal questions submitted by the Applicant. The Court considered that it should be assessed whether the Applicant's Referral based on Article 93 (10) is justified within the jurisdiction of the Court set out in Article 113 [Jurisdiction and Authorized Parties] of the Constitution.
The Court also noted that the present Referral pursuant to Article 93 (10), as well as other similar Referrals previously submitted pursuant to Article 84 (9) [Competencies of the President] of the Constitution, must necessarily be reasoned within the jurisdiction of the Court set forth in Article 113 of the Constitution.
In this regard, the Court reiterated that the content of the provision of Article 113 of the Constitution, taken in its entirety, is clear and concrete as to the competencies of the Government arising from the context of the authorized party in the Constitutional Court. Consequently, despite the need that may arise in practice for interpreting other matters relevant to the competences of the Government, it results that Article 113 of the Constitution constitutes the fundamental and sole jurisdictional basis of the Constitutional Court in relation to the competencies of the Government to refer cases to the Constitutional Court as an authorized party.
The Court further stated that the submitted referral, following the resignation of the Prime Minister, could only be raised under Article 113, paragraph 2, where the authorized parties could dispute in the Court matters relating to compliance with the Constitution of the decrees of the Prime Minister, and of Government regulations or pursuant to Article 113, paragraph 3, as matters relating to situations of conflict of constitutional competencies of the Assembly, the President and the Government.

In view of what is stated above, the Court concluded that the issues raised by the Applicant do not fall within the scope of the jurisdiction of the Constitutional Court, as set out in Article 113 of the Constitution and, therefore, despite their importance and the legitimate dilemmas they may raise, the Court cannot provide answers to questions raised as long as they have not been submitted to the Court under the procedures provided for by the Constitution.

Consequently, the Court concluded that the Applicant's Referral is inadmissible because it does not fall within the limits of its jurisdiction provided for in Article 113, paragraph 1, of the Constitution.

RESOLUTION ON INADMISSIBILITY

in

case No. KO124/19

Applicant

The (outgoing) Prime Minister of the Republic of Kosovo

Request for interpretation of the act of resignation of the Prime Minister of the Republic of Kosovo and definition of the competencies and functioning of the Government after the resignation of the Prime Minister

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the (outgoing) Prime Minister of the Republic of Kosovo, Mr. Ramush Haradinaj (hereinafter: the Applicant).

Subject matter

2. The subject matter is the request for interpretation of the act of resignation of the Prime Minister of the Republic of Kosovo and the definition of the competences and functioning of the Government after the resignation of the Prime Minister.

3. The Applicant submitted the following question to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court):

(i) *"after the resignation of the Prime Minister, can it be considered that the situation created after this act, as established in Article 95, paragraph 5, is analogous to the situation where the Government is considered resigned within the meaning of Article 100, paragraph 6 of the Constitution and the dissolution of the Assembly, within the meaning of Article 82, paragraph 1, sub-paragraph 2 [?]" and*

(ii) *"what are the competencies and functioning of the Government after the resignation of the Prime Minister?."*

Legal basis

4. The Referral is based on paragraph 10 of Article 93 [Competencies of the Government], in conjunction with Article 113 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Proceedings before the Constitutional Court

5. On 29 July 2019, the Applicant submitted the Referral to the Court.

6. On the same date, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Gresa Caka-Nimani and Safet Hoxha.

7. On the same date, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the President of the Republic of Kosovo, His Excellency Mr. Hashim Thaqi (hereinafter: the President) and the President of the Assembly of the Republic of Kosovo, Mr. Kadri Veseli (hereinafter: the President of the Assembly) with a request that the latter be submitted to all deputies of the Assembly. On that occasion, the Court invited the President, the President of the Assembly and the deputies of the Assembly to submit their comments, if any, by 12 August 2019.

8. On 13 August 2019, the Parliamentary Group of VETËVENDOSJE! Movement (hereinafter: LVV), represented by the deputy Albulena Haxhiu, submitted their comments to the Court.

9. On 14 August 2019, the Court sent a copy of the comments from the LVV Parliamentary Group to the Applicant giving him the opportunity to comment, if any, and requested him to submit the act of resignation as the Prime Minister of the Republic of Kosovo, by 21 August 2019.

10. On the same date, a copy of the comments of the LVV Parliamentary Group was sent to the President and the President of the Assembly with a request that the copy of the comments be disseminated to the deputies of the Republic of Kosovo.

11. On 4 September 2019, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. On 11 June 2017, the early parliamentary elections were held.

13. On 8 July 2017, the CEC certified the results of the elections for the Assembly. On 7 September 2017, the Assembly was constituted upon the election of the President and Vice-Presidents.

14. On the same date, the President mandated Ramush Haradinaj, as a candidate proposed by the PDK, AAK and Nisma, for the establishment of the Government.

15. On 9 September 2017, the Assembly, with sixty-two (62) votes *"for"*, voted for the Government of the Republic of Kosovo with Prime Minister Ramush Haradinaj.

16. On 19 July 2019, the Applicant, in a capacity of the Prime Minister of the Republic of Kosovo, at the 111th meeting of the Government of the Republic of Kosovo, declared the irrevocable resignation from the position of the Prime Minister.

17. On 22 July 2019, the Applicant formally addressed the President and the President of the Assembly with the notice of resignation from the position of Prime Minister. In paragraph 3 of that letter, the Applicant stated that *"until the election of the new Government, I will perform my constitutional duty as outgoing Prime Minister and Government"*.

Applicant's allegations

As to the admissibility of the Referral

18. The Applicant alleges that Article 93 (10) [Competencies of the Government] of the Constitution expressly gives to the Government the competence to refer questions to the Constitutional Court. The Applicant alleges that: *"[…] This competence under this constitutional*

provision is a broad competence and is not subject to any restrictions, including but not limited to the specific cases listed in Article 113 of the Constitution."

19. The Applicant refers to the Judgment of this Court in case no. KO98/11, in respect of the Referral pursuant to Article 93 (10), the Court found, *inter alia*: "*If the questions are constitutional questions then the Government will be an authorised party and the Referral will be admissible*".

20. In this regard, the Applicant adds: "*From the constitutional authorization of the Government also derives the right of the Prime Minister to refer constitutional issues which otherwise cannot be referred under Article 113, paragraphs 2 and 3 [Jurisdiction and Authorized Parties] of the Constitution. This is due to the fact that there are legal acts and circumstances that are considered "constitutional issues" but which cannot formally be brought before the Constitutional Court because they do not have the form of a law, decree, regulation or statute of a municipality (in accordance with Article 113, paragraph 2 of the Constitution). Such is the case with the "Resignation of the Prime Minister", an act which is not a law or decree but is an action that has caused a legal-political effect to the extent that there is a social need for interpretation of the Constitution*".

21. The Applicant alleges that the resignation of the Prime Minister, after the speech and notification sent to the President and the President of the Assembly, may be considered to fall within the material jurisdiction (*ratione materiae*) of the Court, as the issues raised fall within the circle of the constitutional issues as reflected in cases no. KO80/10 and KO103/14 of this Court. The Applicant adds: "*It is quite clear that the characteristic of the criterion of "constitutional issue", as defined in the above-mentioned cases, is that the issue falls within the scope of the Constitution of the Republic of Kosovo in the sense of letter and spirit*".

22. With regard to the Court's newest case law, more specifically case no. KO79/18, the Applicant alleges, *inter alia*: "*In resolution No. KO79/18, the Constitutional Court mentions the phrase "in its present composition" implying that there is current internal consensus to address only issues arising from Article 113 which reveals the Court's discretion to define "constitutional questions" itself. Also in the same decision is presented a historical overview of the acceptance of "constitutional issues".*

23. Finally, the Applicant claims that the present Referral falls within the range of constitutional issues affecting the separation of powers, the maintenance of constitutional order and state-building. The Applicant alleges that: *"[...] The Court has previously dealt with them and given that the Court has stated that it has discretion in defining narrowly or broadly the "constitutional questions", this discretion should in this case be used in the broad definition of admissibility. This is because the state-building must be understood in perpetuum and "the social needs for the Court to be included in interpretations of specific articles of the Constitution" should not reflect the timing of the action, the actual composition nor the evolution of the discretion of the Constitutional Court".*

Regarding the merits of the Referral

24. The Applicant alleges that the Constitution does not specify the competencies of the outgoing Government and in the absence of a Law on the Government, such situations remain legally unregulated. The Applicant with regard to Article 95 (5) [Election of the Government] of the Constitution adds: "*The Constitution does not determine whether, in the case referred to above, the Government is considered to be outgoing, as is the case when a motion of no confidence is voted for the Government as a whole, as defined by Article 100, paragraph 6 of the Constitution*".

25. In this regard, the Applicant asserts that in the period prior to the entry into force of the Constitution, the Constitutional Framework for Provisional Self-Government in Kosovo provided for the resignation of the Government, which set out in section 3, item 9.3.13.: "*Upon the resignation of the Prime Minister, the entire Government shall resign. The Government shall continue in a caretaker capacity until the election of a new Prime Minister*".

26. The Applicant alleges that within the meaning of Article 95 (5) of the Constitution, the dismissal of the Government implies the successful passing of the motion of no confidence to the Government by the Assembly. The Applicant alleges: "*Concerning the meaning of Article 95, paragraph 5 of the Constitution, Commentary on the Constitution of the Republic of Kosovo, by Prof. Dr. Enver Hasani/Prof. Dr. Ivan Čukalović states that "Within the meaning of Article 95.5, the Government is run by the Prime Minister, and the dismissal, resignation, or remaining the Prime Minister's seat vacant shall, ipso jure, result in the Government being considered dismissed".*

27. As to Article 100 (6) [Motion of No Confidence] of the Constitution, the Applicant alleges: "*If we take into account the current practice of implementing the Constitution in situations set out in Article 100 (when a successful motion of no confidence has passed) or in cases under Article 82, paragraph 1, sub-paragraph 2, (where the Assembly itself has decided on dissolution), that is, in both of these situations, the Government (Thaqi I Government, Thaqi II Government, Mustafa Government), during the period of successful passing of the motion of no confidence, namely the dissolution of the Assembly, until the election of the new Government, continued to exercise function, organize and hold regular meetings of the Government, being limited by not fully exercising constitutional powers, such as for example, has not approved the draft law*".

28. The Applicant also refers to the constitutional and legal provisions of the countries in the region, such as the Republic of Albania, the Republic of Croatia and the Republic of Northern Macedonia, on matters governing the competencies of the outgoing governments.

Comments submitted by the LVV Parliamentary Group

29. The LVV Parliamentary Group, in their comments on the Referral, state that the Applicant cannot submit a constitutional question if the matter is not established in Article 113 of the Constitution. According to the LVV parliamentary group, from the content of the referral it can be concluded that it does not fall "*prima facie"* under the jurisdiction provided by Article 113 of the Constitution.

30. Referring to the most recent case law of the Court, namely Resolution on Inadmissibility of the Constitutional Court in case KO79/18, *the President of the Republic of Kosovo*, of 21 November 2018, in matters of jurisdiction established by Article 1113 of the Constitution, the Parliamentary Group of the LVV stated that the Applicant cannot use Article 93 (10) of the Constitution to refer cases to the Court if the matter does not fall within the scope of Article 113 of the Constitution. They added that even the President could not use this kind of referral of the constitutional questions based on Article 84 (9) of the Constitution.

31. Also, referring to the most recent case law of the Court, more specifically Resolution on Inadmissibility in case KO131/18, *the President of the Republic of Kosovo* of 6 March 2019, on the issue of jurisdiction established in Article 113 of the Constitution, the Parliamentary Group of the LVV, added: *"[...] under the Constitution and the case law of this Court, the President's authority to refer*

constitutional questions must be understood in relation to the provisions of the Constitution which relate to the jurisdiction of the Court set forth in Article 113 of the Constitution and that the constitutional provision established in paragraph 9 of Article 84 of the Constitution which states that the President may "refer constitutional questions" - is related to Article 113 of the Constitution".

32. Finally, the LVV Parliamentary Group, considers: *"[...] Since no legal action or inaction (constitutional issue) of the Applicant (the outgoing Prime Minister) falls under Article 113 of the Constitution, specifically the jurisdiction of the Constitutional Court, the [LVV] Parliamentary Group considers that the Applicant's Referral has no constitutional and legal support [...] The Constitutional Court must render a Resolution on Inadmissibility by which it will decide to declare such meaningless and out of any legal logic referrals inadmissible*".

Admissibility of the Referral

33. The Court first examines whether the Referral meets the admissibility requirements as established in the Constitution and further specified in the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, No. 01/2018 (hereinafter: the Rules of Procedure).

34. Article 113, paragraph 1, of the Constitution provides that: *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".*

35. The Court notes that the Government is an authorized party under Article 113 [Jurisdiction and Authorized Parties], paragraphs 2 and 3, of the Constitution.

36. In accordance with Article 113, paragraph 2, of the Constitution, "*The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:*

> *(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;*
>
> *(2) the compatibility with the Constitution of municipal statutes*.

37. Further, Article 113, paragraph 3, of the Constitution provides that: *[…],the Government […][is] authorized to refer the following matters:*

> *(1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;*
> *(2) compatibility with the Constitution of a proposed referendum;*
> *(3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;*
> *(4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;*
>
> *(5) questions whether violations of the Constitution occurred during the election of the Assembly.*

38. In this regard, Article 113, paragraphs 2 and 3 of the Constitution, expressly provide for cases that the Government may refer to the Constitutional Court.

39. As to the present case, the Court recalls that the Applicant in the present Referral requests *"Interpretation of the act of resignation of the Prime Minister of the Republic of Kosovo and definition of the competencies and functioning of the Government after the resignation of the Prime Minister".*

40. The Applicant, more specifically before the Court, addresses the following question:

> *"after the resignation of the Prime Minister, can it be considered that the situation created after this act, as established in Article 95, paragraph 5, is analogous to the situation where the Government is considered resigned within the meaning of Article 100, paragraph 6 of the Constitution and the dissolution of the Assembly, within the meaning of Article 82, paragraph 1, sub-paragraph 2 , accordingly what are the competencies and functioning of the Government after the resignation of the Prime Minister?"*

41. The Court recalls that the Applicant, regarding the admissibility of the Referral, states that: "*Article 93, paragraph 10, of the Constitution […] expressly gives the Government the competence to refer cases to*

the Constitutional Court. This competence under this constitutional provision is a broad competence and is not subject to any restrictions, including but not limited to the specific cases listed in Article 113 of the Constitution".

42. In support of his arguments, the Applicant further adds that "*pursuant to the decision of the Constitutional Court in case KO98/11, where it considered the admissibility of the Referral submitted by the Government of Kosovo pursuant to Article 93, paragraph 10 of the Constitution, decided that "If the questions are constitutional questions then the Government will be an authorised party and the Referral will be admissible" under Article 93, paragraph 10 of the Constitution".*

43. Therefore, the Applicant alleges that the Referral should be declared admissible as *"the resignation of the Prime Minister"* falls into the *"constitutional issues" and clarification of this issue has an impact on "separation of powers and the maintenance of constitutional order".*

44. In this respect, as it is rightly specified in the content of the Applicant's Referral, the Constitutional Court, under Article 113, paragraph 1 of the Constitution, has jurisdiction to decide only on cases brought before it in a legal manner by authorized parties.

45. In this regard, the Court is the final authority for the interpretation of the Constitution, in accordance with Article 112, paragraph 1 of the Constitution, in relation to the cases before it as established in Article 113. In this respect, the Court has made it clear that it does not deal with interpretations of issues relating to legal actions or inactions of the constitutional institutions for which it is not authorized under Article 113 of the Constitution (see the case of the Constitutional Court, KO79/18, *the President of the Republic of Kosovo,* Resolution on Inadmissibility of 21 November 2018).

46. With regard to the meaning and limits of Article 93, paragraph (10) of the Constitution, which states that the Government may refer constitutional questions to the Constitutional Court, which the Applicant refers to, the Court notes that the referrals submitted on this basis may be admissible only within the jurisdiction of the Court, expressly and clearly set out in Article 113, paragraph 2 and 3.

47. The Court, as the Applicant pointed out in the Referral, in its previous case law, applying the meaning of the notion of "*constitutional questions*", considered referrals which are not expressly included within the limits of its jurisdiction as established in Article 113,

paragraphs 2 and 3 of the Constitution. In this connection, the Court was served with a Referral by the Government concerning the immunity of the deputies of the Assembly of the Republic of Kosovo, which the Court considered to constitute "*constitutional questions*" (see the case of the Constitutional Court KO98/11, *the Government of the Republic of Kosovo*; Judgment of 20 September 2011). The Court was also requested by the President of the Republic to interpret the meaning of the specific provisions of the Constitution (see, for example, Case No. KO80/10, *the President of the Republic of Kosovo*; Judgment of 7 October 2010; Case No. KO97/10, *Acting President of the Republic of Kosovo;* Judgment of 28 December 2010; Case No. KO57/12, *the President of the Republic of Kosovo*, Judgment of 22 October 2012; Case No. KO103/14, *the President of the Republic of Kosovo*, Judgment of 1 July 2014)·

48. On the basis of this position, the Court declared inadmissible the Referrals submitted by the President of the Republic of Kosovo pursuant to Article 84, paragraph 9 of the Constitution, finding that they did not fall under Article 113, paragraphs 2 and 3 of the Constitution, and consequently could not be reviewed by the Court (see cases of the Constitutional Court, KO79/18, *the President of the Republic of Kosovo*, Resolution on Inadmissibility of 21 November 2018; KO131/18, *the President of the Republic of Kosovo*, Resolution on Inadmissibility of 6 March 2019; and, KO181/18, *the President of the Republic of Kosovo*, Resolution on Inadmissibility of 13 June 2019).

49. In addition, the Court notes that the case law of the Court established in the case of the Court KO79/18, cited above, was also known to the Applicant. In this regard, the Court notes that in his response regarding the Referral of the President of the Republic of Kosovo, in the case KO181/18, mentioned above, the Prime Minister stated that *"this time also as in case KO79/18 [the President] based referral on Article 84, paragraph 9, and Article 112, paragraph 1, of the Constitution. For this particular case, always according to the clarification of the Constitutional Court, it is explicitly stated that it does not deal with interpretations of matters relating to legal actions or inactions of the constitutional institutions for which it is not authorized under Article 113 of the Constitution.*
[...]
Therefore, taking into account the basis on which the Referral was filed, without denying the President's right to bring the case before the Court, it is apparent that the Referral does not meet the admissibility requirements due to the lack of the Court's basic

jurisdiction in relation to the authorizations of the President as an authorized party deriving precisely from Article 113 of the Constitution (see the case of the Constitutional Court, KO181/18, cited above, paragraph 33 and 34).

50. Therefore, the Court reiterates that the content of the provision of Article 113 of the Constitution, taken in its entirety, is clear and concrete as to the competencies of the Government deriving from the context of an authorized party before the Constitutional Court. Consequently, despite the need that may appear in practice for interpretation regarding other matters relevant to the competences of the Government, it follows that Article 113 of the Constitution represents the basic and sole jurisdictional foundation of the Constitutional Court with respect to the authorizations of the Government as an authorized party. before the Constitutional Court (see, *mutatis mutandis*, the case of the Constitutional Court, KO79/18, cited above, paragraph 78).

51. Therefore, in the present case, the Court recalls once again that the Applicant requests *"Interpretation of the act of resignation of the Prime Minister of the Republic of Kosovo and definition of the competencies and functioning of the Government after the resignation of the Prime Minister".*

52. The Court finds that the Referral does not fall within the purview and is not reasoned within the meaning of Article 113, and this is also confirmed by the Applicant, because pursuant to Article 113, paragraph 2, the Government may refer the question of the compatibility with the Constitution of the laws, decrees of the President and the Prime Minister, and of the regulations of the Government as set forth in 113.2 (1), and of the municipal statute, as established in 113.2 (2) of the Constitution.

53. Whereas, based on Article 113, paragraph 3, the Government is authorized to refer matters relating to situations of conflict among constitutional competences of the Assembly, the President and the Government; compatibility of the referendum with the Constitution; the compatibility of the declaration of the state of emergency and the actions taken during this state with the Constitution; the compatibility of the proposed constitutional amendments with international agreements and the constitutional review of the procedure followed; as well as the constitutionality of the election process of the Assembly.

54. The Court notes that the question of the legal status of the Government, following the resignation of the Prime-minister, can be

brought before the Court only if it is referred under Article 113, paragraph 2, where the authorized parties may challenge before the Court the questions relating to the compatibility with the Constitution of the decrees of the Prime Minister, as well as of the regulations of the Government, or based on Article 113, paragraph 3, as questions related to situations of conflict among constitutional competences of the Assembly, the President and the Government.

55. Therefore, based on the foregoing, the Court concludes that the issues raised by the Applicant before the Court do not fall within the scope of the jurisdiction of the Constitutional Court, as set out in Article 113 of the Constitution, and therefore despite their importance and legitimate dilemmas that may arise, the Court cannot answer the questions raised until they have been submitted to the Court under the procedures provided for by the Constitution.

56. Therefore, in accordance with Article 113, paragraph 1, of the Constitution, the Court concludes that the Applicant's Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113, paragraph 1 of the Constitution, and Rule 59 (2) of the Rules of Procedure, on 4 September 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Arta Rama-Hajrizi

KI48/18, Request for constitutional review of Decision AA. No. 52/2017 of the Supreme Court of the Republic of Kosovo of 25 November 2017 and Judgment A.A. U.ZH. No. 62/2017 of the Supreme Court of the Republic of Kosovo of 7 December 2017

KI 109/17, Applicant Arban Abrashi and the Democratic League of Kosovo (LDK) Judgment of 23 January 2019

Keywords*: election dispute, local elections, mayor of municipality, freedom of election and participation, judicial protection of rights*

Referral KI48/18 was submitted by Mr. Arban Abrashi and the Democratic League of Kosovo. Mr. Arban Abrashi was a candidate for Mayor of the Municipality in the local elections of 2017 and before this Court he appeared in the capacity of an individual, namely the natural person; whereas, the Democratic League of Kosovo was a political entity through which. Mr. Arban Abrashi competed for Mayor of the Municipality of Prishtina and before this Court he appeared as a political entity, namely a legal person.

The Applicants, in essence, alleged that the Supreme Court, but also the ECAP, in the proceedings for the review of their complaints and appeals failed to provide judicial protection of their rights guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution and, accordingly, the decisions of these public authorities have resulted in violation of their rights of election and participation guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution.

The Constitutional Court declared the Referral admissible for review on merits after finding that the Applicants are authorized parties; they challenge decisions of public authorities; have exhausted legal remedies as elaborated in the Judgment; have specified the fundamental rights and freedoms which have allegedly been violated; have submitted the Referral within the deadline; the Referral is not manifestly ill-founded; and the Court found no other admissibility requirement which was not fulfilled. As a result, the Referral passed the admissibility test and was declared admissible for review on merits.

Before considering the merits of the case, the Court addressed the issue of its jurisdiction regarding the election disputes. In this regard, the Court clarified its constitutional competence as regards individual referrals related to election disputes, emphasizing that, in this respect, it is limited to paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, namely, in assessing whether an act of the public authority may have violated

the relevant fundamental individual rights and freedoms and after exhaustion of all legal remedies provided by law.

The Court then dealt with all the Applicants' allegations separately and in their entirety, applying on this assessment: (i) the constitutional guarantees related to the challenged rights, namely Articles 45 and 54 of the Constitution; (ii) the fundamental principles resulting from the European heritage of the democratic elections summarized by the Venice Commission; and (iii) the case law of the European Court of Human Rights (ECtHR).

Following the application of these guarantees, principles and tests established through the ECtHR case law, the Court unanimously found that the challenged decisions of the Supreme Court did not violate the Applicants' rights to judicial protection of rights guaranteed by Article 54 of the Constitution and the right to a legal remedy guaranteed by Article 32 of the Constitution with regard to the right to an effective remedy guaranteed by Article 13 of the European Convention on Human Rights (ECHR), because in the circumstances of the case, the Supreme Court, has correctly assessed the issues related to: (i) confirmation/cancellation of the election results; (ii) the declaration as out of time of the Applicants' allegations relating to irregularities on the voting day, which were filed for the first time with the ECAP after the announcement of the final results; and (iii) invalid and blank ballots, after the ECAP investigated the election material in the contested voting centers and found that the irregularities "*do not have influence on the final results*". In addition, the decisions of the Supreme Court were "*sufficiently reasoned"* in relation to the Applicants' allegations and in line with the standards established by the case law of the ECtHR and of the member states of the Venice Commission as to the reasoning of decisions in the election disputes. The findings of the Supreme Court, are in compliance with the constitutional guarantees, the relevant case law of the ECtHR and the basic principles of the Venice Commission relating to an "*effective complaint system*", as an integral part of "*procedural guarantees*", which is a fundamental condition to the implementation of the five fundamental principles that are related to the qualities of the vote.

The Court unanimously held that the challenged decisions of the Supreme Court have not violated the Applicants' rights of election and participation guaranteed by Article 45 of the Constitution in conjunction with the right to free elections, guaranteed by Article 3 to the ECHR because, in the circumstances of the present case, the latter have not been rendered contrary to (i) criteria for protection of fundamental principles on the quality of vote, as guaranteed by the Constitution, election laws and the Code of Good Practice of the Venice Commission; (ii) the requirement of the "*procedural guarantees*" for implementing the principle of the "*free vote*" and "*equal vote*"; (iii) the principle of transparency in the election disputes as

established by the ECtHR case law and the basic principles of the Venice Commission; and (iv) the ECtHR case law in the context of the "*post-election rights*".

The Court also rejected unanimously the Applicant's request for a hearing, because it did not consider that there is any ambiguity about "*evidence or law*". The Court found that the documents contained in the Referral are sufficient to establish the merits of this case.

Therefore, at the end, the Court unanimously held that: (i) Decision [AA. No. 52/2017] of 25 November 2017 of the Supreme Court was not rendered in violation of the fundamental rights and freedoms of the political entity LDK, and is in compliance with the fundamental rights and freedoms guaranteed by Articles 45 and 54 of the Constitution; and that (ii) Judgment [A.A.U.ZH. No. 62/2017] of 7 December 2017 of the Supreme Court was not rendered in violation of the fundamental rights and freedoms of Mr. Arban Abrashi and of political entity LDK, and is in compliance with their fundamental rights and freedoms guaranteed by Articles 45 and 54 of the Constitution.

JUDGMENT

in

Case No. KI48/18

Applicant

Arban Abrashi and the Democratic League of Kosovo

Constitutional review of Decision AA. No. 52/2017 of the Supreme Court of the Republic of Kosovo of 25 November 2017 and Judgment A.A. U.ZH. No. 62/2017 of the Supreme Court of the Republic of Kosovo of 7 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

Applicants

1. The Referral was submitted by Mr. Arban Abrashi, a candidate for Mayor of the Municipality of Prishtina in the local elections of 2017 (hereinafter: the First Applicant), as well as by the political entity the Democratic League of Kosovo (LDK) (hereinafter: the Second Applicant).

2. The first Applicant and the second Applicant (hereinafter when the Court refers to them jointly: the Applicants) are represented by Mr. Durim Berisha.

Challenged decision

3. The Applicants challenge Decision [AA. No. 52/2017] of 25 November 2017, and Judgment [A.A.U.ZH. No. 62/2017] of 7 December 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

4. By Decision [AA. No. 52/2017] of 25 November 2017 of the Supreme Court (hereinafter: First Decision of the Supreme Court) the appeal of the political entity Lëvizja VETËVENDOSJE! was approved as grounded and Decision [ZL. A. No. 1102/2017] of 22 November 2017 of the Election Complaints and Appeals Panel (hereinafter: the ECAP) was modified, in which the party to the proceedings was only the political entity LDK, namely the second Applicant; whereas, Judgment [A.A.U.ZH. No. 62/2017] of 7 December 2017 of the Supreme Court (hereinafter: Second Decision of the Supreme Court) rejected as ungrounded the appeal of both Applicants filed against Decision [ZL. Ano. 1125/2017] of 1 December 2017 of the ECAP.

Subject matter

5. The subject matter is the constitutional review of the aforementioned decisions, which, allegedly violate the Applicants' rights guaranteed by Article 45 [Freedom of Election and Participation] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

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

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

Proceedings before the Court

8. On 29 March 2018, the Applicants submitted the Referral to the Court.

9. On 30 March 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.

10. On 4 April 2018, the Court notified the representative of the Applicants about the registration of the Referral and requested him to clarify whether he represents the second Applicant too in the proceedings before the Court, as he submitted the power of attorney only for the first Applicant. In case of a positive reply, the Court invited him to submit a power of attorney indicating this. The Court also requested the representative of the Applicants to submit to the Court the copy of Decision [AA. No. 52/2017] of 25 November 2017 of the Supreme Court. For further clarifications and the requested additional documentation, the Court set to the Applicants a deadline of fourteen (14) days from the date of receipt of the notification letter.

11. On 10 April 2018, the Post of Kosovo returned the envelope to the Court and notified it that the submission of the notice of 4 April 2018 failed, as the address given by the Applicant in the referral form submitted to the Court was incomplete.

12. On 13 April 2018, the Applicants' representative contacted the Court by electronic mail and requested that all communications and documents regarding Referral KI48/18 be sent by electronic mail. Based on this request, on the same date, the Court sent a copy of the notification of 4 April 2018.

13. On 13 April 2018, the Applicants' representative submitted a copy of the requested Decision.

14. On 23 April 2018, the Applicants' representative submitted the power of attorney for representing the second Applicant in the proceedings before the Court.

15. On 27 April 2018, the Court sent a copy of the Referral to the Supreme Court and the ECAP. On the same date, the Court notified Mr. Shpend Ahmeti, the Mayor of the Municipality of Prishtina and the candidate of Lëvizje VETËVENDOSJE! for the Mayor of the Municipality of Prishtina, in the local elections of 2017, in a capacity of an interested party, about the registration of the Referral and invited him to submit

his comments, if any, within fourteen (14) days from the day of receipt of the notification.

16. On 11 May 2018, within the time limit set by the Court, Mr. Shpend Ahmeti submitted his comments to the Court.

17. On 14 May 2018, the Court notified the Applicants about the receipt of comments by Mr. Shpend Ahmeti and sent a copy of them.

18. On 31 May 2018, the Court received additional comments from the Applicants regarding the comments submitted by Mr. Shpend Ahmeti.

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

20. 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.

21. On 14 September 2018, the Court notified Mr. Shpend Ahmeti about the receipt of the additional comments from the Applicants and sent a copy of them.

22. On 14 September 2018, the Court notified Lëvizje VETËVENDOSJE!, in the capacity of the interested party, about the registration of the Referral and also sent a copy of the Referral together with a copy of the comments submitted by the Applicants and by Mr. Shpend Ahmeti. The Court invited it to submit its comments, if any, within fourteen (14) days from the day of receipt of the notification letter. Lëvizje VETËVENDOSJE! did not submit comments to the Court.

23. On 26 October 2018, as the mandate of the abovementioned four judges was terminated as a Judge of the Court, the President of the Court, based on the Law and the Rules of Procedure, appointed the new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

24. On 20 December 2018, Judge Bajram Ljatifi requested the President of the Court to be excluded from the review of the Referral No. KI48/18, because he was previously a part of the decision-making process for the same request regarding the proceedings conducted before the Central Election Commission (hereinafter: the CEC).

25. On 21 December 2018, the President, in accordance with Article 18.1 (1.3) of the Law and Rule (9) of the Rules of Procedure, rendered the decision by which the request for the recusal from the review and decision-making process regarding case KI48/18 was approved.

26. On 22 January 2019, the Applicants filed a request for holding a hearing.

27. On 23 January 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

28. On the same date, the Court voted unanimously that the Referral is admissible, and that the challenged decisions of the Supreme Court, namely Decision [AA. No. 52/2017] of 25 November 2017 and Judgment [A.A. UZH. No. 62/2017] of 7 December 2017 are compatible with Article 54 [Judicial Protection of Rights] and 32 [Right to Legal Remedies] of the Constitution in conjunction with Article 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: the ECHR) and Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 (Right to free elections) of Protocol No. 1 to the ECHR.

29. On the same date, the Court unanimously voted to reject the request of the Applicants for a hearing.

Summary of facts

30. On 22 October 2017, the first round of local elections in the Republic of Kosovo was held. The first Applicant, Mr. Arban Abrashi, was the LDK candidate for Mayor of the Municipality of Prishtina. The second Applicant, LDK, was a political entity competing in the Municipality of Prishtina through its candidate, Mr. Arban Abrashi.

31. The final results of the first round of the elections determined that the competition for the Mayor of the Municipality of Prishtina would be decided based on the result of the second round of elections (run-off), which would take place between the two candidates with the majority of votes in the first round, namely between the first Applicant, Mr. Arban Abrashi and Mr. Shpend Ahmeti, a candidate of VETËVENDOSJE! Movement for the Mayor of the Municipality of Prishtina.

32. On 19 November 2017, the second round of local elections was held, where the two aforementioned candidates competed for the Mayor of the Municipality of Prishtina. .

33. According to the preliminary results announced by the CEC, Mr. Shpend Ahmeti won 41,401 votes, whereas Mr. Arban Abrashi 41.164 votes. Preliminary results announced by the CEC, at this stage of the proceedings, did not include the conditional votes, by mail votes and the votes of persons with special needs. The difference in votes at this stage of the election procedure was a total of 237 more votes for Mr. Shpend Ahmeti.

Procedure after the announcement of the Preliminary Results of the second round (run-off) of the local elections of 2017 for the Mayor of the Municipality of Prishtina

34. On 20 November 2017, the second Applicant filed an appeal with the ECAP. By this appeal, the second Applicant requested the verification of all ballot papers which were classified as invalid ballots, according to the case file, 610, and as blank ballot papers, according to the case file, 473. The second Applicant, by this appeal, alleged that the commissioners of Lëvizje VETËVENDOSJE!, knowing the narrow result between the candidates, declared a considerable number of ballot papers as invalid or blank, and according to the claim, "*despite the fact that in those ballot papers it could be clearly noted the expressed will of the voter*".

35. On 21 November 2017, the ECAP found that the aforementioned appeal of the second Applicant was a general appeal and as such could not be proceeded further for review. Consequently, the ECAP requested the second Applicant to complete the appeal so as to accurately specify the polling centers and the polling stations where allegedly the ballot papers were declared invalid and blank.

36. On the same date, on 21 November 2017, the second Applicant completed the appeal upon the ECAP request.

37. On 22 November 2017, the ECAP by Decision [ZL. A. No. 1102/2017] approved as grounded, the appeal of the second Applicant. Based on this appeal, the ECAP ordered the CEC to recount/reassess ballot papers (i) declared as invalid; (ii) the ballot papers used but unfilled by the voters, consequently blank; as well as (iii) to recount all regular ballot papers in the polling stations specified in the respective Decision. The ECAP requested the CEC that the assessment of the ballot papers declared as invalid as well as of those considered blank,

be made in accordance with the Training Manual on voting procedures and counting in polling station, as well as in the presence of the accredited observers, including those of LDK and of Lëvizje VETËVENDOSJE!. Finally, the ECAP ordered that the result deriving from the recounting and reassessment is included in the final result to be announced by the CEC. This Decision, the ECAP reasoned by being based on the "*the large number of invalid and blank ballots*" and "*narrow result between the two candidates*".

38. Within 24-hour deadline, Lëvizje VETËVENDOSJE! filed an appeal with the Supreme Court and requested that the above-mentioned ECAP Decision be annulled and that the ECAP and the CEC be ordered to continue counting the conditional and by mail votes for the candidates for the Mayor of the Municipality of Prishtina. Within the same deadline, the ECAP filed a response to the appeal of Lëvizje VETËVENDOSJE! and requested that the appeal of the latter be rejected as ungrounded and the challenged decision of the ECAP be upheld by the Supreme Court.

39. On 25 November 2017, the Supreme Court rendered its first Decision [AA. No. 52/2017] which approved as grounded the appeal of Lëvizje VETËVENDOSJE!, and modified Decision [ZL. A. No. 1102/2017] of 22 November 2017 of the ECAP, so that the Appeal of the second Applicant was rejected as ungrounded. The Supreme Court reasoned that the challenged decision of the ECAP was not based on convincing evidence and that the appealing allegations of the second Applicant were not proven. In addition, the Supreme Court considered that the ECAP did not base its assessment on the Law No. 03/L-073 on General Elections (hereinafter: the LGE) together with the Law No. 03/L-256 on Amending and Supplementing the LGE (hereinafter: Law on Amending and Supplementing the LGE), as no legal provision foresees that due to "*narrow result between the candidates*" and due to "*non-compliance of invalid or unfilled ballot papers*" the recounting should take place. According to the reasoning of the Supreme Court, it is the right of each voter to participate in the elections and to vote and that the used and unfilled ballot papers in its nature cannot be taken as a basis to go in recounting. In addition, the Supreme Court reiterates that in the Municipality of Prishtina, by local and international monitors no violation was reported and no objection in the voting book was reported, and accordingly in these elections it was assessed that there were no irregularities that *"would violate the election process"*.

40. On 29 November 2017, the CEC, after the end of the procedures for challenging the preliminary results before the ECAP and the Supreme

Court, announced the final results of the elections of the second round for the Mayor of the Municipality of Prishtina. According to those results, the first Applicant, Mr. Arban Abrashi, received in total 41,897 votes, namely 49.78% of votes, whereas, Mr. Shpend Ahmeti received in total 42,262 votes, namely 50.22% of votes. The difference in votes in this final phase of the election procedure when the CEC counted all votes, including conditional votes, by mail votes and votes of persons with special needs, was a total of 365 more votes in favor of Mr. Shpend Ahmeti. Based on these results, Mr. Shpend Ahmeti was declared the winner of the competition for the Mayor of the Municipality of Prishtina.

Procedure after the announcement of the Final Results of the second round of local elections of 2017 for the Mayor of the Municipality of Prishtina

41. On 30 November 2017, one day after the final results were announced by the CEC, the Applicants filed an appeal with the ECAP against the CEC decision of 29 November 2017, challenging the final result of the election for the Mayor of the Municipality of Prishtina. The Applicants claimed (i) a violation of the LGE and election rules, and (ii) violation of Article 45 [Freedom of Election and Participation] of the Constitution. According to the Applicants, their rights were violated as Lëvizje VETËVENDOSJE! using different ways had influenced the free will of citizens, among other things, including (i) the use of road/taxi transport services; (ii) telephone calls; and (iii) sending sms. The Applicants also alleged irregularities regarding invalid ballots, blank ballots and the absence of ballots on some conditional ballots and as a result could have been used for the implementation of the so-called practice of the "*Bulgarian train*".

42. Through this appeal, the Applicants requested the ECAP to order (i) a full recount of votes in the Municipality of Prishtina; (ii) the evaluation of the ballots declared invalid, blank and spoiled; and (iii) checking the envelopes of conditional ballot papers that have not been confirmed, and according to the allegation, consequently have not been opened at all. Further on, the Applicants requested the ECAP that, in case that even after the recount the alleged violations cannot be avoided, the new voting for the Mayor of the Municipality of Prishtina be ordered.

43. On 1 December 2017, the ECAP by Decision [ZL. Ano. 1125/2017] responded to the Applicants' complaint. The ECAP divided the assessment of the complaint into two separate items, which pronounced in two items of its enacting clause. In item I of the enacting clause, the ECAP rejected as inadmissible the Applicants' appeal for the part related to the alleged irregularities on the voting

day for the second round of the local elections, namely on 19 November 2017. For the phase after the announcement of the final results, the ECAP considered these allegations as inadmissible. In item II of the enacting clause, the ECAP rejected as ungrounded the Applicants' appeal, for the part relating to the final results announced by the CEC on 29 November 2017. The ECAP reasoned the division of its Decision in two aspects of the assessment of admissibility pointing out that the LGE and the Elecion Rules stipulate that each stage of the electoral process has certain legal deadlines for filing complaints and appeals with the ECAP related to the specific stage of the electoral process being conducted. In this regard, the ECAP emphasized that in the present case, the electoral process is in the phase "*after announcement of the final results"* by the CEC, and therefore only appeals on CEC decisions related to the same phase are admissible.

44. Accordingly, and in particular as regards item I of the enacting clause, the ECAP reasoned that the appeals of the Applicants related to the election day, namely the alleged irregularities of 19 November 2017, which according to the Applicants relate to (i) the use of road/taxi transport services; (ii) telephone calls; and (ii) sending sms, are out of time and inadmissible at this phase of the electoral process. This is because, according to the ECAP reasoning, based on Article 13 of the Law on Amending and Supplementing the LGE in relation to paragraph 1 of Article 119 of the LGE, the deadline for filing a complaint regarding the allegations of those irregularities was 24 hours from the closure of the voting centers, namely until 20 November 2017, at 19:00 hrs. In addition, the ECAP clarified that the allegations related to the irregularities on the voting day were already decided by the Supreme Court by the Decision [AA. No. 52/2017] of 25 November 2017.

45. With regard to item II of the enacting clause, the ECAP considered that the Applicants' appeal was ungrounded, as they failed to substantiate their allegations indicated in the appeal regarding the discrepancies of the final results.

46. The ECAP emphasized that the Applicants, as evidence, attached a list of 31 polling stations where in each of them, according to the Applicants, were declared 5 to 9 invalid ballots. According to the decision, for the purpose of investigating and verifying the Applicants' allegations in respect of the discrepancies of the final results, namely, irregularities regarding the invalid ballot papers, blank ballot papers, and the absence of envelopes containing the conditional votes, and which could have resulted in the irregularities of the chain character known as the "*Bulgarian train*", the ECAP, based on Rule 14 of

Regulation No. 02/2015 on ECAP Rules and Procedures (hereinafter: Rule No. 02/2015), engaged investigative teams consisting of 8 judges and 10 officials of secretariat. This investigating team, according to the ECAP reasoning, examined and reevaluated invalid votes in all 31 polling stations specified by the Applicants and found that 4 out of 183 invalid ballots were actually valid. As a result, the ECAP reasoned that in addition to the changes in 4 votes which were declared as valid by the investigative team and which were included in the final election results, the ECAP teams did not find any other irregularities in the 31 polling stations that were the subject of the investigation, according to the Applicants' request. The ECAP further noted that, in addition to the reassessment of invalid ballots, the ECAC investigative teams have also counted the regular ballots, a recount that has resulted to be compatible with the final results announced by the CEC.

47. The ECAP also referred to the response to CEC to the appeal of the Applicants through which the CEC emphasized that there is no legal basis for the Applicants' allegations that the invalid and blank ballot papers may be considered as an evidence for recount. According to the CEC, this is because the members of the Polling Station Council sign the Final Result Forms (FRF) and the Candidate Result Forms (CRF) after the end of voting and counting, and this means that at the moment of signing the above mentioned forms, the Polling Station Council agrees to conclude the process.

48. On 5 December 2017, the Applicants filed an appeal with the Supreme Court against the Decision [ZL. Ano. 1125/2017] of 1 December 2017 of the ECAP. In their appeal, the Applicants' raised three categories of issues, namely the appealing allegations against the ECAP Decision. The first category of the allegations of the Applicants concerned the fact that, according to them, the ECAP had not assessed at all their claim as to the allegedly unlawful influence on the will of the voters exercised by Lëvizja VETËVENDOSJE! through, among other things, the transport of voters, telephone calls and sending sms. The Applicants challenge the fact that the ECAP declared this appeal as inadmissible based on the LGE provisions, reasoning that appeals relating to the voting day should be filed within 24 hours, but the Applicants claim that the event was made known one hour after the deadline within which they could file appeal regarding the issues pertaining to the voting day. The second category of the allegations of the Applicants concerned invalid ballot papers, on which, according to them, the ECAP had not decided at all. According to the Applicants, considering that the ECAP investigation resulted in the valid announcement of a number (4) of ballot papers which had been declared invalid previously, it was important for the process and the

accuracy of the final results that all ballots be reevaluated. The third category of the Applicants' allegations concerned the opening of the envelopes of conditional votes, on which, according to the claim, the ECAP had not decided that they should be opened and checked - despite the fact that, according to them, their request for an explanation of the absence of ballot papers was completely lawful and reasonable considering the danger posed by the practice known as the "*Bulgarian train*". The Applicants also alleged violations of their rights guaranteed by Article 45 of the Constitution, namely the right to be elected and to elect.

49. The Applicants requested the Supreme Court (i) to approve their appeal as grounded and to modify the challenged ECAP decision, so that their request for recount of all ballot papers and reevaluation of invalid ballot papers be approved, and (ii) to declare unlawful the transportation of citizens which, according to the Applicants, had general impact on the irregularity of the electoral process and on the final results for the Mayor of the Municipality of Prishtina.

50. On 7 December 2017, the Supreme Court issued its second Decision [A.A. U.ZH. No. 62/2017], which rejected as ungrounded the Applicant's appeal and upheld Decision [A. ZL. No. 1125/2017] of 1 December 2017 of the ECAP. In this respect, as regards item I of the enacting clause of the challenged ECAP Decision, the Supreme Court considered that the ECAP had correctly ruled when dismissing the Applicants' appeal as inadmissible. This is because, according to the Supreme Court, the deadline for complaining against irregularities related to the voting day had expired. As a consequence, the Supreme Court concluded that the ECAP had correctly decided when it rejected as inadmissible the Applicants' appeal, as based on Article 13 of the Law on Amending and Supplementing the LGE in conjunction with Article 119 of the LGE, the deadline for the appeal is 24 hours from the closure of the voting centers, and, therefore, the deadline for the appeal was 20 November 2017, at 19:00 hrs, whereas these allegations were filed after 10 days, namely on 30 November 2017. The Supreme Court in its reasoning emphasized that in this phase of the election process an appeal may be filed only with regard to CEC decisions, after the announcement of the final results.

51. In addition, as regards item II of the enacting clause of the challenged ECAP Decision, the Supreme Court held that the Applicants' allegations as to the final results are in contradiction with the factual situation determined by the ECAP. According to the Supreme Court, based on Article 14 of Rule No. 02/2015, the investigative team of ECAP had found that out of 31 ballot boxes in which only 183 ballots

were declared invalid, only 4 are valid, while others are invalid as initially announced by the polling station councils. The Supreme Court further noted that in addition to the 4 invalid votes, the ECAP investigating teams did not find any other irregularities in 31 polling stations that were the subject of the investigation. In addition, the Supreme Court stated that the ECAP had recounted all the regular ballot papers and verified the stamps on each ballot, concluding that the final result was in line with that announced by the CEC. According to the assessment of the Supreme Court, the challenged decision of the ECAP was clear and comprehensible and as such contained sufficient reasons for decisive facts and that the substantive law was correctly applied.

52. On 11 December 2017, the CEC certified the final results of the local elections for Mayor of the Municipality of Prishtina. On that occasion, Mr. Shpend Ahmeti was officially declared the Mayor of the Municipality of Prishtina.

Applicants' allegations

53. The Applicants initially allege that the Court should assess the constitutionality of the entire electoral process, assessing both the facts and the procedure conducted and not limited to the assessment of fundamental rights and freedoms. In support of this argument, the Applicants refer to the Opinion of the Venice Commission (CDL-PI (2017) 007 and the Decision of the Constitutional Court of Austria (E 17/2016 -20) of 1 July 2016.

54. The Applicants allege that Decision [AA. No. 52/2017] of 25 November 2017, consequently, the first Decision of the Supreme Court and Judgment [A.A.U.ZH. No. 62/2017] of 7 December 2017 of the Supreme Court, therefore the second Decision of the Supreme Court, were rendered in violation of their rights guaranteed by Article 45 [Freedom of Election and Participation] and Article 54 [Judicial Protection of Rights] of the Constitution, and resulted in violation of the "*principle of the rule of law*" and "*the principle of constitutional democracy*" as fundamental principles of the Constitution.

55. More specifically, the Applicants allege that the Supreme Court, by its first and second Decision, violated their right to judicial protection of rights guaranteed by Article 54 of the Constitution, because by challenged decisions of the Supreme Court, was assessed only the legality of ECAP decisions without addressing their constitutionality and consequently, resulted in a violation of the rights of the Applicants guaranteed by Article 45 of the Constitution.

56. The Court will further summarize the Applicants' allegations in conjunction with Article 54 [Judicial Protection of Rights] and Article 45 [Freedom of Elections and Participation] of the Constitution.

Allegations of violation of Article 54 [Judicial Protection of Rights] of the Constitution

57. The Applicants allege that the regular courts serve as a pre-constitutional instance for the protection of human rights and freedoms and are obliged to guarantee the application of constitutional provisions when assessing the allegations. In this regard, the Applicants emphasize that the regular courts should take into account the principle "*in dubio pro libertate*", according to which the fundamental rights and freedoms should be widely interpreted and in favor of the individual, who at all stages of the proceedings is in an unequal position with regard to the state institutions. In support of these allegations, the Applicants refer to a number of decisions of the Constitutional Court of Germany (BVerfGE 9, 237 § 242, 247, BVerfGE 8, 2010 § 216, BVerfGE 3, § 225 240, BVerfGE 63, 230 342, BVerfGE 6, 32 § 42) and the case of the European Court of Human Rights (hereinafter: the ECtHR) *Golder v. Great Britain*).

58. The Applicants specifically state that the Supreme Court, by two of its decisions, violated their fundamental rights and freedoms guaranteed by Articles 45 and 54 of the Constitution, because according to them, the latter: (i) assess only the legality and not the constitutionality of the respective allegations; and (ii) they are arbitrary.

59. As to the first category of allegations, the Applicants allege that the Supreme Court did not fulfill the constitutional obligation to assess allegations relating to the election rights, as an integral part of the fundamental rights and freedoms guaranteed by the Constitution, and are limited only to assessing the legality of the ECAP decisions (both ECAP Decisions). According to the allegation, limiting only to the assessment of legality, the Supreme Court, by its decisions, also violated the "*principle of constitutional supremacy*".

60. However, as regards the second category of allegations, namely the arbitrariness of the challenged decisions, the Applicants build their allegations mainly based on the erroneous and arbitrary interpretation of the applicable law.

61. In this regard, the Applicants allege that (i) the reasoning of the Supreme Court in its first Decision [AA. No. 52/2017] that "*the law*

does not foresee the narrow result between the candidates as a condition for recount", is unconstitutional because according to them *"no country counts conditions or cases when recount is ordered - because it is right in itself - for confirmation of the electoral process";* (ii) that the second Decision of the Supreme Court [AA U.ZH. No. 62/2017] has no legal basis. In this regard, the Applicants allege that the reasoning of the Supreme Court, which in the appeals procedure was limited only to the assessment of *"irregularities related to the data administration",* is not based on the applicable law. In support of this allegation, the Applicants reason that the appealing allegations about the latter, namely *"the irregularities in the administration of the data in the CRC* [Count and Results Center]*"* are based only on the special procedure provided for in Article 105 of the LGE, whereas the Applicants have filed complaints pursuant to Article 119 of the LGE. In addition, the Applicants allege that Articles 118.4 and 119.1 of the LGE and respective amendments-supplementations, recognize the right to supplement the appeal submitted to ECAP with new evidence and facts. In this regard, the Applicants also refer to the Opinion [CDL-PI (2017) 007] of the Venice Commission, arguing that the admissibility criteria in such cases should be clearly specified in the law, in order to prevent the declaration of appeal as inadmissible; and finally under (iii) the findings of the Supreme Court are arbitrary because they hold that *"during the counting in some of the polling stations, the irregularities were noted, but were minimal and balanced, because both candidates were affected".* In this regard, the Applicants allege that "*violation of constitutional rights exists or does not exist – it cannot be said to have been violated a little or a lot".*

Allegations of violation of Article 45 [Freedom of Election and Participation] of the Constitution

62. The Applicants allege that by failing to provide judicial protection of fundamental rights of the Applicants, consequently, acting in violation of Article 54 of the Constitution, the decisions of the Supreme Court have also resulted in a violation of Article 45 of the Constitution. In this regard, the Applicants allege that three electoral principles embodied in Article 45 of the Constitution were violated, which, according to the Applicants, are also foreseen in paragraph 2 of Article 123 [General Principles] of the Constitution, and include the following: (i) the principle of the free vote/freedom of vote; (ii) the principle of equal vote and (iii) the principle of publicity (transparency). All of these principles, according to the Applicants, have been violated in their case by the Supreme Court, ECAP and CEC. More specifically:

Regarding the principle of free vote/freedom of vote

63. The Applicants allege that the principle of free vote must guarantee that (i) "*the election results should reflect the true will of the voters";* (ii) *"the voter must be free of any state or non-state influence";* (iii) *"the freedom of the voter to decide for whom he/she wants to vote for, should not be violated before he votes"*. In constructing the context of the *"principle of free vote*", the Applicants refer to the Decision of the Constitutional Court of Austria VfSlg 2.037/ 950; and Decisions of the of the Federal Constitutional Court of Germany, BVerfGE 66, 369 e BVerfGE 9, 335.

64. The Applicants allege that during the proceedings before the regular courts they provided evidence on "*impact on Prishtina citizens by sending sms on behalf of NGOs, delivery of tickets for free transport and influence through activists*", which, according to the allegation, result in violation of the "*principle of free vote/ freedom of vote"*. According to the Applicants, the Supreme Court in its Second Decision [AA U.ZH. No. 62/2017] considered these allegations as new, avoiding reasoning about them and not as evidence that they had to administer. The Applicants claim that despite the fact that the ECAP considered their evidence as sufficient evidence to suspect on the regularity of the electoral process, the Supreme Court did not in any decision-making procedure deal with the assessment of these allegations. The Applicants again emphasize that by not addressing these allegations, they were denied the right to judicial protection of rights.

Regarding the principle of equal vote

65. The Applicants allege that the principle of equal vote must guarantee (i) strict and formal equality; (ii) equality of opportunities; (iii) "*not just equality of the weight of the vote, but also the equality of weight of the success of the vote*"; and (iii) not only "*the right to benefit the mandate, but also the right to protect the mandate from violations during the electoral process*". In constructing the context of the "*principle of equal vote*", the Applicants refer to the Decision of the Constitutional Court of Austria VfSlg 8.644/1979; Decisions of the Federal Constitutional Court of Germany, BVerfGE120, 82, BVerfGE 121, 266, BVerfGE 63, 230, BVerfGE 95, 408 and BVerfGE 151, 179, as well as Judgment of this Court in case KI34/17, paragraph 91.

66. The Applicants allege that the Supreme Court, ECAP and CEC have failed to guarantee an electoral process where "*the weight of the vote*" is equal. The Applicants reiterate that despite the fact that the Supreme Court in its second Decision [AA U.ZH. No. 62/2017] finds

that "*the election process was damaged*" it did not consider it necessary to recount the boxes from all polling stations, which according to them, would be able to verify the result and possible omissions. According to the Applicants, their request for recount of ballot boxes at all polling stations was rejected in an unconstitutional way.

Regarding the principle of publicity (transparency)

67. The Applicants allege that this principle, despite the fact that it is not a constitutional written principle, is the result of the interaction of constitutional articles and, according to the Applicants, *inter alia*, means that (a) "*the voter has to comply with the effectiveness of the act of voting. He must be convinced that the 'weight of his vote at all stages from casting the vote in the ballot box, administering the election material up to the publication of the results, has been consistent with the rules and election principles";* and that (b) *"the participants in the electoral process, candidates or voters will have the opportunity, in case of doubts about the truthfulness of published results, to exercise legal remedies through which those doubts are clarified.*" In support of these allegations, the Applicants refer to the decisions of the Federal Constitutional Court of Germany BVerfGE 123, 39 and BVerfGE 121, 266.

68. In addition, the Applicants refer to the Opinion (CLD-AD (2002) 23 rev), of the Venice Commission, emphasizing the obligation of the state to guarantee transparency of processes, including the right to recount votes in case of the appeal. According to the Applicants, the right to recount is, *inter alia*, stipulated by Articles 101 and 106 of the LGE, which have left the competence and the possibility to the CEC to order, *ex officio*, the recount or the repetition of vote before the publication of results.

69. In this regard, the Applicants allege that the reasoning of the Supreme Court, according to which "*the law nowhere foresees a recount in the event of a small difference between candidates*", violates the right to confirm and verify the election result. Moreover, according to the Applicants, this reasoning does not take into account and does not assess the rights of the Applicants guaranteed by Article 45 of the Constitution. The Applicants allege that "*in the event of a narrow election result*", the recount is a fundamental right which is initiated through the CEC or at the request of the party. In this regard, the Applicants refer to the Decision IC_275/2009 of 1 October 2009 of the Swiss Constitutional Court, according to which "*if there are doubts as*

to the regularity of the process, all ballot papers should be recounted in order to avoid any irregularity".

70. In this regard, the Applicants state that the ECAP and the Supreme Court "*have found that in the recount of the samples - conducted without the presence of the parties to the procedure - there were irregularities*", but according to the Applicants, the ECAP and the Supreme Court, by its second Decision [AA U.ZH. No. 62/2017] "*considers the latter balanced between the two candidates in the competition*". In this regard, the Applicants allege that "*there is no big or minor violation*" and that in case of finding any violation, the repetition of the second round of elections should be ordered. In support of this allegation, the Applicants refer to the Decision (EI4/2015-25) of the Constitutional Court of Austria.

71. The Applicants further allege that the Supreme Court, by its first Decision [AA. No. 52/17] annulled only the Decision of the ECAP [ZL. Ano. 1102/2017] of 22 November 2017, but not the CEC Decision [2343-2017] on the recount of all regular ballot papers in the polling stations established by the abovementioned Decision of ECAP.

72. The Applicants also reiterate the allegation that the Supreme Court, by its second Decision [AA U.ZH. No. 62/2017 and ECAP Decision [ZL. Ano. 1125/2017] of 1 December 2017, in addressing their second appeal of 30 November 2017, did not address the Applicants' evidence as "*new and specific evidence*" and did not address their allegations of constitutional violation.

73. The Applicants allege that the principle of transparency has also been violated in case of "*destruction of election material*" by the CEC, and with this also
their right to recount.

Applicants' specific requests

74. The Applicants emphasize that their purpose in seeking the assessment of the constitutionality of the challenged Decisions was to request the order for the recount of ballots, as they has requested at all stages of the proceedings. However, the Applicants point out that such a request, in the meantime, is impossible given that "*the CEC destroyed of all election material*". Noting that the act of *"destroying the election material*" has violated not only the principle of transparency, but also the right of the Applicants to recount, the only solution, according to the Applicants, remains "*the repetition of voting in the second round of elections".*

75. In addition, the Applicants request the Court: (i) to declare the Referral admissible; (ii) to hold that there has been a violation of Article 54 of the Constitution, (iii) to hold that as a result of violation of Article 54 of the Constitution there has been a violation of Article 45 of the Constitution, (iv) to declare invalid Judgment [AA.U.ZH. No. 62/2017] of the Supreme, and all decisions of the previous instances; (v) to declare invalid the electoral process (the second round of voting) for the Mayor of the Municipality of Prishtina, of 19 November 2017; and (vi) to order the CEC, that within 30 days from the receipt of the Judgment of the Constitutional Court, to organize the second round of elections for Mayor of the Municipality of Prishtina.

Comments submitted by the interested party, Mr. Shpend Ahmeti

76. In the capacity of the interested party, Mr. Shpend Ahmeti submitted comments regarding i) the admissibility of the Referral; ii) the jurisdiction of the Constitutional Court to decide on the matter; and iii) the merits of the Referral.

77. As to the admissibility of the Referral, Mr. Shpend Ahmeti claims that the Referral should be declared inadmissible because all legal remedies have not been exhausted. In this regard, as to the allegations of irregularities on the voting day, Mr. Shpend Ahmeti states that the Applicants have failed to exhaust legal remedies within the legal deadlines set by the Constitution, the Law and the Rules of Procedure of the Court.

78. Specifically, he argues that, pursuant to Article 36 of the LGE and Article 25.1 of Electiob Rule 9/2013, the Applicants, regarding their allegations of irregularities on the Election Day, should have had complained within 24 hours after closure of the polling stations, not after the announcement of the final results by the CEC.

79. In addition, Mr. Shpend Ahmeti argues that the request for repetition of the second round of elections has not been filed before the court instances. In the latter, the Applicants requested only the recount of votes. Mr. Shpend Ahmeti claims that the Applicant cannot ask the Court for the repetition of the second round of elections if he has not requested it from the other instances of the regular courts.

80. In addition, as to the admissibility of the Referral and the exhaustion of other legal remedies, Mr. Shpend Ahmeti claims that the Referral is also manifestly ill-founded and must be declared as such, because the Applicants are not subject to violations of fundamental rights and

freedoms guaranteed by the Constitution or because they failed to sufficiently reason before the Court such violations.

81. Regarding the jurisdiction of the Constitutional Court, Mr. Shpend Ahmeti alleges that the latter, based on Article 113.7 of the Constitution, does not have the jurisdiction to assess the constitutionality of the electoral process. This constitutional provision, according to Mr. Shpend Ahmeti, limits the Court regarding the referrals filed by the individuals "*only in the area of the protection of individual rights and freedoms guaranteed by the Constitution"*.

82. In addition, with regard to the issue of the jurisdiction of the Court, Mr. Shpend Ahmeti states that it is necessary to make "*the distinction between constitutional adjudication and adjudication by the authorities of the regular court system"*. In this regard, he emphasizes that the main allegation of the Applicants is related to the arguments of the absolute invalidity of the second Decision of the Supreme Court [AA U.ZH. No. 62/2017] and the silence of the opposing party [the Supreme Court] in relation to the Applicants' submissions regarding alleged constitutional violations, namely violation of Article 45 of the Constitution. According to Mr. Shpend Ahmeti, while the Constitutional Court makes the constitutional review, the regular courts assess the legality when deciding on the concrete case. In this regard, Mr. Shpend Ahmeti states that the allegation of absolute invalidity of the second Decision of the Supreme Court [A.A. U.ZH. No. 62/2017] is ungrounded in entirety in relation to the subject matter jurisdiction of the Supreme Court, as defined by the Constitution and the Law on Courts. In addition, Mr. Shpend Ahmeti, in the argument of the jurisdiction of the courts to assess the legality of the allegations, reiterates that the regular courts in case of suspicion of the constitutionality of the law they assess, may address the Constitutional Court through paragraph 8 of Article 113 of the Constitution.

83. With regard to the merits of the Referral, Mr. Shpend Ahmeti alleges that the Applicants' allegations concerning the violation of Articles 45 and 54 of the Constitution are abstractly articulated and state that the law itself "*has accepted the relative factuality of the electoral process*" and that this aims at legal certainty. Therefore, for any (administrative or criminal) irregularity, sanctions for those responsible are foreseen. Mr. Shpend Ahmeti further claims that an insistence on reparation would violate the right of the majority of citizens who have expressed their political will.

84. More specifically with regard to Article 45 of the Constitution, Mr. Shpend Ahmeti claims that there has been no violation of this Article and that the Applicants have not specified violation of the rights guaranteed by this Article. According to him, such an "*unqualified allegation articulated in an abstract way"* cannot be subject of review by the Court. In the second round of elections for the Mayor of the Municipality of Prishtina, no case has been proven to violate the personal character of the vote, its equality, the freedom of choice or its secrecy. Mr. Shpend Ahmeti further emphasizes the fact that at the end of the electoral process, all forms have been signed by all members of the voting commissions, which according to him, is an evidence of fair and correct electoral process.

85. More specifically, as regards Article 54 of the Constitution, Mr. Shpend Ahmeti claims that there has been no violation of this article and that there is a misinterpretation regarding this provision, which, according to Mr. Shpend Ahmeti, the Applicants have given "*an extensively abstract meaning*". According to Mr. Shpend Ahmeti, the judicial protection of rights guaranteed by the Constitution must be understood within the structural logic of the laws in force. In the present case, according to the comments, the specific provisions of the Law on Courts are important, which define the jurisdiction of the judicial authorities and the provisions of the LGE that define the subject matter jurisdiction for the appeals submitted to the Supreme Court as a judicial body that controls the legality of decisions issued by ECAP. Specifically, Mr. Shpend Ahmeti, refers to Article 12 of the Law on Amending and Supplementing the LGE, which defines the jurisdiction of the Supreme Court in dealing with appeals.

86. With regard to the evidence submitted to the Court by the Applicants, namely the television reports, Mr. Shpend Ahmeti emphasizes that the Constitutional Court is not a court before which is administered the evidence that has already been administered by the regular courts. In addition, Mr. Shpend Ahmeti considers that the Applicants had the legal opportunity to submit all their allegations before the justice authorities (Police, Prosecution, courts) and these authorities could have decided on third-party violations. However, according to him, in any case cannot be ascertained that there has been a violation of fundamental rights and freedoms guaranteed by the Constitution based on television reports submitted as evidence by the Applicants. This, according to the comments, is not something that can be requested from the Constitutional Court which can only make a constitutional review and violation of fundamental rights and freedoms guaranteed by the Constitution.

87. Regarding the referral of the Applicants to the decision of the Constitutional Court of Austria (E I 4/2015 – 25) Mr. Shpend Ahmeti claims that comparison with this decision does not stand because the election result in Austria was canceled because there has been a violation of the Federal Election Law for the election of the President, where the votes were opened earlier by the non-competent person; the criterion of the impact of the violation regarding the result was based on 77,000 votes; and violations of procedures by lower instances have been found. In addition, he states that the entire decision of the Austrian Constitutional Court had to do with a situation entirely different from that reflected by the Applicants.

88. As to the final petitum of the Applicants for repetition of the second round of elections, Mr. Shpend Ahmeti points out that if eventually the repetition of the runoff would be ordered, this would result in a violation of his rights guaranteed by Article 45 of the Constitution. This is because the Mayor of the Municipality of Prishtina was elected in a regular electoral process and the repetition of the process after a few months following the elections would negatively affect the Mayor himself, by violating his rights guaranteed by Article 45 of the Constitution.

89. Mr. Shpend Ahmeti also emphasizes that the Applicants did not intend to count the votes, but to revote, because the Referral to the Constitutional Court was submitted only after the election material was destroyed by the CEC, and before this happened according to the comments, the Applicants had the opportunity to address the Court by requesting the interim measure and the preservation of the election material. In this regard, Mr. Shpend Ahmeti also emphasizes that "*if the violations of the electoral process actually existed, the Applicants had the opportunity to request from the Constitutional Court a measure of security, by which it would prohibit the destruction of the election material [...]*".

90. Finally, Mr. Shpend Ahmeti requests the Court to declare the Applicants' Referral as "*manifestly inadmissible*", since, according to him, the Applicants' submissions are manifestly ill-founded and are not reasoned *prima facie*.

Additional comments submitted by the Applicants

91. The Applicants, through the comments submitted in response to the comments filed by Mr. Shpend Ahmeti, (i) challenge his procedural capacity in the proceedings before the Court; (ii) present their disagreement with regard to his arguments in favor of the

inadmissibility of the Referral; (iii) present their disagreement with regard to their arguments concerning the lack of jurisdiction of the Court to review the referral in question; and (iv) challenge his arguments against the violation alleged by the Applicants.

92. As to the first issue, namely the procedural legitimacy of Mr. Shpend Ahmeti in the proceedings, the Applicants state that Lëvizja VETËVENDOSJE! is a procedural party before the Court and not Mr. Shpend Ahmeti, because Lëvizja VETËVENDOSJE! was a party to proceedings before the regular courts. In addition, in this respect, the Applicants emphasize that Mr. Shpend Ahmeti, before the Court, must act as a natural person and not as a Mayor of the Municipality of Prishtina, under which name he has submitted his comments to the Court.

93. As to the arguments in favor of the inadmissibility of the Referral, the Applicants allege that Mr. Shpend Ahmeti's comments are "*distortion of the legal provisions and do not match with the Applicant's allegations*". The Applicants specifically challenge the argument of Mr. Shpend Ahmeti that the Applicants did not exhaust legal remedies in their substantive sense, as before the regular courts the Applicants did not request the repetition of the second round of elections, which is the request before the Court, but only a recount of ballot papers.

94. With regard to the comments relating to the jurisdiction of the Court, the Applicants consider that the comments of Mr. Shpend Ahmeti offer irrelevant justification and are not connected to the allegations raised by the Applicants. The allegations of the Municipality of Prishtina/Mr. Shpend Ahmeti that the Court has no jurisdiction to assess the constitutionality of the individual act, but only the constitutionality of the law, does not stand as Article 113.8 of the Constitution deals with the incidental control procedure that differs from the individual complaints procedure. According to them, Mr. Shpend Ahmeti failed to understand "*the individual complaints or election complaints and as a result, their argumentation is irrelevant to the issue at hand*".

95. Finally, the Applicants challenge the arguments of Mr. Shpend Ahmeti, who claims that they have not substantiated violations of Articles 45 and 54 of the Constitution; whereas, as regards the referenced case of the Constitutional Court of Austria, the Applicants consider that Mr. Shpend Ahmeti has misunderstood the context in which this argument was presented.

Relevant constitutional and legal provisions

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 45
[Freedom of Election and Participation]

1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.
2. The vote is personal, equal, free and secret.
3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.

[...]

Article 54
[Judicial Protection of Rights]

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

Article 123
[General Principles]

[...]

2. Local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections.

[...]

Article 139
[Central Election Commission]

1. The Central Election Commission is a permanent body, which prepares, supervises, directs, and verifies all activities related to the process of elections and referenda and announces their results.

[...]

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 3 of Protocol no. 1 to the ECHR
(Right to free elections)

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 13
(Right to an effective remedy)

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[...]

LAW NO. 03/L-073 ON GENERAL ELECTIONS IN THE REPUBLIC OF KOSOVO AND LAW NO. 03/L-256 ON AMENDING AND SUPPLEMENTING THE LAW NO. 03/L-073 ON GENERAL ELECTIONS IN THE REPUBLIC OF KOSOVO

Article 103
[Storage of Ballots and Transportation of Election Material]

103.4 The CEC shall, by decision after the official certification of the results of the election, destroy specified election materials at an appropriate time within 60 days, except as directed by ECAC. [...]

Article 105
[Complaints Concerning the C&RC Process]

105.1 Complaints concerning the conduct of the count at the C&RC shall be submitted in writing to the ECAP within twenty four (24) hours of the occurrence of the alleged violation. (As amended by Law No.03/L-256, Article 4).

105.2 The submission of a complaint shall not interrupt or suspend the counting process.

105.3 All complaints to the ECAP shall be decided no later than seventy two (72) hours from receipt of the complaint in the ECAP central offices.(As amended by Law No.03/L-256, Article 5)

Article 106
[Election Results]

106.1 The CEC shall certify the final election results after the completion of all polling station and counting centre procedures and when all outstanding complaints related to voting and counting have been adjudicated by the ECAP and any appeals of ECAP's decisions on them have been determined by the Supreme Court of Kosovo. (As amended by Law No.03/L-256, Article 6)

106.2 Prior to certification of the election results, the CEC may order a recount of ballots in any polling station, or counting centre, or a repeat of the voting in a polling centre or municipality.

106.3 The results of an election are final and binding once they have been certified by the CEC. [...]

Article 117
[Procedures of ECAC]

117.1 The ECAC shall establish its own rules of procedure.

117.2 The ECAC shall, in adjudicating a complaint or appeal examine and investigate all relevant evidence, and grant a hearing if it deems it necessary.

117.3 Adjudication on appeals and complains by ECAC shall be based on clear and convincing evidence.

117.4 The ECAC may order a recount of the ballots in a polling station or polling centre and an examination of the balloting material as part of its investigation into a complaint or appeal.

Article 118
[Decisions]

118.2 The ECAP shall provide the legal and factual basis for its decision in writing. The ECAP shall provide copies of its written decisions to the parties involved in the matter within seventy two (72) hours of the issuance of the decision if it affects the certification of the election results. For other decisions the ECAP shall provide copies of its written decisions to the parties involved in the matter within five (5) calendar days. (As amended by Law No.03/L-256, Article 12 paragraph 1).

118.4 An appeal may be made from a decision of the ECAP, as ECAP may reconsider any of its decisions upon the presentation by an interested party. An appeal to the Supreme Court of Kosovo may be made within twenty four (24) hours of the decision by ECAP, if the fine involved is higher than five thousand Euro (€5,000) or if the matter affects a fundamental right. The Supreme Court shall decide within seventy two (72) hours after the appeal is filed. (As amended by Law No.03/L-256, Article 12 paragraph 2).

118.5 The ECAP decision is binding upon the CEC to implement, unless an appeal allowed by this law is timely filed and the Supreme Court determines otherwise.(As amended by Law No.03/L-256, Article 12 paragraph 3).

Article 119
[Complaints]

119.1 A person who has a legal interest in a matter within the jurisdiction of ECAP, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAP within twenty four (24) hours after the close of the polling stations and the ECAP shall decide the complaint within seventy two (72) hours after the complaint is received. (As amended by Law No.03/L-256, Article 13).[...]

119.2 The Office may submit a complaint to the ECAC in respect of a Political Entity failing to comply with this law or CEC Rules affecting the electoral or the registration process.

119.3 The ECAC shall not consider a complaint concerning a decision of the CEC, but may consider an appeal from a decision of the CEC as specified under article 122 of this Law.

119.4 The ECAC may impose sanctions on a Political Entity for violation of this law or CEC rules committed by the members, supporters and candidates of the Entity. A Political Entity may submit evidence to the ECAC showing that it made reasonable efforts to prevent and discourage its members, supporters and candidates from violating this law or electoral rules. The ECAC shall consider such evidence in determining an appropriate sanction, if any, to be imposed on the Political Entity.

119.5 The ECAC may upon its own discretion consider matters otherwise within its jurisdiction, when strictly necessary to prevent serious injustice.

119.6 The provision of false information to the ECAC shall be a violation of this law that the ECAC may sanction under article 121 of this Law.

Article 120
[Remedies and Sanctions for Violations]

120.1 The ECAC may, if it determines that a violation of this law or CEC rules has occurred:

b) prior to certification of the election results and, in the sole discretion of ECAP, under exceptional circumstances to nullify the results of a specific polling station or polling center, and to order the CEC to repeat the voting in a polling centre or polling station; if it considers that the final election results could be affected(As amended by Law No.03/L-256, Article 14).

Article 122
[Electoral Appeals]

122.1 1 A natural or legal person whose legal rights have been affected by any of the following decisions of the CEC may appeal that decision to the ECAP within twenty four (24) hours after the decision being appealed is announced by CEC and the appeal must be decided by ECAP within seventy two (72) hours after the appeal is made. (As amended by Law No.03/L-256, Article 15).

a) the inclusion or exclusion of a person from participation in an out-of-Kosovo voting programme;
b) the certification or refusal to certify a Political Entity or candidate to participate in an election;
c) a candidate who after certification does not want to participate in an election; d) the accreditation or refusal to accredit an electoral observer;
e) the imposition or an administrative fee on a Political Entity under article 42 of this law; and
f) the refusal to register a Political Party within the Office.

122.2 The ECAC shall uphold an appeal from a decision of the CEC if it determines that the CEC decision was unreasonable having regard to all the circumstances.

122.3 The ECAC may, if it upholds an appeal from a decision of the CEC:
a) direct the CEC to reconsider its decision; and
b) direct the CEC to take remedial action.

RULES AND PROCEDURES No. 02/2015 of ECAP, of 4 December 2015

Article 2
[Definitions]

The terms used in this rule have this meaning:
[...]
2.1 "Complaint" – means a regular legal remedy submitted in writing by a person who has a legal interest or whose rights have been violated during the election process.
2.2 "Appeal" means a regular legal remedy against first instance decisions.

[...]

COMPLAINTS
Article 5
[Conditions for Filing Complaints]

[...]
5.3 Complaints regarding the electoral process for the polling day are submitted to the ECAP within twenty-four (24) hours from the moment of the closure of the voting center (Article 119.1 of LGE)
5.4 Complaints concerning the conduct of the count at the C&RC shall be submitted in writing to the ECAP within twenty four (24) hours of the moment of finding out from the complainant of the alleged violation, based on Article 105.1 of LGE.
5.4 For all issues that are not directly related to voting and re-counting, the complaint must be filed with the ECAP within 24 hours of the alleged violation.
[...]

APPEALS
Article 10
[Criteria for appeal]

[...]
10.5 With respect to the appeal of a CEC decision, the appeal must be filed within five (5) days after notification of the CEC decision. For all other appeals, unless otherwise specified, appeals must be filed within twenty four (24) hours from the receipt of the ECAP decision by the Applicant.
[...]

Article 14
[Procedure for Administration of Investigation of Election Material]

14.1 When ECAP accepts a complaint deemed to be regular and when such a complaint is suspected of fraudulent activity involving the election material, the decision-making panel will authorize a member of the panel as the main investigator and the legal officer in charge of the concrete case to conduct the investigations.
[...]

CEC ELECTION REGULATION NO. 06/2013 COUNT AND RESULTS CENTER of 2 July 2013

Article 8
Complaints regarding to process in CRC

8.1 Complaints about the conduct of the count in the CRC, under Article 105 of the Law on General Elections in the Republic of Kosovo and Article 26 of the Law on Local Elections in the Republic of Kosovo must be submitted in ECAP in writing within 24 hours of the occurrence of the alleged violation.

8.2 Submitting the complaint does not interfere or stop the counting process.

8.3 Pursuant to the provisions of Article 105.3 of the Law on General Elections in the Republic of Kosovo, and Article 26 of the Law on Local Elections in the Republic of Kosovo, for all the complaints ECAP will decide no later than 72 hours after receiving them in their headquarters.

Article 9
Election Results

[...]
9.3 In exceptional cases before certification of the results, the CEC can order a recount of ballots in any Polling Station, Polling Center,

and Counting Center or repeat voting at a Polling Center or in a municipality.

[...]
9.5. Prior to certification of the election results, it is the competence of EPAC, in exceptional cases to annul the results of a Polling Station or Polling Center, and order CEC to repeat the voting in a Polling Station or Polling Center, if it considers that they have impact in final results.
[...]

CEC ELECTION REGULATION Nr. 09/2013 VOTING, COUNTING AND MANAGEMENT OF POLLING CENTER

Article 25
Complaints

25.1 Complaints regarding the voting and counting in polling stations should be submitted to the EPAC within 24 hours of the close of polling stations and they will be settled by EPAC within 72 hours after the complaint is received, in accordance with Article 119.1 of the Law on General, Elections Article 28 of the Law on Local Elections and Procedural Rules of EPAC.

25.2 Submission of the complaint shall not terminate or suspend the counting process.

25.3 Any member of the PSC who complains about the results listed in PS may mark his dissenting opinion in the poll book and may file a complaint in EPAC.

Article 26
Repetition of voting

26.1.Prior to certification of the election results, it is the competence of EPAC, in exceptional cases to nullify the results of a polling station or polling center and order CEC to repeat voting in a polling station or polling center, if it considers that is has impact in final results, in accordance with Article 120.1 (b) of the Law on General Elections and Article 28 of the Law on Local Elections. In this case, the same rules will apply for repetition of voting.

Assessment of the admissibility of the Referral

96. The Court first examines whether the Referral has met the admissibility criteria established in the Constitution and further specified in the Law and the Rules of Procedure.

97. In this regard, the Court, by applying Article 113 of the Constitution, the relevant provisions of the Law regarding the procedure in the case foreseen in Article 113, paragraph 7 of the Constitution; and Rule 39 [Admissibility Criteria] and Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure shall examine whether: (i) the Referral was filed by authorized parties; (ii) the decisions of public authorities are challenged; (iii) all legal remedies have been exhausted; (iv) the rights and freedoms which have allegedly been violated are specified; (v) the time limits have been respected; (vi) the Referral is manifestly ill-founded; and (vii) there is an additional admissibility requirement, pursuant to Rule 39 (3) of the Rules of Procedure, which is not met.

Regarding authorized parties

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

99. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which stipulates:

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

100. Finally, the Court also refers to paragraph (a) of paragraph (1) of Rule 39 [Admissibility Criteria], of the Rules of Procedure which establishes:

> *(1) The Court may consider a referral as admissible if:*
> *(a) the referral is filed by an authorized party,*

101. As to the fulfillment of these requirements, the Court first notes that in the present case there are two Applicants and each of them should be legitimated as an authorized party based on the relevant provisions cited above, as a precondition to review this Referral. As to the first Applicant, namely Mr. Arban Abrashi, the Court notes that he, in a capacity of an individual, that is a natural person, he is a party authorized to file a constitutional complaint with the Court (see Constitutional Court: KI73/09 Applicant: *Mimoza Kusari-Lila*, Resolution of 19 February 2010; KI152/18 Applicant: *Shaqir Totaj*, Resolution on Inadmissibility of 17 January 2018; KI157/17 Applicant: *Shaip Surdulli*, Resolution on Inadmissibility of 15 May 2018). As to the second Applicant, namely the political entity LDK, the Court notes that in accordance with paragraph 4 of Article 21 of the Constitution, the second Applicant also has the right to submit a constitutional complaint, invoking the constitutional rights that apply to legal entities, to the extent applicable. (See case of the Constitutional Court KI41/09 *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 21 January 2010; see also: case of ECtHR, *Party for a Democratic Society and Others v. Turkey*, No. 3840/10, Judgment of 12 January 2016).

102. In addition, and in this regard, the Court also notes that the ECtHR through its case law has found that the right to be elected within the meaning of Article 3 of Protocol no. 1 of the ECHR, is the right that it is also guaranteed to political parties as legal entities and that they may complain irrespective of their candidates (See, for example, case of ECtHR of the *Georgia Labor Party v. Georgia*, complaint no. 9103/04, Judgment of 8 July 2008, paragraphs 72-74 and other references mentioned in that decision). Consequently, the Court concludes that both Applicants are authorized parties.

Regarding the act of public authority

103. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above and to Article 47 [Individual Requests] of the Law, which provide:

> 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. […]*

104. The Court also refers to paragraph (2) of Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure, which, *inter alia*, provides:

> *(2) A referral under this Rule must accurately clarify [...] what concrete act of public authority is subject to challenge.*

105. In this regard, the Court notes that the Applicants challenge acts of a public authority, namely the first Decision [Decision AA. No. 52/2017] of 25 November 2017 and the second Decision [Decision AA.U.ZH. No. 62/2017] of 7 December 2017] of the Supreme Court, as stipulated by paragraph 7 of Article 113 of the Constitution and relevant provisions of the Law and of the Rules of Procedure. Accordingly, the Court concludes that the Applicants challenge acts of a public authority.

Regarding the exhaustion of legal remedies

106. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above, and paragraph 2 of Article 47 [Individual Requests] of the Law and item (b) paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure which foresee:

Article 47
[Individual Requests]

(...)

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

Rule 39
[Admissibility Criteria]

1. The Court may consider a referral as admissible if:

(...)

> *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.*

107. The Court notes that paragraph 7 of Article 113 of the Constitution provides for the obligation to exhaust "*all legal remedies provided by law*". This constitutional obligation is also defined by Article 47 of the

Law and item (b) of paragraph (1) of Rule 39 and applies both to natural persons and to legal persons, to the extent applicable.

108. In this regard, the Court must examine whether all legal remedies have been exhausted by the first Applicant, in the capacity of an individual as a natural person, and by the second Applicant, in the capacity of the political entity as a legal person. The criteria for assessing whether that obligation is fulfilled are well established in the case-law of the Court and of the case law of the ECtHR in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution.

109. In the circumstances of the present case, the Court recalls that in the first Decision of the Supreme Court [AA. No. 52/2017], only the second Applicant, namely the LDK as a political entity, specifically, a legal person, was a party to the proceedings before the ECAP and the Supreme Court. The first Applicant was not a procedural party although the applicable law, namely through Article 119.1, foresees this opportunity for legal persons, i.e. candidates who have an interest in protecting their fundamental rights and freedoms. Consequently, the Court concludes that only the second Applicant has exhausted all legal remedies and the Court will review the constitutionality of the first Decision of the Supreme Court [AA. No. 52/2017] in relation to the rights and freedoms guaranteed by the Constitution belonging to the LDK as a political party and a legal person. (See, *mutatis mutandis*, political entities as Applicants before the ECtHR for electoral disputes, *Refah Partisi (Social Welfare Party) and Others v. Turkey*, Nos. 41340/98, 41342/98, 41343/98 and 41344/98, See also the case of the *Russian Conservative Party of Entrepreneurs and Others v. Russia*, No. 55066/00 and 55638/00, Judgment of 11 January 2007, where the Applicant was a political entity along with the candidate who competed under the sign of that same political entity).

110. In addition, with regard to the second and last Decision of the Supreme Court [AA.U.ZH. No. 62/2017], the Court recalls that the party to the proceedings were both the first and the second Applicant. Consequently, the Court finds that both Applicants have exhausted all legal remedies and the Court will review the constitutionality of the second Decision of the Supreme Court [AA.U.ZH. No. 62/2017] in relation to the rights and fundamental freedoms guaranteed by the Constitution that belong to the first Applicant as an individual, namely as a natural person, as well as the second Applicant as a political entity, namely a legal person.

111. Therefore, emphasizing that in the case under consideration the Applicants' allegations are identical, the Court notes that the second Applicant has exhausted all legal remedies to challenge before this Court the first Decision of the Supreme Court; whereas as far as the second Decision of the Supreme Court is concerned, both Applicants have exhausted all legal remedies.

Regarding the accuracy of the Referral and deadline

112. In addition, the Court also examines whether the Applicants have fulfilled other admissibility criteria, further specified in the Law and the Rules of Procedure. In this regard, the Court first refers to Article 48 [Accuracy of Referral] and Article 49 [Deadlines] of the Law, which provide:

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

113. The Court recalls that the same requirements are further provided in items c and d of paragraph 1 of Rule 39 [Admissibility Criteria] and paragraphs 2 and 4 of the Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure.

114. As to the fulfillment of these requirements, the Court notes that the Applicants have clearly specified what fundamental rights and freedoms guaranteed by the Constitution have allegedly been violated and have specified the act of the public authority which they challenge in accordance with Article 48 of the Law and relevant provisions of the Rules of Procedure and have filed the Referral within the deadline of four (4) months stipulated in Article 49 of the Law and the provisions of the Rules of Procedure.

Regarding other admissibility requirements

115. Finally and after considering the Applicants' constitutional complaint, the Court considers that the Referral cannot be considered manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure and there is no other ground for declaring it inadmissible, as none of the requirements established in Rule 39 (3) of the Rules of Procedure is applicable in the present case. (See, *inter alia*, ECHR case *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144, see also: the case of the Court No. KO73/16, *Applicant: Ombudsperson*, Judgment of 8 December 2016, para 49).

Conclusion regarding the admissibility of the Referral

116. The Court concludes that the Applicants are authorized parties; challenge decisions of public authorities; have exhausted legal remedies as specifically elaborated above; have specified the rights and freedoms that claim to have been violated; have submitted the referral within the deadline; the referral is not manifestly ill-founded; and there is no other admissibility requirement which is not fulfilled.

117. Therefore, the Court declares the Referral admissible.

Merits of the Referral

I. Introduction

118. The Court first recalls that the Applicants allege violation of their rights guaranteed by Article 45 [Freedom of Election and Participation] and Article 54 [Judicial Protection of Rights] of the Constitution.

119. In substance, the Applicants mainly allege that the Supreme Court, but also the ECAP, in the proceedings conducted for the review of their complaints and appeals, have failed to provide judicial protection of their rights guaranteed by Article 54 of the Constitution and, consequently, these public authorities have violated their rights to election and participation guaranteed by Article 45 of the Constitution.

120. In dealing with the allegations of the Applicants, the Court will first deal with issues relating to the jurisdiction of the Court with regard to election disputes. Subsequently, the Court will deal separately with all allegations of the Applicants starting with the category of allegations relating to the violation of the right to judicial protection of rights guaranteed by Article 54 of the Constitution, to continue with the

category of the allegations related to violations of the rights of election and participation guaranteed by Article 45 of the Constitution.

121. The Court, beyond the application of constitutional guarantees related to the respective rights, in dealing with these allegations during the review of all allegations, will also apply,: (i) the case law of the ECtHR in interpreting Article 3 (Right to free election) of Protocol no.1 to the ECHR in accordance with which the Court, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret fundamental rights and freedoms guaranteed by the Constitution; and (ii) the fundamental and common principles of European heritage for free and democratic elections, summarized in the Venice Commission Opinions, namely the Code of Good Practice in Electoral Matters and Explanatory Report, Opinion No. 190/2002, CDL-AD (2002) 023rev2-cor, adopted at the 51st plenary session by the Venice Commission of 5-6 July 2002 and subsequently approved by the Parliamentary Assembly of the Council of Europe in the first part of the 2003 session (hereinafter: Code of Good Practice and/or Explanatory Report).

122. The Court emphasizes that the Code of Good Practice is based on the underlying principles of European electoral heritage, which constitute the basis of a good practice in electoral matters. Under this Code, the electoral heritage of Europe consists of five underlining principles and they are: (1) universal vote; (2) equal vote; (3) free vote; (4) secret vote; and (5) direct vote. Beyond these principles, the Code of Good Practice also sets three requirements, the fulfillment of which is a prerequisite for the proper implementation of the underlying principles of this Code and they are: (1) respect for fundamental rights; (2) the level of regulation and stability of the election law; and (3) procedural guarantees.

123. Beyond this, the Court will also apply in the circumstances of the present case, the Opinions and Reports adopted by the Venice Commission over the years regarding best practices for resolving election disputes, summarized in a separate document, namely the document of the Venice Commission, known as "*Summary of Reports and Opinions of the Venice Commission on Election Dispute Resolution*", CDL-PI (2017) 007, dated 9 October 2017 (hereinafter: Report on Election Dispute Resolution) and the Venice Commission Report on the Cancellation of Election Results, CDL-AD (2009) 054, adopted by the Council for Democratic Elections at its 31st meeting and adopted by the Venice Commission at its 81st plenary meeting, on 11-12 December 2009 (hereinafter: Report on the Cancellation of the Election Results).

Jurisdiction of the Court

124. The Court recalls that the question of its jurisdiction in the assessment of the election disputes was raised by the Applicants, who allege that the Court should "*assess the constitutionality of the entire election process*", assessing both the facts and the procedure conducted and not limited only "*in the nature of the protector of fundamental freedoms and rights*". In support of this argument, the Applicants refer to the Opinion of the Venice Commission (CDL-PI (2017) 007) and Decision of the Constitutional Court of Austria (E 17/2016-20) of 1 July 2016. These allegations have been challenged through the comments submitted to the Court, by Mr. Shpend Ahmeti, who claims that under Article 113.7 of the Constitution, the Court "*does not have the jurisdiction to assess the constitutionality of the election process*".

125. In this regard, the Court recalls that its jurisdiction is clearly defined by Article 113 [Jurisdiction and the Authorized Parties] of the Constitution. This article contains the entire 10 items with their respective sub-items describing the parties authorized to submit referrals to the Court, as well as issues which they may submit to the Court. In addition to Article 113 of the Constitution, the latter also defines a jurisdictional competence of the Court specifically described in paragraph 4 of Article 62 [Representation in the Institutions of Local Government] of the Constitution. Therefore, the Court emphasizes that its sole jurisdiction derives from the aforementioned Articles of the Constitution, while no additional jurisdiction is assigned by law under paragraph 10 of Article 113 of the Constitution.

126. In this regard, the Court emphasizes that the Constitution of the Republic of Kosovo through paragraph (5) of item 3 of Article 113 explicitly defines the jurisdiction of the Court to assess whether the Constitution was violated during the election of the Assembly, if such a matter is raised by the Assembly Kosovo, the President of the Republic of Kosovo and the Government.

127. Beyond this provision, the Court emphasizes that it has no special jurisdiction to assess the constitutionality of an electoral process. Such jurisdiction is not established by the Constitution, either by law or by applicable election legislation, which could constitute additional jurisdiction based on paragraph 10 of Article 113 of the Constitution.

128. The jurisdiction of the Court to review electiob disputes, as is the present case under review, is limited to paragraph 7 of Article 113 of the Constitution. In this regard, the Court notes that complaints

relating to election disputes may be considered by the Court after they have been filed by the authorized parties which challenge an act of a public authority which allegedly infringed the relevant fundamental individual rights and freedoms and after exhaustion of all legal remedies provided by law.

129. The Constitutional Court, in this respect, serves as the last instance which assesses the constitutionality of the decisions of the public authorities specialized for election complaints. According to the LGE, the ECAP serves as the first authority before which the first instance complaints can be filed, whereas the Supreme Court serves as the second instance for the latter. This institutional two-instance system of decision-making meets the institutional requirements that the bodies that decide on election disputes should have based on the criteria set out in the Code of Good Practice.

130. Accordingly, the jurisdiction of this Court, in the context of election disputes, beyond the issues falling within the scope of paragraph (5) of item 3 of Article 113 of the Constitution, is limited to assessing the constitutionality of the decisions of these public authorities, namely in assessing whether they have been subject to compliance with the fundamental rights and freedoms guaranteed by the Constitution and relevant international instruments set forth in Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, which the Court, based on Article 53 [Interpretation of Human Rights Provisions], interprets the alleged violation of these rights in accordance with ECtHR decisions.

131. The Court also notes that the Opinion of the Venice Commission, to which the Applicants refer, namely the Code of Good Practice, does not support the arguments of the Applicants. In fact, in elaborating the international standards related to an "*effective complaint system*", the Code of Good Practice establishes constitutional courts only as one of the options to deal with complaints related to election disputes (see item 3.3., paragraph 93 of the Explanatory Report). According to the Code of Good Practice, the states are free to choose the mechanisms that review these complaints in accordance with the respective constitutions, insofar as they respect the general principles related to electoral rights. This is also in line with the ECtHR case law in interpreting Article 3 of Protocol no.1 to the ECHR.

132. For comparative issues, it is important to note that unlike the Constitution of the Republic of Kosovo, in all countries (Germany, Austria, Switzerland), which decisions the Applicants refer to the Court, have separate and specific jurisdiction to deal with the election

disputes. (See Article 93 of the Basic Law of Germany, which defines the competence of the Federal Constitutional Court for electoral complaints, see Article 80 [Appeal to the Federal Supreme Court] of the Federal Law on Swiss Political Rights; and see Article 141 of the Constitution of Austria).

III. Assessment of the allegations of the Applicants

1. Applicants' allegations of violation of the rights to judicial protection guaranteed by Article 54 of the Constitution

133. The Court recalls that the Applicants allege that the Supreme Court, by both of its decisions, violated their fundamental rights and freedoms guaranteed by Article 54 of the Constitution namely, because according to them, they are arbitrary. In this regard, their allegations may be categorized as follows: (i) "*confirmation of the election results*"; (ii) "*irregularities on the voting day and the deadline for filing it*"; and (iii) "*minimal and balanced irregularities*". In addition, the Applicants allege that the Supreme Court, through its decisions, has made (iv) "*only the assessment of the legality rather than the constitutionality of the respective allegations*". (See specific allegations raised by the Applicants in paragraphs 57-61). In dealing with each allegation, the Court will apply the constitutional guarantees, the relevant ECtHR case law and the relevant principles of the Venice Commission. Furthermore, once all the specific allegations of the Applicants are reviewed, the Court will also assess (v) whether the proceedings followed in the circumstances of the present case, in their entirety, may have resulted in a violation of the general principles for protection of the judicial rights guaranteed by the Constitution of the Republic of Kosovo

As regards the "confirmation of the election results"

134. The Court recalls that the Applicants allege that the reasoning of the Supreme Court in its first Decision [AA. No. 52/2017] that *"the law does not foresee the narrow result between the candidates as a condition for recount",* is unconstitutional because according to them *"no state counts conditions or cases when the recount is ordered - because it is the right in itself - for confirmation of the electoral process*".

135. The Court initially notes that the European standards regarding the annulment of the election results stem from the guarantees of Article 3 of Protocol no.1 to the ECHR. According to the Venice Commission, the latter derive from paragraph b of Article 25 of the Covenant on

Civil and Political Rights, which sets out the fundamental principles of the right to vote and to be elected. The Court recalls that both of these international instruments based on Article 22 of the Constitution are directly applicable in the legal order of Kosovo.

136. However, the rights to cancel the results, which in principle but with the exceptions, are applicable also in terms of active and passive rights, in practice are only applicable in the event of substantial violations of the election law. According to the Venice Commission, while the practice of cancellation of the election results varies widely within the states, in principle, the number of complaints against the election result is very high, and the cancellation of the election results is usually the last resort (Set section II, paragraph 5 of the Report on the Cancellation of Results). According to the latter, the cancellations of the election resultd have occurred very rarely in the last decades.

137. In almost all member states of the Venice Commission, the issue of cancellation of the election results is determined by general provisions. Practice varies from countries that have the criteria set out in the Constitution, laws, or are not defined in any (See section III, item A, paragraph 8 of the Report on the Cancellation of Results). Moreover, there are member states of the Venice Commission which stipulate that all court disputes regarding the elections must be closed before the candidate takes over the office; and there are other countries that do not allow canceling the mandate after being sworn in for the office. (See Section IV, item C, paragraphs 70-75 of the Report on the Cancellation of Results).

138. A common denominator however is established by the Venice Commission as an integral part of an "*effective complaint system*", which, according to the Code of Good Practice, the Explanatory Report and the Dispute Resolution Report establishes that "*The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned*".

139. The ECtHR case law regarding the assessment of the election disputes, which is consistently referred to the Code of Good Practice, pointing out that the existence of a national system for an "*effective complaint system*", is one of the fundamental guarantees of free and fair elections, reflects the same standard. It also contains the essential test set by the Venice Commission, namely, assessing whether "*the irregularities may have affected the final outcome*", or even more

specifically, there is "*a real impossibility to establish the wishes of the voters*". (See ECtHR cases, *Kovach v. Ukraine* no 39424/02, Judgment of 7 February 2008 *and Riza and Others v. Bulgaria,* 48555/10 and 48377/10, Judgment of 13 October 2015*).*

140. However, the ECtHR also notes that it is not the role of the courts to modify the expression of the will of people. (For more context regarding the latter, see the Decisions of the European Commission on Human Rights, *I.Z. v. Greece*, No. 18997/81, Decision of 28 February 1994, and *Babenko v. Ukraine* No. 43476/98, Decision of 4 May 1999). It maintains that the freedom enjoyed by decision-making authorities must be limited, with sufficient accuracy, by the provisions of domestic law. The procedure must be such as to guarantee a fair, objective and sufficiently reasoned decision and to prevent any abuse of power by the relevant authority. (See cases of ECtHR, *Podkolzina v. Latvia*, No. 46726/99, Judgment of 9 April 2002, paragraph 35, *Kovach v. Ukraine*, cited above, paragraphs 54-55, *Kerimova v. Azerbaijan*, No. 20799/06 Judgment of 30 September 2010, paras 44-45; *Riza and Others v. Bulgaria*, cited above, paragraph 143).

141. The ECtHR case law put emphasis on some minimum safeguard measures against arbitrariness (See ECtHR case, *Davydov and Others v. Russia*, no. 75947/11, Judgment of 30 May 2017, paragraph 288). In this dispute, when included in such a review, the ECtHR is bound to ascertain whether the decision taken by the internal authority was arbitrary or manifestly unreasonable (See ECtHR cases, *Riza and Others v. Bulgaria*, cited above, paragraph 143; *Kerimli and Alibeyli v. Azerbaijan*, no. 18475/06 and 22444/06, Judgment of 10 January 2012, paras 38-42, *Davydov and Others v. Russia*, cited above, para. 288).

142. Based on the abovementioned elaborations, the standards of the member states of the Venice Commission, as regards the cancellation of the election result and relevant case law of the ECtHR, regarding the member states of the Council of Europe, the Court notes that the basic criteria that constitute the test whether the review of complaints for challenging the election results could result in the cancellation of the same, are divided into two categories: (i) "*the powers of the authority making the decision"*; and (ii) "*its discretion and the relevant limitations*".

143. Regarding the first, the Court notes that according to the standards and the referred practice, the authorities that examine the election complaints should have (i) the possibility of the cancellation of the elections; (ii) this opportunity should be used or limited to sufficient

accuracy in the provisions of the applicable law; (iii) their duty is not to change the will of the voters; and (iv) it should be limited in the sense of avoiding arbitrariness. Whereas, as regards the second, the Court notes that the discretion of the decision-making authorities should focus on the assessment (i) of "*determination of the voter's wish is impossible*" or (ii) "*such violations and irregularities may have influenced election result*". The case law of the European Courts and of the ECtHR, as elaborated above, shows that this test has been interpreted in a conservative manner and that cases in which the courts have canceled election results are cases of substantial violations of law and that reflect apparent arbitrariness.

144. There is sufficient case law to assess whether "*irregularities may have affected the outcome*". The European courts have found that "*the irregularities may have affected the election results"* when there has been: (i) a failure to meet the necessary requirement to participate in the elections; (ii) errors in voter registration or nomination of candidates; (iii) breach of campaign regulation; (iv) violation of legislation applicable to the voting process; (v) violation in counting or reporting; and (vi) violations in the allocation of mandates. (Paragraph 79 of the Report on the Cancellation of Results).

145. The above mentioned categories under (iv) and (v), "*violation of the applicable legislation during the voting process"* and "*violation during the counting and reporting process*", closely coincide with the circumstances of the present case, so the Court will also summarize the cases when the respective courts have found violations.

146. According to the Venice Commission, the European courts to which the latter refers, found that the "*the legislation applicable on the voting process has been violated*" only when: (i) the elections had not started for more than 6 hours from the time scheduled; (ii) public order was disturbed on election day; (iii) lack of ballot papers in the voting booth; (iv) some voters have voted several times or for others or their identity was not controlled; (v) there was a family voting; (vi) incapacity of the official representatives present at the polling stations; (vii) difference and discrepancy between the number of ballot papers in the polling box and the number of voters who signed the electoral register was evident; (viii) a sealed package of ballot papers has been opened by unauthorized civil servants; (ix) manipulation of votes of postal voting; (x) ballot papers have not been signed and stamped by the appropriate official; (xi) assistance provided by the personnel of a polling station to persons who were not in need of help; (xii) no documentation of the voting process; (xiii) voting after the polling stations were closed; (xiv) no legal termination of the electoral

procedure by the election administration. Whereas, according to the same case law, "*violations counting or reporting*" have been found when (i) advance votes (in those countries where it is allowed) have incorrectly been rejected by the electoral administration; (ii) ballot papers have been left unattended before counting; (iii) examination of ballot papers carried out by an unauthorized person; (iv) some votes were counted twice; (v) examination of validity of the ballot papers was carried out according to different criteria by the election administration; (vi) wrongful calculation of election result (vii) irregularities made in the election report which has not been signed by the members of the electoral board; (viii) documentation and ballot papers have been sent open to central electoral bodies; and (ix) falsification of results. (See Section V, paragraphs 76-80, of the Report on the Cancellation of Election Results).All these categories of cases in their entirety reflect substantive violations of law and electoral rules and evident arbitrariness.

147. In applying these principles in the circumstances of the present allegation, the Court recalls that the first Decision of the Supreme Court challenged by the Applicants through this allegation was brought as a result of the complaint of Lëvizja VETËVENDOSJE! in the Supreme Court against the Decision [ZL. A. No. 1102/2017] of ECAP 22 November 2017, which approved as grounded the appeal of the second Applicant in the ECAP against the CEC decision on the announcement of preliminary results. The ECAP decided and ordered the CEC to recount all ballot papers based on two main arguments: (i) "*the large number of invalid and blank ballot papers*" and (ii) the "*narrow result between the two candidates*". The Supreme Court modified this ECAP Decision, reasoning mainly that the ECAP reasoning was not based on law, because according to the Supreme Court (i) "*the large number of invalid and blank ballot papers*" and nor (ii) the "*narrow result between the two candidates*" is not defined by law as a condition to decide on "recount" or "revote".

148. In this regard, the Court notes that the general provisions of the LGE stipulate that "*the repetition of elections*" is one of the principles governing the procedure of counting the ballot papers. The LGE further specifies as a "*recount*" or "*revote*" option and this competence, according to the LGE, is left to: (i) the CEC, which may, based on paragraph 2 of Article 106, order the recount of votes at any polling station, counting center or even the repetition of voting at a polling station or in a municipality prior to certification of results; and (ii) the ECAP, which on the basis of paragraph 4 of Article 117 has the competence to order the recount of ballots at a polling station or polling centre as well as reviewing the voting material as part of the

investigation of the complaint or appeal. This competence of the ECAP is further specified by Article 14 of the Law on Amending and Supplementing the LGE, namely item b of Article 120 of the LGE, according to which, the ECAP in "*exceptional cases*" and prior to certification of the election results, may cancel the election results at a polling station or a polling centre, ordering the CEC to repeat the same if it considers that the "*identified violations have an impact on the final results"*.

149. Accordingly, the Court notes that the possibility of "*recount*" and "*re-vote*" is clearly defined in the LGE and relevant amendments and was further specified in the CEC and ECAP Regulations. While the LGE does not correctly count the criteria on which eventual violations during the electoral process would result in a recount or revote, the amendment and supplementation of the LGE set two conditions based on which the ECAP may decide to cancel the election result, and consequently order the repetition of the voting as it follows: (i) "*extraordinary circumstances*" and (ii) "*whether the identified violations have an impact on the final outcome*". The assessment of whether these two requirements are met is at the discretion of the CEC in the context of paragraph 2 of Article 106 of LGE in conjunction with Article 6 of the Law on Amending and Supplementing the LGE; ECAP in the context of paragraph 4 of Articles 117 of the LGE and Article 120 of the LGE in conjunction with Article 14 of the Law on Amending and Supplementing LGE, and the courts assessing the respective complaints.

150. In this regard, the Court notes that the standards embodied in the applicable electoral legislation, also with regard to the competencies of decision making authorities and of setting the boundaries of their discretion, are in the harmony with the practice of the Venice Commission member states and also the case law of the ECtHR.

151. In this regard, the Court notes that the reasoning and conclusion of the Supreme Court that the two criteria based on which the ECAP had ordered the recount, (i) "*the large number of invalid and blank ballots*", and (ii) the "*narrow result between the two candidates*", were not the grounds established in the law to order the recount or revote, was correct and based on the LGE and the respective amendments.

152. Therefore, the Court concludes that the first Decision [AA. No. 52/2017] of the Supreme Court of 25 November 2017 challenged by the Applicants, did not apply the law in a manifestly arbitrary manner and the latter did not violate the Applicants' election rights. This is

because (i) the reviewing complaint authority in the circumstances of the present cases, the ECAP and the Supreme Court, considered that the "*the irregularities do not have influence on the final results*" and that (ii) the circumstances of the specific case and the respective allegations do not constitute "*exceptional circumstances"*.

153. In addition, the Court notes that the circumstances of the present case and the allegations of the Applicants find no support in any of the cases of the ECtHR nor in the case law of the member states of the Venice Commission, as elaborated above.

(ii) Regarding irregularities on the voting day and deadline for their submission

154. The Court recalls that the Applicants allege that the second Decision [AA. U.ZH. No. 62/2017] of the Supreme Court has no legal basis. In this regard, the Applicants allege that the reasoning of the Supreme Court that in the appeals proceedings it is limited only to the assessment of "*the irregularities related to the data administration*", does not have support in the applicable law. According to the Applicants, the issues related to the "*irregularities regarding the administration of CRC data*" are based only on the special procedure provided for in Article 105 of the LGE, whereas the Applicants filed appeals pursuant to Article 119 of the LGE. In addition, the Applicants allege that Articles 118.4 and 119.1 of the LGE and the respective amendments and supplements recognize the right to supplement the appeals submitted to the ECAP with new evidence and facts. In this regard, the Applicants also refer to the Reports of the Venice Commission on Dispute Resolution, arguing that the admissibility criteria in such cases, should be clearly specified in the law in order to prevent the declaration of complaints as inadmissible.

155. The Court notes that, in essence, this allegation of the Applicants concerns the declaration as out of time by the ECAP and the Supreme Court of the allegations of irregularities on the voting day, namely the allegations relating to (i) the use of road/taxi transport services; (ii) telephone calls; and (iii) sending sms by Lëvizja VETËVENDOSJE !. (challenged allegations), which were submitted to the ECAP after the announcement of the final results.

156. The context of this allegation raises four essential issues (i) the deadline for complaint; (ii) the requirements for filing a complaint; (iii) the possibility of filing new evidence; and d) the competences of the authorities that review the complaints. In this regard, the Court will again refer to the Code of Good Practice and respective

Explanatory Report. The latter and to the extent relevant to the circumstances of the case, in the section addressing the "*effective complaints systems*", addresses, *inter alia*: (i) time limits for complaints; (ii) access to legal remedies; and (iii) the powers of the appellate bodies. (See in more detail item 3.3, paragraphs 95, 96 and 97 of the Explanatory Report).

157. Regarding the first, namely the "*deadlines for complaints"*, the Explanatory Report stipulates that they should be short and that the appeal bodies should also decide as soon as possible. A deadline of 3 to 5 days for the first instance (also for the complaint and decision-making) is reasonable for decisions in election disputes according to the Explanatory Report. Time limits are further specified in the Report on the Cancellation of Election Results, stating that European practice recognizes deadlines of one (1) to five (5) days for complaints related to election disputes. According to the same report, it is permissible for constitutional courts to take more time for their decision-making (Report on the Cancellation of Results, paragraph 61).Regarding the second, namely "*the access to legal remedies"*, the Explanatory Report stipulates that the complaint procedure should be simple, it is necessary to avoid excessive formalization and to avoid decisions of inadmissibility, especially in politically sensitive cases. Specifically, the complaint procedures should be simple and that the responsibilities of the various bodies involved in this process be well defined. As for the third, namely, "*the powers of the complaint bodies"*, the Explanatory Report stipulates that the risk of the successive bodies refusing to make a decision on merits should be eliminated, which, according to the Venice Commission, may occur when there is more than one possibility in theory to file a complaint to certain bodies, or in cases where the jurisdiction of different courts, for example, regular courts and constitutional courts - are not clearly differentiated (See part 3 item 3.3, paragraph 97 of the Explanatory Report).

158. In applying these principles in the circumstances of the present allegation, the Court recalls that the second Decision of the Supreme Court, namely Judgment [A.A. U.ZH. No. 62/2017] which the Applicant challenges through this allegation, was rendered as a result of the Applicants' appeal to the Supreme Court against Decision [A. ZL. No. 1125/2017] of 1 December 2017 of the ECAP after the announcement of the final results. The Supreme Court upheld the ECAP Decision which rejected the Applicants' allegations related to the announcement of the final result as ungrounded, while rejecting the category of the allegations relating to the announcement of the

preliminary results, namely the irregularities on the election day, arguing that these allegations were out of time.

159. In this regard, the Court notes that the LGE and the relevant amendments stipulate that in principle the time limit of complaints before ECAP and of the ECAP in the Supreme Court are 24 hours.

160. The Court notes that: (i) Article 13 of the Law on Amending and Supplementing in conjunction with paragraph 1 of Article 119 of the LGE also provides that appeals to ECAP must be filed within 24 hours of the closure of the polling stations; (ii) the ECAP decisions, in accordance with Article 12 of the Law on Amendment and Supplementation of the LGE in conjunction with paragraph 4 of Article 118 of the LGE are appealed also within 24 hours to the Supreme Court in cases where the fine involved is higher than € 5,000 and the case concerns a fundamental right. Based on the same Article, the ECAP may "*reconsider any of its decisions upon the presentation by an interested party of new evidence*"; and finally (iii) Article 4 of the Law on the Amendment and Supplementation of the LGE in conjunction with Article 105 of the LGE determines that for the complaints related to the counting administration procedure in the CRC the deadline is 24 hours from "*the occurrence of the alleged violation".*

161. The Court also notes that the initiation of these complaints relates to two phases after the elections, the phase after the announcement of the preliminary results and after the announcement of the final results, namely, in accordance with the Code of Good Practice. (See section 3, item 3.3, paragraph 95 of the Explanatory Report).

162. In the context of this allegation, the Court notes that one day after the second round of elections and the announcement of preliminary results by the CEC, the second Applicant filed a complaint with the ECAP. The content of the complaint concerned mainly the challenging of the ballot papers declared invalid and blank. In this complaint, the Applicants had not raised any other allegations relating to the irregularities on the voting day, specifically (i) the use of road/taxi transport services; (ii) telephone calls; and (iii) sending sms by Lëvizja VETËVENDOSJE!. The Applicants reason that these irregularities had not been known to them when the deadline for complaints was closed and that they had understood about them on 20 November 2017, after the expiry of the deadline for submission of the latter.

163. However, the Court notes that the following day, namely on 21 November 2017, the ECAP allowed the Applicants to supplement their

request because they considered the latter to be generalized. According to the case file, the Applicants did not submit the allegations related to the irregularities on the voting day, but supplemented the claim only in respect of allegations that relate mainly to invalid and blank ballot papers. The ECAP issued the decision the following day, namely on 22 November 2017, in favor of the Applicant ordering the recount of all ballots. This decision was appealed in the Supreme Court by Lëvizja VETËVENDOSJE! on 23 November 2017. According to the case file, the Applicants had not submitted the challenged allegations in response to the appeal to the Supreme Court. The Supreme Court, rendered its first Decision on 25 November 2017 by approving the appeal of Lëvizja VETËVENDOSJE! and by annulling the ECAP decision. Upon completion of the procedure for challenging the preliminary results to the ECAP and the Supreme Court, on 29 November 2017, the CEC announced the final results of the second round of elections for the Mayor of the Municipality of Prishtina. On 30 November 2017, one day after the announcement of the final results by the CEC, the Applicants filed a complaint with the ECAP by challenging the final result of the elections, alleging, among other things, violations of the law and the Constitution, an allegation, which among others, was justified by the allegations of irregularities on the voting day. Consequently, the Court notes that these irregularities allegedly were understood on 20 November 2017, according to the allegation 1 hour after the deadline for complaints relating to the announcement of the preliminary results, for the first time filed with the ECAP on 30 November 2017, after the announcement of the final results, and 10 days after the closure of the voting centers.

164. In addition, the Court recalls that the Applicants also allege that their claims should not have been declared as out of time, because their appeals were not based on Article 105 of the LGE and the relevant amendments but on Articles 118 and 119 of the LGE and the relevant amendments. The Court first notes that: (i) the appeal of 20 September 2017 is based on Article 119 of the LGE and the relevant amendments; (ii) the appeal of 30 November 2017 is based on Articles 105 and 119 of the LGE and the relevant amendments; while, (iii) the appeal of 5 December 2017 was also based on Articles 105 and 119 of the LGE and relevant amendments. However, the fact that the Applicants allege to have filed appeals based on one article and not the other, does not change the situation in the circumstances of the present case.

165. This is because Article 13 of the Law on Amending and Supplementing the LGE, in conjunction with paragraph 1 of Article 119 stipulates that the time limit for filing an appeal to the ECAP is 24 hours from the

moment of the closure of the polling center. In this context, Article 12 of the Law on Amending and Supplementing the LGE in conjunction with paragraph 4 of Article 118 of the LGE specifies that ECAP decisions may be appealed within 24 hours to the Supreme Court. The same article, and as noted above, established that the ECAP may "*reconsider any of its decisions upon the presentation by an interested party of new evidence*". However, the Court notes that before the announcement of the final results, the Applicants did not use any of these options for filing the respective allegations.

166. The Court notes that the Applicants had ample opportunities to submit these claims before the ECAP and the Supreme Court prior to the announcement of the final results: (i) by supplementing the initial complaint, the opportunity given by ECAP on 21 November 2017; (ii) by responding to the complaint of Lëvizja VETËVENDOSJE! in the Supreme Court before rendering the decision of the latter; (iii) at any time from the filing of the first complaint until the decision of the Supreme Court is rendered based on paragraph 2 of Article 12 of the Law on Supplementing and Amending Article 4 paragraph 118 of the LGE. The latter allow the ECAP to "*review any of the decisions taken after the presentation of new facts by the interested party*". The Court notes that the Venice Commission also recognizes the right to present evidence/facts after a complaint has been filed. (See section 6, paragraph 3.3, paragraph 65 item (a) of the Report on Dispute Resolution). In fact, these allegations of irregularities on the Election Day, which according to the case file, were submitted to the ECAP only after 10 days, after the first decision was rendered by the Supreme Court, and, accordingly, after all the deadlines for complaints and decision-making necessary for the announcement of the final results have expired.

167. Moreover, relevant to the circumstances of the present case, is the fact that the Explanatory Report also stipulates that it is important to avoid decisions on inadmissibility or to refuse to award decisions on merits, but the Explanatory Report relates the latter with the circumstances where there may be a conflict of jurisdiction over the election appeals or for other formal reasons on which the relevant courts may refuse to answer the merits. The Court notes, however, that the Code of Good Practice, Explanatory Report, Report on Dispute Resolution, and the Report on the Cancellation of Results, and in this view, also the case law of the ECtHR, in the context of requests for lack of formalities or even requests for avoiding the decisions on inadmissibility, do not refer to non-compliance with deadlines for filing complaints related to election disputes. On the contrary, the latter emphasize the importance of short deadlines for the latter. Exception for this is the

right to present evidence/facts after a complaint has been filed, and before the relevant final decision has been taken. (See section 6, item 3.3, paragraph 65 item (a) of the Report on Dispute Resolution). Appeals submitted after the deadlines set by law do not fall into this category.

168. Therefore, the Court finds that the Second Decision [AA. U.ZH. No. 62/2017] of the Supreme Court was not rendered in contravention of the law and has not interpreted the applicable election law in an arbitrary manner. Moreover, the Court notes that the circumstances of the present case and the allegations of the Applicants do not find support in any of the cases of the ECtHR, or in the case law of the Venice Commission member states, as elaborated above.

Regarding "minimal and balanced irregularities"

169. The Court recalls that the Applicants allege that the findings of the Supreme Court are arbitrary because they conclude that "*during the counting in some polling stations, the irregularities were noted but were minimal and balanced, because the two candidates were affected*". In this regard, the Applicants allege that *"violation of constitutional rights exists or does not exist- it cannot be said to have been violated little or much".*

170. In addressing this allegation, the Court first notes that it does not find that the ECAP or the Supreme Court reached this conclusion or found that there were any irregularities which could be "*minimal and balanced*" - as claimed by the Applicants.

171. However, the Court notes that such an allegation may be related to the context of the second Decision of the ECAP, namely Decision [ZL. Ano. 1125/2017] of 1 December 2017, and the second Decision of the Supreme Court, namely Judgment [AA.U.ZH. No. 62/2017] of 7 December 2017, decisions which, *inter alia*, dealt with the findings of the ECAP investigative teams for addressing the Applicants' allegation regarding invalid and blank ballot papers.

172. In this regard, the Court recalls that the ECAP based on Rule 14 of Regulation No. 02/2015, engaged investigative teams to review Applicants' allegations, namely, the irregularities of invalid ballots, blank ballots, and missing envelopes containing the conditional votes, which may have resulted in irregularities of a chain character known as the "*Bulgarian train*" in 31 polling stations that were challenged by the Applicants. The Court recalls that this investigating team, according to the reasoning of the ECAP and the Supreme Court,

reviewed and re-evaluated invalid votes in all the polling stations specified by the Applicants and found that 4 of 183 ballots which had been declared invalid were in fact valid. This difference in the number of votes was included in the final results. The findings of the ECAP investigative teams had shown that from these 4 votes declared invalid initially, and which resulted valid, 2 had been in favor of the Applicants while 2 in favor of Mr. Shpend Ahmeti.

173. The ECAP and the Supreme Court found that such findings did not result in "*inability to determine the will of the voters*" and that the latter "*did not affect the final result*". As elaborated above, based on the ECtHR case law and the principles of the Venice Commission summarized in the Code of Good Practice, the respective Explanatory Report and the Report on Dispute Resolution, the assessment of whether the irregularities have affected the final result belongs to the authorities which review the election appeals, and in the present case the ECAP and the Supreme Court.

174. In addition and beyond the reasoning and assessment of ECAP and the Supreme Court, the Court also refers to the Code of Good Practice, as far as the issue of invalid, blank or spoiled ballots is concerned. In addressing the issues related to "*counting*", the Code of Good Practice maintains that "*It is best to avoid treating too many ballot papers as invalid or spoiled. In case of doubt, an attempt should be made to ascertain the voter's intention*" (See item 3.2, paragraph 49 of the Explanatory Report).

175. The Court notes that this principle does not necessarily mean recounting or even cancelling the election results, namely the re-voting. Fulfillment of criteria that would result in the cancellation of the election results are elaborated in detail above. This principle in fact means that in the case of invalid, blank or spoiled votes, the practice of the member states of the Venice Commission stipulates that one additional effort should be made to reevaluate those ballot papers.

176. The Court finds that this effort has been made in the circumstances of the present case. As noted above, the ECAP investigative teams have not only counted all the ballots in the 31 polling stations challenged after the announcement of the final results in the ECAP by the Applicants, but have reviewed and re-evaluated all the ballot papers declared invalid and blank, finding that the difference between invalid and valid votes is 4 votes out of 183.

177. In this regard, the Court also refers to the ECHR Guide on Article 3 of Protocol no.1 to the ECHR, according to which: "*A still less stringent*

scrutiny would apply to the more technical stage of vote counting and tabulation. A mere mistake or irregularity at this technical stage would not, per se, signify unfairness of the elections, if the general principles of equality, transparency, impartiality and independence of the electoral administration were complied with. The concept of free elections would be put at risk only if (i) there is evidence of procedural breaches that would be capable of thwarting the free expression of the opinion of the people, for instance through gross distortion of the voters' intent; and (ii) where such complaints receive no effective examination at the domestic level." (See ECtHR Guide on Article 3 of Protocol no.1 to the ECHR, paragraph 96).

178. Accordingly, the Court does not find that the challenged decision of the Supreme Court was rendered contrary to the law, nor have interpreted the election law in an arbitrary manner. In addition, the Court finds that the circumstances of this allegation find no support in any of the cases of the ECtHR and the case law of the Venice Commission member states, as elaborated above.

(iv) Regarding the allegations related to the assessment of legality and constitutionality by the Supreme Court

179. The Court recalls that the Applicants allege that the Supreme Court has violated their right to judicial protection of rights guaranteed by Article 54 of the Constitution, because through challenged decisions only the legality of the ECAP decisions was assessed without addressing their constitutionality. This has resulted, according to them, in violation of the principle of the *"constitutional supremacy"*.

180. In essence, the Court notes that this allegation raises two essential issues: (i) the obligation of regular courts to assess, when making their decisions, the fundamental rights and freedoms guaranteed by the Constitution, beyond the rights and freedoms guaranteed by law; and (ii) the lack of reasoning of the challenged decisions of the Supreme Court regarding allegations of constitutional violation of the Applicants.

181. With regard to the first, the Court emphasizes that, beyond the Constitutional Court, it is also a duty of the regular courts to interpret the fundamental rights and freedoms guaranteed by the Constitution when assessing the alleged violations. This obligation derives from Article 21 [General Principles] of the Constitution, according to which, among other things, fundamental human freedoms are the basis of the legal order of the Republic of Kosovo. Within these rights are those guaranteed by international agreements and instruments included in

Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution; and (ii) Article 102 [General Principles of the Judicial System] of the Constitution, according to which the courts adjudicate based on the Constitution and the law. Therefore, the rights guaranteed by the Constitution are protected by all judicial instances and the Constitutional Court, which based on Article 112 of the Constitution, is the final authority to assess the alleged violations by public authorities of fundamental rights and freedoms guaranteed by Constitution.

182. The above-mentioned constitutional Articles also guarantee the principle of "*constitutional supremacy*", according to which the Constitution, in hierarchical terms, stands at the top of the pyramid and is the source of all laws and sub-legal acts in the Republic of Kosovo. In the latter, the "*supremacy*" of the Constitution is also ensured through the application of a mechanism for controlling the constitutionality of laws and verifying their compatibility with the Constitution, always in the manner provided by the Constitution.

183. However, in the context of the assessment of fundamental rights and freedoms, namely individual referrals, as is the case in the circumstances of the present case, the Court notes that the boundary between the jurisdiction of the Constitutional Court and the regular courts in assessing the constitutionality and legality is not always accurately defined. The Constitutional Court, but also the regular courts, are often in a position to assess and interpret the law, the Constitution, but also the international instruments, as guaranteed by Article 22 of the Constitution. It is the principle of subsidiarity and the fourth instance doctrine, which, in principle, but depending on the particular circumstances of each case, make that distinction.

184. In light of the abovementioned explanations, and to assess whether the Supreme Court reviewed the substantive allegations of the Applicants, the Court refers to the second issue presented above, namely the alleged lack of reasoning of the challenged decisions of the Supreme Court regarding the Applicants' allegations of constitutional violation.

185. In this regard, the Court should initially emphasize that the guarantees of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to fair trial) of the ECHR, in principle, on the basis of ECtHR case law, are not applicable in the election disputes (See*inter alia*, *Pierre-Bloch v. France*, Judgment of 21 October 1997, paragraph 50). This does not mean that the decisions related to electoral disputes should not be reasoned. On the contrary.

However, the reasoning of a court decision in the election disputes must be put in the context of Article 3 of Protocol no.1 to the ECHR and the relevant ECtHR case law. According to the ECtHR, the procedure for reviewing electoral disputes should include a " *sufficiently reasoned decision*" in order to "*prevent the abuse of power by the relevant decision-making authority*" (see, *inter alia*, *Kerimova v. Azerbaijan*, cited above, paragraphs 44- 45; *Podkolzina v. Latvia*, cited above, paragraph 35, *Kovach v. Ukraine*, cited above, paragraph54-55). In addition, a reasoned decision in the election disputes is also required by the Opinions of the Venice Commission, specifically the Report on Dispute Resolution (See item 11.2 of Section C item 1.6 of of the Report). The Court in this respect, also recalls that the time limits of decision-making in the election disputes are in principle very short, especially in the first and second instance.

186. Beyond the election disputes, the concept of "*sufficiency of reasoning*" even where desirable could be a wider and more detailed reasoning is a concept developed and also used by the ECtHR itself. (See case *Merabishvili v. Georgia*, No. 72508/13, Judgment of the Grand Chamber [GC] of 28 November 2017, paragraph 227 - although the circumstances of the case are not the same, the concept of "*sufficiency of reasoning*" stands. In this case of the Grand Chamber, the ECtHR in its reasoning stated the following*: "Whilst more detailed reasoning would have been desirable, the Court is satisfied that this* [reasoning] *was enough in the circumstances*".

187. In order to accurately assess whether the Constitutional allegations of the Applicants at the Supreme Court have been dealt with and there was "*sufficient reasoning*" by the Supreme Court, in the circumstances of the present case, the Court will further accurately recall the relevant citations from the two appeals filed by the Applicants with the Supreme Court.

188. Firstly, as regards the first appeal filed with the Supreme Court against Decision [ZL. A. no. 1102/2017], of 22 November 2017 of the ECAP, namely the appeal of 30 November 2017, the Court recalls that the Applicants stated the following*: "The Constitution of the Republic of Kosovo in Article 45 [...] in its three paragraphs speaks about three constitutional rights of each citizen of Kosovo. The first has to do with the right to be elected and to elect, except in cases when this right is restricted by a court decision; The second right has to do with the right to guarantee the sanctity of vote as a personal, equal, free and confidential right. The third and the last one deals with the right of each citizen in Kosovo to be guaranteed by the state institutions that the realization of the right to election will be guaranteed in the way*

that everyone will have the right to influence in a democratic way in the decisions of public authorities". The Applicants further emphasized that: "*These election rights are enshrined in the respective laws of Kosovo, including the infrastructure for local elections. Therefore, by Law [LGE], which in Article 3 [Fundamental Principles] foresees many election principles and the election process in its entirety"*. The Applicants also emphasized that "*Code is an applicable election regulation of CEC No. 11/2013 and of Article 45 of the Constitution and the [LGE] as above.* In the last part of this appeal, the Applicants stated that: "*The election right of the candidate [...] was violated by "Vetëvendosje" in the way that the latter took actions violating severely the basic constitutional and legal principles regarding the elections. Above all, the PRINCIPLE OF SECRECY AND THE RIGHT TO A FREE VOTE were violated, as two components, which in the constitutional democracies is known as HOLINESS OF THE VOTE"*.

189. Secondly, regarding the second appeal submitted to the Supreme Court against Decision [ZL. Ano. 1125/2017], of 1 December 2017 of the ECAP; namely the appeal of 5 December 2017, the Court recalls that the Applicants requested the annulment of the ECAP Decision for three reasons: *"I. Due to erroneous application of the provisions of the Law on General Elections and the Law on Local Elections by the ECAP; II. Due to incorrect assessment of evidence provided by the solidary appellants as above; and finally; III. Due to the violation of three constitutional rights of the voters for the Mayor of Prishtina guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution:- the right to be elected and elect;-the right to guarantee the holiness of vote and finally - the right of each citizen of Kosovo to be guaranteed by the state institutions that the realization of the election right will be guaranteed so that each citizen can influence democratically in the decisions of the public authorities but not on the day of election silence"*.

190. In this regard, the Court notes that the Applicants in their appeals submitted to the Supreme Court, referred to the violation of Article 45 of the Constitution by citing and summarizing the rights guaranteed by the three paragraphs of this Article, but the Applicants built the specific allegations of violation of fundamental rights and freedoms, through arguments and reasoning based on law.

191. The Court considers that all the substantive allegations of the Applicants, which were substantiated and reasoned, were dealt with and received a response from the Supreme Court.

192. In line with its case law, the Court emphasizes that its already consolidated position that "*the mere mentioning of respective articles of the Constitution, without elaborating their alleged violation, is not sufficient to build a grounded allegation of constitutional violation*". (see, *inter alia*, in this context, the case of the Constitutional Court, KI54/18, Applicant *Shaip Sylaj*, Resolution on Inadmissibility of 10 October 2018, paragraph 61 and the references to that paragraph) applies *mutatis mutandis* also to the submissions with allegation of constitutional violation that the parties file to the pre-constitutional bodies, in the present case in the ECAP and the Supreme Court. Before the latter, as well as in the proceedings before the Constitutional Court, the arguments elaborated on the allegations of constitutional violation should be presented, thus strengthening the position that it is not enough to cite the relevant constitutional articles or the fundamental principles of a right.

193. Therefore, in the circumstances of the present case, the challenged decisions of the Supreme Court, which were rendered within the short time limit of 72 hours and are decisions which have "*sufficiently reasoned*" the Applicants' allegations, and which based on the applicable election law, and which based on the hierarchy of norms is in compliance with the Constitution, while its constitutionality has not been challenged before the Constitutional Court based on the relevant constitutional provisions and unless it has been assessed and declared contrary to it.

(v) As to general principles in conjunction with Article 54 of the Constitution and whether the Applicants' allegations in their entirety may have resulted in the violation of the latter

194. After dealing with the specific allegations of the Applicants of violations of the rights guaranteed by Article 54 of the Constitution, the Court will also deal with and apply in the circumstances of the present case, the general principles of judicial protection of rights and the right to a legal remedy based on the case law of the Court and of the ECtHR and the fundamental principles for an "*effective complaints system*", as summarized by the relevant reports and opinions of the Venice Commission, to assess whether the appeal proceedings in their entirety in this election dispute, may have resulted in a violation of Article 54 of the Constitution.

195. In this regard, the Court notes that Article 54 of the Constitution consists of two rules but which must be read together and interdependent. The first rule is general and states that "*everyone enjoys the right of judicial protection if any right guaranteed by this*

Constitution or by law has been violated or denied". This rule in principle implies that judicial protection is a right guaranteed to each individual, natural or legal, to whom may have been "*violated*" an existing right guaranteed by the Constitution or by law or "*denied*" the right to acquire or enjoy any rights guaranteed by the Constitution or by law. The second rule of this article speaks and guarantees the right to "*effective legal remedies*" in cases when it is found that a right protected by the Constitution or by law has been violated.

196. Article 54 of the Constitution is also supplemented and should be closely read in conjunction with Article 32 [Right to Legal Remedies] of the Constitution and Article 13 (Right to an effective remedy) of the ECHR and with the relevant case law of the Court and the ECtHR, as will be explained in the following paragraphs.

197. The Court notes that Article 32 of the Constitution complements both aspects of Article 54 of the Constitution, guaranteeing the right to use legal remedies against the court decisions or administrative decisions which have violated the rights guaranteed, but by limiting that use in the manner prescribed by law. Whereas Article 13 of the ECHR guarantees the right to an "*effective remedy"* in the event of a violation of the rights guaranteed by ECHR, before a national body, or before a body foreseen by the domestic law.

198. Therefore, in principle and in its entirety, Article 54 on the judicial protection of rights, Article 32 of the Constitution on the right to a legal remedy and Article 13 of the ECHR for an effective remedy guarantee: (i) the right to judicial protection in case of violation or denial of a right guaranteed by the Constitution or by law; (ii) the right to use a legal remedy against judicial and administrative decisions that violate the rights guaranteed in the manner prescribed by law; (iii) the right to an effective legal remedy if it is established that a right has been violated; and (iv) the right to an effective remedy at national level if a right guaranteed by the ECHR has been violated.

199. To date, the Court has in some cases found a violation of Article 54 of the Constitution. In all those cases, the violation was found in conjunction with Article 32 of the Constitution, namely with Article 13 of the ECHR. Violations in those cases consisted in the failure/refusal of public authorities to enforce a final decision. More specifically, the case law of the Court so far consists in finding constitutional violations that relate to the second rule of Article 54 of the Constitution. (See cases of Constitutional Court KI47/12, Applicant *Islam Thaçi*, Judgment of 11 July 2012, paras 46 and 51; KI55/11, Applicant *Fatmir Pireci*, Judgment of 9 July 2012, paras 43-47; KI129/11, Applicant

Viktor Marku, Judgment of 11 July 2012, paras 44-48; KI50/12, Applicant Agush *Llolluni*, Judgment of 9 July 2012, paras 39-45; KI94/13, Applicant *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 24 March 2014, paragraph 90; KI112/12 Applicant *Adem Meta*, Judgment of 5 July 2013, paras 54-55; KI80/12 Applicant *Sali Pepshi* Judgment of 5 July 2013, paras 49-50).

200. However, the essence of the rights guaranteed by Article 13 of the ECHR, and in the context of the constitutional order of the Republic of Kosovo, in conjunction with Articles 32 and 54 of the Constitution, is established through the ECtHR case law, *inter alia,* through case *Klass and Others v. Germany* according to which:*"Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress ("redress"). Thus Article 13 must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated".* (See case of ECtHR *Klass and Others v. Germany*, No. 5029/71, Judgment of 6 September 1979, paragraph 64).

201. In this context, when the ECtHR examines whether a legal remedy provided by the relevant state is effective or not, it essentially answers the question as to whether such a legal remedy would, if used, include in itself the ability and capacity to prevent the alleged violation which has occurred or is continuing to occur, or to a violation which has already occurred, could the complainant find adequate remedy. This is the key question in which the ECtHR responds when deciding on the effectiveness of a legal remedy.

202. More specifically, from the case law of the ECtHR, the main requirements come as far as an effective legal remedy is concerned: (i) the essential requirements of an effective legal remedy; (ii) the institutional requirements for an effective legal remedy; and, (iii) the issue of the cumulative nature of the proceedings. Considering that the circumstances of the present case and the allegations of the Applicants relate mainly to alleged violations of judicial protection of rights and effectiveness of the legal remedy, the Court will elaborate these three criteria in more detail in the following by applying them to the circumstances of the present case.

203. With regard to the first issue, namely "*the essential requirements of an effective legal remedy*", the ECtHR case law indicates that to consider a legal remedy effective it should be (i) "*effective in practice*

and in law"; (ii) the effectiveness should be such as to have the ability and capacity to prevent the occurrence of an alleged violation or continuation of that violation; or (iii) to be a legal remedy which may provide adequate correction for any violation that has occurred. (See case of ECtHR, *Kudla v. Poland*, cited above). There is no effective legal remedy ever if the scope of review by a court or public authority authorized to make such a review is so weak that it is impossible to properly address the key elements of whether it has or not been violation of the ECHR. (See case of ECtHR, *Wainwright v. United Kingdom*, No. 12350/04, Judgment of 26 September 2006, paras 53-56).

204. In this respect, the Court notes that these criteria are met in the circumstances of the present case for the following reasons: (i) the legal remedy in the election disputes is defined by the LGE and the Law on respective Amendments and Supplements, namely Articles 105, 118 and 119 therein. Moreover, as elaborated above, beyond the appeals related to election disputes, the LGE and the relevant amendments also determine the possibility of recount and re-vote in "*extraordinary cases*" and "*if the identified violations have impact on the final result*" as it is defined by Articles 106, 117 and 120 of the LGE and the respective amendments. As elaborated above, the legal provisions that determine the possibility of cancellation of the election results are in harmony with the practice of the Venice Commission member states as summarized in the Code of Good Practice and Explanatory Report, Report on Dispute Resolution and Report on the Cancellation of Results. Moreover, the ECAP and the Supreme Court practice shows that these provisions are effective, if the ECAP and the Supreme Court finds the allegations of the Applicants as grounded. The recent cases of ECAP practice and the Supreme Court find this. The Court notes that in the last elections, the vote was repeated in the Partesh municipality, following the ECAP Decision which found the allegations in the appeal as grounded based on the police reports and Basic Prosecution files (see Decision [ZL. Ano. 560/2017] of 2 November 2017 of the ECAP) and in the Istog Municipality, following the ECAP Decision, which upheld the allegations as a result of the investigation of the election material (see Decision [ZL. Ano. 1114/2017] of 27 November 2017 of the ECAP). In the same line of argument, the Court emphasizes that the legal remedy available in the election disputes as defined by the applicable election law, ii) has the capacity to prevent the occurrence of an alleged violation or continuation of that violation, and (iii) provide adequate correction for any kind of violation that has occurred. The Court also recalls that the ECtHR has determined that the legal remedy is ineffective when "*the scope of review by a court or public authority authorized to make*

such review is so weak that it is impossible to properly address the key elements to whether or not there has been a violation of the ECHR". Case *Murray v. United Kingdom* clarifies this dispute. In this case, unlike the circumstances of the present case, the ECtHR, finding the weak power of the judicial review that the regular courts had by the "Human Rights Act 1998", and has decided to find a violation of Article 13 of the ECHR precisely because of the poor prospect of success that the legal remedy has provided. (See case *Murray v. United Kingdom,* no. 14310/88, Judgment of 28 October 1994, paragraph 100; see also, *mutatis mutandis*, ECtHR case *Wainwright v. United Kingdom*, cited above, paragraphs 53-56).

205. As regards the second issue, namely (ii) "*institutional requirements*" for an effective legal remedy, the ECtHR case law indicates that the authority referred to in Article 13 of the ECHR should not necessarily be a judicial authority. (See ECTHR case, *Chahal v. United Kingdom*, No. 22414/93, Judgment of 15 November 1996). But if it is not a judicial authority then it is necessary that the power and guarantees it offers to be relevant to determining whether the legal remedy before that authority is effective or not. In this respect, the ECtHR examines the issue of independence of that public authority and the procedural guarantees it provides to determine the effectiveness of a legal remedy. (See ECHR case, *De Souza Ribeiro v. France*, No. 22689/07, Judgment of 13 December 2012).

206. In this regard, the Court notes that these criteria are also met because the decision-making authority in the election disputes in the Republic of Kosovo includes institutions with full institutional independence, including the CEC as the authority which independence is defined by Article 139 of the Constitution; the ECAP as a permanent and independent authority as foreseen by the LGE and the respective amendments and is the competent body to decide on election complaints and appeals relating to the electoral process and, finally, a judicial body, the Supreme Court which reviews ECAP decisions upon the complaints.

207. And finally, with regard to the third issue, namely, "*cumulative nature of the proceedings*", the case law of the ECtHR shows that the complete accumulation of redress procedures and channels in a legal system must be taken into account when deciding whether or not the Applicant has an effective legal remedy available or not. In this respect, the ECtHR has emphasized that even if any legal remedy itself cannot meet all of the requirements of Article 13 of the ECHR - the total of legal remedies may meet those requirements. (See ECHR case,

Surmeli v. Germany, No. 75529/01, Judgment of 8 June 2006, see also *Leander v. Sweden*, no. 9248/81, Judgment 26 March 1987).

208. In this respect, the Court, having in mind that it has already found that the two requirements of the first two criteria were met, also finds that the proceedings in its entirety has enabled and provided an effective legal remedy in addressing the Applicants' allegations. Consequently, the Court finds that the criteria for assessing the effectiveness of an effective legal remedy within the meaning of Article 13 of the ECHR in the circumstances of the present case , have been met.

209. In support of this conclusion, the Court also refers to the ECtHR case law where it has found a violation of Article 3 of Protocol no.1 to the ECHR in conjunction with Article 13 of the ECHR, namely in cases where it has found a violation of the right to a legal remedy related to the election rights, cases that coincide with the allegations of the Applicants.

210. In case of *Petkov and Others v. Bulgaria* (see case of ECtHR, *Petkov and Others v. Bulgaria,* no. 77568/01, 178/02 and 505/02 Judgment of 11 July 2009), the Applicants alleged that they had been prevented from running for parliamentary elections and that they did not have an effective remedy to challenge such a prohibition. They were a part of the list of the election candidates, but were removed from the list on suspicion of collaborating with former state security agencies in communist times in Bulgaria. Later Bulgaria's Supreme Administrative Court ordered all three new applicants to return to the candidate lists, however the decisions of that court were not implemented and parliamentary elections were held without the Applicants as candidates. The ECtHR found a violation of Article 3 of Protocol no.1 to the ECHR as it noted that (i) the election rules concerning de-registration were issued only 2 and a half months before the elections, which was in conflict with the recommendations of the Venice Commission; (ii) the mechanism as such posed significant practical, legal and temporal difficulties; and (iii) the practical issues of this legal initiative were clarified by the CEC only 12 days before the elections that could have been clarified much earlier. After noting these flaws, the ECtHR found a violation based on the failure of the Bulgarian authorities to pursue final decisions requiring re-placement of Applicants on the list of candidates. The violation of Article 13 in the circumstances of the present case was found for the reason that the ECtHR was not satisfied that the proceedings before the Constitutional Court of Bulgaria had the capacity to provide a sufficient correction to the Applicants.

211. In case *Grosaru v. Romania (*see ECtHR case *Grosaru v. Romania,* no. 78039/01, Judgment of 2 March 2010*)*, the Applicant was a candidate from the ranks of the Italian minority in Romania who competed for a seat in the Assembly. He had won the highest number of votes at national level; while another candidate, also from the community of Italians of Rumania, had won the most votes in a certain zone (*"single contituency"*). The winner of the seat in the Assembly was declared the other candidate and not the Applicant. The problem the ECtHR found in this case was related to the fact that the CEC equivalent in Romania declared the winner with an arbitrary application of the law because the law specifically did not state whether the winner should be declared the one who wins at the national or at the level of the electoral zone. Thus, the case concerned the lack of clarity of the electoral law with regard to national minorities and the lack of impartiality of the authorities that reviewed the Applicant's request which were considered as violations that infringed the essence of the right guaranteed by Article 3 of Protocol no.1 of the ECHR. Meanwhile, the violation of Article 13 was found precisely because no local court had ruled on the interpretation of that challenged legal provision filed by the Applicant. On one hand, the Supreme Court of Romania declared inadmissible the Applicant's application as it considered that the decisions of the CEC were final; and, on the other hand, the Constitutional Court of Romania had declared itself incompetent and without jurisdiction to decide on the election issues.

212. Finally, in the case *Paunović and Milovojević v. Serbia (*See ECTHR case *Paunović and Milovojević v. Serbia, no. 41683/06,* Judgment of 24 May 2016*)*, at a certain time, the representative of their political party had submitted their resignations from the mandate of a deputy; the resignations which they had subsequently revoked. Despite the revocation of the resignation and the fact that the resignation was not handed over to them personally, their mandate of a deputy was terminated. Therefore, the main issue before the ECtHR had to do with whether the mandate had been terminated in accordance with the applicable legal rules or not. The ECtHR found a violation of Article 3 of Protocol no.1 to the ECHR because the entire process of termination of the mandate of a deputy was made outside the legal framework and as such was unlawful. The ECtHR found that their mandate was terminated despite the fact that the Applicants had notified the Assembly in person that they did not want to submit their mandate and that their first request for resignation was considered withdrawn and invalid. Meanwhile, in relation to Article 13 of the ECHR, the ECtHR explained that the separate examination for this allegation was made only for post-election election disputes which were not subject

to review by local courts and not to those election disputes where the allegations of the Applicants were subject to judicial review by the local courts. Therefore, as in the present case the Supreme Court and the Constitutional Court of Serbia did not consider the merits of the case at all, the ECtHR found a violation of Article 13 of the ECHR.

213. The Court notes that, while the factual circumstances of the cases in question do not correspond to the circumstances of the present case, they result in a common denominator of the cases in which the ECtHR has found a violation of Article 13 of the ECHR in relation to the election rights and that is the *arbitrariness*. In all three cases, the courts rejected to assess allegations of serious violation of the election law. In the present case, this Court has considered the merits of the Applicants' allegations and maintains that in the circumstances of the present case there is no *"arbitrariness"* that could potentially lead in violation of the Constitution and ECHR.

214. Finally, the Court recalls that it will refer to the basic principles for a right to legal remedy in the electoral disputes as summarized by the Venice Commission, and specifically the rules determined for an "*effective complaints system*" as an essential part of the "*procedural guarantees*", one of the requirements for implementation of five fundamental principles that are related to the democratic elections, summarized by the Code of Good Practice, respective Explanatory Report and the Report on Dispute Resolution.

215. According to the Venice Commission, there are nine (9) fundamental principles that constitute an "*effective* complaint *system*" in the election disputes. (See section 3.3 of the Code). Regarding the importance of the circumstances of the present case, the Court refers to the following principles: (i) the procedure should be simple and without formalities, particularly as regards the receipt of the complaint/appeal; (ii) the appeal procedures and, in particular, the competencies and responsibilities of different authorities should be clearly regulated by law in order to avoid conflicts of jurisdiction. Neither the complaining party nor the authorities should have the right to choose the appeal body; (iii) the appeal body should have the power to cancel the elections when the irregularities affect the final results. Elections can be canceled entirely or only results in an electoral zone or at a polling station. In case of cancellation, new elections should be organized in the respective area; (iv) the time limits for appeal and decision-making should be short (three to five days for each first instance complaint); and (v) if the appeal body is a higher election commission, it should have *ex officio* the right to rectify or annul the decisions taken by the lower election commissions.

216. The Court recalls that throughout the reasoning of the Applicants' allegations, the Court has dealt with all these matters. And, it is relevant to reiterate that it has specifically explained that, while the principles of the Venice Commission recommend the avoidance of inadmissible claims, the latter was never decided in the context of missing the deadline to file complaints or even to submit evidence before the decision-making authorities prior to rendering the respective final decision.

217. Based on the foregoing and taking into account the allegations raised in the circumstances of the present case and the facts presented, the Court also by relying on the standards established in its case law and the case law of the ECtHR and the standards summarized by the Venice Commission, holds that (i) the first instance Decision of the Supreme Court, namely Decision [AA. No. 52/2017] of 25 November 2017 was not rendered in violation and is in compliance with the rights to judicial protection of rights guaranteed by Article 54, of the right to an effective legal remedy guaranteed by Article 32 of the Constitution, in conjunction with the right to an effective remedy guaranteed by Article 13 of the ECHR, of the political entity LDK, namely the second Applicant and that the (ii) second Decision of the Supreme Court, namely Judgment [AA.U.ZH. No. 62/2017] of 7 December 2017 was not taken in violation of the rights guaranteed by Article 54 and the right to an effective legal remedy guaranteed by Article 32 of the Constitution in conjunction with the right to an effective remedy guaranteed by Article 13 of the ECHR, of Mr. Arban Abrashi and the political entity of LDK, namely the first and second Applicant.

2. As to the Applicants' allegations of violation of freedom of election and participation guaranteed by Article 45 of the Constitution

218. In dealing with these allegations of the Applicants, the Court will first summarize the general principles on freedom of election and participation guaranteed by Article 45 of the Constitution, and then will apply them in the circumstances of the present case. As to the first, the Court will elaborate: (i) the applicability of Article 3 of Protocol no.1 to the ECHR in the circumstances of the present case; (ii) the guarantees of Article 45 of the Constitution in conjunction with Article 3 of Protocol no.1 to the ECHR; and (iii) the fundamental principles/framework of assessment of election disputes based on the case law of the ECtHR and the Venice Commission. Subsequently, the Court, by applying these fundamental principles, will examine the

Applicants' allegations of violation of: (i) "*equal vote*"; (ii) "*free vote*"; and (iii) "*principle of transparency*".

General principles

As regards the applicability of Article 3 of Protocol no.1 to the ECHR

219. The rights guaranteed under Article 3 of Protocol no. 1 to the ECHR are essential for establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. (See, *mutatis mutandis*, the case of ECtHR, *Hirst v. United Kingdom* (no.2) [GC] No. 74025/01, Judgment of 6 October 2005, paragraph 58). However, these rights are not absolute. They have space for "*implicit restrictions*" and the Contracting States are given room for assessment in this sphere. (see cases of ECtHR *Mathieu-Mohin and Clerfayt*, cited above, paragraph 52, *Matthea v. United Kingdom*, no.24883/94, Judgment of 18 February 1999, paragraph 63, *Labita v. Italy*, No. 26772/95, Judgment of 6 April 2000, paragraph 201 and *Podkolzina v. Latvia*, No. 46726/99, para. 33).

220. It is important to note that the guarantees of Article 3 of Protocol no.1 to the ECHR differ from other rights guaranteed by the ECHR, and this is reflected in the wording of its own article which is focused on determining the obligation on the Contracting States to hold elections that ensure the free expression of the voters' opinion and is not formulated in the light of a particular right or freedom. Consequently, the focus of Article 3 of Protocol no.1 is on the obligation of the Contracting State and not on the rights and freedoms of natural or legal persons, even though they are not excluded, as the case-law of the ECtHR emphasizes. (See the case of ECtHR *Mathieu-Mohin and Clerfayt v. Belgium*, No. 9267/81 Judgment of 2 March 1987, paragraphs 46-51).

221. In this regard, the Court also emphasizes the fact that, according to ECtHR case law, Article 3 of Protocol no.1 to the ECHR does not cover all categories of elections, and in principle its guarantees do not apply to local elections. (See case of ECtHR *Xuereb v. Malta*, no. 52492/99, Decision of 15 June 2000). This is because the text of Article 3 of Protocol no.1 refers specifically to the "*legislature*", namely "*free expression of the opinion of the people in the choice of the legislature*". Therefore, in interpreting Article 3 of Protocol no.1 to the ECHR, the ECtHR, in principle, excluded from the scope of its control the presidential elections or referendums. However, according to the ECtHR the "*legislature*" should not be interpreted as the synonym of the "*parliamentary elections*". The ECtHR has in fact insisted that this

term be interpreted in the light of the constitutional structure of the respective state. (see *Mathea v. the United Kingdom*, cited above, paragraph 40). Through *Vito Sante Santoro v. Italy*, the ECtHR has acknowledged that the regional councils are part of the "*law-making body*" because they are "*competent to issue sub-legal acts and regulations within the territory they cover in a number of important areas in a democratic society […]*". (see case of ECtHR, *Vito Sante Santoro v. Italy*, No. 36681/97, Judgment of 1 July 2004, paragraph 52). However, according to ECtHR, the scope of Article 3 of Protocol no.1 to the ECHR does not cover the elections of "*local governments*" which lack sufficient lawmaking authority. (see cases of the European Commission on Human Rights: *X v. United Kingdom*, no. 7566/76, Decision of 11 December 1976, *Booth-Clibborn and Others v. United Kingdom*, No.11391/85, Decision of 5 July 1985, Case of ECtHR *Gorizdra v. Moldova* No. 53180/99, Decision of 2 July 2002).

222. Based on the principles outlined above, the Court notes that in the circumstances of the present case related to the election of the Mayor of the Municipality, Article 3 of Protocol no.1 to the ECHR in principle is not applicable. This is because, as noted above, according to the ECtHR case law, the guarantees of Article 3 of Protocol no.1 to the ECHR are in principle applicable to the elections related to a "*legislative body*" and that in principle, they are not applicable to the "*local governments*" elections that lack sufficient lawmaking authority.

223. Notwithstanding this, the Court considers that the principles derived from the case law of the ECtHR in relation to Article 3 of Protocol no. 1 to the ECHR must be applied in the circumstances of the present case in terms of the definitions and guarantees related to the elections rights protected beyond the ECHR and Article 45 of the Constitution. However, the Court will not limit itself to the applicability of Article 3 of Protocol no.1, to the ECHR, and in fundamental principles built up by the ECtHR in terms of reviewing election disputes and moreover, it will also apply the basic principles of the Venice Commission to be elaborated in the next section of this Judgment.

(ii) Regarding the guarantees of Article 45 of the Constitution in conjunction with Article 3 of Protocol no.1 to the ECHR

224. The Court notes that Article 45 of the Constitution consists of 3 separate paragraphs and each of them has the relevant elements and rules. In support of the justification of the allegations in the circumstances of the present case, the Court will focus only on the first two paragraphs of Article 45 of the Constitution.

225. The first paragraph of Article 45 of the Constitution defines the right to vote (the active right of vote) and the right to be elected (passive right of vote). The first right, i.e. the one of active vote, belongs only to individuals, i.e. to natural persons, who are citizens of the Republic of Kosovo and who have reached the age of 18, even on the voting day and in the event that their right is not limited by a court decision. The other right, that of a passive vote, belongs to the candidates as individuals, namely as natural persons, who run in elections at the local or central level, as well as to political entities, namely legal persons competing in the elections at the local or central level . Also for the passive right of vote applies the condition that right of the latter to exercise this right is not limited by a court decision.

226. Meanwhile, the second paragraph of Article 45 of the Constitution guarantees that the vote is personal, equal, free and secret. The same guarantees are also defined in terms of local self-government, which according to Article 123 of the Constitution is exercised through representative authorities elected in general, equal, free and direct elections and by secret ballot. These constitutional guarantees are also further specified by the LGE, the Law on Amending and Supplementing the LGE and the Law No. 03/L-072 on Local Elections in the Republic of Kosovo (hereinafter: the Law on Local Elections). In addition, the latter are in harmony with the five fundamental principles of the European electoral heritage, summarized in the Code of Good Practice and respective Explanatory Report, which, as summarized above, include the universal vote, equal vote, free vote, secret vote, and direct vote.

227. In the interpretation of guarantees embodied in Article 45 of the Constitution, the Court refers to the ECtHR case law, which has also interpreted Article 3 of Protocol no.1 to the ECHR as a guarantee of "*the active right of vote*" and "*the passive right of vote*". Both provide substantial and procedural safeguards. However, the Court notes that, based on the case law of the ECtHR, the passive rights have been equipped by less protection through the ECtHR case law than active rights (see ECHR case *Zdanoka v. Latvia*, No. 588278/00, Judgment of 16 March 2006, para. 105 -106). The ECtHR case law in relation to passive rights has largely focused on verifying the lack of arbitrariness in the domestic proceedings that may have resulted in disqualification of a natural or legal person to run in the election. (See ECtHR cases, *Zdanoka v. Latvia* cited above, paragraph 115; *Melnitchenko v. Ukraine*, No. 17707/02, Judgment of 19 October 2004, paragraph 57).

228. Beyond the active and passive rights of vote, according to the most recent ECtHR case law, Article 3 of Protocol no. 1 to the ECHR includes the "*post-election period*" or "*post-election rights*". In that regard, the ECtHR has argued that the essence of free elections implies a number of electoral rights that encompass minimum standards governing the practices and institutions designed to administer voting, counting and determining the election result. (See ECtHR case, *Davydov and Others v. Russia*, No. 75947/11, Judgment of 30 May 2017, paragraphs 284-285).

229. In light of these rights, the ECtHR has, *inter alia*, reviewed cases involving the laws regulating voter registration issues as a prerequisite for the free exercise of the election rights (See ECtHR case, *Georgian Labor Party v. Georgia* No. 9103/04, Judgment of 8 July 2008); the obligation of the state to organize free elections includes the obligation to establish mechanisms that have the capacity to investigate the allegations of electiob irregularities and to improve and address the latter (*Namat Aliyev v. Azerbaijan* No. 18705/06 Judgment of 8 April 2010); or cases related to the need for a court hearing responsible for complaints and election disputes. The latter determined that the essence of an election right may be restricted, hence violated, if there is no sufficient guarantee for an effective and impartial appeal system. (See ECtHR case*, Grosaru v. Romania*, cited above).

(iii) Regarding the framework for assessment of election disputes based on the ECtHR practice and the Venice Commission

230. In principle, the test that the ECtHR applies to assess whether Article 3 of Protocol no.1 has been violated was determined by *Mathieu-Mohin and Clerfayt v. Belgium* and according to which*: "the Court has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate". In particular, such restrictions should not impede the free expression of public opinion in the choice of the legislature". (*See ECtHR case, *Mathieu-Mohin and Clerfayt v. Belgium, cited above, paragraph* 52).

231. In this respect, the ECtHR case law has built several other criteria based on which it examines the alleged violations of the election rights, including the fact that: a) "*constraints on electoral rights must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through free vote*" (See *Hirst v. United Kingdom* (no 2)

cited above, paragraph 162 and *Lykourezos v. Greece* no. 33554/03, Judgment of 15 June 2006, paragraph 52). In practice, according to the ECtHR, this means that it reviews relevant complaints in terms of lack of arbitrariness or of proportionality. (see case of ECtHR *Yumak and Sadak v. Turkey*, No. 10226/03, Judgment of 8 July 2008, paragraph 109).

232. In principle, in assessing compliance with Article 3 of Protocol no.1 to the ECHR, the ECtHR focuses mainly on two essential issues: a) whether there has been arbitrariness or lack of proportionality in the circumstances of the case concerned and whether the restrictions have infringed the free expression of the will of the voters. (See ECtHR cases, *Mathieu-Mohin and Clerfayt v. Belgium*, cited above, paragraph 52; *Ždanoka v. Latvia* [GC], cited above, paragraphs 103-104 and 115).

233. In this regard, in order to put even more in the practical context the ECtHR test in assessing arbitrariness and disproportionality in election disputes, the Court will refer to three ECtHR cases in which it found violation of Article 3 of Protocol no.1 in the context of the "*post-election rights*".

234. In case of *Namat Aliyev v. Azerbaijan*, the Applicant competed for a seat in the Assembly of Azerbaijan. He complained that his right to run as a candidate in the free elections had been violated due to serious irregularities and violations of electoral law that occurred before and on the voting day. The created conditions, according to the Applicant, made it impossible to correctly determine the voter's opinion. The ECtHR held that the Applicant filed extremely serious allegations about the unlawful influence of the voting authorities on the voting process, influence on the free choice of voters, unauthorized ballot boxes, ill-treatment of observers and clear discrepancies indicating possible failure regarding what has happened to thousands of unused ballot papers. The court considered that such claims had the potential to impede the democratic nature of the elections. Furthermore, the ECtHR was also based on the official reports of observers who had provided the same facts as to serious irregularities as the Applicant himself. These were some of the reasons - the seriousness of which was sent in finding a violation of Article 3 of Protocol no.1 to the ECHR by the ECtHR.

235. In another case, namely, *the Georgian Labor Party v. Georgia* (cited above), the Applicant was the political entity the so-called "*Georgia Labor Party*". This political entity complained, *inter alia*, of the fact that with the exclusion of votes from two districts a certain number of

the population was deprived of their right to vote - which had affected their right to run in the elections. Regarding this case, the ECtHR examined a number of claims of this political entity while it found violation of Article 3 of Protocol no.1 for the fact that the Central Election Commission had taken a hasty decision to conclude elections nationwide without any valid justification. Subsequently, the exclusion of the two districts from the local elections, namely the voters in the Khulo and Kobuleti districts, was considered to be an act that disregarded a number of essential prerequisites of the rule of law and as such resulted in *de facto* deprivation of the vote *("de facto disfranchisement")* for a significant number of the population. As a result of the exclusion of these voters, the right of a political entity to stand for election was violated in a causal way, a right guaranteed by Article 3 of Protocol no.1 to the ECHR.

236. The Court notes that, while the circumstances of the cases in question do not coincide with the circumstances of the present case, they result in a common denominator of cases in which the ECtHR has found a violation of Article 3 of Protocol no.1 to the ECHR. These cases reflect obvious arbitrariness; lack of proportionality; the restrictions that have violated the free expression of the will of the voters and the inability to verify the will of the voters.

237. Further and beyond the ECHR case law, as previously stated in this Judgment, the Court will refer to the practice of the Venice Commission and, accordingly, to the Code of Good Practice, which is based on the underlining principles of European election heritage, which consists of five underlining principles and they are: (1) universal vote; (2) equal vote; (3) free vote; (4) secret vote; and (5) direct vote. The same are guaranteed also through Article 45 of the Constitution and applicable election laws.

238. Furthermore, the Court recalls that the Code of Good Practice highlights three conditions, the completion of which is a prerequisite for the proper implementation of these five principles of this Code and they are: (1) respect for fundamental rights; (2) the level of regulation and stability of the election law; and (3) procedural guarantees.

239. Concerning the first implementing condition, namely, respect for fundamental rights, the Code of Good Practice underlines that democratic elections are not possible without respect for human rights. In particular, respect for the right to freedom of expression, media, movement inside the country, assembly, association for political purposes, including the right to create political parties. Any restriction of these rights should be foreseen by law and be in the

public interest in accordance with the principle of proportionality. In the part of the Explanatory Report, it is emphasized that the possible limitations of these rights should also be in accordance with the ECHR. (part II of Explanatory Report item 1).

240. Concerning the second implementing requirement, namely "*the level of regulation and the stability of the election law"*, the Code of Good Practice underlines that, apart from rules on technical and similar details that may be included in the lower legal regulatory level (administrative acts, regulations), the election rules should have at least the level of a law. Issues that relate to the fundamental rights of the election law, in particular those with the election system/electoral system and electoral zones, should not be subject to legal amendments-supplementations one year before the elections. If such a thing is necessary to occur, they must be foreseen by the Constitution or any other act that has a higher level than ordinary law. In the part of the Explanatory Report is stated that the stability of the law is a crucial issue for the credibility of the electoral process, which in itself is a vital process for consolidating a democracy of a country. (See Section II, paragraph 2, paragraph 63 of the Explanatory Report).

241. And finally, with regard to the third condition, namely the "*procedural guarantees",* the Code of Good Practices states that the organization of elections should be conducted by an independent body subject to observations by local and international observers and should provide an "*effective complaint system*". The latter have been elaborated and applied in the circumstances of the present case in detail during the examination of the Applicants' allegations relating to alleged violations of the rights to judicial protection guaranteed by Article 54 of the Constitution.

Application of these principles in the circumstances of the present case

242. The Court recalls that the Applicants allege that the Supreme Court, through both of its decisions violated the fundamental rights and freedoms guaranteed by Article 45 of the Constitution. In this regard, their allegations may be categorized as follows: (i) "*violation of equal vote*"; (ii) "*violation of allegations vote*"; and (iii) "*violation of the principle of transparency*". (see specific raised by the Applicants in paragraphs 62-73 of this Judgment).

243. In this regard, the Court notes that the Applicants raise only 2 of the 5 underlining principles related to the quality of the vote, "*equal vote*" and "*free vote*". The Applicants' allegations further fall within the

scope of the third requirement, namely the "*procedural guarantees*". Consequently, in the light of the basic principles of the Venice Commission, the Court will assess whether the general principles in relation to "*free vote*" and "*equal vote*" and respective "*procedural guarantees*" may have been violated. Whereas, in the context of the ECtHR case law, the Court will examine the Applicants' allegations in terms of the "*post-election rights*" guaranteed by Article 3 of Protocol no.1 to the ECHR, applying the ECtHR test in the election disputes, namely arbitrariness; lack of proportionality and whether the restrictions have violated the free expression of the will of voters. The Court will further deal with each Applicant's allegation individually.

(i) As to "equal vote"

244. The principle of *"equal vote"* according to the Code of Good Practice and relevant Explanatory Report means: (i) the right to equal vote - namely the right of each voter to have, in principle, a vote and in the electoral systems where voters are given the right for more than one vote, each voter must have the same number of votes; (ii) the equal power of the vote in the sense that according to the Code, the seats should be distributed equally between the electoral zones; (iii) equal opportunities – namely equal opportunity must be guaranteed to all parties and candidates, meaning that the state authorities must preserve their neutrality in all respects, particularly in terms of electoral campaign, media coverage and political party and election campaigns funding; (iv) equality and national minorities – the parties of national minority should be allowed and that, in principle, the special rules guaranteeing seats reserved for minorities are not contrary to the principle of equal vote; and (v) gender equality in respect that the rules requiring a minimum percentage of candidates of each gender should not be considered to be in contravention of the principle of equal vote as long as they have a constitutional basis (See section 2 of the Code of Good Practice and section 2 of the Explanatory Report).

245. The Court notes that the Applicants also refer to (i) strict and formal equality; and (ii) equality of opportunities. In this regard, the Court notes that the Code of Good Practice and the relevant Explanatory Report deal with strict and proportional equality in the framework of equality of opportunities (See section 2.3 of the Explanatory Report). According to them, and as elaborated above, the equality of opportunities according to the practice of the member states of the Venice Commission is built in the sense of the neutrality and impartiality of state authorities and the application of the same rules for everyone in the election processes. According to the Code, in this

respect, there are two interpretations of equality: formal and proportional. The first one means that the political parties should be treated equally regardless of their power in parliament or between voters and that this also applies to the use of public mechanisms supporting the election campaigns; while the second, implies that the political parties should be treated in proportion to the number of votes. (see item 2.3 (b) of the Code of Good Practice).

246. In this regard, the Court recalls that the Applicants reason the violation of principle of "*equal vote*" with the fact that the Supreme Court, ECAP and CEC have failed to guarantee an electoral process where "*the weight of the vote*" is equal, because according to the allegation, the Supreme Court in its second Decision [AA U.ZH. No. 62/2017] finds that "*the election process has been damaged*" but did not consider it necessary to recount the boxes from all polling stations. According to the Applicants, their request for recount of boxes at all polling stations was rejected in an unconstitutional way. (see in this context, the Applicants' specific allegation in paragraph 61 of this Judgment).

247. The Court notes that these allegations have been raised in terms of alleged violations of the right to judicial protection of rights guaranteed by Article 54 of the Constitution and are addressed in detail in paragraphs 167-176 of this Judgment.

248. The Court notes that no other allegation or circumstance associated with it, of the Applicants, falls within the scope of the guarantees defined by the Venice Commission principle in the context of the "equal *vote*", including the "*equality of opportunities"*. Whilst the Applicants refer to the latter, the Court recalls that equality of opportunities under the practice of the Venice Commission member states is built in the sense of the neutrality and impartiality of the state authorities and the application of the same rules for all in the electoral process. The Applicants' allegations do not fall into this category.

249. In addition, the Court notes that the challenged decision of the Supreme Court, within the meaning of the ECHR case law, does not reflect arbitrariness, lack of proportionality, and as is widely dealt within the context of the Applicants' allegations related to Article 54 of the Constitution, has also not been rendered in violation of free expression of the will of the voters.

(ii) As to principle of "free vote"

250. The principle of "free vote" according to the Code of Good Practice implies (i) the freedom of the voter to form an opinion (see for more, section 2.3 of the Code of Good Practice and section 2.3 of the Explanatory Report) and (ii) the freedom of the voter to express opinion and respective opportunity to fight the election fraud. (See sections 3.1 and 3.2 of the Code of Good Practice). In the context of the specific allegation, only second is relevant.

251. In this context, the Code of Good Practice in principle stipulates that the freedom of voters to express their will primarily requires accurate observation of the voting procedures. Moreover, according to the Code of Good Practice, voters (in the capacity of the voter and in the capacity of the candidate) are entitled to an accurate assessment of the voting results and the state is obliged to sanction any election fraud. The Code of Good Practice and the Explanatory Report set out a number of rules embodied in this principle, and the Court will refer only to those relevant to the circumstances of the present case, namely (i) "*voting procedure*" (See Code of Good Practice 3.2 (xi-xv) (see the Code of Good Practice, item 3.2 (i-xi)) and (ii) "*counting*", (See Code of Good Practice 3.2 (xii-xv)).

252. Regarding the "*voting procedure*", the Court notes that the Explanatory Report states, *inter alia*, that "*the voting procedure has a crucial role in the overall electoral process because electoral fraud is most likely to occur during the voting process*". (see section 3.2.2, paragraph 32 of the Explanatory Report). As far as "*counting*" is concerned, *inter alia*, and as far as relevant to the circumstances of the present case, it is advisable to "*avoid treating too many ballot papers as invalid or spoiled. In case of doubt, an attempt should be made to ascertain the voter's intention*". (See item 3.2.2.4 paragraph 49 of the Explanatory Report).

253. In this context, the Court recalls that the Applicants reason violation of the principle of "*free vote*" through the evidence provided to the regular courts on "*the influence of Pristina citizens by sending SMS on behalf of NGOs*" offering *coupons for free transport and influence through activists*", which, according to the allegation, result in a violation of the "*principle of free vote/freedom of vote* ". According to the Applicants, the Supreme Court in its second Decision [AA.U.ZH. No. 62/2017] considered these allegations as new, avoiding the reasoning about them and not as an evidence that they had to administer. (see in this context, the Applicants' specific allegation in paragraph 63 and 64 of this Judgment).

254. The Court notes that these allegations of the Applicant relate to "*procedural guarantees*" for the implementation of the "*free vote*" principle on election day, namely with irregularities on the election day and allegations related to invalid and blank ballots which have already been addressed in the context of allegations of violation of the right to judicial protection guaranteed by Article 54 of the Constitution, specifically in paragraphs 154-166 of this Judgment.

255. The Court also recalls that in elaborating the principles related to the "*free vote*", the Code of Good Practice and the Explanatory Report specifically stipulate that it is advisable to "*avoid treating too many ballot papers as invalid or spoiled. In case of doubt, an attempt should be made to ascertain the voter's intention "*. The Court has also specifically addressed this issue in paragraphs 172-175 of this Judgment.

256. The Court further notes that no other allegation or circumstance associated with it, of the Applicants, falls within the scope of the guarantees defined by the two basic principles of the Venice Commission in the context of the "*free vote*", namely freedom of voters to form an opinion or even the freedom of voters to express an opinion and to fight electoral fraud.

257. Moreover, the Court notes that the challenged decision of the Supreme Court, in the light of the case law of the ECtHR, does not reflect arbitrariness, lack of proportionality, and as is widely dealt with in the context of the assessment of the Applicants' allegations relating to Article 54 of the Constitution, and has also not been rendered in violation of free expression of the will of the voters.

(iii) As to "principle of transparency"

258. The Court recalls that the Applicants also allege violation of the principle of transparency. In this respect, the Court notes that, in the context of the Code of Good Practice, the transparency is mainly used in the sense of financing election campaigns. However, the Code of Good Practice considers transparency important in at least three other aspects.

259. Firstly, the transparency is considered important in terms of ballot counting - a process that should be in itself transparent. To ensure such transparency, the observers (local and international), the candidates' representatives and the media should be allowed to be present during the vote counting. Secondly, transparency is also

important in terms of procedural protection so that the organization of elections should be done by an impartial body. Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the electoral process from the pre-election period to the end of the process of the election result. Thirdly, in order to be in compliance with the international standards, an election process should clearly provide voters, candidates and political entities with the right to transparent complaints procedures. (See Code of Good Practice 3.2 (xiii) page 9, item 3.1 paragraph 68, and Report on Election Dispute Resolution, item 6, paragraph 100). The latter are elaborated in more detail in the Report on Dispute Resolution. In this respect, the Venice Commission recommends that proceedings before a judicial body that reviews complaints and appeals regarding the election rights should be public and the parties should have the right to present their case directly or through a legal representative. The minimum guarantees that must exist, according to the Venice Commission, is accordingly included the right to fair, impartial and public hearing of a complaint or appeal. The complaints and appeals system should be transparent and as such should include the publication of complaints, appeals, responses and decisions. (See Report on Dispute Resolution, item 6, paragraph 100).

260. The Court recalls that the Applicants allege that the Code of Good Practice obliges the state institutions to guarantee transparency of proceedings and the right to recount votes in the cases of appeals. This conclusion stands. The Court has elaborated throughout this Judgment the fundamental principles regarding the right to appeal in the election disputes as an essential part of "*effective complaints systems*" and "*procedural guarantees*", the latter a fundamental condition for the implementation of the five principles pertaining to the quality of vote in democratic elections. As noted, the right to appeal in the election disputes and also the "*right of verification of the election result*", including the possibility of annulment of the election results, are guaranteed by the Constitution of the Republic of Kosovo and the applicable election law, in the manner prescribed by law, and which, as elaborated, is also in line with the practice of the member states of the Venice Commission.

261. The Court specifically notes that as to the allegations of violation of the principle of transparency, the Applicants raise the following question: (i) violation of the right to "*recount and repeat the voting"*, which according to them is provided by Articles 101 and 106 of the LGE; (ii) the violation of the right to "*confirmation and verification of the election results*", because according to the allegation "*in case of narrow election result*", the recount is a fundamental right which is

initiated through the CEC or at the request of the party"; (iii) the fact that although the ECAP and the Supreme Court "*find that there have been irregularities"*, they "*consider the latter balanced between the two candidates in the competition*", resulting according to the allegation, in the arbitrary decisions of the ECAP and the Supreme Court; and that (iv)the ECAP and the Supreme Court did not address the Applicants' evidence as "*new and specific evidence*" and did not address their allegations of constitutional violation (see specifically these allegations in paragraphs 67-73 of this Judgment).

262. The Court notes that all these allegations have been raised even in the sense of alleged violations of the right to judicial protection of rights guaranteed by Article 54 of the Constitution and are addressed in detail in paragraphs 134-176 of this Judgment.

263. However, the Court notes that the Applicants in this context raise three new allegations which the Court will consider in the following: (i) the allegation that the ECAP made the assessment of the ballots at the disputed polling stations without the presence of the parties; (ii) the allegation that the Supreme Court by its first Decision [AA. No. 52/2017] has only repealed the Decision of the ECAP [ZL. A. no. 1102/2017] of 22 November 2017 but not the CEC Decision [2343-2017] for the recount of all regular ballot papers in the polling stations established by abovementioned Decision; and (iii) the allegation that the principle of transparency has been violated even in the case of "destruction of election material" by the CEC, and in that case their right to recount.

264. As to the first, the Court recalls that the allegation has to do with the investigations conducted by ECAP as a result of the Applicants' complain of 30 November 2017, the ECAP based on: (i) paragraph 4 of Article 117 of the LGE, according to which the ECAP may order the review of the voting material as part of investigations related to complaints; (ii) Article 14 on Regulation No. 02/2015; and (iii) Regulation 04/2015 on investigation proceedings of elections material, with a view to verifying the Applicants' claims regarding the discrepancies of the final result, established the Investigative Team, according to the case file, consisting of 8 judges and 10 officers of the Secretariat. The Court notes that the election materials and the manner of investigation of each category of election material are correctly defined by the respective ECAP Regulations. These investigative teams after the completion of the investigations are obliged according to the respective rules to compile a minutes based on all electoral materials investigated. This material is then submitted to the ECAP for further consideration. The findings of the investigative

teams on the basis of the aforementioned law may result in ECAP decision on the recount of ballots. The Decision [ZL. A. no. 1125/2017] of 1 December 2017 of ECAP reflects this procedure and concludes that after reviewing the material of the investigative teams, according to the ECAP, the final result announced by the CEC was confirmed. Consequently, the Court notes that the challenged procedure relates to the ECAP investigation procedure rather than to a recount or counting procedure, the principle of transparency guaranteed by Article 101 of the LGE.

265. Furthermore, the Applicant's allegations in this context do not fall within the scope of other constitutional guarantees, legal or those established by the Venice Commission relating to an "*effective complaint system*", including the right to a transparent complaint procedure (See Report on Dispute Resolution item 2, paragraph 111); or even the publication of complaints, appeals, responses and decisions. (See Report on Dispute Resolution, item 6, paragraph 100). Finally, the Court also notes that this allegation was not filed by the Applicants with the Supreme Court and the latter was not given the opportunity to respond to that allegation.

266. Regarding the second, the Court recalls that the Supreme Court rendered its first Decision [AA. No. 52/2017] by which it approved the appeal of VETËVENDOSJE! Movement as grounded and modified Decision [ZL. A. No. 1102/2017] of 22 November 2017 of the ECAP, so that the appeal of the second applicant was rejected as ungrounded. The Court notes that the Supreme Court did not explicitly provide the annulment of the CEC Decision. However, the Court also notes that pursuant to paragraph 3 of Article 12 of the Law on Amendment and Supplementation of LGE in conjunction with paragraph 5 of Article 118 of LGE, the ECAP decision is mandatory to be implemented by the CEC, unless the allowed appeal is filed within the prescribed time limit and the Supreme Court determines otherwise.

267. Thirdly and finally, with regard to the destruction of the election material and the respective violation of the principle of transparency, the Court notes (i) the Applicants do not challenge the respective CEC Decision on destruction of the election material. Therefore, the issues raised by this allegation do not meet the admissibility criteria set forth in paragraph 7 of Article 113 of the Constitution and Articles 47 and 48 of the Law; (ii) the issue of the destruction of the election material is determined by paragraph 4 of Article 103 of the LGE, according to which "*the CEC shall, by decision after the official certification of the results of the election, destroy specified election materials at an appropriate time within 60 days, except as directed by ECAC*". The

Court notes that the Applicants are not authorized parties to raise the issue of compliance of the laws with the Constitution before the Court; and (iii) from the case file it results that the Applicants have never requested the storage of election material in the CEC, ECAP or even in Constitutional Court based on Article 27 on Interim Measures of the Law.

268. Based on the foregoing and taking into account the allegations raised in the circumstances of the present case and the facts presented, the Court, also based on the standards established in its case law and case law of the ECtHR and the standards summarized by the Venice Commission, finds that (i) the first Decision of the Supreme Court, namely the Decision [AA. No. 52/2017] of 25 November 2017 was not rendered in violation and is in compliance with the rights to freedom of election and participation guaranteed by Article 45 of the Constitution, in conjunction with the right to free elections guaranteed by Article 3 of Protocol No. 1 to the ECHR, of the political entity LDK, namely the second Applicant, and that (ii) the second Decision of the Supreme Court, namely Judgment [AA.U.ZH. No. 62/2017] of 7 December 2017 was not rendered in violation and is in compliance with the rights to freedom of election and participation guaranteed by Article 45 of the Constitution in conjunction with the right to free elections guaranteed by Article 3 of Protocol No. 1 to the ECHR, of Mr. Arban Abrashi and the political entity LDK, namely the first and second Applicants.

V. Request for hearing

269. The Court recalls that the Applicants also requested the Court to schedule a hearing.

270. In their justification of their request for a hearing, the Applicants stated that "*the principle of orality and publicity"* is one of the fundamental principles in the constitutional procedure and as such is guaranteed at all stages of the proceedings "*either before administrative bodies, regular courts or even before the Constitutional Court*". Related to this, they noted that it can be noticed from the case file, that the Applicants "*have not been given the opportunity to submit their allegations in public hearing"* and that *"a situation has arisen in which it is indispensably required to present factual and legal aspects before the trial panel, as established in Rule 42 paragraph 2 of the Rules of Procedure of the Constitutional Court*".

271. In this regard, the Court recalls that under paragraph (2) of Rule 42 [Right to Hearing and Waiver] of the Rules of Procedure, "*The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law".*

272. The Court notes that the abovementioned Rule of Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file suffices, beyond any doubt, to reach a decision on merits in the case under consideration. (See the case of the Constitutional Court, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110 - which states that "*The Court considers that the documents contained in the Referral are sufficient to decide this case […]").*

273. In the present case, the Court does not consider that there is any ambiguity about "*evidence or law*" and therefore, it does not consider necessary to hold a hearing. The documents contained in the Referral are sufficient to establish the merits of this case.

274. Therefore, the Court unanimously rejects the Applicants' request for a hearing as ungrounded.

IV. Other important issues

Regarding the status of foreign decisions and their role in decision-making

275. The Court notes that the Applicants support their allegations by referring to the various decisions of the foreign courts, in particular the decisions of the Federal Constitutional Court of Germany, the Constitutional Court of Austria and the Swiss Federal Supreme Court. The Court first marks the difference in the jurisdiction of the respective Constitutions with the Constitution of the Republic of Kosovo in dealing with the election disputes. In addition, the Court notes that the latter do not coincide with the factual or legal circumstances of the present case. The Court notes that the reasoning of other constitutional or international courts should be interpreted in the context of constitutional and legal guarantees and in the light of the factual circumstances in which they were rendered.

276. In this regard, the Court notes that, apart from the fact that the Applicants have emphasized and cited these decisions of the foreign courts, they have not elaborated their factual and legal relation with the

circumstances of the present case. In addition, only the decisions of the ECtHR have the status of the source of the law in the legal system of the Republic of Kosovo.

277. As regards the reports of the Venice Commission, in addition to those referred by the Applicants, the Court dealt with all relevant reports and opinions of the Venice Commission and applied them in the circumstances of the case.

V. Conclusions

278. The Court has assessed all the Applicants' allegations separately and in their entirety, applying into this assessment: (i) the constitutional guarantees pertaining to the challenged rights, Articles 54 and 45 of the Constitution, respectively; (ii) the underlying principles resulting from the European electoral heritage as summarized by the Venice Commission; and (iii) the caselaw of the ECtHR, and decided that the Decision [AA. No. 52/2017] of 25 November 2017 and the Judgment [A.A. U.ZH. No. 62/2017] of 7 December 2017 of the Supreme Court are in compliance with Articles 54 and 45 of the Constitution.

279. The Court has found that the challenged decisions of the Supreme Court have not violated the Applicants' rights for judicial protection of rights guaranteed by Article 54 of the Constitution and the right to a legal remedy guaranteed by Article 32 of the Constitution in conjunction with the right to an effective remedy guaranteed by Article 13 of the ECHR, because in the circumstances of the present case, the Supreme Court has correctly assessed the issues pertaining to: (i) confirmation/cancelation of the election results; (ii) declaring as out of time the Applicants' allegations pertaining to irregularities on the election day, and which were submitted to the ECAP for the first time after the announcement of the final election results; and (iii) invalid and blank ballots, after the ECAP investigated the election material in the contested polling stations and did not find that "the final election results were affected". In addition, the decisions of the Supreme Court were "sufficiently reasoned" pertaining to the Applicants' allegations and are in conformity with the standards established through the case-law of the ECtHR and the Venice Commission as to the reasoning of decisions in electoral disputes. The findings of the Supreme Court, are in compliance with the constitutional guarantees, the relevant case-law of the ECtHR and the basic principles of the Venice Commission as it pertains to "an effective system of appeal" as an integral part of the "procedural guarantees", which is a fundamental condition for the implementation of the five underlying principles pertaining to the qualities of the vote.

280. The Court has found that the challenged decisions of the Supreme Court have not violated the Applicants' rights pertaining to the freedom of election and participation guaranteed by Article 45 of the Constitution in conjunction with the right to free elections guaranteed by Article 3 of Protocol nr. 1 of the ECHR because, in the circumstances of the present case, these decisions have not been rendered in contradiction with: (i) any of the conditions for the implementation of the underlying principles on the qualities of the vote, as guaranteed by the Constitution, the election laws and the Code of Good Practice of the Venice Commission; (ii) any of the "procedural guarantees" for the implementation of the "free suffrage" and "equal suffrage" principles; (iii) the "principle of transparency" in electoral disputes as established by the ECtHR case law and the basic principles of the Venice Commission; and (iv) contrary to the ECtHR case law in the context of the "*post-election rights*".

281. Based on the foregoing and taking into account the allegations raised and the facts presented, in the circumstances of the present case, the Court finds that: (i) the first Decision of the Supreme Court, namely Decision [AA. No. 52/2017] of 25 November 2017, was not rendered in violation of the rights and fundamental freedoms of the political entity LDK, namely the second Applicant and is in compliance with the rights and fundamental freedoms guaranteed by Articles 45 and 54 of the Constitution; and that (ii) the second Decision of the Supreme Court, namely Judgment [A.A. U.ZH. No. 62/2017] of 7 December 2017, was not rendered in violation of the rights and fundamental freedoms of Mr. Arban Abrashi and of the political entity LDK, namely the first and second Applicant, and is in compliance with the rights and fundamental freedoms guaranteed by Articles 45 and 54 of the Constitution.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 59 (a) of the Rules of Procedure, in its session held on xx January 2019, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD, that Judgment A.A. U.ZH. No. 62/2017 of 7 December 2017 of the Supreme Court of the Republic of Kosovo is in compliance with Article 54 of the Constitution of the Republic of Kosovo in conjunction with Article 32 of the Constitution of the Republic of Kosovo and Article 13 of the European Convention on Human Rights as well as in compliance with Article 45 of the Constitution of the Republic of Kosovo in conjunction with Article 3 of Protocol no. 1 to the European Convention on Human Rights;

III. TO HOLD that Decision AA. No. 52/2017 of 25 November 2017 of the Supreme Court of the Republic of Kosovo, is in compliance with Article 54 of the Constitution of the Republic of Kosovo in conjunction with Article 32 of the Constitution of the Republic of Kosovo and Article 13 of the European Convention on Human Rights as well as in compliance with Article 45 of the Constitution of the Republic of Kosovo in conjunction with Article 3 of Protocol no. 1 of the European Convention on Human Rights;

IV. TO REJECT the request for a hearing as ungrounded.

V. TO NOTIFY this decision to the Parties;

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

VII. TO DECLARE this Decision effective immediately.

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

KI01/18, Applicant: Gani Dreshaj – the Alliance for the Future of Kosovo (AAK), Constitutional review of Judgment A.A. –U.ZH No. 64/2017 of the Supreme Court of Kosovo, of 26 December 2017

KI01/18, Judgment adopted on 23 January 2019, published on 4 February 2019

Keywords: *individual referral, interim measure, second round of elections, election law, active election rights, passive electoral rights, voter lists, post-election rights, exhaustion of legal remedies, municipal elections*

The Applicants requested the Court to assess the constitutionality of the decisions of the CEC, ECAP and Supreme Court, which, allegedly, violated their rights guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo in conjunction with Article 3 of Protocol no. 1 to the ECHR. The Applicants essentially complained that because of not counting 52 (fifty-two) voters' votes in the second round of elections, valid for the election of the Mayor of Istog, the right of their candidate (Gani Dreshaj) to be elected has been violated, as guaranteed by Article 45 of the Constitution in conjunction with Article 3 of Protocol no. 1 to the ECHR.

The Court first, based on its practice on municipal election disputes, found that one of the Applicants (Gani Dreshaj) did not exhaust all legal remedies as established in Article 113 (7) of the Constitution. The Court also found that the second Applicant (AAK) exhausted all legal remedies and that it would consider the allegations on merits.

The Court notes that the present case addresses the issues of interconnection of active election rights with passive election rights, update of election lists between the two rounds of elections and disputes of counting the votes in the count centers that matched the post-election period.

The Court, based on the ECtHR consolidated case law, decided to assess whether the challenged decisions of the CEC, ECAP and the Supreme Court could withstand the ECtHR test that determines whether those decisions: (i) are in compliance and provided for by applicable law, (ii) whether they are proportionate, and (iii) whether they are arbitrary or unreasonable. However, the Court first held that the legal framework regulating the election right in the Republic of Kosovo is not subject to constitutional review; and that its assessment is limited only within the framework of the allegations raised in the present case.

The Court further found that: (i) the non-update of voter lists was a fact known by all participants in the electoral race-including the Applicants; and (ii) the counting of 52 (fifty-two) voters' votes does not have such an extent to guarantee the vote of a certain group of voters – moreover, when it is taken

into account that none of those voters had complained to the competent bodies because of not counting their votes.

The Court, by providing a global assessment of all central issues of the present case, considered that the challenged decisions of the CEC, ECAP and Supreme Court are in compliance and are provided for by the applicable election law, are proportionate - and are not arbitrary or unreasonable.

Therefore, the Court concluded that the challenged decisions of ECAP and of the Supreme Court are in compliance with Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 of Protocol no. 1 to the ECHR. The Court also rejected the Applicants' request for interim measure.

JUDGMENT

in

Case No. KI01/18

Applicants

Gani Dreshaj and the Alliance for the Future of Kosovo (AAK)

Constitutional review of Judgment A.A. –U.ZH No. 64/2017 of the Supreme Court of Kosovo, of 26 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 was submitted by Mr. Gani Dreshaj, a candidate for the Mayor of the Municipality of Istog in the local elections of 2017 (hereinafter: the first Applicant), and by the political entity the Alliance for the Future of Kosovo (AAK), (hereinafter: the second Applicant).

2. The first Applicant and the second Applicant (hereinafter when referred by the Court jointly: the Applicants) are represented by Mr. Arianit Koci, a lawyer from Prishtina.

Challenged decision

3. The Applicants challenge the constitutionality of Judgment A.A. – U.ZH No. 64/2017 of the Supreme Court of Kosovo of 26 December 2017 in conjunction with Decision ZL. Ano. 1142/2017 of the Election Complaints and Appeals Panel (hereinafter: the ECAP) of 23 December 2017.

Subject matter

4. The subject matter is the constitutional review of the aforementioned decisions, which, allegedly, violated the Applicants' rights guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and by Article 3 of Protocol No. 1 to the European Convention on Human Rights (hereinafter: the ECHR).

5. The Applicants also request the imposition of interim measure by requesting the Court to prohibit: "*the enforcement of the Decision of the Central Elections Commission (CEC) on certification of the results of the second round of elections for Mayor of the Municipality of Istog until the merit based decision is rendered by the Constitutional Court*".

Legal basis

6. The Referral is based on Articles 21.4 [General Principles], 113.1 and 7 [Jurisdiction and Authorized Parties] and 116.2 [Legal Effect of Decisions] of the Constitution, Articles 27 [Interim Measures] and 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 32 [Filing of Referrals and Replies] and 56 [Request for Interim Measures] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

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

Proceedings before the Court

8. On 3 January 2018, the first Applicant submitted the Referral to the Court.

9. On 3 January 2018, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

10. On 5 January 2018, the Court notified the first Applicant about the registration of the Referral. On the same date, a copy of the Referral was sent to the ECAP, the Supreme Court and to Mr. Haki Rugova, a candidate of the political entity the Democratic League of Kosovo (hereinafter: the LDK), for Mayor of the Municipality of Istog, with the opportunity to submit its comments on the allegations raised in the Referral No. KI01/18.

11. On 15 January 2018, the Court requested the first Applicant to clarify his Referral and a copy of the Referral was sent to the second Applicant, with the opportunity to submit its comments on the allegations raised in Referral No. KI01/18.

12. On 11 and 17 January 2018, the ECAP and Mr. Haki Rugova submitted their comments regarding Referral No. KI01/18.

13. On 19 January 2018, the abovementioned comments were sent to the first Applicant for any possible comment.

14. On 26 and 31 January 2018, the Applicants submitted their responses, in which they repeated their positions for irregular election process, addressed the comments of the ECAP and Mr. Haki Rugova and presented their arguments on exhaustion of legal remedies and of the procedural legitimacy (*standing*).

15. On 1 March 2018, the Court, in its review session, decided that the assessment of the Referral be postponed for another date.

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

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

18. On 22 August 2018, the President rendered decision to appoint Judge Radomir Laban as Judge Rapporteur instead of Judge Altay Suroy.

19. On 28 September 2018, the President of the Court rendered decision on the appointment of the new Review Panel composed of Judges: Arta Rama-Hajrizi and Bajram Ljatifi.

20. On 1 October 2018, the Court sent to the members of the Venice Commission Forum a request with some questions for comparative analysis of the Referral under consideration.

21. On 17 October 2018, Judge Bajram Ljatifi requested the President of the Court to be excluded from the review of the Referral No. KI01/18, because he was previously a part of the decision-making process for the same request regarding the proceedings conducted before the CEC.

22. On 25 October 2018, the President, pursuant to Article 18 of the Law and Rule 9 of the Rules of Procedure, rendered a decision on the appointment of Judge Gresa Caka-Nimani, as a member of the Review Panel, in the Referral No. KI01/18, instead of Judge Bajram Ljatifi.

23. On 23 January 2019, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court to declare the Referral admissible and to hold that the challenged decisions are in compliance with Article 45 of the Constitution and Article 3 of Protocol no.1 to the ECHR.

Summary of facts

24. On 22 October 2017, the first round of local elections in the Republic of Kosovo was held. The first Applicant, Mr. Gani Dreshaj, was the AAK candidate for the Mayor of the Municipality of Istog. The second Applicant, AAK, was a political entity competing in the Municipality of Istog through its candidate, Mr. Gani Dreshaj.

25. The final results of the first round of the elections determined that the competition for the Mayor of the Municipality of Istog would be decided based on the results of the second round of elections (run-off), which would take place between the two candidates with the majority of votes in the first round, namely between the first Applicant, Mr. Gani Dreshaj and Mr. Haki Rugova, a candidate of the Democratic League of Kosovo (the LDK) for the Mayor of the Municipality of Istog.

26. On 19 November 2017, the second round of local elections was held, where for the Mayor of the Municipality of Istog the two aforementioned candidates competed.

27. On 24 November 2017, the LDK complained to the ECAP requesting the cancellation of the second round of elections held on 19 November 2017, alleging that there has been an abuse of the voting process by mail because the number of by mail voters for the Municipality of Istog was extremely high, as 58% of by mail votes in Kosovo are only for the Municipality of Istog.

28. On 27 November 2017, the ECAP (Decision No A. 1114/2017) approved the LDK complaint as grounded, annulled the result for the second round of elections of 19 November 2017 and ordered the CEC to repeat the vote for the second round of local elections, for Mayor of the Municipality of Istog. The ECAP assessed that the by mail ballots for the second round of local elections for the Mayor of the Municipality of Istog are determinative in the final result and that the manner of voting in this case damages and seriously violates the second round of the electoral process for Mayor in the municipality of Istog. The ECAP concluded that the only and fair solution is the repetition and revote in the second round of elections for Mayor of the Municipality of Istog in all polling stations of the Municipality of Istog.

29. The relevant part of the ECAP decision states: "*From all that was emphasized above, regarding the voting by mail from the voters of Montenegro, Austria and Slovenia, for the second round of local elections for Mayor of the Municipality of Istog, the panel held that the manner of voting and delivery of packages of the ballots is done in an organized manner, and it does not follow from the case file that the voters in question have voted and have sent ballot papers in person. Therefore, such a way of organizing the voting is assessed by the panel as unlawful and as such it seriously harms and undermines the second round election for Mayor of the Municipality of Istog … The Panel considers that in this situation the only right solution is to repeat the second round of local elections for Mayor of the Municipality of Istog, and to revote, since it is not fair to cancel the ballots by mail only, although it is clear that these votes are manipulated, we do not have the complete assurance that all are manipulated, because there are likely to have regular votes among these votes, so that each citizen vote will go to its destination, the only fair and non-discriminatory solution is the re-voting in all polling stations in the Municipality of Istog".*

30. Both, the LDK and the second Applicant (AAK) complained to the Supreme Court against the above-mentioned decision of the ECAP. The LDK requested the cancellation of by mail voting and the exclusion of result of by mail voting from total and final results of the local elections for Mayor of the Municipality of Istog. The second Applicant (AAK) requested that the challenged decision of the ECAP be annulled and the CEC be ordered to certify the final results of the elections in the second round for Mayor of the Municipality of Istog, including by mail votes.

31. On 1 December 2017, the Supreme Court (Decision AA. No. 55/2017) rejected the complaints of the LDK and of the second Applicant (AAK)

filed against Decision ZL. A. No. 1114/2017 of the ECAP. The Supreme Court upheld the ECAP decision and found that: (i) the ECAP correctly assessed that there has been an abuse of the voting process by mail; (ii) that the abuse of the voting by mail is unlawful and seriously violates the second round electoral process for Mayor of the Municipality of Istog; (iii) The ECAP has accurately and convincingly found that there was a substantial impairment of the electoral process for Mayor of the Municipality of Istog; and that (iv) in the present case, the revote is the only "right legal way" to remedy violations of this electoral process.

32. The relevant part of the aforementioned decision of the Supreme Court emphasizes: *"The subject of review and assessment in the Supreme Court of Kosovo were the appealing allegations of the appellants as well as those related to the ECAP decision on revote and by mail vote. However, these allegations by this Court are also rejected as ungrounded because the ECAP in its decision has provided sufficient legal reasons which the Supreme Court of Kosovo accepts. Thus, because of the fact, that from evidence, namely the material evidence that are in the case file, it is accurately and convincingly confirmed that the second round electoral process for Mayor of the Municipality of Istog was damaged by the above mentioned violations of law and, which, among other things, determine and influence the final election results. This Court notes that with the forbidden acts, it results, inter alia, that in the present case, the fundamental principles of the election process expressly provided for by the provisions of Article 2 of the Law on General Elections in the Republic of Kosovo have been violated, namely Article 3 on Local Elections in the Republic of Kosovo and the European Convention on Human Rights concerning the the right to secret vote, guaranteeing the right to equal vote, etc".*

33. On 17 December 2017, the second round of elections for Mayor of Istog was repeated, where the candidates were the first Applicant, (Gani Dreshaj), the candidate of AAK, and Mr. Haki Rugova, the LDK candidate.

34. On 21 December 2017, the CEC approved the Report of the Count and Results Center (hereinafter: the CRC) for the elections of 17 December 2017 in the Municipality of Istog. Based on that report, Mr. Haki Rugova, the LDK candidate won 10,033 votes, whereas the first Applicant (Gani Dreshaj) 10,019 votes.

35. Meanwhile, the second Applicant (the AAK - branch in Istog), represented by legal officer B.L., filed a complaint to the ECAP by challenging the voting process and administration of counting by the Count and Results Center. The second Applicant (AAK) complained

about the irregularities that have arisen and the final results of the re-voting for the Mayor of the Municipality of Istog on 17 December 2017. The second Applicant (AAK) mainly complained that 52 (fifty two) ballot papers of voters who had reached the age of majority between 20 October 2017 until 17 December 2017 were not counted.

36. The CEC, in its response to the Applicant's complaint, among other things, stated that: "*... during the CRC administration where the votes of fifty-two (52) voters were rejected, because their names were not in the Final List of the Voters, but who have reached the age of 18 in the elections of 17.12.2017 in the municipality of Istog, point out that the Central Civil Registry Extract contained all the names of 18-year-old registered voters, including those who have turned 18 up to Election Day, 22 October 2017. According to the Election Regulation No. 02/2013 Drafting, Confirmation and Challenge of Voters List, Article 3.3 in order to create the list of voters, the CEC during the election process receives three (3) times the civil registry extract from the Civil Registry Agency. The first time, no later than two days after the announcement of the election date, second time not later than 3 days before the start of the challenge and confirmation from the voter lists, and the third time no later than two (2) days after the end of the challenge period and confirmation of VL. This list the voters had the opportunity to challenge during its review (voter list), by the public and from 29 August 2017 until 12 September 2017*".

37. As for the conditional votes, the votes that were rejected due to their irregularities - during the entire electoral process - for the Mayor of the Municipality of Istog, the CEC explained: "*...by the total number of 481, of conditional votes and VPCV votes it was confirmed that 309 votes meet legal criteria as regular ballot for counting and further proceeding, while 172 votes have been rejected. The reason why 172 ballots have been rejected ... is that they have not met the legal criteria, as 108 rejected ballots have to do with the persons who voted but were not in the Final Voters List (FVL); 61 rejected ballots were because the persons who voted were not voters respectively citizens of Istog where the election process was held; 2 ballots were rejected because the voters who voted did not register as voters with special needs and 1 ballot was rejected because the voter besides having conditional ballot was proved to have voted as a voter at his regular polling station*".

38. The explanations given by the CEC were accepted and approved by ECAP – in entirety - as set out in the decision below.

39. On 23 December 2017, the ECAP (Decision ZL. Ano. 1142/2017) rejected the second Applicant's (AAK) allegations of irregularities and

the final outcome of the re-voting as inadmissible and ungrounded, namely, the ECAP reasoned that the voter list could have been challenged within the deadline set by law - and that after the deadline for challenging - the voter list has been certified. In this regard, the ECAP also added that the voter list is only certified once and is valid for the entire election process because its duration cannot be known in advance. The ECAP concluded that voters who had reached the age of majority in the time period from 20 October 2017 until 17 December 2017 could not have been part of the certified voter list.

40. Regarding the counting of 52 (fifty-two) voters' ballots that reached the age of majority between 22 October 2017 and 17 December 2017, the relevant part of the ECAP decision stipulates:

> *"In respect to allegations of the appellant that there are 50 ballots that were not counted because the voters have reached the adult age to vote between dates of 20 October 2017 and 17 December 2017 which votes were not counted. These allegations were assessed by the Commission as ungrounded because the Central Civil Registry Extract contained all names of voters registered with age of 18 including those who have reached 18 years until the election date of 22 October 2017. [...] the CEC during the electoral process receives three (3) times the civil registry extract from the Civil Registry Agency. The first time, no later than two days after the announcement of the election date, second time not later than 3 days before the start of the challenge and confirmation from the voter lists and the third time no later than two (2) days after the end of the challenge period and confirmation of VL". This list could have been challenged by voters during period of its review (the voters list), by the public from 29 August 2017 until 12 September 2017. Since the voters list was certified after expiry of challenging deadline, 12 September 2017, and since it is certified and became valid for an electoral process because it is certified only once for an electoral process regardless of duration of the election process, then, on this ground the voters who have reached the adult age during period from 22 October 2017 and 17 December 2017 could not be part of the certified voters list".*

41. The second Applicant (AAK) filed a complaint with the Supreme Court challenging the legality of the abovementioned ECAP decision, proposing that its appeal be approved, that the challenged decision of ECAP be annulled, the final results of the re-voting for the Mayor of the Municipality of Istog held on 17 December 2017 be annulled and to order CEC to repeat the voting in the Municipality of Istog.

42. On 26 December 2017, the Supreme Court (Judgment A.A. -U.ZH No. 64/2017) rejected the appeal of the second Applicant (AAK) filed against Decision ZL. Ano. 1142/2017 of ECAP as ungrounded. The Supreme Court upheld the ECAP decision finding that the factual situation was correctly determined and that the law was not violated to the detriment of the complainant (AAK). The Supreme Court added that the complainant's allegations were ungrounded and could not affect the determination of a factual situation other than that established by the ECAP.

43. Regarding the allegations of the second Applicant (AAK) on the deprivation of the right to all voters to vote, the relevant part of the reasoning of the Supreme Court can be summarized as follows:

> *"This Court also assesses as ungrounded the allegations when it was stated that by the Decision of ECAP, the right to vote of all voters was prohibited which is in contradiction with Article 45 of the Constitution of the Republic of Kosovo; this is because the CEC receives the latest Civil Registry Extract with all eligible voters even with those voters who until the voting day reach 18 years of age and gain the right to vote. The Voters List for elections is certified only once and is valid for respective elections, because nobody knows how long the elections may take; however the date when the elections shall be held can be known as it was the case with elections of 22 October 2017. Legal provision of Article 6 of Election Regulation no. 10 states that: "The same voter's list that was used for Municipal Elections will be used for the second round of Municipal Mayor Elections". Therefore, the same voters list used for the election date in these municipal elections of 22 October 2017 will be used also for the second round of these elections."*

44. On 27 December 2017, the CEC certified the final results of the elections for Mayor of the Municipality of Istog. On that occasion, Mr. Haki Rugova was officially declared the Mayor of the Municipality of Istog.

Applicants' allegations

45. The Applicants allege that the ECAP and the Supreme Court violated their rights, the right to be elected, as guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 of the Protocol No. 1 (Right to free elections) to the ECHR.

46. Regarding the difference in votes between the first Applicant, Mr. Gani Dreshaj, the AAK candidate, and Mr. Haki Rugova, the LDK candidate,

the Applicants allege*: "The results of the second round of elections for Municipality of Istog were extraordinary narrow. According to certified results by the Central Election Commission, the candidate from the Democratic League of Kosovo, Mr. Haki Rugova, won elections with a difference of only 14 votes".*

47. The Applicant further add: "*In the second round of elections, there are total 52 (fifty two) ballot papers of the citizens whose votes were not counted. These citizens voted through so called "conditional ballots" as they did not appear on election list certified by the Central Election Commission."*

48. The Applicants allege: "*In its appeals filed with ECAC and with the Supreme Court, the AAK has been claiming that the Final Voters List was lastly updated prior to municipal elections of 22 September 2017. As consequence of this, the votes of 52 (fifty two) citizens who reached their majority age between dates of 22 October 2017 (the election date) and 17 December 2017 (repetition of elections) were not counted and not included in the final result as their names did not appear in the Final Voters List."*

49. The Applicants allege that the legal position of ECAP and the Supreme Court that the election lists are only certified once because: *"nobody can know how long can the elections take, instead, only the date when elections will be held can be known as it was the date of 22 October 2017"*, is not accurate because it is not in compliance with Article 45 (1) of the Constitution, which provides: *"Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision".*

50. In this regard, the Applicants emphasize that the Constitution does not make any distinction between the first and second round of elections. The Applicants further claim that the Constitution guarantees to all individuals the right to elect and be elected, *'even on the day of elections',* provided they have reached the age of eighteen.

51. As to the imposition of interim measure, the Applicants request the Court: "*to render decision on interim measure which would prohibit the enforcement of the Decision on certification of the second round elections results for Mayor of the Municipality of Istog rendered by the Central Elections Commission (CEC) of 27 December 2017 until the merit based decision is rendered by the Constitutional Court."*

52. Finally, the Applicants request the Court: (i) to declare the Referral admissible; (ii) to impose an interim measure until the Court decides on the merits of the case; (iii) to prohibit the implementation of the decision of the Central Election Commission on certification of the results of the second round of elections for the Mayor of the Municipality in Istog of 27 December 2017 until the Court decides on the merits of the case; (iv) to hold that there has been a violation of Article 45.1 of the Constitution; (v) to declare invalid Judgment A.A.-U.ZH. No. 64/2017 of the Supreme Court of 27 December 2017; and (vi) to order the Central Election Commission to repeat again the voting of the second round of local elections for Mayor of the Municipality of Istog.

Comments submitted by the interested parties

53. The ECAP in its response numbering two hundred and ten (210) pages includes the complaints of political entities AAK and LDK, CEC decisions, CD regarding the procedures conducted, the supplementation of AAK complaints, additional evidence from the CEC, response to AAK appeal before the Supreme Court, etc.

54. The ECAP stated: *"...the Applicant's Referral should be declared inadmissible or manifestly ill-founded and to confirm in its entirety the reasons given in Decision ZL. Ano. 1142/2017 of 23 December 2017 and in the ECAP response to the complaint filed with the Supreme Court".*

55. Mr. Haki Rugova, as an interested party, in his response submitted to the Court, stated that in this case all decisions of the CEC, ECAP and the Supreme Court were rendered in accordance with and by respecting the Constitution, laws and regulations that govern the sphere of the election right in the Republic of Kosovo.

56. Regarding the allegations of the Applicant of the irregularities of the voter list, Mr. Haki Rugova claims that no one has complained within the legal deadlines on the voters list certified by the CEC and that fifty-two (52) votes alleged by the Applicant are unconfirmed and uncounted votes for which it is not known to which candidate they belong.

57. Mr. Haki Rugova, proposes that the Applicant's Referral be declared inadmissible due to non-exhaustion of legal remedies because: "*Judgment A.A.-U.ZH. No. 64/2017 of the Supreme Court which constitutionality is being challenged by this Referral of the Applicant Gani Dreshaj, but also the ECAP Decision that preceded this*

Judgment, were issued based on (as stated in the Judgment of the SC and the ECAP Decision) the complaints of the Alliance for the Future of Kosovo as a political entity rather than on the individual complaints of the Applicant, the candidate Gani Dreshaj ... therefore, as in the case KI73/09 "Mimoza Kusari-Lila vs Central Election Commission", even in this case it is considered that the Applicant has not exhausted all legal remedies... ."

58. On 26 and 31 January 2018, the first Applicant (Gani Dreshaj) submitted two responses of eleven (11) pages, which can be summarized as follows: The first Applicant claims: (i) it is a practice that the appeals to ECAP and Supreme Court be filed by a political entity and not the candidate competing for the position of the mayor of municipality; (ii) that he is a direct victim while the second Applicant (AAK) is an indirect victim; (iii) that the first Applicant, in the capacity of the AAK candidate, has exhausted all legal remedies in accordance with the legislation in force; (iv) his Referral to the Court is a continuation of the AAK 'battle' before ECAP and the Supreme Court; (v) fifty-two (52) voters should be given the opportunity to vote because the difference in votes in the competition for the mayor of municipality of Istog was only fourteen (14) votes; (vi) the first Applicant expects a detailed response from the Court and a repetition of the second round of voting for the Mayor of the municipality of Istog.

59. On 31 January 2018, the second Applicant (AAK) represented by Arianit Koci, a lawyer, filed a four (4) page submission, in which case he raised mainly the same allegations as raised earlier by the first Applicant (Gani Dreshaj). The second Applicant (AAK) stated that in the present case, it is an indirect victim whereas the Mr. Gani Dreshaj is a direct victim and that the case law of the Court and of the Court on Human Rights also recognizes to legal persons the status of a victim.

60. In this regard, as far as its procedural legitimacy (standing) before the Court is concerned, the second Applicant (AAK) stated: *"The AAK submits that the Referral of Mr. Gani Dreshaj in the capacity of AAK candidate for the mayor of the Municipality of Istog and in a capacity of a direct victim of violation of the right to be elected, which is guaranteed by the Constitution and international conventions should be considered a continuation of the legal battle initiated by the legal entity AAK through the complaint filed with the ECAP as well as an appeal with the Supreme Court, as determined by relevant applicable laws".*

Main comments received from the Forum of the Venice Commission

61. The Court notes from the responses received from the Forum of the Venice Commission that there are similar legal situations in the states that have responded but are not identical with the referral under review.

62. The Court sent to the Forum of the Venice Commission a list of questions that mainly relate to the concepts of active and passive election rights as well as their interaction with the constitutional systems of the respective states and the issue of updating the election lists between the rounds of voting.

63. The Federal Constitutional Court of Germany explained: (i) The violation of "active right" does not automatically cause the violation of "passive right". If so, such a violation would certainly affect all qualified persons to be elected, not just a specific complainant but all election candidates; (ii) the question of whether the election law was violated due to non-inclusion of the voters in the voter list is largely dependent on the federal state (*lander*) and by the precise circumstances of the case; (iii) in the event of a repetition of elections in Lower Saxony, the voter lists will not be updated and the initial lists will be used, unless six (6) months have elapsed since the first elections were held; and (iv) election disputes in Germany are not assessed if the rights of individual have been personally violated but if objectively it can be said that the elections were irregular.

64. The Constitutional Court of South Africa stated: (i) the candidate protects his own interest but also of the public. His right is independent and does not depend on whether 52 (fifty-two) voters have complained or not; (ii) active and passive rights are interrelated but not dependent on one another. According to South African law, the main issue would be the correctness of the elections, while the non-counting of 52 (fifty-two) votes of voters, could materially prejudice the result for the complainant; (iii) violation of the active right is not necessarily an automatic violation of the passive right; (iv) the non-counting of 52 (fifty-two) voters' votes did not violate the complainant's right to be elected, but this is a matter of unfair elections in the material sense, and in such cases, the courts of South Africa tend to intervene; (v) the voter lists should be updated for the second round; and (vi) the courts of South Africa would order updating the list because the universal right to vote should be interpreted in favor of the right to vote, and not for its abolition.

65. The Constitutional Court of Austria stated: (i) according to Austrian election law, the violation of the active right does not imply a violation of the candidate's right to be elected, thus his passive right; and (ii) in principle, the second round of voting is only part of a single election procedure, in case of holding the second round of voting, the original election lists are not updated.

66. The Constitutional Court of Bulgaria stated: (i) under the Bulgarian electoral law, the active and passive rights are interdependent; however, any violation of the active right does not lead to the annulment of the election result; and (ii) whenever two rounds of voting are held, a new voter list is created before the second round is held. If an individual reaches 18 years of age on the same day and is not on the voter list, he can still vote.

67. The Supreme Court of Ireland stated: (i) the voter list is published in a draft form on 1 November and enters into force on 15 February of the following year; (ii) it is valid for 12 months; (ii) any individual wishing to be included in the voter list must complain to the competent bodies to be included in the additional list (*supplementary register*); and (iii) the voter list which entered into force on 15 February is used for the elections and referendums over the next 12 (twelve) months.

68. The Czech Constitutional Court stated that "an individual who is not on the voter list has the right to appeal for non-inclusion on the voter list in the administrative court".

69. The Constitutional Court of Latvia stated that: (i) the municipal elections in Latvia are being held in a single round; however, the repeated elections are possible in a case where the court has annulled the election results; (ii) in case of cancellation of elections, Article 45 of the Municipal Election Law provides that the same voters who have met the requirements for voting in the initial elections may vote in the repeated elections; and, (iii) the passive right to be elected does not go as far as entitling a candidate to be elected by a specific group of voters.

70. The Constitutional Court of Croatia stated that "according to the election law of the Republic of Croatia, in case of holding the second round of elections, the voter lists are not updated".

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 45 [Freedom of Election and Participation]

"1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.

2. The vote is personal, equal, free and secret.

3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies."

Article 139 [Central Election Commission]

1. The Central Election Commission is a permanent body, which prepares, supervises, directs, and verifies all activities related to the process of elections and referenda and announces their results.

2. The Commission is composed of eleven (11) members.

3. The Chair of the Central Election Commission is appointed by the President of the Republic of Kosovo from among the judges of the Supreme Court and courts exercising appellate jurisdiction.

4. Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats. If fewer groups are represented in the Assembly, the largest group or groups may appoint additional members. One (1) member shall be appointed by the Assembly deputies holding seats reserved or guaranteed for the Kosovo Serb Community, and three (3) members shall be appointed by the Assembly deputies holding seats reserved or guaranteed for other Communities that are not in majority in Kosovo.

European Convention On Human Rights

Article 2 of Protocol No. 1 to the ECHR
(Right to free elections)

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Law No. 03/L-073 on General Elections in Republic of Kosovo as amended and supplemented by Law No. 03/L-256

"Article 9
The Challenge Procedure

9.2 A person who wishes to challenge a name that he/she considers should not be on the VL shall submit a request to the court of first instance clearly stating the facts supporting his/her challenge and including any relevant evidence.

9.3 A person may submit a request to the court of first instance if he/she discovers that his/her name does not appear on the VL. Such request shall include any relevant evidence.

Article 10
Adjudication Process

10.1 All decisions of the court of first instance are final, including decisions regarding the inclusion or exclusion of a name from the VL.
[…]
10.4 A request regarding improper exclusion from the Voters List, regular or by-mail, must be received by the court of first instance within 40 days before the election day.

Article 105
[Complaints Concerning the C&RC Process]

105.1 Complaints concerning the conduct of the count at the C&RC shall be submitted in writing to the ECAC within 24 hours of the complainant's becoming aware of the alleged violation. (Amended by Law No. 03/L-073, Article 4).

105.2 The submission of a complaint shall not interrupt or suspend the counting process.

105.3 All complaints to the ECAP shall be decided no later than seventy two (72) hours from receipt of the complaint in the ECAP central offices. (Amended by Law No. 03/L-073, Article 5).

Article 106
Election Results

106.1 The CEC shall certify the final election results after the completion of all polling station and counting centre procedures and when all outstanding complaints related to voting and counting have been adjudicated by the ECAP and any appeals of ECAP's decisions on them have been determined by the Supreme Court of Kosovo. (Amended by Law No. 03/L-073, Article 6).

106.2 Prior to certification of the election results, the CEC may order a recount of ballots in any polling station, or counting centre, or a repeat of the voting in a polling centre or municipality.

106.3 The results of an election are final and binding once they have been certified by the CEC. […]

Article 117
Procedures of ECAC

117.1 The ECAC shall establish its own rules of procedure.

117.2 The ECAC shall, in adjudicating a complaint or appeal examine and investigate all relevant evidence, and grant a hearing if it deems it necessary.

117.3 Adjudication on appeals and complains by ECAC shall be based on clear and convincing evidence.

117.4 The ECAC may order a recount of the ballots in a polling station or polling centre and an examination of the balloting material as part of its investigation into a complaint or appeal.

Article 118
Decisions

118.2 The ECAP shall provide the legal and factual basis for its decision in writing. The ECAP shall provide copies of its written decisions to the parties involved in the matter within seventy two (72) hours of the issuance of the decision if it affects the certification of the election results. For other decisions the ECAP shall provide copies of its written decisions to the parties involved in the matter within five (5) calendar days. (Amended by Law No. 03/L-073, Article 12 paragraph 1).

118.4 An appeal may be made from a decision of the ECAP, as ECAP may reconsider any of its decisions upon the presentation by an

interested party. An appeal to the Supreme Court of Kosovo may be made within twenty four (24) hours of the decision by ECAP, if the fine involved is higher than five thousand Euro (€5,000) or if the matter affects a fundamental right. The Supreme Court shall decide within seventy two (72) hours after the appeal is filed. (Amended by Law No. 03/L-073, Article 12 paragraph 2).

118.5 The ECAP decision is binding upon the CEC to implement, unless an appeal allowed by this law is timely filed and the Supreme Court determines otherwise. (Amended by Law No. 03/L-073, Article 12 paragraph 3).

Article 119
Complaints

119.1 A person who has a legal interest in a matter within the jurisdiction of ECAP, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAP within twenty four (24) hours after the close of the polling stations and the ECAP shall decide the complaint within seventy two (72) hours after the complaint is received. (Amended by Law No. 03/L-073, Article 13). […]

119.2 The Office may submit a complaint to the ECAC in respect of a Political Entity failing to comply with this law or CEC Rules affecting the electoral or the registration process.

119.3 The ECAC shall not consider a complaint concerning a decision of the CEC, but may consider an appeal from a decision of the CEC as specified under article 122 of this Law.

119.4 The ECAC may impose sanctions on a Political Entity for violation of this law or CEC rules committed by the members, supporters and candidates of the Entity. A Political Entity may submit evidence to the ECAC showing that it made reasonable efforts to prevent and discourage its members, supporters and candidates from violating this law or electoral rules. The ECAC shall consider such evidence in determining an appropriate sanction, if any, to be imposed on the Political Entity.

119.5 The ECAC may upon its own discretion consider matters otherwise within its jurisdiction, when strictly necessary to prevent serious injustice.

119.6 The provision of false information to the ECAC shall be a violation of this law that the ECAC may sanction under article 121 of this Law.

Article 120
Remedies and Sanctions for Violations

120.1 The ECAC may, if it determines that a violation of this law or CEC rules has occurred:

b) prior to certification of the election results and, in the sole discretion of ECAP, under exceptional circumstances to nullify the results of a specific polling station or polling center, and to order the CEC to repeat the voting in a polling centre or polling station; if it considers that the final election results could be affected (Amended by Law No. 03/L-073, Article 14).

Article 122
Electoral Appeals

122.1 A natural or legal person whose legal rights have been affected by any of the following decisions of the CEC may appeal that decision to the ECAP within twenty four (24) hours after the decision being appealed is announced by CEC and the appeal must be decided by ECAP within seventy two (72) hours after the appeal is made. (Ndryshuar me Ligjin nr. 03/L-073, nenin 15).

a) the inclusion or exclusion of a person from participation in an out-of-Kosovo voting programme;
b) the certification or refusal to certify a Political Entity or candidate to participate in an election;
c) a candidate who after certification does not want to participate in an election;
d) the accreditation or refusal to accredit an electoral observer;
e) the imposition or an administrative fee on a Political Entity under article 42 of this law; and
f) the refusal to register a Political Party within the Office.

122.2 The ECAC shall uphold an appeal from a decision of the CEC if it determines that the CEC decision was unreasonable having regard to all the circumstances.
122.3 The ECAC may, if it upholds an appeal from a decision of the CEC:
a) direct the CEC to reconsider its decision; and

b) direct the CEC to take remedial action.

Law on Local Elections in the Republic of Kosovo No. 03/L-072

Article 9
Election of Mayors

"9.5 A candidate is elected Mayor of a Municipality if he or she receives more than 50% plus one vote of the total valid votes cast in that Municipality.

9.6 If none of the candidates receives more than 50% plus one of the total votes cast in that Municipality, a second election shall be organized by the CEC between the two candidates who received the most valid votes. A second round of elections is held on the Sunday four (4) weeks after the first round.

9.7 The candidate who wins the majority of votes in the second round is elected as Mayor of the Municipality."

Rules and Procedures No. 02/2015 of ECAP, of 4 December 2015

Article 2
[Definitions]

The terms used in this rule have this meaning:
[...]
2.1 "Complaint" – means a regular legal remedy submitted in writing by a person who has a legal interest or whose rights have been violated during the election process.
2.2 "Appeal" means a regular legal remedy against first instance decisions.

[...]

Article 5
[Complaints]

[...]
5.3 Complaints regarding the electoral process for the polling day are submitted to the ECAP within twenty-four (24) hours from the moment of the closure of the voting center (Article 113.1 of LGE)
5.4 Complaints concerning the conduct of the count at the C&RC shall be submitted in writing to the ECAP within twenty four (24)

hours of the moment of finding out from the complainant of the alleged violation, based on Article 105.1 of LGE.
5.5 For all issues that are not directly related to voting and re-counting, the complaint must be filed with the ECAP within 24 hours of the alleged violation.
[...]

APPEALS
Article 10
[Criteria for appeal]

[...]
10.5 With respect to the appeal of a CEC decision, the appeal must be filed within five (5) days after notification of the CEC decision. For all other appeals, unless otherwise specified, appeals must be filed within twenty four (24) hours from the receipt of the ECAP decision by the Applicant.
[...]

Article 14
Procedure for Administration of Investigation of Election Material

14.1 When ECAP accepts a complaint deemed to be regular and when such a complaint is suspected of fraudulent activity involving the election material, the ECAP Chairperson or the Chairperson of the decision-making panels shall appoint a member of the Secretariat of ECAP, as the main investigator of that complaint.
[...]

CEC Election Regulation No. 02/2013
Drafting, Confirmation and Challenge of Voters Lists
of 2 July 2013

"Article 3
The process of drafting the Voters List

3.1 CEC maintains Voters List and ensures that the Voters List is accurate and updated, and it contains:

a) Extract the most recent available from the Central Civil Registry of all voters entitled to vote who are registered as citizens of Kosovo under the Law on Citizenship;

b) All eligible voters to vote abroad who have successfully applied for voting abroad.

3.2 Central Civil Registry CEC to provide all relevant information that the CEC requires maintaining the Voters List in accordance with the deadlines established by the CEC.

3.3 In order to create the list of voters, the CEC during the election process receives three (3) times the civil registry extract from the Civil Registry Agency. The first time, no later than two days after the announcement of the election date, second time not later than 3 days before the start of the challenge and confirmation from the voter lists, and the third time no later than two (2) days after the end of the challenge period and confirmation of VL".

CEC Election Regulation No. 06/2013 Count and Results Center of 2 July 2013

Article 8
Complaints regarding to process in CRC

8.1 Complaints about the conduct of the count in the CRC, under Article 105 of the Law on General Elections in the Republic of Kosovo and Article 26 of the Law on Local Elections in the Republic of Kosovo must be submitted in ECAP in writing within 24 hours of the occurrence of the alleged violation.

8.2 Submitting the complaint does not interfere or stop the counting process.

8.3Pursuant to the provisions of Article 105.3 of the Law on General Elections in the Republic of Kosovo, and Article 26 of the Law on Local Elections in the Republic of Kosovo, for all the complaints ECAP will decide no later than 72 hours after receiving them in their headquarters.

Article 9
Election Results

[...]
9.3 In exceptional cases before certification of the results, the CEC can order a recount of ballots in any Polling Station, Polling Center, and Counting Center or repeat voting at a Polling Center or in a municipality
.

[...]

9.5. Prior to certification of the election results, it is the competence of EPAC, in exceptional cases to annul the results of a Polling Station or Polling Center, and order CEC to repeat the voting in a Polling Station or Polling Center, if it considers that they have impact in final results.
[…]

CEC Election Regulation No. 10/2013
Second Round of Elections for Municipal Mayors
of 2 July 2013

Article 1
General Provisions

This Regulation is intended to regulate, election observers, appointment of polling station committees, Voters List, voting and counting in polling stations, voting for people with special needs and circumstances, as well as the campaign spending limits and financial disclosure of Political Party for the Second Round of Elections for Municipal Mayor.

Article 3
Applicable procedures

All provisions in the relevant election regulations of the CEC are applicable during the second round of Mayoral elections, unless they are replaced or amended specifically by this Regulation..

Article 5
Appointment of Polling Station Committees

Both candidates that compete in the second round of municipal mayor elections will be allowed to have their representatives in PSC, pursuant to decision of CEC. Political entities of candidates must nominate their representatives. If there are no sufficient nominations received from that political entity, then the composition of PSC will remain as defined in article 4.2 of this Regulation.

Article 6
Voter's List

The same voter's list that was used for Municipal Elections will be used for the second round of Municipal Mayor Elections".

Admissibility of the Referral

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

72. In this regard, the Court, by applying Article 113 of the Constitution, the relevant provisions of the Law regarding the procedure in the case foreseen in Article 113, paragraph 7 of the Constitution; and Rule 39 [Admissibility Criteria] and Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure shall examine whether: (i) the Referral was filed by authorized parties; (ii) the decisions of public authorities are challenged; (iii) all legal remedies have been exhausted; (iv) the rights and freedoms which have allegedly been violated are specified; (v) the time limits have been respected; (vi) the Referral is manifestly ill-founded; and (vii) there is an additional admissibility requirement, pursuant to Rule 39 (3) of the Rules of Procedure, which is not met.

Regarding authorized parties

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

74. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which stipulates:

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

75. Finally, the Court also refers to paragraph (a) of paragraph (1) of Rule 39 [Admissibility Criteria], of the Rules of Procedure which establishes:

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

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

76. As to the fulfillment of these constitutional requirements, the Court first notes that in the present case there are two Applicants and each of them should be legitimated as an authorized party based on the relevant provisions cited above, as a precondition to review this Referral. As to the first Applicant, namely Mr. Gani Dreshaj, the Court notes that he, in a capacity of an individual, that is, a natural person, he is a party authorized to file a constitutional complaint with the Court (see cases of the Constitutional Court: KI73/09 Applicant: *Mimoza Kusari-Lila*, Resolution of 19 February 2010; KI152/18 Applicant: *Shaqir Totaj*, Resolution on Inadmissibility of 17 January 2018; KI157/17 Applicant: *Shaip Surdulli*, Resolution on Inadmissibility of 15 May 2018). As to the second Applicant, namely the political entity AAK, the Court notes that in accordance with paragraph 4 of Article 21 of the Constitution, the second Applicant also has the right to submit a constitutional complaint, invoking the constitutional rights that apply to legal entities, to the extent applicable. (See: Resolution on Inadmissibility, *AAB-RIINVEST University LLC Prishtina v. the Government of the Republic of Kosovo*, Case KI41/09 of 21 January 2010; see also: case of ECtHR, *Party for a Democratic Society and Others v. Turkey*, No. 3840/10, Judgment of 12 January 2016).

77. In addition, and in this regard, the Court also notes that the ECtHR through its case law has found that the right to be elected within the meaning of Article 3 of Protocol No. 1 of the ECHR, is the right that is also guaranteed to political parties as legal entities and that they may complain irrespective of their candidates (see, for example, the case of the *Georgia Labor Party v. Georgia*, complaint no. 9103/04 ECtHR, Judgment of 8 July 2008, paragraphs 72-74 and other references mentioned in that decision). Consequently, the Court concludes that both Applicants are authorized parties.

Regarding the act of public authority

78. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above and to Article 47 [Individual Requests] of the Law, which provide:

> *"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".*

79. The Court also refers to paragraph (2) of Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure, which, *inter alia*, provides:

(2) A referral under this Rule must accurately clarify [...] what concrete act of public authority is subject to challenge.

80. In this regard, the Court notes that the Applicants challenge acts of a public authority, namely Judgment of the Supreme Court [Decision AA. U.ZH. No. 64/2017] of 26 December 2017 and the Decision of ECAP [ZL.A. No. 1142/2017] of 23 December 2017, as stipulated by paragraph 7 of Article 113 of the Constitution and other provisions of the Law and of the Rules of Procedure. Accordingly, the Court concludes that the Applicants challenge acts of a public authority.

Regarding the exhaustion of legal remedies

81. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above, and paragraph 2 of Article 47 [Individual Requests] of the Law and item (b) paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure which *foresee:*

Article 47
[Individual Requests]

(...)

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

Rule 39
[Admissibility Criteria]

1. The Court may consider a referral as admissible if:
(...)
(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,

82. The Court notes that paragraph 7 of Article 113 of the Constitution provides for the obligation to exhaust "*all legal remedies provided by law*". This constitutional obligation is also defined by Article 47 of the Law and item (b) of paragraph (1) of Rule 39 and applies both to natural persons and to legal persons, to the extent applicable.

83. In this regard, the Court must examine whether all legal remedies have been exhausted by the first Applicant, in the capacity of an individual, as a natural person, and by the second Applicant, in the capacity of the

political entity as a legal person. The criteria for assessing whether that obligation is fulfilled are well established in the case-law of the Court and in the case law of the ECtHR in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution.

84. In the circumstances of the present case, the Court recalls that only the second Applicant, namely the AAK as a political entity, specifically, a legal person, was a party to the proceedings before the ECAP and the Supreme Court. The first Applicant was not a procedural party although the applicable law, namely the LGE, in Article 119.1, foresees an opportunity for legal persons, i.e. candidates who have an interest in protecting their fundamental rights and freedoms. Consequently, the Court concludes that only the second Applicant has exhausted all legal remedies and the Court will review the constitutionality of the Judgment of the Supreme Court [A.A.-U.ZH. nr. 64/2017] in relation to the rights and freedoms guaranteed by the Constitution belonging to the AAK as a political entity and a legal person. (See, *mutatis mutandis*, political entities as Applicants before the ECtHR for electoral disputes, *Refah Partisi (Social Welfare Party) and Others v. Turkey*, Nos. 41340/98, 41342/98, 41343/98 and 41344/98, See also the case of the *Russian Conservative Party of Entrepreneurs and Others v. Russia*, No. 55066/00 and 55638/00, Judgment of 11 January 2007, where the Applicant was a political entity along with the candidate who competed under the sign of that same political entity).

85. In this regard, the Court notes that, on one hand, the appeals procedures before ECAP and the Supreme Court were initiated and conducted on behalf of the second Applicant (AAK), while, on the other hand, from the content of the documents submitted it results that the first Applicant (Gani Dreshaj), did not file any complaint on his behalf. The complaint of the first Applicant in his name was filed for the first time with the Constitutional Court, which is confirmed by the power of attorney he had provided for his representative.

86. However, the second Applicant (AAK) in the submission filed on 31 January 2018, notified the Court that it considers the Referral of the first Applicant (Gani Dreshaj), as the "continuation of the battle" conducted before ECAP and the Supreme Court; and in the present case, considers that the first Applicant is a 'direct' victim, while qualifying itself as an 'indirect victim'.

87. The Court emphasizes that this case differs from previous cases No. KI73/09 and No. KI152/17, because in these cases the Applicants

submitted their Referrals to the Court individually, while the regular proceedings before the CEC, the ECAP and the Supreme Court were conducted by political entities. In these cases, the political entities did not submit the Referral to the Court to support their candidates (the Applicants), which in fact determines the difference between the cases mentioned and this case (see: Constitutional Court of the Republic of Kosovo: KI73/09 Applicant: *Mimoza Kusari-Lila v. Central Election Commission*, Resolution on Inadmissibility of 24 March 2010, paragraph 35; see also, *mutatis mutandis,* case No, KI152/18 Applicant *Shaqir Totaj*, Resolution on Inadmissibility of 8 February 2018, paragraphs 39-46 and references mentioned in that decision).

88. Based on the foregoing, the Court notes that in the case under consideration, the Applicant AAK has exhausted all legal remedies provided for by Article 113.7 of the Constitution. In addition, the Court based on its case law, notes that the first Applicant Mr. Gani Dreshaj did not exhaust all legal remedies specified in Article 113.7 of the Constitution. Therefore, the Court will consider the appealing allegations only in relation to the second Applicant (AAK), regardless of the fact that the allegations of both applicants are identical..

Regarding the accuracy of the Referral and deadline

89. In addition, the Court also examines whether the Applicants have met other admissibility criteria, further specified in the Law and the Rules of Procedure. In this regard, the Court first refers to Article 48 [Accuracy of Referral] and Article 49 [Deadlines] of the Law, which provide:

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

90. The Court recalls that the same requirements are further provided in items c and d of paragraph 1 of Rule 39 [Admissibility Criteria] and paragraphs 2 and 4 of the Rule 76 [Referral pursuant to Article 113.7

of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure.

91. As to the fulfillment of these requirements, the Court notes that the Applicants have clearly specified what fundamental rights and freedoms guaranteed by the Constitution have allegedly been violated and have specified the act of the public authority which they challenge in accordance with Article 48 of the Law and relevant provisions of the Rules of Procedure and have filed the Referral within the deadline of four (4) months stipulated in Article 49 of the Law and the provisions of the Rules of Procedure.

Regarding other admissibility requirements

92. Finally and after considering the Applicants' constitutional complaint, the Court considers that the Referral cannot be considered manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure and there is no other ground for declaring it inadmissible, as none of the requirements established in Rule 39 (3) of the Rules of Procedure are applicable in the present case. (See, *inter alia*, ECHR case *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, see also: the case of the Court No. KO73/16, Applicant*: Ombudsperson*, Judgment of 8 December 2016, para 49).

Conclusion regarding the admissibility of the Referral

93. The Court concludes that the Applicants are authorized parties; that they challenge decisions of public authorities; that they have exhausted legal remedies as specifically elaborated above; they have specified the rights and freedoms which allegedly have been violated; have submitted the referral within the deadline; the referral is not manifestly ill-founded; and there is no other admissibility requirement which is not fulfilled.

94. Therefore, the Court declares the Referral admissible.

Assessment of the merits of the Referral

95. In the present case, the Court will not assess *in abstracto* whether the legal framework governing the election right in the Republic of Kosovo is compatible or incompatible with the Constitution. The scope of the Court, in this case, is limited only in assessing whether the challenged decisions of the ECAP and of the Supreme Court are in compliance with Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 of Protocol No. 1 (Right to free elections) to the ECHR.

96. In this regard, the Court refers to Article 53 of the Constitution, which establishes:

> *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

97. The Court refers to Article 45 [Freedom of Election and Participation] of the Constitution, which foresees:

> *"1.Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.*
>
> *2. The vote is personal, equal, free and secret.*
>
> *3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies".*

98. In addition, the Court refers to Article 3 of Protocol No. 1 (Right to free elections) of the ECHR, which provides:

> *"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".*

(a) General principles and the ECtHR test under Article 3 of Protocol No. 1

99. Article 3 of Protocol No. 1 differs from other rights guaranteed by the Convention and its Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that this provision also implies individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113).

100. The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Nonetheless, these rights are not absolute. There is room for "implied limitations", and Contracting States must be given a margin of appreciation in this sphere. The Court reaffirms that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, paragraph 52; *Matthews*, cited above, § 63; *Labita*, cited above, paragraph 201; and *Podkolzina v. Latvia*, no. 46726/99, paragraph 33, ECHR 2002-II). There are numerous ways of organizing and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision (see *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, § 61, ECHR 2005-IX).

101. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions imposed on the rights to vote or to stand for election do not curtail the exercise of those rights to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see case *Mathieu-Mohin and Clerfayt*, cited above, paragraph 52). In particular, any such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Hirst*, cited above, paragraph 62).

102. In relation to the cases concerning the right to vote, that is, the so-called "active" aspect of the rights under Article 3 of Protocol No. 1, the Court has considered that exclusion of any groups or categories of the general population must be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis, Aziz v. Cyprus*, no. 69949/01, paragraph 28, ECHR 2004-V). In particular, the Court has found that domestic legislation imposing a minimum age or residence requirements for the exercise of the right to vote is, in principle, compatible with Article 3 of Protocol No. 1 (see *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI; see also *Hirst*, cited above, paragraph 62).

103. The Convention institutions have also held that it was open to the legislature to remove political rights from persons convicted of serious or financial crimes (see *Holland v. Ireland*, no. 24827/94, Commission decision of 14 April 1998, DR 93-A, p. 15, and *M.D.U. v. Italy* (dec.), no.

58540/00, 28 January 2003). In *Hirst* (§ 82), however, the Grand Chamber underlined that the Contracting States did not have carte blanche to disqualify all detained convicts from the right to vote without having due regard to relevant matters such as the length of the prisoner's sentence or the nature and gravity of the offence. A general, automatic and indiscriminate restriction on all detained convicts' right to vote was considered by the Court as falling outside the acceptable margin of appreciation. The Convention institutions have had fewer occasions to deal with an alleged violation of an individual's right to stand as a candidate for election, that is, the so-called "passive" aspect of the rights under Article 3 of Protocol No. 1. In this regard the ECtHR has emphasized that the Contracting States enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, these criteria vary in accordance with the historical and political factors specific to each State. The multiplicity of situations provided for in the constitutions and electoral legislation of numerous member States of the Council of Europe shows the diversity of possible approaches in this area. Therefore, for the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned (see *Mathieu-Mohin and Clerfayt*, paragraph 54, and *Podkolzina*, paragraph 33, both cited above).

104. In case *Podkolzina*, the ECtHR found a violation of Article 3 of Protocol No. 1 with regard to restrictions on an individual's eligibility to stand as a candidate for election. In that case, the applicant was removed from the list of parliamentary candidates on account of her allegedly insufficient knowledge of the official language of the State. The ECtHR acknowledged that a decision determining a parliament's working language was in principle one which the State alone had the power to take, this being a factor shaped by the historical and political considerations specific to the country concerned. A violation of Article 3 of Protocol No. 1 was found, however, because the procedure applied to the applicant to determine her proficiency in the official language was incompatible with the requirements of procedural fairness and legal certainty, with the result that the negative conclusion reached by the domestic authorities in this connection could be deemed deficient (paragraphs 33-38).

105. In case *Melnychenko v. Ukraine* (no. 17707/02, paragraphs 53-67, ECHR 2004-X), the ECtHR also recognized that legislation establishing domestic residence requirements for a parliamentary candidate was, as such, compatible with Article 3 of Protocol No. 1. At

the same time, the decision of the Ukrainian authorities to deny the applicant registration as a parliamentary candidate was found to be in breach of the above provision, given that the domestic law governing proof of a candidate's residence lacked the necessary certainty and precision to guarantee the applicant adequate safeguards against arbitrary treatment. The ECtHR underlined in that case that, while the Contracting States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure itself contains sufficient safeguards to prevent arbitrary decisions (paragraph 59).

106. In certain older cases, the former Commission was required on several occasions to consider whether the decision to withdraw an individual's so-called "active" or "passive" election rights on account of his or her previous activities constituted a violation of Article 3 of Protocol No. 1. In all those cases, the Commission found that it did not. Thus, in the cases of *X v. the Netherlands* (no. 6573/74, Commission decision of 19 December 1974, DR 1, p. 87) and *X v. Belgium* (no. 8701/79, Commission decision of 3 December 1979, DR 18, p. 250), it declared inadmissible applications from two persons who had been convicted following the Second World War of collaboration with the enemy or "uncitizen-like conduct" and, on that account, were permanently deprived of the right to vote. In particular, the Commission considered that "the purpose of legislation depriving persons convicted of treason of certain political rights and, more specifically, the right to vote [was] to ensure that persons who [had] seriously abused, in wartime, their right to participate in the public life of their country are prevented in future from abusing their political rights in a manner prejudicial to the security of the State or the foundations of a democratic society" (see: *X v. Belgium*, p. 253).

107. In case of *Van Wambeke v. Belgium* (no. 16692/90, Commission decision of 12 April 1991, unreported), the Commission declared inadmissible, on the same grounds, an application from a former member of the Waffen-SS, convicted of treason in 1945, who complained that he had been unable to take part in the elections to the European Parliament in 1989. In the case of *Glimmerveen and Hagenbeek v. the Netherlands* (nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187), the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organization with racist and xenophobic tendencies, to stand for election. On that occasion, the Commission referred to Article 17 of the Convention, noting that the applicants "intended to participate in these

elections and to avail themselves of the right [concerned] for a purpose which the Commission [had] found to be unacceptable under Article 17" (*ibid.*, p. 197). In that case it was also underlined that the standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations.

108. In the context of employment restrictions imposed on public officials on political grounds, the Court has held that Article 10 of the Convention may apply in connection with their dismissal. A violation of Article 10 was found in this respect in *Vogt* (cited above, paragraphs 43-44), where the applicant was dismissed as a civil servant in relation to her specific activities as a member of the Communist Party in West Germany. However, in *Volkmer v. Germany* ((dec.), no. 39799/98, 22 November 2001) and *Petersen v. Germany* (dec.), no. 39793/98, ECHR 2001-XII), the ECtHR declared inadmissible as unsubstantiated the applicant civil servants' complaints under Article 10 about their dismissal on account of their collaboration with the regime and secret services of the former German Democratic Republic. In the case of *Sidabras and Džiautas v. Lithuania* (nos. 55480/00 and 59330/00, §§ 51-62, ECHR 2004-VIII), the ECtHR found a violation of Article 14 taken in conjunction with Article 8 as regards the existence of wide-ranging restrictions barring former KGB officers in Lithuania from access to various spheres of employment in the private sector, which were introduced almost a decade after the re-establishment of Lithuanian independence. At the same time, it is to be noted that those applicants' dismissal from their positions as, respectively, a tax inspector and prosecutor, on the ground of their former KGB employment was not considered to amount to an interference with their rights under Article 10 of the Convention (*ibid.*, paragraphs 67-73).

109. It is also relevant in this context to note that Article 3 of Protocol No. 1, or indeed other Convention provisions, do not prevent, in principle, Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention (see, in the context of a legislative ban on a police officer from engaging in political activities, examined by the Court

under Articles 10 and 11 of the Convention, *Rekvényi*, cited above, paragraphs 34-50 and 58-62).

110. In *Rekvényi*, no violation of the Convention was found in that the domestic legislation in issue was judged to be sufficiently clear and precise as to the definition of the categories of persons affected (members of the armed forces, police and security services) and as to the scope of the application of the impugned statutory restriction, the statute's underlying purpose of excluding the whole group from political activities being compatible with the proportionality requirements under Articles 10 and 11 of the Convention. It was thus immaterial for the Court's assessment of the compatibility of the impugned measures with the Convention whether or not the applicant in that case could have requested the domestic courts to scrutinise whether his own political involvement represented a possible danger to the democratic order (*ibid.*). Similarly, in *Podkolzina and Melnychenko*, both cited above, the Court did not state that the Convention require that the domestic courts be empowered to review matters such as the proportionality of the statutory obligations imposed on those applicants to comply with, respectively, language and residence requirements in order to exercise their rights to stand as candidates for election, given that those statutory requirements were in themselves perfectly acceptable from the Convention point of view.

111. It follows from the above analysis that, as long as the statutory distinction itself is proportionate and not discriminatory as regards the whole category or group specified in the legislation, the task of the domestic courts may be limited to establishing whether a particular individual belongs to the impugned statutory category or group. The requirement for "individualisation", that is the necessity of the supervision by the domestic judicial authorities of the proportionality of the impugned statutory restriction in view of the specific features of each and every case, is not a precondition of the measure's compatibility with the Constitution.

112. Article 3 of Protocol no. 1 deals only with the election of the legislature. This expression, however, does not only define the state parliament. The constitutional structure of the State in question must be considered (*Timke v. Germany*, Commission's decision). In general, the scope of Article 3 of Protocol No. 1 does not cover local or municipal elections (*Xuereb v. Malta*; *Salleras Llinares v. Spain*) or regional (*Malarde v. France*). The ECtHR held that the power to make regulations and by-laws which is conferred on the local authorities in many countries is to be distinguished from legislative power, which is referred to in Article 3 of Protocol No. 1 to the Convention, even

though legislative power may not be restricted to the national parliament alone (*Mółka v. Poland* (decision)).

113. Nevertheless, the Court considers that the principles derived from the case law of the ECtHR regarding the guarantees of Article 3 of Protocol No. 1 are useful for municipal election disputes in the Republic of Kosovo and especially for the case under consideration.

114. The rights guaranteed under Article 3 of Protocol No. 1 and are not absolute and there is room for *implied limitations*. The "implied limitations" concept under Article 3 of Protocol No. 1 also means that the ECtHR does not apply the traditional tests of *necessity* or *pressing social need* which are used in the context of Articles 8 to 11 of the ECHR. In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. In addition, the ECtHR has stressed the need to assess any electoral legislation in the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another (*Mathieu-Mohin and Clerfayt v. Belgium*, § 52; *Ždanoka v. Latvia* [GC], §§ 103-104 and 115).

115. Referring to the recommendations of the Venice Commission, the ECtHR found that the post-voting stages should be accompanied by clear procedural guarantees, be open and transparent, and allow observation by members across the whole political spectrum, including the opposition representatives. The ECtHR emphasized that it is true that Article 3 of Protocol No. 1 was not conceived as a code on electoral matters designed to regulate all aspects of the electoral process. Therefore, the level of the scrutiny of ECtHR will depend on the particular aspect of the right to free elections. Thus, tighter scrutiny should be reserved for any departures from the principle of universal right to vote, but a broader margin of appreciation can be afforded to States where the measures prevent candidates from standing for election. A still less stringent scrutiny would apply to the more technical stage of vote counting and tabulation. The ECtHR has accorded a wide margin of appreciation to the responding states in the electoral matters and that any error or irregularity in itself does not imply a violation of Article 3 of Protocol No. 1. Violation can be found in cases of impeding voters, where the election result was distorted in a flagrant manner, there has been no substantial review of complaints or in the case of a manifestly arbitrary or unreasonable assessment (*Davydov v. Russia* paragraphs 283- 288).

116. The Court considers that Article 45 of the Constitution cannot be read in isolation from other constitutional provisions and that the rights that it protects are not absolute but subject to "implied limitations". In this regard, the Court refers to Article 73 of the Constitution, which stipulates that judges, prosecutors and other public officials explicitly listed in that provision cannot be nominated or elected as deputies of the Assembly, without previously resigning from their duties. Therefore, the drafters of the Constitution have set the conditions that limit electoral rights, which imply that those restrictions are in accordance with the spirit of the Constitution, read as a whole. The Kosovo drafter of the Constitution also established the CEC as a permanent body for overseeing the elections, which among other things, has the duty to respect and enforce the legal deadlines for complaints and other technical aspects such as updating voter lists, counting conditional votes etc. The Constitution, Election Laws and Election Regulations issued by the CEC, according to the Court, should be read as a constitutional-legal entirety and in harmony with each other that, apart from granting the election rights, also restricts them. The Court also considers that if any restriction constitutes a violation of the essence of the election rights, constitutes something that is determined on case-by-case basis.

117. The Court notes that Article 45 of the Constitution consists of 3 separate paragraphs and each of them has the relevant elements and rules. All three paragraphs should be read together and interdependent with one another. In support of the justification of the allegations in the circumstances of the present case, the Court will focus only on the first two paragraphs of Article 45 of the Constitution.

118. The first paragraph of Article 45 of the Constitution defines the right to vote (the active right of vote) and the right to be elected (passive right of vote). The first right, i.e. the one of active vote, belongs only to individuals, i.e. to natural persons, who are citizens of the Republic of Kosovo and who have reached the age of 18, even on the voting day and in the event that their right is not limited by a court decision. The other right, that of a passive vote, belongs to the candidates as individuals, namely as natural persons, who run in elections at the local or central level, as well as to political entities, namely legal persons competing in the elections at the local or central level. Also for the passive right of vote applies the condition that the right of the latter to exercise this right is not limited by a court decision.

119. These constitutional provisions so far have not been dealt with in merit. The Court has had small number cases in which the Applicants'

allegations are related to Article 45 of the Constitution. In either of these cases, the Court has not found any violation. In fact, in all of these cases, the referrals filed have been rejected for one of the procedural aspects of admissibility. (See cases of the Constitutional Court: KI73/09 Applicant *Mimoza Kusari-Lila*, Resolution of 19 February 2010; KI152/18 Applicant *Shaqir Totaj*, Resolution on Inadmissibility of 17 January 2018; KI157/17 Applicant *Shaip Surdulli*, Resolution on Inadmissibility of May 15 2018). The present case is the only/second case so far in which the Court assesses the merits of the referral.

120. However, the Court notes that the ECtHR case law has interpreted Article 3 of Protocol 1 to the ECHR as a guarantee of "*the active right of vote*" and "*the passive right of vote*". In accordance with Article 45 of the Constitution, the first, means the right to elect, namely to vote, and the second, the right to be elected, namely, to run for the position of an elected representative. Both provide substantial and procedural safeguards. However, the Court notes that passive rights have been equipped by less protection through the ECtHR case law than active rights (see ECHR case *Zdanoka v. Latvia*, No. 588278/00, Judgment of 16 March 2006, para. 105 -106). The ECtHR case law in relation to passive rights has largely focused on verifying the lack of arbitrariness in the domestic proceedings that may have resulted in disqualification of a natural or legal person to run in the election. (see case *Zdanoka v. Latvia* cited above, paragraph 115; *Melnitchenko v. Ukraine*, No. 17707/02, Judgment of 19 October 2004, paragraph 57).

121. In addition to the active and passive rights of vote, according to the most recent ECtHR case law, Article 3 of Protocol no. 1 includes the "*post-election period*" or "*post-election rights*". In that regard, the ECtHR has argued that the essence of free elections implies a number of electoral rights that encompass minimum standards governing the practices and institutions designed to administer voting, counting and determining the election result. (See case cited above, *Davydov and Others v. Russia*, No. 75947/11, Judgment of 30 May 2017, paragraphs 284-285).

122. In light of these rights, the ECtHR has, *inter alia*, reviewed cases involving the laws regulating voter registration issues as a prerequisite for the free exercise of the election rights (*Georgian Party v. Georgia* No. 9103/04, Judgment of 8 July 2008); the obligation of the state to organize free elections includes the obligation to establish mechanisms that have the capacity to investigate the allegations of electoral irregularities and to improve and address the latter (*Namat Aliyev v. Azerbaijan* No. 18705/06 Judgment of 8 April 2010); or cases related to the need for a court hearing responsible for complaints and election

disputes. The latter determined that the essence of an election right may be restricted, hence violated, if there is no sufficient guarantee for an effective and impartial appeal system. (See ECtHR case*, Grosaru v. Romania*, cited above).

(b) Application of general principles in the present case

123. The Court notes that the Referral raises issues of interconnection and interaction of active and passive electoral rights and the updating of voter lists between the rounds of elections. The Court also notes that the claims raised in the Referral have emerged as a consequence of post-election disputes, which in this case relates to the counting of votes in the second round of voting that, according to Applicants; allegations, are decisive for the winner of the local elections for Mayor of the Municipality of Istog.

124. Taking into account the above mentioned in this present case, the Court will examine the Applicant's allegations in relation to the following constitutionally guaranteed rights; i) Regarding active rights of vote ii) Regarding passive rights of voteiii) As regards the post-election period or post-election rights.

As to active rights of vote

125. The Court recalls that Article 45 of the Constitution establishes the individual's right to elect (the right to vote) this right belongs only to individuals or natural persons who are citizens of the Republic of Kosovo who have reached the age of 18, even on the voting day, and if their right is not restricted by a court decision

126. In accordance with Article 3 of Protocol No. 1, the ECtHR has considered that exclusion of any groups or categories of the general population must be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis, Aziz v. Cyprus*, no. 69949/01, paragraph 28, ECHR 2004-V). In particular, the Court has found that domestic legislation imposing a minimum age or residence requirements for the exercise of the right to vote is, in principle, compatible with Article 3 of Protocol No. 1 (see *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI; see also *Hirst*, cited above, paragraph 62).

127. In the present case, the Court notes that the essence of the Applicants' complaint does not refer to the denial of voting rights to an individual, that is, the restriction of voting rights by a decision of a public authority.

128. The Court recalls that the essence of the Applicants' complaint is that the non-counting of 52 (fifty-two) voters' votes has violated the active right of vote of 52 (fifty-two) voters, which leads to a violation of the passive right of the first Applicant (Gani Dreshaj), to be elected as Mayor in the Municipality of Istog.

129. In this regard, the Court notes that based on the documentation submitted by public authorities, it is about 108 (one hundred and eight) rejected ballots for persons who have voted conditionally, and who have not been on the Final Voters List. Consequently, the Court will consider the Applicants' allegation having regard to 108 (one hundred and eight) voters, whose votes have been rejected and will not be limited to only 52 (fifty-two) voters.

130. The Court considers that the non-count of 108 (one hundred and eight) ballots, essentially addresses the issue of the interdependence of the active right of the voters concerned with the passive right to be elected as alleged by the Applicants.

131. As to the above allegation, the Court notes that none of those 108 (one hundred and eight) voters have complained to the ECAP regarding the administration and counting of votes in the CRC, according to the procedure foreseen in Article 105 of the Law on General Elections. The Applicants did not either substantiate by evidence these allegations, they did not provide evidence to the Court that some of the disputed voters initiated proceedings before the competent authorities concerning the limitation of their active rights of vote.

132. With respect to the same allegation, the Court also notes that, based on the answers received from the Venice Commission, in most of the cases, the Applicants' passive right to be elected does not go so far as to give the candidate the right to be elected by a particular group of voters (see the answers of the Constitutional Courts of Austria, Bulgaria and Latvia).

133. Based on the above, the Court notes that the challenged decisions of the public authorities in the present case are based on the relevant provisions of the election law. This law was correctly applied in the circumstances of the present case. The constitutionality of the legal framework is not considered before the Court and is not initiated in terms of active right of vote.

134. Accordingly, the Court concludes that the Applicants' passive rights are not directly related to the active right of a particular group of voters who have not challenged the procedures that result in the cancellation

of their 108 (hundred and eight) votes before the competent public authorities.

135. Taking into account all the facts, the court concludes that in the present case, the constitutional guarantees regarding the active election right provided for in Article 45 of the Constitution and Article 3 of Protocol No. 1 to the ECHR are not applicable in sense the allegations raised by the Applicants, as the subject of dispute is not the deprivation of the voting rights of an individual, that is, the restriction of the right to vote by the decision of a public authority.

As to the passive right of vote

136. The Court reminds that "*passive right if vote*" in accordance with Article 45 of the Constitution, and Article 3 of the Protocol no. 1 to the ECHR means the right to be elected, namely to run for the position of the elected representative. This right does not imply the right of any candidate to be elected. This right includes essential and procedural guaranties. However, the Court notes that passive rights have less protection through the case law (see: the case of the ECtHR, *Zdanoka v. Latvia*, No. 58278/00, judgment of 16 March 2006, paragraphs 105-106).

137. The Court notes that passive right of vote belongs to candidates as individuals, namely to natural persons running for elections at the local or central level, as well as to the political entities, or legal entities in the race at the local or central level election.

138. The case-law of the ECtHR with regard to the passive rights is clearly focused solely on the verification of the lack of arbitrariness in domestic proceedings that may have resulted in the disqualification of a natural or legal person from standing as a candidate for the election (see: abovementioned case of *Zdanoka v. Latvia*, para. 115; *Melnitchenko v. Ukraine*, no. 17707/02, Judgment of 19 October 2004, § 57).

139. The Court notes that the Applicants do not challenge any decision of the public authority resulting in disqualification of any natural or legal person from standing as a candidate in the elections.

140. Therefore, the Court concludes that in the present case, the constitutional guarantees concerning the passive right of vote as foreseen by Article 45 of the Constitution and Article 3 of Protocol no. 1 to the ECHR are not applicable, as the subject of the dispute is not

the disqualification of any natural or legal person from standing as a candidate in the elections.

As to the post-election period or post-election rights

141. For the purposes of this test, the Court will use the Code of Good Practice in Electoral Matters (Guidelines and Explanatory Report) (CDL-AD (2002) 23 rev), adopted by the European Commission for Democracy Through Law ("Venice Commission") at its 51st and 52th session (5-6 July and 18th and 19th October 2002) hereinafter (Code of Good Practice).

142. The Court reiterates that the Code of Good Practice in Electoral Matters of the Venice Commission pays considerable attention to the process of counting, transferring and tabulating results, insisting that this process must be transparent and open, and that observers and representatives of candidates must be allowed to be present and obtain copies of the minutes (see Section I.3.2 of the Code). In the same regard, the Explanatory Report contains some additional recommendations that refer to the process of counting, recording results and their transfer to a higher authority (see Rationale, Sections I.3.2.2.4 (Counting) and I. 3.2.2.5 (Transferring the results). The report suggests that observers, the media and others authorized to be present at the polling station have the right to be present during the count, and that there should be "sufficient copies of the minutes to the proceedings to ensure that all the above mentioned persons receive one". Moreover, the transfer of results - a "vital operation whose importance is often overlooked" - should also be conducted in an open and controlled manner, where the person transferring the results, usually the presiding officer of the polling station, should be accompanied by other members of the polling station representing the opposing parties, if necessary with additional security.

143. These detailed recommendations reflect the importance of technical details, which can be crucial in ensuring an open and transparent procedure for determining the will of voters through the counting of ballot papers and accurate recording of election results throughout the system, from a local vote by the Central Election Commission. They confirm that, in the eyes of the Code of Good Practice in Electoral Matters, the post-voting phases relating to counting, recording and transferring election results constitute an essential part of the electoral process. As such, they should be accompanied by clear procedural guarantees, be open and transparent, and allow observation by members throughout the political spectrum, including the opposition,

to ensure the exercise of the principle of freedom of voters to express their will and the need to combat electoral fraud.

144. It is true that Article 3 of Protocol No. 1 to the Convention is not conceived as a code on electoral issues aimed at regulating all aspects of the electoral process (see Communist Party of Russia and Others v. Russia, No. 29400/05, paragraph 108, 19 June 2012). However, the Court has already confirmed that the common principles of the European constitutional heritage, which form the basis of any truly democratic society, include the right to vote in terms of the ability to vote universally, equally, freely, secret and direct elections held at regular intervals (see Code of Good Practice in Electoral Matters). Article 3 of Protocol no. 1 to the Convention explicitly provides for the right to free elections at regular intervals by secret ballot, and other principles are also recognized in the judicial practice of the institutions of the Convention (see the Russian Conservative Party of Entrepreneurs and Others, paragraph 70). In this environment, free elections should be understood both as an individual right and as a positive obligation of the state, which consists of a certain number of guarantees, starting from the right of the voters to freely form an opinion, and extends to the careful regulation of the process in which the voting results are determined, processed and recorded.

145. At the same time, the Court reiterates that the level of its own control will depend on a certain aspect of the right to free elections. Therefore, more stringent oversight should be reserved for any deviation from the principle of universal suffrage (see Hirst (No. 2), cited above, §§ 62). States in which measures preventing candidates from running for elections can be given greater freedom of appreciation, but such interference should not be disproportionate (see Krasnov and Skuratov v. Russia, No. 17864/04 and 21396/04, paragraph 65, 19 July 2007, and the Russian Conservative Party of Entrepreneurs and Others, cited above, paragraph 65).

146. Even less stringent control would apply to the technical phase of counting and tabulation. It is necessary to take into account the fact that this is a complex process, with many people involved in several levels. The mistake or irregularity at this stage would in itself not mean unfairness of the elections, if the general principles of equality, transparency, impartiality and independence of the electoral administration are respected. The concept of free elections would be at risk only if there were evidence of procedural violations that could impede the free expression of the opinion of people, for example, through a significant disturbance of voters' intentions; and where such complaints were not received in an efficient manner at the domestic

level. Moreover, the Court should be cautious in granting unlimited status to challenge this stage of the election of individual participants in the electoral process. This is especially the case when domestic legislation contains reasonable restrictions on the ability of individual voters to challenge the results in their constituencies, such as the requirement for a voter quorum (see section II.3.3 (f) of the Code of Good Practice). However, states should ensure such access to a complaint system as it would be sufficient to guarantee under Article 3 of Protocol No. 3 is effective throughout the election cycle. In the Russian context, the decision of the Constitutional Court of 22 April 2013 confirmed that certain voters could challenge the results in the constituencies in which they voted; subsequent legal changes provided such a status.

147. The Court therefore confirms that only serious irregularities in the process of counting and tabulating the votes that remained without effective domestic examination could constitute a violation of the individual right to free elections guaranteed by Article 3 of Protocol No. 1 to the Convention, both in its active and passive aspect. In accordance with its subsidiary role, the role of the Court is limited to ensuring that the examination of the domestic (domestic legislation of a country) level provides minimal procedural guarantees and that the findings of domestic (regular) courts are not arbitrary or manifestly unreasonable (see the Communist Party of Russia and others, cited above, paragraph 116-17). The Court will continue to analyze the allegations of the Applicants accordingly. (*Davydov v. Russia*, paragraphs 283-288).

148. The Court also reiterates that the ECtHR test in the present case applies in the context of a post-election dispute (*post-election rights)* related to the counting of votes in the second round of voting and the updating of the electoral lists. The Court reiterates that the allegations of the Applicants, in essence, must be considered against the post-election background and in parallel with the ECtHR test.

149. In this regard, the Court will use the ECtHR test to find whether (i) the Electoral Legislation provides minimum procedural guarantees; ii) whether the challenged decisions of the ECAP and the Supreme Court are arbitrary or manifestly unreasonable;

(i) whether Election Legislation provides minimum procedural guarantees

150. The Court emphasizes that in this case, the legal framework governing the right to vote in the Republic of Kosovo is not the subject of

consideration by the Court, that is, whether this framework is in compliance or not with the Constitution, but whether the legal framework of electoral legislation provides minimal procedural guarantees. The subject of the review are the challenged decisions of the ECAP and the Supreme Court and whether those decisions can withstand the test of the ECtHR as evidenced by the jurisprudence developed in connection with Article 3 of Protocol No. 1 to the ECHR listed in the previous paragraph.

151. Concerning the minimum procedural guarantees of the Election Legislation, the Court notes that, according to the applicable election laws, there is a possibility of appeal to the ECAP on any decision of the CEC. Furthermore, it is envisaged that there is a two-instance system, that is, the possibility that an unsatisfied party will appeal to the Supreme Court against the decisions rendered by the ECAP.

152. It is also possible to file an appeal against any decision of the Count and Registration Center within twenty-four (24) hours of the occurrence of the alleged violation.

153. In addition, in accordance with the applicable electoral legislation prior to certification of the election results, the CEC may order re-count of ballot papers at any polling station, or counting center, repetition of elections in the polling station or municipality.

154. Furthermore, the Court notes that the ECAP and the Supreme Court have the possibility to annul the elections in accordance with the legislation in force in one or more constituencies if they consider that there are serious election irregularities.

155. The Court notes that the ECAP precisely using the abovementioned jurisdiction due to the irregularities of the ballot papers received by mail cancelled the results for the second round of elections of 19 November 2017 and ordered the CEC to repeat the vote for the second round of local elections for the Mayor of the Municipality of Istog. What is an indicator that the ECAP was particularly cautious in ensuring objective electoral correctness in order to avoid serious violations of the second round of elections for the Mayor of the Municipality of Istog.

156. From the above, the Court concludes that the Electoral Legislation provides for the possibility of a multi instance decision on appeals by independent public authorities and that the appeals are effective, and that the election legislation provides sufficient procedural guarantees

to unsatisfied parties to challenge decisions that are not in accordance with the electoral legislation.

ii) whether the challenged decisions of the ECAP and the Supreme Court are arbitrary or manifestly unreasonable

157. For the purpose of the ECtHR test, the Court again emphasizes the ECAP reasoning regarding the allegation of not counting the 52 (fifty-two) voters' votes, which essentially states: *"In respect to allegations of the appellant that there are 50 ballots that were not counted because the voters have reached the adult age to vote between dates of 20 October 2017 and 17 December 2017 which votes were not counted. These allegations were assessed by the Commission as ungrounded because the Central Civil Registry Extract contained all names of voters registered with age of 18 including those who have reached 18 years until the election date of 22 October 2017. [...] the CEC during the election process receives three (3) times the civil registry extract from the Civil Registry Agency. The first time, no later than two days after the announcement of the election date, second time not later than 3 days before the start of the challenge and confirmation from the voter lists and the third time no later than two (2) days after the end of the challenge period and confirmation of VL". This list could have been challenged by voters during periods of its review (the voters list), by the public from 29 August 2017 until 12 September 2017. Since the voters list was certified after expiry of challenging deadline, 12 September 2017, and since it is certified and became valid for an election process because it is certified only once for an election process regardless of duration of the election process, then, on this ground the voters who have reached the adult age during period from 22 October 2017 and 17 December 2017 could not be part of the certified voters list".*

158. The Court recalls that the ECAP was given this decision after a detailed explanation of the CEC regarding the acceptance and rejection of conditional votes "*...by the total number of 481, of conditional votes and VPCV votes it was confirmed that 309 votes meet legal criteria as regular ballot for counting and further proceeding, while 172 votes have been rejected. The reason why 172 ballots have been rejected .is that they have not met the legal criteria, as 108 rejected ballots have to do with the persons who voted but were not in the Final Voters List (FVL); 61 rejected ballots were because the persons who voted were not voters respectively citizens of Istog where the election process was held; 2 ballots were rejected because the voters who voted did not register as voters with special needs and 1 ballot was rejected*

because the voter besides having conditional ballot was proved to have voted as a voter at his regular polling station".

159. The Court notes that the Supreme Court approved in entirety the reasoning given by the ECAP, therefore, the ECtHR test is equally valid for both trial panels.

160. The Court notes that the CEC certified the voter list based on Rule 3.3 of Election Regulation no. 02/2013 of the CEC and later explained in detail why some 309 (three hundred and nine) votes were accepted as regular, and why 172 (one hundred and seventy-two) votes were rejected as irregular..

161. The Court notes that this reasoning of the CEC was supported by the ECAP and the Supreme Court, reasoning in detail based on which legal norms acted when rendering the challenged decisions.

162. Therefore, the Court finds that the challenged decisions of the ECAP and the Supreme Court are in compliance and provided by law, reasoned, and are not arbitrary, or manifestly unreasonable. It is another matter if the aforementioned legal provision is compatible or not with the Constitution. On this issue, the Court has already stated at outset that the legal framework regulating the right to vote in the Republic of Kosovo is not subject to review in the present case.

163. Regarding the Applicants' allegation of updating the voter lists, the Court notes that the challenged decisions of the CEC, ECAP and Supreme Court have been rendered pursuant to Article 6 of Regulation No. 10/2013 of the CEC regarding the voter lists, which establishes: "*The same voter's list that was used for Municipal Elections will be used for the second round of Municipal Mayor Elections*".

164. The Court recalls that Article 3 of the Election Regulation on the Drafting, Confirmation and Challenge of the Voters List, No. 02/2013, specifies: "*In order to create the list of voters, the CEC during the election process receives three (3) times the civil registry extract from the Civil Registry Agency. The first time, no later than two days after the announcement of the election date, second time not later than 3 days before the start of the challenge and confirmation from the voter lists, and the third time no later than two (2) days after the end of the challenge period and confirmation of VL*".

165. Likewise, Article 10.4 of the Law on General Elections No. 03/L-073, as amended and supplemented by Law No.03/L-256, provides: "*10.4 A request regarding improper exclusion from the Voters List, regular*

or by-mail, must be received by the court of first instance within 40 days before the election day".

166. The use of the same voter list by the CEC, for the second round of the electoral process, which was subsequently upheld as lawful by the challenged decisions of ECAP and the Supreme Court does not constitute a sudden change and unforeseeable electoral practice or legal basis that could affect the flagrant distortion of the electoral process. For the Applicant, as for all participants in the electoral competition, the non-update of the voters' list for the second round of elections has been a known fact since the beginning of the electoral process, given the condition set out in Article 6 of Regulation No. 10 regarding the voter lists (see *vice versa*, *Paschalidis, Koutmeridis and Zaharakis v. Greece*). The use of the same election register by the CEC was valid for all municipalities in which the second round was held, and not only for municipal elections in Istog.

167. Therefore, the Court finds that the challenged decisions regarding the update of the voter lists of the ECAP and the Supreme Court are in compliance with the law, reasoned, and the latter are not arbitrary or manifestly unreasonable.

168. Regarding the nature of violations that could lead to the announcement of invalid elections, the Constitutional Court of Bulgaria held: "*The announcement of invalid elections may only be conditional upon particularly serious violations whenever the Constitutional Court finds that the electoral process was incompatible with the basic democratic and constitutional principles that are relevant to the right to vote and are flagrant and frequent to the extent that they completely invalidate the election process and outcome ... The Constitutional Court considers that such violations may be due to a failure to open polling stations; constraints on voters to have access to polling stations; replacement of ballots and voter lists on Election Day to violate the voting process; the strong pressure exerted on voters to discourage them from appearing in polling stations or forcing them to vote for candidacy that is not their choice*" (see Constitutional Court of the Republic of Bulgaria, Decision No. 5 of June 9, 2013 in Constitutional Case No. 13/2013).

169. From the foregoing, the Court concludes that the challenged decisions of ECAP and of the Supreme Court are in compliance with Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 of Protocol No. 1 to the ECHR.

Request for interim measure

170. The Court recalls that the Applicants also request the Court to impose interim measure to prohibit "*the enforcement of the Decision on certification of the second round elections results for Mayor of the Municipality of Istog of 27 December 2017 rendered by the Central Elections Commission (CEC) until the merit based decision is rendered by the Constitutional Court.*"

171. The Court notes that the Applicants also request the Court to impose the interim measure because *"...it is in the general interest to impose an interim measure until a decision on merits is taken on this matter because any violation of the constitutional rights during the voting process and/or during the administration of counting of the CRC undoubtedly affects the distortion of the result, therefore the actual result does not reflect the will of citizens of the Municipality of Istog".*

172. In this regard, the Court refers to Article 27 [Interim Measures] of the Law, which provides:

> *1."The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest".*

173. The Court also refers to Rule 57 (4) of the Rules of Procedure, which specifies:

> *"Before the Review Panel may recommend that the request for interim measures be granted, it must find that:*
>
> > *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
> > *(...)*
> > *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*
> >
> > *(c) the interim measures are in the public interest".*

174. Taking into account that the Applicants' rights guaranteed by Article 45 [Freedom of Election and Participation] of the Constitution, in

conjunction with Article 3 of Protocol No. 1 to the ECHR, have not been violated, the Court also rejects the request for interim measure.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 and 116.1 and 2 of the Constitution, Articles 27, 47, 48 and 49 of the Law and Rules 56 and 59 (1) of the Rules of Procedure, unanimously, on 23 January 2019,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, unanimously, that Judgment (A.A. -U.ZH. No. 64/2017) of the Supreme Court of 26 December 2017 and Decision (ZL.A. No. 1142/2017) of ECAP are in compliance with Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 of Protocol No. 1 to the ECHR;

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

IV. TO NOTIFY this judgment to the Parties;

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

VI. This judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KI87/18, Applicant: Insurance Company „IF Skadeforsikring“, Constitutional review of Judgment E. Rev. No. 27/2017 of the Supreme Court of 24 January 2018, which was served on him on 7 March 2018.

KI87/18, Judgment of 27 February 2019, published on 15 April 2019

Key words: individual referral, judgment, violation of Article 31 of the Constitution and Article 6 of the ECHR

The Applicant claimed that Article 31 of the Constitution and Article 6 of the ECHR were violated due to the lack of reasoning of the judgment, namely that the Supreme Court did not provide sufficient and adequate reasoning regarding the modification of Judgment Ae. No. 191/2015 of the Court of Appeals, regarding the default interest, by which he considers that the principle of the right to a reasoned court decision was violated, as well as the principle of legal certainty because the court did not have consistent case law, for which he submitted to the court several decisions of the Supreme Court.

Having considered all the circumstances of the case, the Court concluded that the Supreme Court, in comparative judgments that fully corresponded to the legal and factual situation of the judgment in question, rendered judgments with a legal reasoning that differ from the challenged judgment, as regards the calculation of the interest rate and the calculation of time limits, as well as the issue of the applicability of law.

Moreover, the Court noted that the Supreme Court, in comparative judgments, did not take a consistent position regarding the calculation of interest rates, whereby it provided various legal reasoning. As such, they lead to the conclusion that the practice of the Supreme Court on this issue is not consistent, and this directly affects legal certainty.

Therefore, the Constitutional Court found that the Supreme Court, as a court of the last instance for deciding in a present case of the Applicant, taking a different position in the challenged judgment in a case that is completely identical or similar to other cases, without providing a clear and sufficient reasoning for this, violated the rights of the Applicant to a reasoned court decision, which led to the violation of the principles of legal certainty, as one of the basic components of the rule of law, which is also an inseparable element of the right to a fair trial under Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR.

JUDGMENT

in

Case No. KI87/18

Applicant

„IF Skadeforsikring“

Constitutional review of Judgment E. Rev. No. 27/2017 of the Supreme Court of 24 January 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of**:**

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

Applicant

1. The Referral was submitted by the insurance company “IF Skadeforsikring” (hereinafter: “IF Skadeforsikring”), from Norway (hereinafter: the Applicant), represented by Visar Morina from Prishtina and lawyer Besnik Z. Nikqi from Prishtina.

Challenged decision

2. The Applicant challenges Judgment E. Rev. No. 27/2017 of the Supreme Court of 24 January 2018, which was served on him on 7 March 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged judgment, which allegedly violated the Applicant’s rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial

Trial], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

5. On 27 June 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. 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.

7. On 16 August 2018, the President of the Court appointed Judge Bekim Sejdiu as the Judge Rapporteur and the Review Panel, composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban (members).

8. On 27 August 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 27 February 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the full Court to declare the Referral admissible and to find a violation.

10. The full Court, by a majority of votes, approved the Referral as admissible.

Summary of facts

11. On 26 July 2009, a car accident occurred involving two passenger vehicles, in which the Mercedes vehicle bearing Kosovo registration

plates and car insurance of the insurance company SIGMA (hereinafter: SIGMA), caused damage to the passenger Audi vehicle, with Norwegian license plates and CASCO auto insurance „IF Skadeforsikring".

12. On 19 October 2010, the Applicant sent a request to SIGMA requesting the payment of damage based on compensation, which resulted from a traffic accident, to which SIGMA did not respond.

13. On 9 July 2012, the Applicant filed an appeal against SIGMA with the Basic Court, in which he requested that the amount of 23,609.24 € be paid in the name of the damage incurred, with a penalty interest rate of 12%, from 19 October 2010.

14. On 23 November 2015, the Basic Court rendered Judgment I. C. No. 281/2012, which approved the Applicant's statement of claim in entirety. The reasoning of the judgment reads:

> *„Article 939, paragraph 1, of the LOR, defined that by paying the compensation from insurance pass on the insurer, based on the Law itself, until the amount of paid compensation, all the rights of the insurer against person who is responsible in any ground for the damage, whereas Article 3 of the Law on Compulsory Motor Liability Insurance defines that the insurer is responsible for the compensation of the damage caused to third persons from the use of the vehicle insured based on motor liability.*
>
> *From the above mentioned legal provisions, it follows that the claimant as insurer of the vehicle that took part in the accident based on motor casco insurance was obliged to compensate the damage caused to the insured vehicle, which he did and in the meantime it enjoys the right to regress the amount paid by the respondent as insurer of the vehicle "Audi A6" based on motor liability insurance for the damage caused to third persons.*
>
> *The Court approved the statement of claim regarding the requested penalty interest in the amount of 12 % per year, deciding in this way in accordance to Article 26.6 of the Law on Compulsory Motor Liability Insurance".*

15. SIGMA filed an appeal with the Court of Appeals against the judgment of the Basic Court for violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation, the decision on the interest, the decision on the costs of the proceedings and erroneous application of the substantive law.

16. On 31 October 2017, the Court of Appeals rendered Judgment Ae. No. 191/2015, rejecting the appeal of SIGMA as ungrounded. The reasoning of the judgment reads:

> *„This Court assesses that the Court of the first instance correctly applied the substantive law, namely Article 939 of the LOR because from the case files and examined evidence it results that the insured person of the respondent was responsible for the caused damage, the respondent paid to its insurer the compensation of the suffered damage and by paying the compensation, all the rights of the insurer passed to the claimant.*
>
> *For the Court of the second instance the appealing allegations of the respondent regarding the gravity of the interest and time period of calculation do not stand because the interest is calculated from the moment of submission of the claim to the Court which in the present case the calculation of the interest was calculated correctly based on Article 26, paragraph 6, of the Law on Compulsory Motor Liability Insurance.*
>
> *The Court assessed the other allegations of the respondent, but found that they were ungrounded because the Court of the first instance completely confirmed the factual situation and correctly applied the substantive law while the allegations of the respondent are contrary to the evidence that are contained in the case files".*

17. SIGMA submitted a request for revision to the Supreme Court against the judgment of the Court of Appeals, on the grounds of erroneous determination of factual situation, erroneous application of the substantive law, the monetary amount, as well as the amount of interest and the time period of its calculation.

18. The Applicant also responded to the Applicant's request for revision, stating *"that the revision as inadmissible within the meaning of Article 214.2 of Law 04/L-118 (on amending and supplementing Law 04/L-006 on Contested Procedure), by the reasoning that the revision refers entirely and only to the erroneous determination of the factual situation, namely that the allegations of the respondent deriving from the revision do not deal with any violations of the provisions of LCP or erroneous application of the substantive law."*

19. On 24 January 2018, the Supreme Court rendered Judgment E. Rev. No. 27/2017, by which:

„I. The revision of the respondent submitted against Judgment Ae. No. 191/2015, of the Court of Appeals of Kosovo, of 31 October 2017, is rejected in the part that is related to the obligation of the respondent for paying to the claimant the amount of 23.609.24 Euros in the name of regress from the base of motor casco insurance, within a time limit of 7 days from the receipt of the Judgment.

II. The revision of the respondent is approved, the challenged Judgment is modified regarding the interest so that the respondent is obliged to pay to the claimant the amount of 23.609.24 Euros with interest in the amount of saving deposits without term, which are paid by the business banks in Kosovo, without certain destination for more than one year, from the submission of the claim on 19 November 2010 until the complete payment.“

20. In the first paragraph of the enacting clause, regarding the rejection of the respondent's appeal, the Supreme Court stated:

„According to the assessment of the Supreme Court of Kosovo, the courts of lower instance have correctly applied the provisions of the contested procedure and substantive law, when they found that the statement of claim of the claimant is grounded. In their judgments, they gave sufficient reasons for the decisive facts recognized by this court of revision too.“

21. In the second paragraph of the enacting clause, regarding the approval of the respondent's revision and modification of the judgment, the Supreme Court stated:

„Regarding the determination of the interest, the judgments of the courts of lower instance have been rendered with erroneous application of the substantive law; therefore, as a consequence they were modified so that the respondent shall pay to the claimant the amount of 23.609.24 Euros with interest rate in the amount of saving deposits without term which are paid by the business banks in Kosovo, without certain destination for more than one year, from 19 November 2010 until the complete payment, this happens because Law on Compulsory Auto Liability Insurance entered in force in 2011 while the case happened in 2009 and as such, it is not applied in the present case“.

Applicant's allegations

22. The Applicant alleges that Judgment E. Rev. No. 27/2017 violated Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

23. The Applicant alleges that Article 31 of the Constitution and Article 6 of the ECHR have been violated due to the lack of reasoning of the judgment, namely that the Supreme Court did not provide sufficient and adequate reasoning regarding the modification of the judgment of the Court of Appeals Ae. No. 191/2015, with a penalty interest rate, by which he considers that the principle of the right to a reasoned court decision has been violated.

24. The Applicant staes in particular that it is not clear "*what is the legal basis on which the Supreme Court concludes:*

> *- that the courts of lower instance committed erroneous application of the substantive law and the respective reasoning on this, as well as*
> *- what is a legal provision that this court considers to be meritorious for adjudication of this matter."*

25. In addition, the Applicant further alleges *„that the Judgment of the Supreme Court, which it alleges, is contrary to its own case law, since by referring to its case law in similar situations it results that the Supreme Court without any reserve referred and applied the respective rule "lex specialis" in this field (CBK, Rule No. 3 on Compulsory Motor Liability Insurance and Law 04/L-018 on Compulsory Motor Liability Insurance) on the occasion of treating the institute of penalty interest"*. According to the Applicant's allegations, the right to legal certainty is violated.

26. In support of his allegations, the Applicant submitted to the Court several other judgments of the Supreme Court to show that the Supreme Court did not follow its case-law: The submitted decision of the Supreme Court's are: *„[E. Rev. No. 23/2017 of 23 December 2017], [E. Rev. No. 48/ 2014 of 13 May 2014], [E. Rev. No. 62/ 2014 of 21 January 2015], [E. Rev. No. 14/2016 of 24 March 2016], [E. Rev. No. 06/2015 of 19 March 2015], [E. Rev. No. 55/2014 of 03 November 2014], [E. Rev. No. 20/2014 of 14 April 2014]"*.

27. The Applicant requests the Court to annul Judgment E. Rev. No. 27/2017 of the Supreme Court due to violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with

paragraph 1 of Article 6 (Right to a fair trial) of the ECHR, and to remand the case for reconsideration.

Relevant law

LAW No. 04/L-018 ON COMPULSORY MOTOR LIABILITY INSURANCE, of 29 July 2011

Article 26
Compensation claims procedure

„[...]
6. In the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim".

Admissibility of the Referral

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

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

Article 21 [General principles]

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

Article 113 [Jurisdiction and Authorized Parties]

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

(...)

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

30. At the outset, the Court notes that pursuant to Article 21.4 of the Constitution, the Applicant has the right to file a constitutional complaint, referring to alleged violations of his fundamental rights and freedoms applicable both to individuals and to legal persons (case of the Constitutional Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

31. Therefore, the Court notes that the Applicant fulfilled the requirements established in Article 113.7 of the Constitution, as it is an authorized party that challenges the act of a public authority, that is, Judgment E. Rev. No. 27/2017 of the Supreme Court, of 24 January 2018, and exhausted all legal remedies provided by law.

32. The Court further examines whether the Applicant fulfilled the admissibility requirements as further specified in the Law and the Rules of Procedure. In that regard, the Court first refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 48
Accuracy of the Referral

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

Article 49
Deadlines

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

33. As regards the fulfillment of these requirements, the Court notes that the Applicant has clearly specified the rights guaranteed by the Constitution and the ECHR, which were allegedly violated, as well as a concrete act of a public authority which he challenges pursuant to

Article 48 of the Law and submitted the Referral within a period of four (4) months stipulated in Article 49 of the Law.

34. The Court also refers to Rule 39 (2) of the Rules of Procedure,

Rule 39
[Admissibility Criteria]

„(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim ".

35. The Court concludes that this Referral initiates a constitutionally reasoned allegation *prima facie* and is not manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure. The Referral must therefore be declared admissible for consideration of the merits of the case.

Merits of the Referral

36. The Court recalls that the Applicant claims a violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant claims that the challenged judgment of the Supreme Court violates its right to a reasoned decision, which in itself leads to a violation of the right to legal certainty. These violations, according to the allegations of the Applicant, were committed because the Supreme Court did not provide sufficient and adequate reasoning for the modification of the position regarding the calculation of the penalty interest, a position which it had consistently applied in its practice until then.

37. The Applicant specifically refers to the fact that the Supreme Court in previous identical cases of determining the amount of interest followed a different case law that was reasoned on a different legal basis. In this regard, the Applicant submitted to the Court several judgments of the Supreme Court.

38. Consequently, according to the Applicant, the fact on which legal basis the Supreme Court based its decision for modification of the penalty interest adjudicated by the lower instance courts, has remained unexplained and unreasonable.

39. The Applicant further alleges that the Judgment of the Supreme Court lacks an adequate reasoning for the new approach it has taken in this

case, concerning the institute of the penalty interest in the legal relations of compulsory motor liability insurance, as in its practice so far, the Supreme Court decided in completely different manner in the similar cases.

40. In the light of these clarifications, the Court in the present case examines the merits of the Referral regarding the allegations in relation to Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

41. In this regard, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

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

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

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

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

43. The Court states that under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the human rights and fundamental freedoms guaranteed by the Constitution in accordance with the ECtHR case law. accordingly, as regards the interpretation of the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR (in the part relating to the right to a reasoned court decision), the Court will refer to ECtHR case law.

General principles on the right to a reasoned decision developed by ECtHR case law

44. The Court notes, first of all, that the guarantees contained in Article 6 paragraph 1 of the ECHR include the obligation of the courts to

provide a reasoning for their decisions. The reasoned court decision, to the parties, shows that their case has really been examined. (see judgment of the ECtHR *H. v. Belgium*, application 8950/80, paragraph 53 of 30 November 1987).

45. The Court also states that, according to the ECtHR case law, Article 6 paragraph 1 obliges the courts to give reasons for their judgments, but this cannot be understood as requiring a detailed answer to every argument (see ECtHR cases *Van de Hurk v. Netherlands*, judgment of 19 April 1994, *Garcia Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, paragraph 26, *Jahnke and Lenoble v. France*, *Perez v. France* [VV], paragraph 81.).

46. In this regard, the Court adds that the domestic court has a certain margin of appreciation when choosing arguments and admitting evidence in support of the parties' submissions, a domestic court is also obliged to justify its proceedings by giving reasons for its decisions (see ECtHR judgment *Suominen v. Finland*, Application 37801/97, from 1 July 2003, para 36.).

47. The Court also states that, in accordance with the ECtHR case law, when examining whether the reasoning of a court decision meets the standards of the right to a fair trial, the circumstances of the particular case should be taken into account. The court decision cannot be without any reasoning, nor will the reasoning be unclear. This applies in particular to the reasoning of the court decision deciding upon the legal remedy in which the legal position presented in the lower instance court decision has been changed (see: case of ECtHR *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61).

48. The Court emphasizes that the notion of a fair procedure, according to the ECtHR case law, requires that a national court which has given sparse reasons for its decisions, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court. This requirement is all the more important where a litigant has not been able to present his case orally in the domestic proceedings. (See ECtHR judgment *Helle v. Finland*, application 157/1996/776/977, of 19 December 1997, paragraph 60).

49. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and reflections when considering the proposed evidence on one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of

a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them (Constitutional Court, cases: no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; br. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI96/16 *IKK Classic* Judgment of 8 December 2017).

Application of the abovementioned principles to the right to a reasoned decision on this case

50. The Court first notes that the Applicant claims that the Supreme Court in the first paragraph of its judgment E. Rev. No. 27/2017, rejected as ungrounded the revision of the respondent filed against the judgment of the Court of Appeals, for which it gave clear and sufficient reasoning.

51. However, the Court further notes that the Applicant states that, by the same judgment in paragraph two of the enacting clause of the judgment, the Supreme Court approved the revision of the respondent and modified the judgments of the lower instance courts related solely to the manner of determining the interest, which has already been adjudicated by the Basic Court and the Court of Appeals. The Applicant states that the Supreme Court did not provide a clear and sufficient reasoning for such a decision, relating to the manner of determining the interest.

52. In this regard, the Court notes that the Applicant solely challenges the Judgment of the Supreme Court in relation to the reasoning in item 2 of the enacting clause of Judgment E. Rev. No. 27/2017, which the Applicant brings in connection with the alleged violations of Article 31 of the Constitution and Article 6 of the ECHR, namely with the right to a reasoned judgment.

53. Accordingly, having regard to the Applicant's main allegation, the Court considers it necessary to analyze whether the Supreme Court provided clear and sufficient reasons to substantiate its decision on modification of the judgment of the lower instance courts on the amount of interest in the case of the Applicant.

54. The Court reiterates that the Supreme Court partially approved the revision of the respondent, and rendered Judgment E. Rev. No. 27/2017, in item 2 of the enacting clause reads:

"II. The revision of the respondent is approved, the challenged Judgment is modified regarding the interest so that the respondent is obliged to pay to the claimant the amount of 23.609.24 Euros with interest in the amount of saving deposits without term, which are paid by the business banks in Kosovo, without certain destination for more than one year, from the submission of the claim on 19 November 2010 until the complete payment."

55. The Court further notes that, as regards the reasoning for the approval of the revision regarding the question of interest and the modification of judgments of lower instance courts, the Supreme Court stated in the reasoning:

„Regarding the determination of the interest, the judgments of the courts of lower instance have been rendered with erroneous application of the substantive law; therefore, as a consequence they were modified so that the respondent shall pay to the claimant the amount of 23.609.24 Euros with interest rate in the amount of saving deposits without term which are paid by the business banks in Kosovo, without certain destination for more than one year, from 19 November 2010 until the complete payment this happens because Law on Compulsory Motor Liability Insurance entered in force in 2011 while the case happened in 2009 and as such, it is not applied in the present case."

56. In this regard, the Court notes that the Supreme Court in Judgment E. Rev. No. 27/2017, found that "*when determining the interest rates, the courts of lower instance rendered judgments based on erroneous application of the substantive law…".*

57. However, the Court notes that the Supreme Court did not state in its reasoning what substantive law was applied by the lower instance courts, and that the application of such a law in determining the interest affected the violation of the substantive law.

58. Furthermore, the Court notes that the Supreme Court did not state in the reasoning what law or its article was erroneously applied by the lower instance regular courts.

59. Furthermore, the Court notes that, as a reason for modification of the decision regarding the determination of interest, the Supreme Court stated in the reasoning only the fact that the case happened in 2009 and that the Law on Compulsory Motor Liability Insurance came into force in 2011 which, in the opinion of the Supreme Court, leads to the conclusion that as such, is not applied in the present case.

60. In this regard, the Court does not consider disputable the Supreme Court's views as to its interpretation what law will be applied in the present case, since it is within the jurisdiction of that court. However, what the Supreme Court failed to explain is precisely the relationship between the presented facts and the application of the law to which it referred, namely in what manner they correlate with each other, and how they affected the decision of the Supreme Court to modify the decisions of the lower instance courts related to the way of determining the interest.

61. With regard to this view of the Supreme Court, the Court reiterates that the ECtHR in Judgment *Hadjianastassiou v. Greece*, in paragraph 33, took the view that the national court must *„indicate with sufficient clarity the grounds on which they based their decision"* namely that the party has the right to be informed about the reasons for the court decision.

62. In this connection, in view of the previous paragraph of the ECtHR, it remains unclear to the Court on which legal provision the Supreme Court specifically substantiated its reasoning on modification of the judgments of the lower instance courts regarding the manner of determining interest. In its judgment, the Supreme Court did not state the arguments and sufficiently elaborated the modified legal position of the lower instance courts (see: *mutatis mutandis*, the ECtHR case, *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61).

General principles on the right to legal certainty developed by ECtHR case law

63. Having regard to the Applicant's allegations that the Supreme Court, by challenged judgment, decided on the same factual and legal issue as in the present case, when it rendered an entirely different decision in relation to its previous case law, the Court finds that the Applicant also raises the question of respect for the guarantees established by the right to a fair trial under Article 31 of the Constitution and Article 6 paragraph 1 of the European Convention in respect of the segment of legal certainty.

64. In this regard, the Court will also examine the Applicant's allegations of the lack of consistency of the case law of the Supreme Court, which, in its opinion, affects legal certainty.

65. The Court recalls that it is not the function of the Court to deal with the errors of facts or law allegedly committed by the national court, unless in so far as they may have violated the rights and freedoms protected by the European Convention (see Judgment of ECtHR, *García Ruiz v. Spain* [GC] no. 30544/96, para. 28, ECHR 1999-I). Similarly, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings, it must respect the independence of those courts (see ECtHR judgment *Ādamsons v. Latvia*, no. 3669/03 , paragraph 118, 24 June 2008).

66. The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see ECtHR *Santos Pinto v. Portugal*, no. 39005/04, paragraph 41, 20 May 2008, and *Tudor Tudor v. Romania*, no. 21911/03, paragraph 29, 24 March 2009).

67. The Court adds that the ECtHR has established the criteria which it uses to assess whether the contradictory decisions of the national courts, adjudicating in the last instance, violate the requirement of a fair trial provided for by Article 6 paragraph 1 of the European Convention, and those criteria are: ***i)*** *whether "profound and long-standing differences" exist in the case-law of the national courts;* ***ii)*** *whether the domestic law provides for a mechanism to overcome these divergences, and* ***iii)*** *whether that mechanism has been applied and, if so, to what extent*. (see ECtHR Judgments, *Iordan Iordanov and Others v. Bulgaria*, Nr. 23530/02, paragraphs 48-50, of 2 July 2009, *Beian v. Romania* (number 1) no.30658/05 paragraphs 34-40, ECHR 2007-V (extracts); *$tefan and $tef v. Romania*, nos. 24428/03 and 26977/03, paragraphs 33-36, of 27 January 2009;
Schwarzkopf and Taussik v the Czech Republic (decision), no. 42162/02, of 2 December 2008, *Tudor Tudor v Romania*, cited above, paragraph 31; and, *Ştefănică and Others v Romania*, no. 38155/02, paragraph 36, 2 November 2010).

Applying the aforementioned principles of legal certainty to this case

68. The Court reiterates that the Applicant considers that the Supreme Court in the previous similar or identical, and in almost identical factual and legal situations, rendered entirely different judgments, which he submitted to the court as a reference. The Applicant refers to

the specific cases of the Supreme Court, which he submitted to the Court by way of a request as an example:

"[E. Rev. 23/2017 of 14 December 2017], [E. Rev. 14/2016 of 24 March 2016], [E. Rev. no. 62/2014, 21 January 2015], [E. Rev. no. 48/2014 of 27 October 2014], [E. Rev. no. 55/2014 of 10 May 2014], and [E. Rev. no. 20/2014 of 14 April 2014]".

69. In that regard, this Court, in the light of those principles, must examine whether there has been a violation of the principle of legal certainty as a segment of the right to a fair trial under Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR, and accordingly the Court will, by a comparative analysis of the judgments of the Supreme Court, try to establish whether there are *"profound and long-standing differences" in the case law of the national courts, whether the domestic law provides for a mechanism to overcome these divergences, and whether that mechanism has been applied and, if so, to what extent*..

i) Determining whether there are "profound and long-standing differences" in the case law of the national courts

70. At the outset, the Court wishes to reiterate that it has conducted an analysis of all judgments of the Supreme Court submitted to the Court by the Applicant. The Court noted that, in all the above cases, all traffic accidents occurred in the same time period as the traffic accident occurred in the present case, which is 2009. Also in all comparative cases, claims for compensation and lawsuits due to the damage caused, were filed by the claimants with the responding parties and courts in 2010.

71. The Court further notes that the Supreme Court, despite these facts, rendered judgments with various legal reasoning, which directly affected the change in the amount of interest granted.

A comparative analysis of the judgments of the Supreme Court submitted by the Applicant to the court

Judgment E. Rev. No. 48/2014 of the Supreme Court, of 27 October 2014

72. The Court notes that in Judgment E. Rev. No. 48/2014, of 27 October 2014, the Supreme Court took the position in which it:

"obliged the respondent Kosovo Office of Insurance in Prishtina to pay back the funds to the claimant - to pay a regress in the amount of € 87,000 with an annual interest rate of 20% starting from 19.11.2010 and until 28.07.2011 and of 12% starting from 29.07.2011 until the final payment as well as to compensate it for the costs of the proceeding in the amount of € 963, all within seven days of receiving this judgment under the threat of forced execution".

73. This view, the Supreme Court reasoned in the following way:

"This Court notes that the lower instance courts also correctly applied the substantive law when recognized to the claimant the right to interest on the principal amount of 20% per annum starting from 19.11.2010 until 28.07.2011, and the interest rate of 12% starting from 29.07.2011 until the final payment, because according to the provisions of Article 277 LOR and Article 26 of the Law on Compulsory Motor Liability Insurance no. 04/L - 018, which stipulates that in the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim.

Judgment E. Rev. 23/2017 of the Supreme Court of 14 December 2017

74. The Court further notes that the same practice was taken by the Supreme Court also in Judgment E. Rev. 23/2017 of 14 December 2017, in which it concluded,

"[...] as far as interest rate is concerned, the challenged judgment of the Court of Appeals of Kosovo Ac. No. 53/2016 of 21.09.2017 and the respondent is obliged to pay the interest in the amount of 20% in the amount approved from the statement of claim from 22.04.2010 as the day of submission of the claim for return of funds for damage and all from 29.07.2011 until 30.07.2011 and up to the final payment the interest at the rate of 12% on the amount due."

Judgment of the Supreme Court E. Rev. No. 62/2014, of 21 January 2015

75. The Court found that the Supreme Court in Judgment E. Rev. No. 62/2014, of 21 January 2015, took a different legal position on the issue of the amount of interest granted by the Basic Court in the amount of 3.5%. This position was reasoned by the Supreme Court in the following way:

> *"The Court notes that the second instance court has correctly applied substantive law when it recognized to the claimant the right to interest on the amount of the main debt at 12% from 14 June 2010 and until the final payment under the provisions of Article 277 of LOR in conjunction with Article 26 of the Law on Compulsory Motor Liability Insurance no. 04/L - 018, which stipulates that the interest is 12% per annum and is calculated for each day of delay until the damages caused by the liable insurer, starting from the date of submission of the compensation claim. From the case file it follows that the claimant filed a claim for compensation for damage with the respondent as of 14 June 2010".*

Judgment E. Rev. No. 27/2017 of the Supreme Court challenged by the Applicant, of 24 January 2018

76. The Court also recalls the reasoning of the Supreme Court in Judgment Rev. No.27/2017, which is challenged by the Applicant, whereby the Supreme Court regarding the approval of the revision related to 12% interest, concluded:

> *"[...] the respondent is obliged to pay to the claimant the amount of 23.609.24 Euros with interest in the amount of saving deposits without term, which are paid by the business banks in Kosovo, without certain destination for more than one year, from the submission of the claim on 19 November 2010 until the complete payment."*

77. It follows that the Supreme Court rendered the judgment in which it modified the interest of 12% granted in the judgments of the Basic Court and the Court of Appeals, replacing by the interest rate paid by the commercial banks in Kosovo.

78. The Court also recalls the reasoning that the Supreme Court took for its "new" approach:

„Regarding the determination of the interest, the judgments of the courts of lower instances have been rendered with erroneous application of the substantive law; therefore, as a consequence they were modified so that the respondent shall pay to the claimant the amount of 23.609.24 Euros with interest rate in the amount of saving deposits without term which are paid by the business banks in Kosovo, without certain destination for more than one year, from 19 November 2010 until the complete payment this happens because Law on Compulsory Motor Liability Insurance entered in force in 2011 while the case happened in 2009 and as such, it is not applied in the present case.“

79. The Court, based on the analysis of the abovementioned judgments of the Supreme Court, finds that there are profound and long-standing differences in the case law of the national courts, which decided on the amount of interest to be granted to claimants. Also, the Court cannot fail to note that in all judgments of the Supreme Court there are differences and inconsistencies in multi-year case law.

ii) whether the domestic law provides for a mechanism to overcome these divergences and iii) whether that mechanism has been applied and, if so, to what extent

80. As regards these criteria, the Court refers to the Law on Courts No. 06/L-054, which in Article 14 foresees the mechanism under which jurisdiction is the issue of harmonization the case law.

Article 14 Competences and Responsibilities of the President and Vice-President of the Court
“[…]
2.10. the President of the Court shall convene an annual meeting of all judges in that court for counseling on the administration of justice within that court; to analyze the organization of the court; to review and propose changes to procedures and practices…”

81. It follows that the mechanism for the harmonization of the case law is foreseen in the legal provision itself. In addition, the functioning of the mechanism of harmonization of the case law itself is neither impossible nor limited, and which would directly reduce its application and efficiency in the practice itself.

Conclusion

82. Taking into account all the circumstances of the case, the Court concludes that the Supreme Court, in comparative judgments, which fully correspond with the legal and factual situation of the judgment in question, rendered the judgments with legal reasoning differing from the challenged judgment, both as regards the calculation of the interest rate and the calculation of time limits, as well as the question of the applicability of the law.

83. Moreover, the Court cannot, fail to mention in particular that the Supreme Court in comparative judgments, did not take a consistent position regarding the calculation of interest rates, giving different legal reasoning. As such, it leads to the conclusion that the case law of the Supreme Court in this matter is not consistent, which directly affects the legal certainty.

84. The Constitutional Court is aware of the fact, and takes into account that the regular courts, when establishing case law, may render different decisions reflecting the development of the case law. However, divergences from the consistency of the case law must have objective and reasonable justifications and explanations, which in the present case was absent in the judgment of the Supreme Court.

85. The Constitutional Court particularly emphasizes the fact that in the present case the the challenged decision of the Supreme Court is a final decision against which there are no other effective legal remedies available under the law. In that regard, the Court notes that the Supreme Court as the highest court in the judicial hierarchy had a special responsibility to reason a decision that would explain all the reasons for the divergence from the previous case law.

86. Bearing in mind the above, the Court concludes that the existing mechanisms of unification of the case law in the present case were not effective.

87. Therefore, the Constitutional Court finds that the Supreme Court, as the court of last instance for deciding in the present case of the Applicant, taking a different position in the challenged judgment in a case that is completely identical or similar to other cases, and for this did not give a clear and sufficient reasoning, violated the right of the Applicant to a reasoned court decision which led to violation of principles of legal certainty, as one of the essential components of the rule of law, which is also an inseparable element of the right to a fair trial under Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR.

88. Therefore, the Court concludes that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to a fair trial] of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (a) of the Rules of Procedure, in the session held on
27 February 2019, by majority

DECIDES

I. TO DECLARE the Referral admissible;

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

III. TO DECLARE invalid Judgment E. Rev. No. 27/2017 of the Supreme Court of 24 January 2018;

IV. TO REMAND the Judgment of the Supreme Court for reconsideration in accordance with the judgment of this Court;

V. TO ORDER the Supreme Court to submit information to the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the judgment of the Court;

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

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

VIII. This Judgment is effective immediately.

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

KI31/18, Request for constitutional review of Judgment E. Rev. No. 20/2017 of the Supreme Court of the Republic of Kosovo of 20 November 2017

KI 31/18, Applicant: Municipality of Peja Judgment of 12 April 2019

Keywords*: right to fair and impartial trial, reasoning of a court decision, decision on interim measure*

Referral KI31/18 was filed by the Municipality of Peja. The latter requested the constitutional review of the abovementioned Judgment of the Supreme Court - which upheld the decisions of the regular courts under which the Applicant was obliged to pay to the private company DPZ Gashi Towing Service the amount of money in value of € 392,515.00, on behalf of the contractual damage, as well as the procedural costs.

Along with its main Referral, the Applicant also filed a request for the imposition of interim measure in order to prevent the execution of the decisions of the regular courts, by which she was obliged to pay the abovementioned amount of money. On 27 February 2019, the Constitutional Court had separately examined the Applicant's request for interim measure and by the Decision on Interim Measure, published on 4 March 2019, it approved the latter based on the criteria established in the Law and the Rules of Procedure. The Constitutional Court approved the interim measure, until 30 April 2019, "*without prejudice to any further decision it will render regarding the merits of the referral*".

Prior to the expiration of the interim measure, namely on 12 April 2019, the Constitutional Court considered the Applicant's Referral as a whole and considered that the latter raised constitutional issues, the deciding of which required a review of the merits of the Referral. Having considered the merits of the Referral, the Court found that in the present case there has been no violation of the Constitution or of the ECHR and that the Applicant had benefited from the constitutional guarantees for a fair and impartial trial in accordance with ECtHR case law and the Constitutional Court.

The Constitutional Court widely dealt with the Applicant's main allegations that the factual situation was not completely determined by the regular courts and that the Supreme Court failed to provide a reasoned decision by failing to respond to some of its arguments presented in the request for revision.

Regarding the Applicant's specific allegations regarding the determination of factual situation and the application of the substantive and procedural law, the Constitutional Court found that the Supreme Court (as well as the lower instance courts), paid due attention to the relevant standards and the necessary elements for the correct and accurate determination of factual situation. The Constitutional Court also did not find that there was arbitrariness in the way the Supreme Court interpreted substantive and procedural law applicable in the circumstances of the case.
In this regard, the Court referred to its general view that, in principle, the correct and accurate determination of factual situation, as well as the relevant legal interpretations, falls within the competence of the regular courts. The arguments of constitutional violations are only grounded if it is found that the regular courts have violated the rights and freedoms guaranteed by the Constitution and the ECHR – which was not found in the present case.

Regarding the Applicant's allegation of non-reasoning of the court decision, the Constitutional Court found that the Supreme Court did not violate the Applicant's right to a reasoned decision - a fundamental component of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. Referring to the consolidated case law of the ECtHR and of the Constitutional Court, the latter emphasized that, despite the fact that the Supreme Court may not have responded to every item raised by the Applicant, the Supreme Court, by its decision addressed arguments and essential allegations of the Applicant and, consequently, fulfilled the obligation to provide a reasoned court decision.

Given that by the Judgment of the Constitutional Court, the constitutionality of the challenged Judgment of the Supreme Court was found and, therefore, of all other related decisions, the Constitutional Court, in accordance with its general case law, annulled the interim measure imposed on it previously.

JUDGMENT

in

Case No. KI31/18

Applicant

Municipality of Peja

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

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

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

Challenged decisions

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

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

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

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 27 [Interim Measures], 47 [Individual Requests] and 48 [Accuracy of the Referral] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

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

Proceedings before the Court

7. On 5 March 2018, the Applicant submitted the Referral to the Court.

8. On 6 March 2018, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Gresa Caka-Nimani.

9. On 8 March 2018, the Court notified the Applicant's representative about the registration of the Referral and requested him to submit a

power of attorney proving that he is authorized to submit the Referral to the Court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of facts

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

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

36. On 19 October 2009, the Applicant by Decision No. 466-6964/2009 extended the tripartite contract for another three months. The

decision stated that this contract will continue "*for three months - until the end of the 2009 local elections and the selection of the tender beneficiary for the performance of these services* [under the Initial Contract]."

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

38. On 25 May 2010, the Applicant replied to the repeated request of DPZ Gashi Towing Service and recommended as follows: "*After analyzing your request regarding the issue raised, the Municipality of Peja* [the Applicant] *namely the Director of Administration recommends that you proceed according to the provisions of Administrative Instruction no. 02/2009 of the Kosovo Police Article 8 (Alienation) and based on the Law on Property and Other Real Rights, namely Article 35 (Abandonment of Ownership) that the owner should explicitly state that he renounces the ownership over that thing with (court decision)."*

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

40. By this claim, DPZ Gashi Towing Service requested that the responding parties be obliged to pay damage of € 663,450.00 plus interest and procedural costs due to non-fulfillment of the obligations arising from the Contract. The claim stated that in the parking lot of

DPZ Gashi Towing Service continue to be the confiscated vehicles that prevent the development of normal business and that according to Article 4 of the contract the respondents were obliged to compensate DPZ Gashi Towing Service.

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

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

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

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

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

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

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

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

they should be rejected as ungrounded and the first instance judgment should be upheld.

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

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

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

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

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

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

52. On 15 June 2017, the Basic Court in Prishtina by its third Judgment on the same matter, Ek. No. 587/2017, fully approved the specified statement of claim of DPZ Gashi Towing Service, where from the initial statement of claim of € 663,450.00, DPZ Gashi Towing Service requested € 392,515.00. The Basic Court in Prishtina obliged the to pay DPZ Gashi Towing Service jointly the amount of € 392,515.00 on behalf of the contractual damage arising from the Contract, together with legal interest and procedural costs.

53. The Basic Court reasoned its Judgment as follows:

> *"The full approval of the claimant's statement of claim the court previously based on the contract signed by the litigating parties of 15.09.2005, on the extension of the contracts dated 15.07.2007 and 19.10.2009, as well as in the expertise prepared by the financial expert on 22.06.2015, therefore, after analyzing these evidence has fully approved the statement of claim of the claiming party based on the provisions of Article 142 of the LOR, which explicitly provides that "General terms and conditions specified by one contracting party, either contained in a standard clause contract or being referred to by the contract, shall supplement particular agreements, as established between contracting parties in the same contract and, as a rule, shall be binding as general terms and conditions of contract must be published in a usual way. General terms and conditions shall be binding for a contracting party if they were known, or should have been known to such party at the moment of entering into contract.*
>
> *The claim of the claimant* [DPZ Gashi Towing Service] *that is specified and approved in the enacting clause of this Judgment, the court has based mainly on the final statement of the claimant, who requested its the total amount of: 392.515.00 Euros (…)on behalf of the compensation only for the days for which the vehicles have stayed and are staying in the parking lot of the claimant. for which from the moment of the signing of the contract by the litigants until today the money was not paid, this has been confirmed through the opinion and finding of the financial perspective in its written expertise. […]*

Referring to the provisions of Article 4 of the Contract dated 15.09.2005 concluded between the litigating parties, in which case their rights and obligations are foreseen, namely in Article 4.3.4.4 and 4.5, this is by the first respondent has also announced the auction for sale of the vehicles with which also directly argues that it is under obligation to the claimant in this case DPZ Gashi Towing with its seat in Peja, therefore the court based on all these evidence as outlined above has also decided as cited in the enacting clause of this judgment by approving and obliging the respondents pursuant to Article 413 of the LOR jointly to pay the contract damage caused to the claiming party".

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

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

56. As to "essential violation of the provisions of contested procedure", the Applicant alleged that the first instance judgment is contradictory and does not contain the reasons justifying such a judgment and does not contain the decisive necessary facts. In this regard, the Applicant submitted several arguments: Firstly, it emphasized that the first instance court approved the specification of the statement of claim of the DPG Gashi Towing Service made in the final word - a part in which the accusing parties were not enabled to make statements regarding the specification of the claim. The final word is a summary of requirements and cannot contain new material or procedural requirements. Secondly, the Applicant stated that the first instance court finds that its judgment was rendered based on the expertise, but does not make the assessment of the findings of the expertise in the judgment. Thirdly, the Applicant states that the first instance court did not elaborate on the confrontation of the arguments of the litigating

parties at all in its judgment nor did it described the contested and uncontested facts. Fourthly, the Applicant emphasized that the first instance court did not specify that under the terms of the contract or the law it has granted the indemnity and that the first instance court did not take into account the instructions given by the Supreme Court when it remanded the case for retrial.

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

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

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

> *"Based on the case file it results that the claimant on 15.09.2005 had entered into a contract for vehicle towing with the respondents, which contract by the decision of the board of the respondent Municipality of Peja dated 18.09. 2007 and 19.10.2009, was extended for 3 months. The claimant as the authority performing the services* [DPZ Gashi Towing Service]

from the contract has taken over the obligation to do the towing of vehicles and their placing in the parking lot at the request of the respondents. According to Article 3.2 of the contract on the towing and storing of vehicles at the claimant's location up to 90 days, the payment shall be made by the owners of vehicles, while according to Article 3.5 of the contract, the payment for services during other days for the vehicles that are not towed during this term is to be made by the respondents, up to the amount gained from the sale of vehicles, foreseen by Article 3.2 of the contract. As for the sale of vehicles which according to Article 3.6, will be considered abandoned and will become a social property, there shall be set up a commission composed of a claimant's and respondents' representatives who will carry out the evaluation/determine the value of the cars for sale and out of the sum received the claimant shall be paid for the provided services. According to Article 3.9 of the contract, the aforementioned provisions shall not apply for the vehicles that are involved in an investigation procedure, until final resolution of the case by the competent authority.

According to Article 2.12 of the contract, the claimant was obliged to perform the transport and storage of vehicles taken for the case investigation purposes, free of charge; whilst as regards the other vehicles, according to Article 4.3 of the contract, the claimant was entitled to ask from the respondents to have these cars sold through public auction in order to get its compensation; while according to the contract , the contracting parties within 60 days from the expiry of the term were obliged to carry out the sale of vehicles and then compensate the claimant out of that sum. If the sale could not be carried out according to the procedure foreseen by the contract, the sale could be carried out by the claimant, itself, through direct sale or sale for spare parts purposes.

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

"The first instance court based on the case evidence and on the aforementioned fact has found that the claimant's statement of claim is grounded and has approved the compensation amount of € 392,515.00, and thereby obliged the respondents to jointly compensate the claimant with this amount, with the reasoning that the claimant has performed his contractual obligation and there was created the obligation for the payment of compensation in conformity with Article 142 and 413 of the LOR.

The Court of Appeals, as a second instance court approves the legal assessment of the first instance court as regular and lawful for the reason that the challenged judgment does not contain essential violations of the provisions of the contested procedure from Article 182, para.2 , sub-items b), g), j), k), and m) of the LCP. [...]

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

"This court considers that the first instance court has correctly applied the substantive law because, based on the evidence from the case file it is not disputable that the claimant has carried out the contracted services, for which a compensation amount was approved by the first instance court. This amount is confirmed also by the opinion and conclusion of the financial expert Mr. Ali Gagica in the expertise dated 22.06.2912 which is based upon the evidence in the case file. Based on the case file it results that it is not disputable, that the respondents are the authority which have ordered the services, have drafted and signed the contract and its extensions, that they have used the services of the claimant, but oppose the claimant's statement of claim by calling upon the flaws of the contractual provisions which they have drafted themselves.

This respondents' standpoint for non-payment of services performed by the claimants is contrary to all principles of the contractual right and principles of business law moral and trust. Moreover, this is out of any legal logic because it is incomprehensible for a party to ask for exemption from the payment of contractual obligations to the other party, given that the said party has carried out its contracted services.

This position could be applied only in the cases of provision of humanitarian services namely in the cases of one-sided contracts but never in cases of business contracts wherein the purpose and the subject of contract is the performance of services for benefiting a contracted counter value. The claimant has rightfully expected to be paid the compensation for the performed services and this constitutes an "expected right according to the normal course of things" guaranteed by the positive right as well as international instruments, that the other party is obliged to fulfil."

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

"The contract entered by the parties is a contract on the performance of services, with mutual charges and according to the law creates mutual obligations for contractual parties respectively performance of services and compensation of these services. This contract is not an aleatory contract (contract on condition), in which the obligation would be created only after the fulfilment of a certain condition. It is not disputable that the claimant has completely abided by the contract and has carried out the contracted services and has addressed the respondents in relation to the sale of vehicles and its compensation in a manner as foreseen by the contract, but the respondents have neglected their contractual obligations and have never taken action for providing adequate compensation to the claimant in conformity with the contract, and in addition by disregarding any legal principle call upon their own shortcomings in order to avoid their obligations.

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

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

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

"The Court of Appeals finds as ungrounded the appealing allegations that the claimant pursuant to the contract had to sell

the vehicles, itself, in order to acquire the compensation according to the provision of Article 3.6 of the contract, according to which vehicles which are not withdrawn within 90 days will be considered to be abandoned and will become social property, because according to both, the position of the Supreme Court of Kosovo provided in the Judgment Rev. No. 191/2004, and the previous decision of the Court of Appeals on this legal matter Ae.no.215/2012, this contractual provision has been concluded contrary to Article 46 and 47 of the LOR and does not produce legal effects because the contract produces legal effects only between the contracting parties whilst it cannot create effects with regard the property rights of the owners of vehicles, namely it cannot serve as a basis for the transfer of the ownership of the vehicles in social ownership, consequently this provision has not given the legal opportunity to the claimant to sell the vehicles for the purpose of realization of compensation.
Should entering into a particular contract be prohibited to one party only, the contract shall remain valid, unless otherwise provided by law for the specific case, while the party violating the statutory prohibition shall suffer corresponding consequences.
This court assesses that the provision of Article 3.6 of the contract entered between the claimant and the respondent is in contradiction with imperative norms and does not produce legal effect hence the claimant could not apply the Article 4.5 of the contract for the realization of compensation through direct sale of vehicles. According to Article 105 of the LOR the nullity of a contractual provision shall not imply nullity of the entire contract, if it can stand without the null provision, itself, if the contract can stand without the null provision..., therefore in conformity with this provision this court assesses that the contract between the contracting parties remains in force without this provision. Consequently, in the present case, on the basis of the provision of Article 103, paragraph 2 of the LOR the compensation of the claimant should have been carried out by the respondents, in conformity with other contractual provisions, namely according to the price foreseen in Article 3.1 and 3.2 of the Contract. [...]"

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

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

(i) The Judgment of the second and the first instance did not take into account the legal position of the Supreme Court presented in Judgment Rev. E. No. 35/2016 and did not correct the flaws in the retrial procedure;
(ii) The first and second instance courts have not clarified on what legal basis their judgments have been based, as it is not clear if the debt owed should be paid on behalf of the "*contractual debt or compensation of the damage*" which was also a remark of the Supreme Court;
(iii) The contract did not force DPZ Gashi Towing Service to maintain the vehicles over the 90-day deadline, so it is illogical why the respondents were obliged to indemnify DPZ Gashi Towing Service for maintaining the vehicles for the time after the expiration of the 90-day deadline;
(iv) The Court of Appeals goes beyond each interpretation of the first instance and decides positively on the request of the DPZ Gashi Towing Service on a completely different legal basis, without a hearing and without determining the factual situation;
(v) The Court of Appeals erroneously considers that after the abrogation of Article 3.6 of the Contract, the other provisions of the Contract remained in force in accordance with Article 103.2 of the LOR and that DPZ Gashi Towing Service should be compensated in accordance with Articles 3.1 and 3.2 of the Contract;
(vi) The Court of Appeals interprets facts which have not been established during the first instance proceedings and draws parallels between this case and other cases which it considers similar, whereas concrete evidence is missing;
(vii) The Court of Appeals as well as the first instance court does not make the interrelation of the expertise with the indemnity granted, rendering the judgment even more meaningless; and
(viii) The first and second instance courts did not enter at all the Applicant's disputes concerning the extension of the contract and there is no contracted obligation, as Article 4.5 of the Contract provides that if the respondents do not organize the auction, then the auction is organized by DPZ Gashi Towing Service.

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

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

Enforcement procedure of the decisions of regular courts

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

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

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

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

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

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

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

> *"In the present case and under these conditions, in this enforcement case, the court of first instance has correctly determined that there are no legal obstacles to carry out the enforcement, therefore rightly rejected as unfounded the*

objection of the debtor Municipality of Peja [Applicant]*, selected by the creditor within the meaning of Article 398 of Law no. 04/L-077 on Obligational Relationships, for the fulfillment of the payment obligation to him, (which selection was not objectively opposed by this debtor), with which legal position this court agrees too, as the court of the second instance, considering the fact that the appealing allegations of the debtor are unsuccessful in having influence on rendering different decision on this enforcement case.*

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

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

Applicant's allegations

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

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

Regarding the allegation of incomplete determination of factual situation

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

78. According to it, the regular courts have never proved the fact that the Contract of 18 September 2009 [the third extension of the Contract] was concluded within the meaning of the Law on Obligational Relationships, because the parties never signed an annex to the Contract but that there was only an internal decision of the Applicant (Municipality of Peja), which was taken in an unlawful manner and without procurement on the eve of the elections. If the Contract is considered as an extension, the Applicant alleges, the regular courts should have justified the legal basis upon which they considered that it was extended without the legal signature of both parties.

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

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

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

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

82. In this regard, the Applicant states that the Supreme Court ignored the procedural objections regarding the determination of factual situation

presented in the request for revision and, by ignoring them, violated the right to a reasoned decision.

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

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

85. The Applicant further alleges that the Supreme Court did not address its allegations of a violation of the substantive law, as it did not explain how it came to such interpretation of Article 4.5 of the Contract. According to the Applicant, the legal interpretation of the provisions of the Contract was the main dispute in this case and "*this interpretation was not unique by the judicial instances throughout the proceedings",* whereas the Supreme Court, by a single fact, finds

the fact of the Applicant *"without any elaboration of the factual situation and legal allegations of the parties*."

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

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

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

Applicant's Referral

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

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

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

Comments submitted by DPZ Gashi Towing Service

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

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

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

95. Regarding the Applicant's allegations that the courts did not establish whether the vehicles were stored under the terms of the contract and whether the vehicle parts were sold or not, DPZ Gashi Towing Service states that these allegations are "untrue" and that this "their insinuation will be the subject matter of a special criminal proceeding" that DPZ Gashi Towing Service will open to the Applicant. Further in this regard, the interested party states that even if the allegations of the Applicant were true, the condition of the vehicles was not the

subject of the dispute, but the subject of dispute were the rights and obligations of the Contract on provision of services.

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

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

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

99. With regard to the proceedings before the Supreme Court, the interested party, namely DPZ Gashi Towing Service, states that "*the Supreme Court, within the meaning of Article 214/2 of the LCP, was not competent to deal with incomplete and erroneous determination of factual situation, which the respondent tries to qualify as a lack the reasoning"*. The Supreme Court did not deal with those allegations because they are not substantial-"*although the Supreme Court has given the clarification that such remarks are not decisive and that it*

was not obliged to give further reasons". It further states that the factual situation was determined 3 times in succession and the right of DPZ Gashi Towing Service "*for compensation of the damage caused*" was confirmed by the Applicant.

Additional comments submitted by DPZ Gashi Towing Service

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

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

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

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

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

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

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

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

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

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

render a decision which will reject the referral of the Municipality of Peja as inadmissible".

Admissibility of the Referral

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

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

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

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

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

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

114. The Court further examines whether the Applicant fulfilled the admissibility requirements as further specified in the Law and the Rules of Procedure. In that regard, the Court first refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 48
Accuracy of the Referral

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

Article 49
Deadlines

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

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

116. 1Having considered the Applicant's allegations, as well as the comments submitted by DPZ Gashi Towing Services, as interested party in this case, the Court considers that the Referral raises issues of a constitutional nature, the deciding of which requires the review of its merits. Therefore, the Referral cannot be considered as manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure and there is no other ground provided for in Rule 39 of the Rules of Procedure on which that referral could be declared as inadmissible.

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

Merits of the Referral

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

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

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

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

Regarding the allegations of a "reasoned court decision"

122. The Court recalls that the Applicant, in essence, claims a violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR, as regards the right to a reasoned decision.

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

124. In this regard, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

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

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

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

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...].

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

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

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

128. The Court recalls that the right to a fair hearing includes the right to a reasoned decision. The ECtHR notes that, according to its established

case-law, which reflects a principle linked to the proper administration of justice, the decisions of the courts and tribunals should adequately state the reasons on which they are based (See ECtHR cases, *Tatishvili v. Russia*, no. 1509/02, Judgment of 22 February 2007, paragraph 58; *Hiro Balani v. Spain*, application no. 18064/91, Judgment of 9 December 1994, paragraph 27; *Higgins and Others v. France*, ECtHR, application no. 134/1996/753/952, Judgment of 19 February 1998, paragraph 42; see also the cases of the Constitutional Court, *IKK Classic* [no. 1] and IKK Classic [no. 2] quoted above and the references to those two Judgments).

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

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

131. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. (See: ECtHR cases, *Garcia Ruiz v. Spain*, [Grand Chambre] application no. 30544/96, Judgment of 21 January 1999. paragraph 29; *Hiro Balani v. Spain*, cited above, paragraph 27; *Higgins and Others v. France,* cited above, paragraph 42).

132. For example, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision. (See: ECtHR cases, *García Ruiz v. Spain*, cited above, paragraph 26; *Helle v. Finland,* application no. 20772/92, Judgment of 19 December 1997, Reports 1997-VIII, paragraphs 59 and 60). A lower court or authority in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal. [See: ECtHR case *Hirvisaari*

v. Finland, application no. 49684/99, Judgment of 27 September 2001, paragraph 30); In cases where a court of third instance or appeal confirms the decisions made by lower courts - its obligation to reasons decision-making differs from cases where a court changes the decision of the lower courts.

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

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

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

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

136. In the present case, the Applicant, referring to earlier decisions of the Constitutional Court, namely in case KI72/12, KI138/15 and KI97/16, and in the ECtHR Decision *Pronina v. Romania* in a summarized way alleges that: the Supreme Court ignored the procedural objections regarding the determination of factual situation presented in the request for revision; the specification of the claim by the DPZ Gashi Towing Service was made in contradiction with the provisions of the contested procedure and the Supreme Court did not address this allegation; the Supreme Court has not dealt with its allegation of the erroneous legal basis upon which the DPG Gashi Towing Service's statement of claim was approved; the Supreme Court as a higher court should have

"*addressed these contradictions regarding the legal basis for the approval of the statement of claim, in the light of the ECHR case law, namely the cases: S.C. Unziexport S.A. v. Romania para. 29* [...] and *Zielinski and Pradal and Gonzalez and Others v. France [GC],* the Supreme Court did not address the Applicant's allegations of a violation of the substantive law as it does not explain how it came to the interpretation of Article 4.5 of the Contract; the Supreme Court found facts "*without elaborating the factual situation and legal allegations of the parties*".

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

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

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

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

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

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

> *"On the basis of the case file it results that the claimant and respondent* [DPZ Gashi Towing Service] *on 15.9.2005 in Peja had concluded a contract on the performance of services, subject of which was performance of services by the claimant* [DPZ Gashi Towing Service] *as a company for towing vehicles and their transport to the certain location, respectively to the claimants base parking lot, as per the request of the respondents.*
>
> *In a such a factual situation, the Supreme Court of Kosovo approved as grounded the legal position of the first and second instance court related to the obligation of the first respondent for the payment of the disputable debt, but did not approve the joint obligation of the second respondent for the payment of this debt, since in relation to the first respondent* [the Applicant]*, these judgments do not contain essential violations of the provisions of the contested procedure which are called upon by the first respondent in its revision, neither does it contain other procedural violations for which pursuant to Article 215, the court takes care ex officio.*

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

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

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

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

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

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

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

Assessment of request for interim measure

142. In order for the Court to review and approve a request for interim measures, it must be ascertained whether the requirements established in the Constitution, the Law and the Rules of Procedure have been met. (See cases of the Constitutional Court in which a decision on interim measure was taken before the merits of the case were decided: case KI31/17, Applicant *Shefqet Berisha*, Decision on Interim Measure of 27 March 2017; and Case KI132/15, *Applicant Deçani Monastery*, Decision on Interim Measure of 12 November 2015).

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

144. Similarly, and in this same line of reasoning, the Court also recalls that the cases where a court of third instance or appeal upholds the decisions taken by the lower courts - its obligation to reason the decision-making differs from the cases when a court changes the decision-making of the lower courts. In the present case, the Supreme Court has not changed the decisions of the lower courts as to the legality of the Contract or the fact that the contractual damage must be compensated to the interested party DPZ Gashi Towing Service. In this case, the Supreme Court has upheld the legality of the two lower instance decisions, which according to the Supreme Court, had correctly determined the factual situation and had not rendered their decisions with procedural violation or with flaws in the application of the substantive law. The Supreme Court, by the challenged decision, had only made a correction and as to the fact that the Applicant should pay alone the contractual damage and not jointly with the Police of Kosovo.

145. Thus, the Court considers essential the fact that a court that substantially changes a decision- has an obligation to give strong, convincing and detailed reasons as to why it considers that the decision of the lower courts was not the right one. On the other hand, it is also self-evident that a third instance court, such as the Supreme Court in the present case, which has already upheld the decisions of the lower instance courts which have sufficiently reasoned their

decisions - is obliged to respond to key allegations of the appellants, but it is not obliged to answer any allegation which the Applicant has considered relevant and has filed in its request for revision. It would be illogical, inadequate and unnecessary burden on the regular judiciary to expect from a court, which only confirms the decisions of a lower court, to answer any argument raised repeatedly.

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

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

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

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

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

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

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

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

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

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

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

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

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

157. Therefore, the Court reiterates that its already established position that is not the task of this Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). The Constitutional Court may not itself assess the facts which have led the regular courts to adopt one decision rather than another, or to reject the referral on one basis or another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would be to disregard the limits imposed on its jurisdiction. It is the role of regular courts is to interpret and apply the relevant rules of procedural and substantive law (see: the ECtHR case *Perlala v. Greece*, No. 17721/04, of 22 may 2007, paragraph 25;

see also the case of the Constitutional Court, for illustration, KI72/18, Applicant *Shpejtim Zymeraj*, Resolution on Inadmissibility of 22 November 2018, paragraph 40).

158. The role of the Court in this case is not to decide on whether the Supreme Court has correctly determined the facts and applied the law fairly when it rejected the Applicant's request for revision as ungrounded and found that the Applicant was responsible for reimbursing the DPZ Gashi Towing Service but to examine whether the proceedings before the Supreme Court, viewed in their entirety, were fair (see, *mutatis mutandis*, the ECtHR case, *Donadze v. Georgia*, No. 74644/01, of 7 March 2006, paragraphs 30-31).

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

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

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

Request for interim measure

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

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

164. Based on the foregoing, the Court had decided to approve the Applicant's request for interim measure *"without prejudice to any further decision it will render regarding the merits of the referral*". The interim measure was approved until 30 April 2019.

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

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

Conclusion

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

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

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

FOR THESE REASONS

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

DECIDES

I. TO DECLARE the Referral admissible;

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

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

IV. TO NOTIFY this Decision to the Parties;

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

VI. TO DECLARE that this Decision is effective immediately.

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

KI25/18, Applicant: Vasilije Antović, Constitutional review of Decision CA. No. 1952/2016 of the Court of Appeals of Kosovo, of 24 April 2017

KI25/18, Judgment of 20 June 2019, published on 11 July 2019

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

The Applicant was employed in the Municipality of Zubin Potok until 1990 when he was dismissed from work. Following the Applicant's lawsuit, the Municipal Court in Mitrovica obliged the Municipality of Zubin Potok to reinstate the Applicant to his former working place, with all rights and obligations. As the municipality of Zubin Potok did not pay the salaries for the time he was dismissed from work, the Applicant filed a new lawsuit. On 12 November 1996, the Municipal Court in Mitrovica-Branch in Zubin Potok, by Judgment P. No. 345/96, partially approved the Applicant's lawsuit and obliged the Municipality of Zubin Potok to pay the Applicant a certain monetary amount on behalf of the compensation for damage due to the lost salaries. This Judgment had become final.
Regarding the enforcement of Judgment P. No. 345/96 of the Municipal Court in Mitrovica, of 12 November 1996, the Applicant from 1997 until the challenged Decision CA. No. 1952/2016 of the Court of Appeals of Kosovo of 25 April 2017, initiated three court proceedings. The first decision on the enforcement of Judgment P. No. 345/96, of 12 November 1996, of the Municipal Court in Mitrovica of 12 November 1996, was Decision No. 82/97 of the Municipal Court in Mitrovica of 29 September 1997, by which the Applicant's proposal was approved. The second decision regarding the enforcement of the same Judgment was Decision P. No. 329/2003 of the Municipal Court in Mitrovica, of 16 May 2003, which assigned the enforcement of Judgment P. No. 345/96 of 12 November 1996. Thirdly, again as a result of the Applicant's proposal for enforcement of Judgment P. No. 345/96, of 12 November 1996, the Basic Court in Mitrovica by Decision P. No. 329/2003 of 19 December 2014, repealed Decision P. No. 329/2003 of the Municipal Court in Mitrovica of 16 May 2003, and decided to reject the Applicant's proposal for enforcement and to complete "*the enforcement procedure within the meaning of Article 66, paragraph 3 of the LCP*". This decision was also confirmed by the Court of Appeals by Decision CA. No. 1952/2016 of the Court of Appeals of Kosovo of 25 April 2017.
The Applicant challenges before the Constitutional Court, Decision CA. No. 1952/2016 of the Court of Appeals of Kosovo, of 25 April 2017, alleging violation of his right to fair trial, emphasizing that the current municipality of Zubin Potok "*could have executed the execution regardless of the*

circumstances that occurred during 10-15 over the past years, given in particular the legal inheritance".

The Court initially reiterated one of the main principles of the right to fair trial, the obligation to enforce judgments that have become *res judicata*. However, the Court emphasized that the *res judicata* effects of the decisions, in this case Judgment P. No. 345/96, of 12 November 1996, have *ad personam* limitations (for a certain person) and in the material scope (the certain case).

As to the present case, the Court noted that by the Decision of the Basic Court, upheld by Decision CA. No. 1952/2016, of 25 April 2017, of the Court of Appeals, Decision P. No. 329/2003 of the Municipal Court in Mitrovica of 16 May 2003 was repealed, and it was decided to complete the enforcement procedure with respect to Judgment P. No. 345/96 of the Municipal Court of Mitrovica, branch in Zubin Potok, of 12 November 1996, against the current municipality of Zubin Potok, after it was found that the enforcement was impossible as the current Municipality of Zubin Potok cannot fulfill the obligations of the Municipality of Zubin Potok before 1999. The Court notes that by the challenged decision, the Court of Appeals only completed the enforcement procedure against the current municipality of Zubin Potok (*ad personam*) and did not put into question Judgment P. No. 345/96 of 12 November 1996.

Therefore, the Court based on the particular characteristics of the case, the facts presented, the allegations raised by the Applicant, the reasoning of the Court of Appeals, and based on established standards and the principles established in its case law and that of the ECtHR, did not find that by Decision CA. No. 1952/2016 of 25 April 2017, there has been a violation of the Applicant's right to fair and impartial trial guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

JUDGMENT

in

Case No. KI25/18

Applicant

Vasilije Antović

Constitutional review of Decision CA. No. 1952/2016 of the Court of Appeals of Kosovo of 24 April 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of**:**

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

Applicant

1. The Referral was submitted by Vasilije Antović, residing in Zubin Potok (hereinafter: the Applicant).

Challenged decision

2. The challenged Decision is Decision CA. No. 1952/2016 of the Court of Appeals of Kosovo of 25 April 2017 (hereinafter: the Court of Appeals), which rejected as ungrounded the Applicant's appeal against Decision E. No. 329/2003 of the Basic Court in Mitrovica of 19 December 2014. The challenged decision was served on the Applicant on 1 February 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision, which allegedly violates the Applicant's rights guaranteed by

Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

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

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 21 February 2018, the Applicant submitted the Referral to the Court.

7. On 23 February 2018, the Applicant submitted the acknowledgment of receipt to the Court, which indicates that the Applicant was served with the challenged decision on 1 February 2018.

8. On 22 February 2018, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Bekim Sejdiu and Gresa Caka-Nimani.

9. On 14 March 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeals of Kosovo.

10. On 28 March 2018, the Court sent a copy of the Referral to the Municipality of Zubin Potok.

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

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 17 August 2018, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur.

14. On 1 October 2018, the President of the Court appointed the new Review Panel composed of Judges: Bekim Sejdiu (Presiding), Gresa Caka-Nimani and Radomir Laban.

15. On 20 June 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral

16. On the same date, the Court unanimously voted that the Referral is admissible and did not find that Decision CA. No. 1952/2016 of the Court of Appeals of Kosovo of 25 April 2017 violated Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights.

Summary of facts

17. The Applicant was employed in the Municipality of Zubin Potok. As a result of his dismissal in 1990, the Applicant filed a lawsuit with the Municipal Court in Mitrovica for the reinstatement to work and exercising the rights deriving from the employment relationship.

18. On 19 April 1994, the Municipal Court in Mitrovica obliged the Municipality of Zubin Potok to reinstate the Applicant to his previous working place, with all rights and obligations.

Proceedings regarding the statement of claim for compensation of salaries

19. On 13 December 1994, the Municipality of Zubin Potok reinstated the Applicant to his previous working place, but did not pay his lost salaries as a result of his dismissal from work.

20. On an unspecified date, the Applicant filed a lawsuit with the Municipal Court in Mitrovica-Branch in Zubin Potok for compensation of lost salaries during his dismissal.

21. On 5 February 1996, the Municipal Court in Mitrovica-Branch in Zubin Potok, by Judgment P. 103/95, partially approved the Applicant's lawsuit for compensation for lost salaries, but rejected his request for payment of interest.

22. As a result of the complaint of the Municipality of Zubin Potok, on 8 May 1996, the District Court in Mitrovica remanded the case for retrial in order to determine once again the exact amount of compensation.

23. On 12 November 1996, the Municipal Court in Mitrovica - Branch in Zubin Potok, by Judgment P. No. 345/96 partially approved the Applicant's lawsuit and obliged the Municipality of Zubin Potok to pay the Applicant a certain amount, including legal interest, on behalf of the compensation for the damage due to the lost salaries starting from 11 October 1995 until the final payment.

As to the enforcement proceeding for the enforcement of Judgment P. No. 345/96, of 12 November 1996

24. The Applicant filed a proposal with the Municipal Court Mitrovica for enforcement of Judgment P. No. 345/96 of the Municipal Court in Mitrovica, Branch in Zubin Potok, of 12 November 1996.

25. On 29 September 1997, the Municipal Court in Mitrovica, by Decision P. No. 82/97, approved the Applicant's proposal for enforcement of Judgment P. No. 345/96 of 12 November 1996.

26. From the case file it follows that the Decision of the Municipal Court in Mitrovica of 29 September 1997 was not enforced before the period of placing Kosovo under international administration.

As to the second enforcement proceeding for enforcement of Judgment P. No. 345/96, of 12 November 1996

27. On 19 March 2003, the Applicant submitted to the Municipal Court in Mitrovica a proposal for the enforcement of Judgment P. No. 345/96 of 12 November 1996. In his proposal for enforcement, the Applicant requested compensation for the lost salaries.

28. On 16 May 2003, the Municipal Court in Mitrovica, by Decision I. No. 329/03, approved the Applicant's proposal for enforcement of Judgment P. No. 345/96 of 12 November 1996.

29. On an unspecified date, against the abovementioned decision, the Municipality of Zubin Potok as a debtor submitted an objection. In its objection, the Municipality of Zubin Potok alleged that it had never received Judgment P. No. 345/96 of 12 November 1996 and Decision No. 82/97 of the Municipal Court in Mitrovica of 29 September 1997 regarding the enforcement of this Judgment.

30. On 26 June 2003, the Municipal Court in Mitrovica, by Decision P. No. 329/03, rejected as ungrounded the objection of the Municipality of Zubin Potok.

31. The Municipal Court in Mitrovica found that there was no evidence that Decision No. 82/97 of the Municipal Court in Mitrovica, of 29 September 1997 on the enforcement of the abovementioned Judgment P. No. 345/96, of 12 November 1996, was submitted to the Municipality of Zubin Potok. Therefore, the Municipal Court in Mitrovica reasoned that "*in order not to impede the right of the debtor [to the Municipality of Zubin Potok] for objection*" this Court by Decision I. No. 329/03 of 15 May 2003 allowed the enforcement of the abovementioned Judgment P. No. 345/96 of 12 November 1996.

32. On an unspecified date, against the abovementioned Decision, I. No. 329/03 of the Municipal Court in Mitrovica, of 26 June 2003, the Municipality of Zubin Potok filed an appeal with the District Court in Mitrovica on the grounds of essential violations of the provisions of the contested procedure, erroneous determination of factual situation and the application of the substantive law. The Municipality by the appeal also requested that the abovementioned decision of the Municipal Court in Mitrovica be annulled and the case be remanded to the same court for retrial or that the Applicant's proposal for the enforcement of Judgment P. No. 345/96 of 12 November 1996 be rejected as ungrounded.

33. Initially, the Municipality specifically stated that contrary to Article 354, paragraph 2, item 10 of the Law on Contested Procedure (hereinafter: the LCP), two enforcement proceedings are conducted for the enforcement of the same judgment. Secondly, the Municipality alleged that Decision P. No. 329/03 of 26 June 2003 is unclear and incomprehensible because the Municipal Court did not refer to the provision of the law, namely Article 53 of the Law on Enforcement Procedure. In the end, the Municipality emphasized that there is no

proof of enforcement, foreseen by Article 36 of the Law on Enforcement Procedure.

34. On 21 July 2003, the District Court in Mitrovica, by Decision GZ. No. 318/2003, rejected as ungrounded the appeal of the Municipality of Zubin Potok.

35. The District Court, regarding the Applicant's allegation of violation of Article 354, paragraph 2, item 10 of the LCP, assessed that *"[...] It is not about such violation of procedure because; there is no evidence that the debtor was served with granted enforcement of 29 September 2003 and in order to not deny the debtor's right to objection, the Municipal Court correctly has again granted the enforcement of 16 May 2003 and the debtor has duly filed its objection on the decision on granted enforcement [...]".* Accordingly, the District Court found that the allegation of the Municipality of Zubin Potok that the Applicant will be compensated twice is ungrounded.

36. As to the Applicant's allegation that Decision I. No. 329/03 of 26 June 2003 is unclear and incomprehensible because the court did not refer to the provision of the law under which the objection was rejected, the District Court held that this allegation is ungrounded "*because the decision is fair, it is based on law, specifically Article 53 of the Law on Enforcement Procedure".*

37. Finally, as regards the allegation of the Municipality of Zubin Potok that there is no certificate of enforceability, foreseen by Article 36 of the Law on Enforcement Procedure, the District Court found that *"in this specific case, the proposal for enforcement was filed with the same court [the Municipal Court in Mitrovica] which has decided in the first instance; in terms of this provision of the law provision of the certificate on enforceability is not necessary".*

38. On 24 September 2003, the Applicant addressed the Ombudsperson Institution, which he notified regarding the enforcement procedure, as a result of which by Decision P. No. 329/03 of the Municipal Court in Mitrovica, of 16 May 2003, his proposal for enforcement of Judgment P. No. 345/96 of 12 November 1996 was approved. In addition, the Applicant also informed the Ombudsperson about the non-implementation of this decision by the debtor, namely the Municipality of Zubin Potok.

39. On an unspecified date, the Applicant addressed the National Bank of Serbia (*Narodna Banka Srbije*) with a request for execution of Decision P. No. 329/03 of 16 May 2003.

40. On 14 October 2003, the National Bank of Serbia (*Narodna Banka Srbije*), branch in Kragujevc, responded to the Municipal Court in Mitrovica, pointing out that Decision I. No. 329/03 of the Municipal Court in Mitrovica of 16 May 2003 cannot be executed because the account from which the confiscation of financial means is required is questionable.

41. On 5 November 2003, the Applicant addressed the National Bank of Serbia, branch in Kragujevc, with a request to take actions regarding the execution of the payment of debts under Judgment P. No. 345/96 of 12 November 1996.

42. On 20 January 2004, the National Bank of Serbia, branch in Kragujevc, responded to the Applicant in connection with his request by notifying as follows: *"According to Regulation 2000/45 on the self-governance of municipalities in Kosovo, in the material financial meaning, the municipality of Zubin Potok operates through the UNMIK budget which mandate and executor is UNMIK Municipal Administrator".* The enforcement of Decision, according to National Bank is *"a competence o f the Municipal Court in Mitrovica and Municipal Administrator of UNMIK".*

As to the third proposal of Judgment P. No. 345/96, of 12 November 1996

43. On 11 August 2014, the Applicant addressed the Basic Court in Mitrovica, with the proposal for enforcement of Judgment P. No. 345/96 of the Municipal Court, Branch in Zubin Potok, of 12 November 1996.

44. On 19 December 2014, the Basic Court in Mitrovica, General Department - Civil Division (hereinafter: the Basic Court), by Decision P. No. 322/2003 decided to:

> 1) Repeal Decision P. No. 329/2003 of the Municipal Court in Mitrovica of 16 May 2003;
> 2) Reject the Applicant's proposal for enforcement of the execution request of Decision P. No. 329/2003 of the Municipal Court in Mitrovica of 16 May 2003 *"due to inadequate enforcement title, pursuant to Article 27 paragraph 1 and Article*

66 paragraph 3 of Law No. 04/L-139 on Enforcement Procedure"; and

3) *"[...] the enforcement process ends within the meaning of Article 66, paragraph 3 of Law No. 04/L-139 on Execution Procedure".*

45. The Basic Court reasoned its Decision *[...]* "*the enforcement title has flaws, which in the present case the enforcement is not possible due to the procedural subjectivity and that the current municipality of Zubin Potok was established by UNMIK/REG/2000/45 [UNMIK Regulation on Self-Governance of Municipalities] and does not represent the succession of the then Municipality and thus cannot be liable for the obligations that were created before 24 March 1999, so the debtor may be the founder of the Municipality of Zubin Potok before 20 June 1999".*

46. The Basic Court further found that *"the enforcement of title is impossible, as it was foreseen by Article 66 par. 3 of Law No. 04/L-139 on Enforcement Procedure [...]".*

47. Therefore, the Basic Court concluded that *"it annulled the enforcement actions and rejected the proposal for enforcement because of inadequate enforcement title and terminated the further process due to the impossibility of execution".*

48. On 31 March 2016, the Applicant filed appeal against the abovementioned Judgment P. No. 329/2003 of the Basic Court of 19 December 2014 with the Court of Appeals. In his appeal the Applicant alleged essential violations of the provisions of the enforcement procedure, as well as erroneous determination of factual situation.

49. On 6 February 2017, the Applicant addressed the Court of Appeals with a submission requesting the resolution of the multi-year problem and that the case registered at the Court of Appeals to be given priority for resolution.

50. On 25 April 2017, the Court of Appeals, by Decision CA. No. 1952/2016, rejected the Applicant's appeal as ungrounded and upheld Decision P. No. 329/2003 of the Basic Court of 19 December 2014.

51. In its decision, the Court of Appeals reasoned that "*Regarding legal stance of the first instance court, expressed in the enacting clause of appealed decision; the second instance court assessed it as lawful and fair and for any unlawful action taken by the Republic of Serbia during its installed interim measures in Kosovo during 1990/1999,*

the local self-governing authorities in Kosovo established by UNMIK Regulation No. 2000/45 and authorities of the Republic of Kosovo shall not be liable and that they have no legitimacy of a party deriving from documents on enforcement in this enforcement procedure".

Applicant's allegations

52. The Applicant alleges in his Referral that his rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution have been violated.

53. The Applicant emphasizes that *"[...] In addition to the abovementioned evidence which relates to unreasonable period of time of 20 years for implementation of enforcement procedure based on the final judgment and final decision on enforcement; the second instance court – the Court of Appeals of Kosovo, reviewing the claimant's – creditor's appeal, did not entirely take into consideration all circumstances stated in the appeal. In fact, the respondent – Municipality of Zubin Potok is an active legal person and the enforcement could have been implemented regardless of circumstances during the last 10-15 years, first of all considering the legal succession".*

Relevant legal provisions

Law No. 04/L – 139 on Enforcement Procedure (published in the Official Gazette, on 31 January 2013)

Article 27
Eligibility of enforcement document

1. Enforcement document shall be eligible for enforcement if it shows the creditor, the debtor, the object, means, amount, and deadline for settling the obligation.

2. If the enforcement document does not assign the time for voluntary fulfillment of the obligation, such deadline will be set by the enforcement decision and writ on seven (7) days.

3. In the case from paragraph 2 of this article, the enforcement authority shall assign the proposed enforcement under the condition that debtor does not fulfill its obligation within the deadline for voluntary fulfillment.

Article 66
Completion of enforcement procedure

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

Article 74
Enactment and enforceability of decisions in enforcement procedure

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

Admissibility of the Referral

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

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

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

[...]

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

56. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

57. Regarding the fulfillment of these requirements, the Court considers that the Applicant is an authorized party, challenging an act of a public authority, namely Decision CA. No. 1952/2016, of 25 April 2017 of the Court of Appeals, after exhaustion of all legal remedies prescribed by law. The Applicant also clarified the 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 established in Article 49 of the Law.

58. The Court finally considers that this Referral is not manifestly ill-founded in accordance with Rule 39 (2) of the Rules of Procedure and that it is not inadmissible on any other ground, as foreseen by the Rules of Procedure. Therefore, it must be declared admissible.

Merits of the Referral

59. The Court recalls that the Applicant alleges that the challenged decision of the Court of Appeals violated his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution.

60. The Applicant specifically states that the Court of Appeals, when considering his appeal, did not take into account all the facts and circumstances of the case, and according to him "*[...] Municipality of Zubin Potok is an active legal person and the enforcement could have been implemented regardless of circumstances during the last 10-15 years, first of all considering the legal succession".*

61. In this regard, the Court notes that the Applicant raises the issue of non-enforcement of Decision P. No. 345/96 of the Municipal Court in Mitrovica of 12 November 1996.

62. The Court notes that, although the Applicant alleges that his rights guaranteed by Articles 31, 32 and 54 of the Constitution have been violated, the essence of his allegations relates to the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).

63. Therefore, the Court will analyze and review the allegations of the Applicant based on the facts presented and the evidence attached in his referral, namely the question of final decision or decision *res judicata*.

64. Accordingly, the Court will focus on examining the Applicant's allegations of a violation of his right guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, which establish:

Article 31 [Right to Fair and Impartial Trial] of the Constitution

> *"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*
> *2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law".*
> *[...]*

Article 6 (Right to a fair trial) of the ECHR

> *"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.".*
> *[...]*

65. In this regard, the Court emphasizes that the issues of final decisions *res judicata*, within the meaning of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, have been interpreted in a detailed way through the ECtHR case law in accordance with which, 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.

66. The Court also notes that the standards and principles established in the case law of the ECtHR as regards the respect or repeal of a final decision, *res judicata*, have already been confirmed and decided also by the decisions of the Constitutional Court (see, *inter alia*, cases, Case No. KI94/13, Applicants *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 14 April 2014, Case No. KI132/15, *Deçan Monastery*, Judgment of 20 May 2016, Case No. KI150/16, Applicant *Mark Frrok Gjokaj*, Judgment of 31 December 2018).

67. Therefore, in interpreting the allegations of violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as regards the annulment of a final decision, the Court will refer to its case-law and that of the ECtHR.

68. The Court, when considering the Referral, will initially elaborate the general principles regarding the right to legal certainty and the respect of a final decision, *res judicata*, based on the standards and principles established in the Court's case law and that of the ECtHR, which will subsequently apply in the circumstances of the present case.

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

69. The Court initially recalls that the right to fair and impartial trial also requires that a final and binding decision (*res judicata*) must be regarded as irreversible. In fact, the ECtHR found that, "*one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question"* (see, *mutatis mutandis*, the case of ECtHR *Brumărescu v. Romania*. application no. 28342/95, Judgment of 28 October 1999, par. 61, Case KI122/17, Applicant *Ceska Exportni Banka AS*, Judgment of 30 April 2018, paragraph 149, Case KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility of 4 January 2017, paragraph 87 and Case KI94/13 , *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 14 April 2014).

70. Therefore, in the case law of the ECtHR and of the Constitutional Court itself, it has been emphasized one of the fundamental principles of the rule of law in a democratic society is the principle of legal certainty, which assumes the respect of judicial decisions that have become, *res judicata*. (see case *Brumarescu v. Romania*, application no. 28342/95, Judgment of 28 October 1999, para 62). According to the ECtHR "*no party is entitled to seek a review of a final and binding decision merely for the purpose of obtaining a rehearing and a fresh determination of the case. (*see, *inter alia*, ECtHR cases *Ryabykh v. Russia*, no. 52854/99, ECtHR, Judgment of 24 July 2003, para. 52, and *Sovtransavto Holding v. Ukraine*, application no. 48553/99, paragraphs 72; see also cases of the Court case no. KI55/11, Applicant *Fatmir Pirreci*, the Constitutional Court, Judgment of 16 July 2012, para. 42 and case no. KI94/13, Applicant *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 14 April 2014).

71. Moreover, the Court also states that the *res judicata* effects of judgments have limitations as to *ad personam* (specific person) and as to material scope (specific matter) (see the case of Constitutional Court KI67/16, Applicant: *Lumturije Voca*, Resolution on Inadmissibility of 6 December 2016, paragraph 88; see also cases: *Esertas v. Lithuania*, Judgment of ECtHR no. 0208/06 of 31 May 2012, paragraph 22, and *Kehaya and Others v. Bulgaria*, Judgment of ECtHR no. 4777/999 and 68698/01 of 12 April 2006, paragraph 66)

Application of the abovementioned principles in the circumstances of the present case

72. The Court initially recalls that the Applicant from 1997 until the challenged decision of the Court of Appeals of Kosovo, CA. No. 1952/2016, of 25 April 2017, has initiated three court proceedings concerning the enforcement of Judgment P. No. 345/96 of the Municipal Court in Mitrovica, of 12 November 1996, by which the Applicant's request for compensation of salaries was approved as a result of his dismissal from work in the 90-ies.

73. First decision on the enforcement of Judgment P. No. 345/96 of the Municipal Court in Mitrovica, of 12 November 1996, was Decision No. 82/97 of the Municipal Court in Mitrovica of 29 September 1997, by which the Applicant's proposal was approved.

74. The second decision regarding the enforcement of the same Judgment was Decision P. No. 329/2003 of the Municipal Court in Mitrovica, of 16 May 2003, by which the enforcement of Judgment P.nr. 345/96 of 12 November 1996 was assigned, which after the appeal proceedings had become final. The Court notes that by Decision P. No. 329/2003 of the Municipal Court in Mitrovica, of 16 May 2003, the Applicant attempted to execute Judgment P. No. 345/96, of 12 November 1996, against the Republic of Serbia, addressing the National Bank of Serbia (*Narodna Banka Srbije*). National Bank of Serbia stated that Decision I. No. 329/03 of the Municipal Court in Mitrovica of 16 May 2003 cannot be executed because the account from which the confiscation of financial means is required is questionable.

75. Third, again as a result of the Applicant's proposal for the enforcement of Judgment P. No. 345/96 of 12 November 1996, the Basic Court in Mitrovica by Decision P. No. 329/2003 of 19 December 2014, annulled Decision P. No. 329/2003 of the Municipal Court in Mitrovica of 16 May 2003, and decided to reject the Applicant's proposal for enforcement and to end "*the enforcement procedure within the meaning of Article 66, paragraph 3 of the LCP*". This decision was also confirmed by the Court of Appeals by Decision CA. No. 1952/2016 of the Court of Appeals of Kosovo of 25 April 2017.

76. Therefore, the Applicant challenges before the Court the Decision of the Court of Appeals of Kosovo, CA. No. 1952/2016 of 25 April 2017, alleging a violation of his right to fair trial, stating that the current municipality of Zubin Potok "*could have conducted the execution in spite of the circumstances that occurred during 10-15 years the past, given in particular the legal succession".*

77. Therefore, the Court will assess whether the challenged decision violated the *res judicata* principle in relation to Judgment P. No. 345/96 of 12 November 1996, namely, if the challenged decision has reopened the case decided by Judgment P. No. 345/96 of 12 November 1996, contrary to the *res judicata* principle.

78. In this respect, the Applicant builds his arguments for non-implementation of Judgment P. No. 345/96 of 12 November 1996 on the fact that the Municipality of Zubin Potok is a legal successor to the Municipality of Zubin Potok, against which Judgment P. No. 345/96 of 12 November 1996 was rendered.

79. In this regard, the Court reiterates that the *res judicata* effects of decisions, Judgment P. No. 345/96 of 12 November 1996, in this case have limitations as to *ad personam* (specific person) and as to material scope (specific matter). (See ECtHR cases *Esertas v. Lithuania, ibidem*, paragraph 22, and *Kehaya and others, ibidem*, paragraph 66).

80. As to the material scope (specific matter), the subject of the case decided by Judgment P. No. 345/96 of 12 November 1996, is the same as that set forth in the challenged decision and relates to compensation for the unpaid salaries of the Applicant as a result of his dismissal from work. This issue was not disputable in the court proceedings conducted in the Applicant's case.

81. With regard to the *ad personam* limitations, the Court recalls once more that regarding *ad-personam* limitations assesses whether the decision in respect of which enforcement is sought relates to the same parties who were part of the procedure when the decision was taken in relation to the substance of the referral and to which extent they can be applied to third parties.

82. In the case of Constitutional Court KI67/16, the Applicant: *Lumturije Voca*, the Court assessed the court proceedings conducted with respect to the Applicant's request regarding the disputed apartment between the parties and the position of the Applicant and other persons in this procedure (see the case of Constitutional Court KI67/16, Applicant: *Lumturije Voca*, Resolution on Inadmissibility, of 6 December 2016).

83. As regards the present case and the *ad personam* limitation on the enforcement of decisions, the Court notes that in relation to Judgment P. No. 345/96 of 12 November 1996, the parties to the proceedings were the Applicant and the Municipality of Zubin Potok before July 1999. This Judgment P. No. 345/96 of 12 November 1996 was not challenged/reopened by the Basic Court in Mitrovica, by Decision P.

No. 329/2003, of 19 December 2014, also upheld by the Court of Appeals through Decision CA. No. 1952/2016 of 25 April 2017.

84. The Court notes that by the Decision of the Basic Court, upheld by Decison CA. No. 1952/2016, of 25 April 2017 of the Court of Appeals, Decision P. No. 329/2003 of the Municipal Court in Mitrovica, of 16 May 2003 was annulled, and consequently it was decided to conclude the enforcement procedure with respect to Judgment P. 345/96 of the Municipal Court of Mitrovica, Branch in Zubin Potok of 12 November 1996, against the current municipality of Zubin Potok.

85. In this regard, the Court first recalls the reasoning of the Basic Court which found that: [...] "*the enforcement title has flaws, which in the present case the enforcement is not possible because of the procedural subjectivity and that the current municipality of Zubin Potok was established by UNMIK/REG /2000/45 and does not represent the succession of the then Municipality and thus cannot be liable with obligations that were created before 24 March 1999, so the debtor may be the founder of the Municipality of Zubin Potok before 20 June 1999*".

86. Furthermore, the Court recalls the reasoning of the challenged decision of the Court of Appeals, which upheld the Decision of the Basic Court, stating that: "*Regarding legal stance of the first instance court, expressed in the enacting clause of the appealed decision; the second instance court assessed it as lawful and fair; for any unlawful action taken by the Republic of Serbia during its installed interim measures in Kosovo during 1990/1999, the local self-governing authorities in Kosovo established by UNMIK Regulation No. 2000/45 and authorities of the Republic of Kosovo shall not be liable and that they have no legitimacy of a party deriving from documents on enforcement in this enforcement procedure*".

87. Therefore, the Court notes that by the challenged decision the Court of Appeals only ended the enforcement procedure against the current Municipality of Zubin Potok *(ad personam)* and did not question Judgment P. No. 345/96 of 12 November 1996.

88. Having ascertained that the Municipality of Zubin Potok was not the successor of the Municipality of Zubin Potok in respect of which the Judgment P. No. 345/96 of 12 November 1996 was rendered, and as such this Judgment cannot be executed against the current Municipality of Zubin Potok, as it has not been a party to the proceeding conducted for that matter. Therefore, the Court considers that there is no compelling reason to force the current Municipality of

Zubin Potok to enforce the 1996 Judgment, not being a party to that proceeding.

89. Therefore, the criterion for enforcement of Judgment P. No. 345/96 of 12 November 1996 *(ad personam)* was not infringed because it did not abrogate or reopen the case decided under the aforementioned Judgment of 1996.

90. In conclusion, the Court finds that in the circumstances of the present case, the conclusion of the enforcement procedure through Decision CA. No. 1952/2016 of 25 April 2017, in the case of the Applicant against the Municipality of Zubin Potok does not violate the final decision, *res judicata*, since it has not reopened or revised the case on which it was decided by Judgment P. No. 345/96 of 12 November 1996.

91. Therefore, and based on the foregoing, the Court, based on the particular characteristics of the case, the presented facts, the allegations raised by the Applicant, the reasoning of the Court of Appeals, and based on the established standards and principles set out in its case law and that of the ECtHR, does not find that Decision CA. No. 1952/2016 of 25 April 2017, violates the right of the Applicant to fair and impartial trial guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 47 and 48 of the Law, and Rule 59 (1) of the Rules of Procedure, on 20 June 2019, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has not been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO NOTIFY this Judgment to the Parties;

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

V. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

KI 24/17, Constitutional review of Judgment Rev. No. 308/2015 of the Supreme Court of Kosovo, of 12 January 2017

KI 24/17, Applicant Bedri Salihu Judgment of 27 May 2019, published on 24 July 2019

Keywords: *Individual referral, unreasoned court decision, (im)partial court*

The Applicant alleges that the challenged Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015] of 12 January 2017 was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights, because according to the Applicant, the challenged Judgment (i) did not implement the Judgment of the Court in Case KI18/16 and consequently, did not meet the standards of a reasoned judicial decision; and (ii) it was rendered by a partial court, because the composition of the decision-making panel of the Supreme Court was identical with the panel that had decided the first time in his case by Judgment [Rev. No. 308/2015] of 12 November 2015, and which the Court declared invalid in case KI18/16.

As to the first allegation, the Court found that Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court did not remedy the flaws identified by the Judgment in the case KI18/16 and therefore, continues not to satisfy the standards of a reasoned judicial decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, declaring the latter invalid and remanding for the second time the Applicant's case for retrial to the Supreme Court.

As regards the second allegation of the Applicant, namely the allegations related to an impartial court, the Court elaborated (i) the general principles of the European Court of Human Rights regarding the criteria for assessing the impartiality of a court; (ii) the concept of subjective and objective impartiality of the court; (iii) the practice of the European Court of Human Rights in terms of assessing the impartiality of the court, namely the concept of "*legitimate doubts*" and the fact that they must be "*objectively justified*" in order to ascertain the impartiality of a court; (iv) the relevant case law regarding the assignment of trial panels/panels in the same composition in the same court cases; and finally concluded that (v) although Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court was rendered by the identical composition of the Panel, which also decided in the previous Judgment, namely, the Judgment [Rev. 308/2015] of 12 November 2015, thus resulting in "*legitimate doubts*" of the impartiality of the court, in the Court's assessment these doubts are not "*objectively justified*" in the circumstances of the present case.

In conclusion, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, and Rules 56 (1) and 74 (1) of the Rules of Procedure, unanimously, in the session of 27 May 2019, the Court declared the Referral admissible, held that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights and declared invalid the Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court, for failure to reason the court decision.

JUDGMENT

in
Case No. KI24/17

Applicant

Bedri Salihu

Constitutional review of Judgment Rev. No. 308/2015 of the Supreme Court of Kosovo, of 12 January 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Mr. Bedri Salihu from Mitrovica, who is represented by Mr. Selman Bogiqi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by paragraph 4 of Article 21 [General Principles] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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 the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

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

Proceedings before the Constitutional Court

6. On 3 March 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 7 April 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalović.

8. On 20 April 2017, the Court notified the Applicant about the registration of the Referral and requested the power of attorney for the

legal representative before the Court. On the same date, the Court also sent a copy of the Referral to the Supreme Court.

9. On 26 April 2017, the Court received the requested additional document.

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

11. 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.

12. On 8 October 2018, as the mandate as judges of the Court of four abovementioned judges was over, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision KSH. KI24/17 on the appointment of the new Review Panel composed of judges: Arta Rama-Hajrizi (Presiding), Safet Hoxha and Radomir Laban.

13. On 27 May 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

14. On the same date, the Court unanimously found that (i) the Referral is admissible, and (ii) Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

15. On 9 April 2010, the Applicant suffered severe bodily harm in a traffic accident caused by the holder of insurance with the insurance company "SIGMA" in Prishtina (hereinafter: "SIGMA").

16. On 30 July 2014, the Basic Court in Prishtina (hereinafter: the Basic Court) by Judgment [C. No. 1234/10] partially approved the claim of the Applicant and obliged SIGMA to compensate the Applicant for the: (i) material damage in a total amount of 3,176 euro including the monthly rent in the amount of 250 euro, starting from 30 July 2014 until the existence of legal conditions; and (ii) the non-material damage in the total amount of 32,000 euro caused by the holder of the insurance.

17. On an unspecified date, SIGMA filed an appeal with the Court of Appeals against the Judgment of the Basic Court, alleging essential violation of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

18. On 29 June 2015, the Court of Appeals by Judgment [Ac. No. 4842/2014] partially approved the appeal of SIGMA by (i) quashing the Judgment of the Basic Court in the part related to the amounts of the compensation of the costs of physical therapy, the monthly rent and the costs of proceedings; whereas (ii) as to the part concerning the adjudication of the amount for non-material damage and a part of the material damage, the Court of Appeals upheld the judgment of the Basic Court.

19. On an unspecified date, SIGMA submitted a request for revision to the Supreme Court against the abovementioned judgment of the Court of Appeals, alleging essential violation of the contested procedure and erroneous application of the substantive law, with the proposal that the Supreme Court of Kosovo approves the revision and decreases the amounts for non-material and material damage or to quash the challenged Judgment and remand the case to the first instance court for retrial.

20. On 12 November 2015, the Supreme Court by Judgment [Rev. No. 308/2015] partially approved as grounded the request for revision submitted by SIGMA and, accordingly, modified the Judgment of the Court of Appeals in conjunction with that of the Basic Court, by reducing the amount to about 20,000 euro of financial compensation for non-material damage caused to the Applicant and confirmed by the two previous courts.

21. On 27 January 2016, the Applicant submitted the first Referral to the Court alleging that the abovementioned Judgment of the Supreme Court was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of ECHR.

22. On 20 May 2016, the Court, by Judgment in case KI18/16 (See case of KI18/16, with Applicant *Bedri Salihu*, Constitutional review of Judgment Rev. No. 308/2015 of the Supreme Court of Kosovo of 12 November 2015) found violation of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, with the reasoning that the challenged Judgment of the Supreme Court did not meet the standards of a reasoned court decision.

23. On 12 January 2017, following the Judgment of the Court in Case KI18/16, the Supreme Court rendered new Judgment, namely, the second on the case, Judgment [Rev. No. 308/2015], by which it reiterated the findings of the first Judgment namely, Judgment [Rev. No. 308/2015] of 12 November 2015.

Applicant's allegations

24. The Applicant alleges that the challenged Judgment of the Supreme Court, namely its second Judgment, was rendered in violation of his fundamental rights and freedoms guaranteed by Article 21 [General Principles] and Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

25. The Applicant more specifically alleges that the Judgment of the Court in case KI18/16 was not implemented by the Supreme Court. According to the Applicant's allegations, the challenged Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015] of 12 January 2017 is the same as its first Judgment, namely Judgment [Rev. No. 308/2015] of 12 November 2015, and again fails to justify the reduction of the amount of 20,000 euro of the compensation of damage by Judgment [Ac. No. 4842/14] of 29 June 2015 of the Court of Appeals in conjunction with Judgment [C. n. 1234/10] of 30 July 2014 of the Basic Court.

26. The Applicant also alleges that in rendering the second Judgment of the Supreme Court, the latter was not impartial because the Presiding Judge was again the same judge, namely, Judge E.H.

27. Finally, the Applicant requests the Court to declare the Referral admissible; to declare invalid the challenged Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court by remanding the case to the Supreme Court; and that during the latter, Judge E.H. be excluded from the decision-making.

Admissibility of the Referral

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

29. 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".*

30. The Court further refers to the admissibility requirements as further specified in the Law. In that regard, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

> Article 47
> [Individual Requests]
>
> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*
>
> Article 48
> [Accuracy of 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...".*

31. As to the fulfillment of these criteria, the Court considers that the Applicant is an authorized party and challenges an act of a public

authority, namely Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms which have allegedly been violated in accordance with Article 48 of the Law and has submitted the Referral in accordance with the deadlines foreseen in Article 49 of the Law.

32. The Court also finds that the Applicant's Referral meets the admissibility requirements established in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible based on the requirements laid down in paragraph 3 of Rule 39 of the Rules of Procedure.

33. Moreover, and finally, the Court considers that this Referral is not manifestly ill-founded on constitutional basis as established in paragraph 2 of Rule 39 of the Rules of Procedure and, therefore, it must be declared admissible. (See also case of ECtHR *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144).

Merits of the Referral

34. The Court initially recalls that the Basic Court adjudicated to the Applicant a certain compensation for material and non-material damage caused to him as a result of the accident of 9 April 2010. This compensation, with certain changes, was confirmed also by the Court of Appeals. The Supreme Court, on the other hand, acting upon the request for revision of the respondent, namely SIGMA, modified the judgments of the lower instance courts, reducing the compensation to the amount of about 20,000 euro. The Court declared invalid this Judgment of the Supreme Court stating that it was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because it did not meet the standards of a reasoned court decision. The Supreme Court, by the challenged Judgment, namely the Judgment [Rev. No. 308/2015] of 12 January 2017, again upheld its first decision, namely Judgment [Rev. No. 308/2015] of 12 November 2015. This Judgment was again challenged by the Applicant, alleging a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because according to the Applicant, the Supreme Court (i) did not implement the Judgment of the Court in Case KI18/16 because its Judgment continues to be unreasoned; and (ii) it was partial because it had decided with the same composition of the panel in both cases.

35. The Court will deal with these allegations individually and by applying the case law of the European Court on Human Rights (hereinafter: the ECtHR), on the basis of which the Court, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution is required to interpret the fundamental rights and freedoms guaranteed by the Constitution. Accordingly, as regards the assessment of the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECtHR.

As to the allegations regarding non-implementation of the Judgment of the Court in Case KI18/16 and the lack of a reasoned court decision

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

37. In principle, the case law of the ECtHR and 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 any argument. The extent to which the obligation to give reasons may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. The essential arguments of the Applicants are to be addressed and the reasons given must be based on the applicable law.

38. In this regard, the Court recalls that the first Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015] of 12 November 2015, which was declared invalid by the Court, contained the following reasoning regarding the modification of the decisions of the lower instance courts regarding the amount of compensation:

> *"Based on the assessment of the Supreme Court of Kosovo, the amounts adjudicated by the lower instance courts, related to the compensation of non-material damage due to physical pain and the fear suffered, and the decrease of daily life activities of Bedri Salihu are not adequate and harmonious with the nature of the non-material damage compensation, taking into account the importance degree of the good and purpose which this compensation serves, as foreseen by Article 200, paragraphs 1 and 2 of the Law on Obligations". .....*
>
> *"Setting from this and considering the age of the claimant at the time when he suffered the injuries from the accident, the nature of injuries, and the purpose of non-material damage compensation, the present Court considers that by the help of the determined amounts, the claimant may experience a significant satisfaction as a balance for the physical pain and fear he suffered".*

39. In this respect, the Court specifically concluded that the Supreme Court (i) had not clarified any of the facts it considered, nor any of the specific reasons it might have taken into account when significantly modifying and lowering the previously approved amounts by the lower instance courts (see, Judgment of the Court in Case KI18/16, paragraph 43); (ii) it does not refer to any factual and legal reasons related to the question on how and why it so significantly diverted from the decision of the lower instance courts on the amount of compensation for non-material damage (see, Judgment of the Court of case KI18/16, paragraph 46); and (iii) it did not specifically justify why the amount of compensation for non-material damage to the Applicant was modified and decreased in relation to the stand of lower instance courts on the same matter. (see, Judgment of the Court in Case KI18 / 16, para 50).

40. The second Judgment of the Supreme Court, rendered as a result of the Judgment of the Court in Case KI18/16, in addressing the observations of the Court, gave the following reasoning:

"In the case of the award of compensation for the non-material damage in the name of the physical pain suffered, the fear suffered, this court has taken into account the intensity of the pain and the fear of the injury, as provided by the provision of Article 200 par. 2 of LOR. In addition to these important elements in determining the amount of compensation, all other circumstances of the case, in particular unpleasant experiences and possible complications during the treatment, should be taken into account. When determining the compensation for non-material damage on behalf of the reduction of overall living activity, this court has taken into account their duration, the age of the claimant, his profession as a waiter, where long standing is required which persistently causes the pain due to the nature of the injury and the consequences that the claimant had, as well as the purpose of the award of this non-material damage. In this case, the personal characteristics of the claimant and the case law of this court have been taken into account in determining the amount of non-material damage."

41. The Court recalls in that regard that, based on the case law of the ECHR and of the Court, the essential arguments of the Applicants must be addressed and the reasons given must be based on the applicable law. In the present case, the Applicant's allegations relating to the substantial reduction of compensation were considered by the Court as essential in its first Judgment, specifically requesting the Supreme Court, that during the retrial, clarifies the reasons on which it was based for reduction of the amount of compensation.

42. The Court notes that the Supreme Court by its second Judgment failed again to provide a resoning that meets the standards of a reasoned judicial decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR because (i) the decision of the court used a general reasoning and which was not based on the particular circumstances and factual circumstances of the concrete case, and (ii) while the court decision referred to Article 200 of the Law on Obligational Relationship of 30 March 1978, it does not clarify how this article or the case law of the Supreme Court, to which it itself refers, has been applied in the circumstances of the present case. The Court considers that the reasoning of the Supreme Court does not further clarify to the Applicant or to the public, for what factual and legal reasons it has significantly reduced the value of the compensation of damage, upheld by the two lower instance courts.

43. Therefore, taking into account the abovementioned observations and the proceedings as a whole, the Court considers that the second

Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015] of 12 January 2017, did not rectify the violations found by the Judgment of the Court in case KI18/16 and consequently did not give sufficient reasons to the Applicant for reducing the compensation of the damage determined by the lower instance courts, thus resulting in a violation of the Applicant's right to a reasoned judicial decision, as an integral part of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. (See ECtHR case *Grădinar v. Moldova*, Judgment of 8 April 2008, paragraph 115).

Regarding the allegations related to the impartiality of the court

44. In assessing the allegations relating to the impartiality of the court, the Court first recalls that the impartiality of a tribunal under Article 31 of the Constitution in conjunction with Article 6 of ECHR, based on the consolidated case law of the ECtHR, must be determined according to (i) a subjective test, that is on the basis of the personal conviction and behaviour of a particular judge implying that a judge may have had personal prejudice or bias in a particular case; and (ii) an objective test, that is ascertaining whether the court, *inter alia,* its composition offered guarantees sufficient to exclude any legitimate doubt in this respect (See, inter alia, ECtHR cases, *Miracle Europe KFT v. Hungary*, Judgment of 12 April 2015, paragraphs 54 and 55, *Gautrin and Others v. France*, Judgment of 20 May 1998, paragraph 58, *San Leonard Band Club v. Malta* Judgment of 29 July 2004, paragraph 58, *Thomann v. Switzerland*, Judgment of 10 June 1996, paragraph 30, *Wettstein v. Switzerland*, Judgment of 21 December 2000, paragraph 42, *Korzeniak v Poland*, Judgment of 10 January 2017, paragraph 46; and case of the Court KI06/12, with Applicant *Bajrush Gashi*, Judgment of 9 May 2012, paragraph 45).

45. More specifically, as regards the subjective test, based on the ECtHR case law, personal impartiality of a judge must be presumed until there is proof to the contrary. (See, *inter alia*, ECtHR cases, *Mežnarić v. Croatia*, Judgment of 30 November 2005, paragraph 30; *Padovani v. Italy*, Judgment of 26 February 1993, para. 26; *Morel v. France*, paragraph 41; *San Leonard Band Club v. Malta*, cited above, paragraph 59; *Hauschildt v. Denmark*, Judgment of 24 May 1989, paragraph 47; *Driza v. Albania*, Judgment of 13 November 2007, paragraph 75; and *Korzeniak v. Poland*, cited above, paragraph 47). As regards the type of proof required to prove such a thing, the ECtHR, for example, sought to ascertain whether a judge has displayed

hostility or ill will for personal reasons. (See, *inter alia*, ECtHR case, *De Cubber v. Belgium*, Judgment of 26 October 1984, para. 25). However, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the ECtHR. (See, ECtHR cases, *Kyprianou v. Cyprus*, cited above, paragraph 119; *Micallef v. Malta*, Judgment of 15 October 2009, paragraphs 93-94; and *Tozicka v. Poland*, Judgment of 24 July 2012, paragraph 33).

46. Furthermore, according to the case law of the ECHR, while in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee. (See case of ECtHR *Micallef v. Malta*, cited above, paragraphs 95 and 101). It must be noted, that in the vast majority of cases raising impartiality issues the ECtHR has focused and found violations in the aspect of the objective test. (see also case of ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*, Judgment of 6 November 2018, paragraph 146; and *Korzeniak v. Poland*, cited above, paragraph 48).

47. As to the objective test, the Court notes that based on the ECtHR case law, when it is applied on a trial panel, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to impartiality of the court. In this respect even appearances may be of a certain importance or, in other words, *"justice must not only be done, it must also be seen to be done*". (In this context, see, *inter alia*, ECtHR cases, *De Cubber v. Belgium*, cited above, paragraph 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. (See, *inter alia*, ECtHR cases, *Castillo Algar v. Spain*, Judgment of 28 October 1998, paragraph 45; *San Leonard Band Club v. Malta*, cited above, paragraph 60; and *Golubović v. Croatia*, cited above, paragraph 49). Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. (See, ECtHR case, *Micallef v. Malta,* cited above, paragraph 98).

48. 48. Furthermore, based on the case law of the ECtHR, the situations within which issues may arise regarding the lack of impartiality may be of (i) functional nature and (ii) personal.

49. The first one relates to the exercise of various functions within a judicial proceeding by the same person or hierarchical or other nature between the judge and other actors in the particular judicial process. With regard to the latter, the level and nature of this connection should be examined. These situations of a functional nature may include

examples of cases in which were carried out (i) advisory and judicial functions (in this context, see, *inter alia*, cases of ECtHR *Procola v. Luxembourg*, Judgment of 8 September 1995 , paragraph 45, *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraph 200; *Sacilor Lormines v. France*, Judgment of 9 November 2006, paragraph 74); (ii) judicial and extra-judicial (in this context, see, *inter alia*, ECtHR case, *McGonnell v. the United Kingdom*, Judgment of 8 February 2000, para. 52-57); and (iii) various court cases. In this context, the ECtHR emphasizes that the assessment of whether the participation of the same judge at different stages of the trial may have resulted in a violation of the requirements related to the impartiality of the court, should be assessed case by case and depending on the circumstances of each case . The second, namely, issues of personal nature, are mainly related to the conduct of a judge regarding a case or the existence of links with one of the parties or his/her representative in one case.

50. The Court also notes that, based on the ECtHR case law, the assessment of court's impartiality under a subjective and objective test implies that, it must be determined whether in a given case there is a legitimate reason to fear that a particular trial panel lacks impartiality. However, to decide whether in a concrete case there is sufficient grounds to determine that a certain judge is not impartial, the standpoint of the applicant is important but not decisive. What is decisive is whether this fear can be held to be objectively justified. (See, *inter alia*, ECtHR cases, *Mežnarić v. Croatia*, cited above, paragraph 31; *Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, paragraph 58; *Wettstein v. Switzerland*, cited above, paragraph 44; *San Leonard Band Club v. Malta*, cited above, paragraph 60; *Korzeniak v. Poland*, cited above, paragraph 49 and *Tozicka v. Poland*, cited above, paragraph 33).

51. In applying those principles in the context of the circumstances of the present case, the Court recalls that the Applicant alleges that the participation of the judge of the Supreme Court, E.H., in both of his cases, as the Presiding Judge raises his fears and doubts of the impartiality of the court. However, the Court notes that, apart from the fact that Judge E.H, was the Presiding Judge in both cases of the Applicant, the composition of the panel at the Supreme Court was also the same. The first Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015] of 12 November 2015, was decided by a panel composed of Judges E.H; G.S; and M.R. This Judgment was declared invalid by the Court in Case KI18/16. The second Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015] of 12 January 2017, rendered as a result of the Judgment of the Court, was again

decided by the same composition of the panel, by Judges E.H; G.S; and M.R.

52. In light of these facts, the Court, based on the ECtHR case law, must assess the Applicant's allegations of the court's bias under the subjective and objective test.

53. As to the subjective test, the Court recalls that the personal impartiality of a judge must be presumed until proven otherwise. The Applicant has not submitted any evidence which could call into question the impartiality of the Presiding Judge at the Supreme Court. Consequently, the Court notes that in rendering Judgment [Rev. No. 308/2015] of 12 January 2017, no evidence can substantiate the finding that the court was not impartial under the subjective test.

54. Therefore, the Court should assess the impartiality of the court in terms of the objective test and, consequently, based on the ECHR case law, if (i) there are sufficient facts and circumstances which may raise legitimate doubts as to the court impartiality; and (ii) these doubts regarding the impartiality of the court in the circumstances of the present case may be objectively justified.

55. In the context of the Applicant's circumstances, namely in circumstances where the Supreme Court has twice decided by a panel of identical composition, to apply the objective test, beyond the general principles elaborated above, the Court is also referred to the concrete case law of ECtHR, through which it had essentially decided on similar matters, namely whether deciding twice by an identical composition of the relevant courts could violate the objective test of the impartiality of the court and under what circumstances.

56. In this regard, the ECtHR has consistently held that the same composition of the trial panels in examining a same issue at different stages of the proceedings results in a violation of the right to an impartial trial and that such possible violations depend on the specific circumstances of a case. According to the case law of the ECtHR, it cannot be stated as a general rule in cases when a superior court which remands the case for retrial is bound to send the case back to a different panel with another composition (See, ECtHR case, *Ringeisen v. Austria*, Judgment of 17 July 1971, paragraph 97).

57. Specifically, in cases *Ringeisen v. Austria* (ECtHR Judgment of 17 July 1971); *Diennet v. France* (Judgment of the ECtHR of 26 September 1995) and *Ilnseher v. Germany* (ECtHR Judgment of 4 December 2018), the Court held that "*for it cannot be stated as a general rule*

resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority". The Court reiterated that "*nor, finally, can any grounds of legitimate suspicion be found in the fact that the judges that had participated in the first decision, cannot participate in the second one*". Such a position, the Court also held in the case of *Thomman v. Switzerland* (ECtHR Judgment of 21 May 1996). In this case, the Court did not find any violation in the composition of a panel that had ruled twice in relation to the same applicant. The court in this case stated that with the remand of the case for retrial, "*the judges made a fresh and thorough review of the case*". (See, for more, the case of ECtHR, *Thomman v. Switzerland*, cited above, paragraph 33 and references therein).

58. However, in the context of the same trial panels/decision-making panels, the ECtHR has found, in certain circumstances, a violation of the right to fair and impartial trial. ECtHR cases *Driza v. Albania* (ECtHR Judgment of 13 November 2007) and *San Leonard Band Club v. Malta* (ECtHR Judgment of 29 July 2004) fall into this category.

59. In the first case, namely in the case *Driza v. Albania*, the ECtHR *inter alia* examined the Applicant's allegations as to the lack of impartiality of the High Court because, according to the allegation (i), three of the judges of the High Court were two times members of the trial panel; and (ii) the President of the High Court had played a dual role during the recourse process. With regard to the first, the ECtHR found that the three judges who had participated in the trial panel had twice decided in disfavor of the complainant's and as a result, such a situation could have raised legitimate doubts on the complainant with regard to the impartiality of the High Court. The ECtHR further assessed whether those doubts were objectively justified. The ECtHR found this to be the case, because the three members of the trial panel had in fact decided on a law-related complaint and that the latter "*would decide whether they had made a mistake in their previous decision or not.*" As for the role of the President of the Court, the ECtHR had emphasized that the recourse procedures in the interest of the law begun at the request of the latter and who had already decided in disfavor of complainant, so it concluded that "*this practice was not compatible with the criterion of subjective impartiality of a judge"* because "*no one can be in the same case both the claimant and judge*".

60. While in the second case, namely in case *San Leonard Band Club v. Malta*, the ECtHR, *inter alia,* reviewed the Applicant's allegations as to the lack of impartiality of the Court of Appeals, that decided on the admissibility of his request for retrial. The Applicant claimed that the

same panel of the Court of Appeals which had decided regarding the Judgment of 30 December 1994, by the Judgment of 13 March 1995, also rejected his request for retrial justified through allegations of manifestly erroneous application of the law. The compatibility with the Constitution and the ECHR of the Judgment of the Court of Appeals was also confirmed by the Maltese Constitutional Court, which annulled a Judgment of the Civil Court which had dealt with the constitutional allegations of the Applicant and found a violation of the right to impartial trial as a result of the same composition of the panel of the Court of Appeals. (See for more paragraphs 19 to 28 of the case *San Leonard Band Club v. Malta*).

61. In assessing the compatibility with the guarantees of Article 6 of the ECHR, the ECtHR first assessed whether the circumstances of the present case could raise legitimate doubts as to the impartiality of the court. In this regard, it found that the fact that the panel of the respective Court of Appeals had twice decided in the same composition constituted a situation which could raise legitimate doubts as to its impartiality (see the detailed reasoning in this context in paragraphs 60, 61 and 62 of this ECtHR case). Following this determination, the ECtHR secondly, assessed whether those doubts were objectively justified. The ECtHR found this to be the case. It reasoned this finding based on the fact that the judges of the panel of the Court of Appeals in the second time were called upon to decided on a complaint relating to the law enforcement issues and were therefore called upon to assess whether they had applied the law in manifestly erroneous manner, namely whether they themselves had the ability to apply the law in a fair manner. (see, in addition, paragraph 63 of the specific case).

62. The Court notes that in both cases, the ECtHR emphasized and admitted that in circumstances where the same panel of judges has decided twice on the same case, there may be legitimate doubts from the perspective of the parties to the proceedings on the impartiality of the court and that in such circumstances it is necessary to further assess whether these doubts may be objectively justified. According to the ECtHR, as stated above, this assessment must be made in each case separately. (See, ECHR cased *Driza v. Albania*, cited above, paragraph 80, and *San Leonard Band Club v. Malta*, cited above, paragraph 62).

63. In assessing whether, in such circumstances, the applicants' doubts may be objectively justified, the ECtHR held that the essential test is related to the nature of the legal remedy that has been used and, if the particulars of a case, the relevant trial panel of judges is called upon to evaluate and determine their own alleged mistakes of their prior

decision or even more specifically, if the application that this trial panel had made in advance of the law, had been adequate and sufficient. (See, in this context, the ECtHR case, *San Leonard Band Club v. Malta*, cited above paragraph 64). In such circumstances, the ECtHR found that the fear of the parties as to the impartiality of the relevant courts is objectively justified.

64. In the context of the circumstances of the present case, the Court, based on the ECHR practice, notes that the fact that the panel in the Supreme Court had identical composition in both cases could raise legitimate doubts from the perspective of the parties to the proceedings regarding the impartiality of the court. Therefore, in such circumstances, it is necessary to proceed with the assessment of whether such allegations may be objectively justified.

65. In order for these doubts to be objectively justifiable, the Court must examine the nature of the case which this panel has decided for the second time. In this regard, the Court recalls that the Supreme Court rendered its second Judgment, namely Judgment [Rev. No. 308/2015] of 12 January 2017, after its first Judgment was declared invalid, namely, Judgment [Rev. No. 3018/2015] of 12 November 2015, by the Court in Case KI18/16. The latter, as noted above, found that the Supreme Court, by its first Judgment, rendered a decision which did not meet the standards of a reasoned judicial decision.

66. In this regard, the Court emphasizes that the Judgment of the Court in Case KI18/16 exclusively pertained to the lack of reasoning of the Judgment of the Supreme Court, namely, Judgment [Rev. no. 308/2015] of 12 November 2015. The Court did not find a violation regarding manifestly erroneous or arbitrary application of the law. In the circumstances of the present case, in rendering the second Judgment, namely Judgment [Rev. no. 308/2015] of 12 January 2017, the members of the panel of the Supreme Court (i) were not called upon to assess and determine whether they have applied the law in manifestly erroneous manner, or even more specifically, to assess their ability to properly and adequately apply the law; but (ii) were obliged to further reason their decision based on the specifics and instructions of the Judgment of the Court in Case KI18/16.

67. Therefore, the circumstances of the present case differ from those of cases *Driza v. Albania* and *San Leonard Band Club v. Malta*. This is because in the first case, acting on the appeal, the same High Court panel was called upon to assess whether it had applied the law in manifestly erroneous manner in the first time, beyond the fact that the Presiding Judge of the respective panel had played a double role in the

recourse process of the law. In the second case, similarly, a panel of the Court of Appeals that once decided on the Applicant's disfavour, also decided the second time to reject his request for retrial, being called upon that the second time assesses itself whether it has applied the law in a correct manner the first time.

68. Therefore, since the same composition of the panel in rendering the challenged Judgment in the circumstances of the present case, based on the case law of the ECtHR, is sufficient reason to (i) raise legitimate doubts of the Applicant on the impartiality of this court; however, (ii) these doubts, in the circumstances of the present case, are not objectively justified.

69. This is because, in the circumstances of the present case, as mentioned above, based on the finding of the Judgment of the Court in case KI18/16, the Supreme Court was only obliged to (i) further reason its previous decision based on the instructions of the Court in order for it to meet the standards of a reasoned judicial decision; and (ii) to assess whether that panel itself first time applied the law in a manifestly erroneous manner, or in other words, to assess whether it was able to apply the law correctly.

70. Finally, and as reasoned in this Judgment, the Court found that (i) the Supreme Court failed to reason its decision for the second time, stating that the second Judgment of the Supreme Court was also rendered in violation of the Applicant's right to a reasoned judicial decision contrary to the guarantees set forth in Article 31 of the Constitution in conjunction with Article 6 of the ECHR; but however, it has not found (ii) that this Judgment was rendered by a partial court under a subjective and objective test established by the ECtHR case law.

71. At the end, the Court notes that the Applicant also alleges a violation of paragraph 4 of Article 21 of the Constitution, and which he merely mentioned and quoted its content, without providing any explanation as to how and under what circumstances this provision was allegedly violated. Moreover, this constitutional provision in its substance specifically refers to "*legal persons*", stipulating that the fundamental rights also apply to them to the extent applicable, implying the possibility that even the legal persons may be affected with violations of fundamental rights and freedoms, when they have applicability in that specific case. In the present case, the Applicant filed an individual Referral and in this context, the Court finds that there is no connection between their Referral and the relevant constitutional provision. (See, *inter alia*, case of the Court KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 8 June 2018, paragraph 75).

Conclusion

72. The Court notes that (i) the right to a reasoned court decision and (ii) the independence and impartiality of the court, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the issues raised by the Applicant in the circumstances of the present case, are essential constitutional issues.

73. In the circumstances of the present case, the Court found that Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court did not remedy the flaws identified by the Judgment in the case KI18/16 and therefore continues not to satisfy the standards of a reasoned judicial decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

74. However, the Court has not found that Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court was rendered by a partial court within the meaning of a subjective and objective test of the impartiality of the court established by the case law of the ECtHR, because although the latter was rendered by the identical composition of the panel and which had decided and rendered the preliminary Judgment, namely, Judgment [Rev. 308/2015] of 12 November 2015, thus resulting in legitimate doubts about the impartiality of the court, in the assessment of the Court, these doubts, in the circumstances of the present case, are not objectively justified.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, and Rules 56 (1) and 74 (1) of the Rules of Procedure, unanimously, in the session of 17 May 2019:

I. DECLARES the Referral admissible.

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

III. DECLARES invalid Judgment Rev. No. 308/2015 of the Supreme Court of Kosovo of 12 January 2017.

IV. REMANDS the Judgment of the Supreme Court for reconsideration in accordance with the Judgment of this Court;

V. REMAINS seized of the matter, pending compliance with that order;

VI. ORDERS that this Judgment is notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VII. DECLARES that this Judgment is effective immediately.

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

KI145/18, Applicant: Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi Constitutional review of Decision AC. No. 530/2016 of the Court of Appeals, of 18 June 2018

KI145/188, Judgment adopted on 19 July 2019 and published on 15 August 2019

Keywords: *individual referral, civil procedure, equality before the law, right to a fair trial, admissible referral, violation of Article 31 of the Constitution.*

The Applicants alleged that the regular courts, by failing to recognize their right to ownership over the challenged immovable property, had violated equality before the law and Article 6 of the Convention, because *"...from the same legal basis as refugees of the Republic of Albania, at the same time, the immovable property (house and land) was given for use; is also given for use to the family of E. M., A. M., A. M., A. M. and F. D. all from the village of Bregu i Zi of M. of Lipjan, then to the Bresa family from Gracka e Vogel M. of Lipjan".* In support of their allegation, the Applicants attached to the Referral three Judgments of the former Municipal Court in Prishtina C. No. 164/2003 of 25 February 2003, C. No. 146/2009 of 12 November 2007 and C. no. 98/2010, of 21 January 2014.

The Court initially assessed whether the Referral fulfilled the admissibility requirements as set out in the Constitution and further specified in the Law on the Constitutional Court and in the Rules of Procedure of the Court. The Court considered that the Court of Appeals did not address at all the Applicants' allegation, who requested that their case be treated similarly, to other cases where other families, such as refugees coming from the Republic of Albania in 1960, acquired ownership of the challenged properties by factual possession through of the acquisition by prescription. After having assessed the proceedings in entirety, and in particular the reading of the Judgment of the Court of Appeals, the Court found that the failure to address the Applicants' allegation constitutes an uncorrectable flaw of the Judgment and is, therefore, incompatible with Article 31 of the Constitution and Article 6 of the Convention.

In conclusion, the Court found that the Judgment of the Court of Appeals Ac. No. 530/2016 of 18 June 2018, rejecting the Applicants' appeal, did not respect the constitutional standard of reasoning of the judicial decision. Accordingly, the Court finds that there has been a violation of Article 31 of the Constitution [Right to Fair and Impartial Trial] and Article 6.1 of the Convention [Right to a fair trial].

JUDGMENT

in

Case No. KI145/18

Applicant

Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi

Constitutional review of Decision AC. No. 530/2016 of the Court of Appeals of 18 June 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of**:**

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

Applicant

1. The Referral was submitted by Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi, residing in the village Babush i Muhaxherëve, Municipality of Lipjan (hereinafter: the Applicants), who are represented by Sabri Kryeziu, a lawyer from Lipjan.

Challenged decision

2. The Applicants challenge the constitutionality of Decision Ac. No. 530/2016 of the Court of Appeals of 18 June 2018, which was served on them on 12 July 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly violates the Applicants' rights guaranteed by Article 3 and 24 [Equality Before the Law] of the

Constitution, and Article 6 of the European Convention on Human Rights (hereinafter: the Convention), in conjunction with Article 31 of the Constitution.

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article of the Constitution, Article 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 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 Constitutional Court

5. On 2 October 2018, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 9 October 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel, composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha (members).

7. On 26 October 2018, the Court notified the Applicants about the registration of the Referral. A copy of the Referral was sent to the Court of Appeals on 8 May 2019.

8. On 10 May 2019, the Court requested additional information from the Basic Court in Prishtina, Branch in Lipjan, regarding the Judgments which the Applicants attached to the Referral.

9. On 22 May 2019, the Basic Court in Pristina, Branch in Lipjan informed the Court that Judgments C. No. 164/2003 (25 February 2003) and C. No. 146/2009 (12 November 2007) are final, after being upheld by the former District Court in Prishtina, whereas Judgment C. No. 98/2010 (21 January 2014) to which the Applicants also refer *"has been remanded for re-procedure where now it has a new case number C. No. 526/18 and is in the process of judicial review"*.

10. On 19 July 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare the Referral admissible and to assess the content of the referral.

Summary of facts

11. The present referral relates to some immovable properties, namely cadastral parcels no. 173, 636, 638 and 641, all identified in possession list no. 169 CZ Babush i Muhaxheer;ve, Lipjan municipality. The immovable property in question was purchased from the Municipality of Lipjan by some private owners (in the 1960-ies). The funds for purchase were provided by the United Nations International Refugee Fund, headquartered in Geneva, Switzerland, for the purpose of sheltering and integrating refugees who came from Albania in the 1960-ies. This immovable properties were then given for use, in good faith, to the Applicants in 1969. However, ownership of these immovable properties has since remained registered in the name of the Municipality of Lipjan.

12. On 25 February 2009, the Applicants filed a statement of claim with the Municipal Court in Lipjan seeking to confirm the ownership over the immovable property referred to above, claiming that they had acquired it by lawful possession since 1969 by the Municipality of Lipjan, based on the contract Vr. No.248 /68 of 17 June 1968.

13. On 16 August 2010, the Municipal Court in Lipjan, by Judgment C. No. 48/2009, upheld the Applicant's claim and confirmed that they had acquired the right of ownership on the basis of lawful possession of the immovable property no. 173, 636, 638 and 641, all registered in the possession list no. 169 CZ Babush i Muhaxherëve. By this judgment, the court obliged the respondent, the Municipality of Lipjan, to recognize to the Applicants the right of ownership of the immovable property in question and to allow their registration as the property of the Applicants in the Immovable Property Registry in Lipjan Municipality, Cadastral Zone Babush i Muhaxherëve.

14. In its judgment, the first instance court reasoned as follows: *"Based on [these] facts the court in support of the provisions of Article 28 para. 4 of the Law on Property-legal Relations concludes that the claimants as conscientious possessors have acquired the ownership right to the disputed immovable property described in item I of the enacting clause over 20 years as a bona fide possessors, despite the fact that this the immovable property is registered in the books of the Cadastral Register in the name of the respondent, as Article 16 of the Law Amending and Supplementing the Law on Basic Property Relations no. 29 promulgated in the Official Gazette of RSY no. 29/1996 by which provision was deleted Article 29 of the said Law which provides that in socially owned objects the right of ownership cannot be acquired by retention, so after the deletion of this legal provision the social and private property are equated in terms of the acquisition of the right of ownership by retention".*

15. On an unspecified date, the Municipality of Lipjan filed an appeal with the Court of Appeals on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of substantive law.

16. On 14 November 2014, the Court of Appeals by Decision Ac. No. 1855/12 quashed the judgment of the court of first instance and remanded the latter for re-trial and reconsideration, on the grounds that "*...the legal assessment of the first-instance court that pursuant to the institute of the acquisition by prescription, the claiming party has acquired the property right under Article 28 para. 4 of the LBPLR, in conjunction with Article 16 of the Law on Amending and Supplementing this Law, cannot stand, because it is also subject to the provisions of the Law on Associated Labor, the legal rules of civil law and Article 29 of the LBPLR. -the right of ownership in socially owned property cannot be acquired on the basis of the acquisition by prescription".*

17. On 11 November 2015, the Basic Court in Prishtina, Branch in Lipjan, joined two claims, that of the Applicants and of some other claimants, who also requested the confirmation of ownership of the abovementioned immovable property, and in a single case decided to:

    1) rejected the statement of claim of the Applicants requesting a confirmation of ownership over the parcels no. 173, 636, 638 and 641, all registered in CZ Babush i Muhaxherëve, in possession list number 169, with the reasoning that "*Since in the present case the claimants Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi, from the village Babush I Muhaxherëve, with no evidence until the conclusion of the main hearing, argued the manner of acquiring the ownership over the immovable property described in the enacting clause of this judgment, as provided by the foregoing provisions, therefore, the court rejected the statement f claim of the claimants as unfounded and decided as in item I of the enacting clause of this judgment".*

    rejected the statement of claim of claimants A.L., M.L. and A.L, from Babush i Muhaxherëve, who also sought the confirmation of ownership of parcels 173, 636, 638 and 641, all registered with CZ Babush i Muhaxherëve, on the basis of the 1966 sale-purchase contract, alleging that their predecessor paid the price in the name of the deposit from 1/3 of the total price in respect of the immovable property in question.

18. On 29 December 2015, the Applicants appealed to the Court of Appeals against the first instance judgment of 11 November 2015 on the grounds of essential violations of the provisions of the contested proceedings, erroneous determination of the factual situation and erroneous application of substantive law. The Applicants specifically requested the court in question to treat their case similar to some of the same other cases (of several other families), which had acquired the property right by way of the acquisition by prescription.

19. On 18 June 2018, the Court of Appeals, by Judgment Ac. No. 530/18, rejected as ungrounded the Applicants' appeal and upheld Judgment C. No. 19/2015 of the Basic Court in Prishtina-Branch in Lipjan, of 11 November 2015, with the following reasoning:

> *"In order to acquire the property right, the two legal requirements must be fully met, to exist a valid basis for acquiring the property right (Article 20 of the aforementioned law), but in addition the property right is acquired by registering in public books of the immovable property or otherwise provided by law (Article 33 of the same law). It follows that in addition to the legal basis for acquiring ownership, there must also be a legal way of acquiring property, and in this case it does not exist due to the fact that immovable property is still evidenced as socially owned property in the name of Lipjan Municipality..*
>
> *The second instance court accepts the assessment of the first instance court that, pursuant to the institute of the acquisition by prescription, the first claimants could not acquire the right of ownership over the contested immovable property, even though by the provision of Article 16 of the Law on Amending and Supplementing the Law LBPLRY, "Official Gazette of the SFRY, No. 29/26, which entered into force on 05.07.1996, stipulating that Article 29 of this Law shall be deleted, but this provision cannot be applied in this specific legal case, but eventually it is possible to apply after the entry into force of this law, whereas in the case of the claimants this provision was not in force, and the principle that the law which was in force at the time of the establishment of the legal-civil relationship applies. According to these provisions, taking into account the provisions of the Law on Associated Labor, the right of ownership of socially owned property in no circumstances can be acquired on the grounds of acquisition by prescription. From the reasons presented the court finds that the first claimants have not met any legal*

requirements to be recognized the right of ownership by acquisition by prescription and that under Article 28 of the LBPLRY".

20. On 9 August 2018, the Applicants filed a request with the State Prosecution in the Supreme Court against the Judgment of the Court of Appeals of 18 June 2018 on the grounds of erroneous application of the substantive law.

21. On 27 August 2018, the Office of the Chief State Prosecutor, by Notification KMLC. No. 117/2018, notifies the Applicants that it has not found sufficient legal basis to file a request for protection of legality with the Supreme Court.

22. On 31 August 2018, the Applicants submit a request for reconsideration to the Office of the Chief State Prosecutor of the proposal for a request for protection of legality, invoking discrimination, namely unequal treatment.

23. On an unspecified date, the Office of the Chief State Prosecutor examines the Applicants' Referral and reasons: "*...we inform you again that we have found that we have no legal basis for filing this extraordinary legal remedy, because this remedy can only be filed by us only if the violation pertains to territorial jurisdiction, since the first instance court rendered the judgment without a main hearing, whereas it was obliged to hold the main hearing, if it was decided on the request on the ongoing case, or if in contravention of the law the public was excluded from the main hearing or if the substantive law was violated. In the present case, according to none of our findings, these legal requirements for filing this extraordinary legal remedy were met".*

Applicant's allegations

24. The Applicants allege that the regular courts, by failing to recognize their ownership right over the disputed immovable property, have violated the equality before the law and Article 6 of the Convention on the following grounds and reasons

"the plaintiffs are Ashkali, minorities, while from the same legal basis as refugees of the Republic of Albania, at the same time, the immovable property (house and land) was given for use, the same court granted ownership to F.I.family from the village of Babush i Muhaxherëve, from the same base is given also to the family of E.M., A.M., A.M., A.M. and F.D. all from the village Bregu i Zi

Lipjan Municiplaity, then to Bresa family from the village Gracka e Vogel from M. Lipjan". In addition to this Referral, we attach to the Constitutional Court a judgment, where it was decided on the recognition of ownership by the same court to Xh.H. from village Babush i Muhaxherëve, M. of Lipjan, where the case is identical in both the factual and the legal situation. And in this way for the identical case the court, because they are Ashkali, did not recognize to the claimants the right of ownership, while to all other cases did, whereby it violated equality before the law".

25. In support of their allegation, the Applicants have attached to the Referral three Judgments of the former Municipal Court in Prishtina C. No. 164/2003 of 25 February 2003, C. No. 146/2009 of 12 November 2007 and C. No. 98/2010, of 21January, 2014.

26. Finally, the Applicants request the Court to modify Judgment C. No. 19/2015 of the Basic Court in Prishtina-Branch Lipjan, of 11 November 2015 and to approve their statement of claim for recognition of the ownership over the disputed immovable property, or to quash Judgment C. No. 19/2015 of the Basic Court in Prishtina-Branch in Lipjan of 11 November 2015 and Judgment Ac. No. 530/2016 of the Court of Appeals of 18 June 2018 and remand the case for retrial.

Admissibility of the Referral

27. The Court first examines whether the Applicants have fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and foreseen in the Rules of Procedure.

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

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

[...]

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

[...]".

29. The Court also examines whether the Applicants have fulfilled the admissibility requirements, foreseen by 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...".

30. As to the fulfillment of the abovementioned criteria, the Court finds that the Applicants are authorized parties; have exhausted available legal remedies; have clarified the act of public authority which constitutionality they challenge and the constitutional rights which allegedly have been violated, and have submitted the referral in time.

31. The Court further examines whether the Referral fulfills the admissibility requirements laid down in Rule 39 (1) (d) and 39 (2) of the Rules, which establish:

Rule 39
[Admissibility Criteria]

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

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

(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".

32. The Court concludes that this Referral initiates a constitutionally reasoned allegation *prima facie* and is not manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure.

33. Therefore, the Court will assess the merits of the case by examining the allegations as filed in the Referral.

Merits of the Referral

34. Initially, the Court recalls that Article 53 of the Constitution obliges the Constitutional Court that: "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

35. With regard to the rights claimed by the Applicants, the Court recalls the case law of the European Court of Human Rights (hereinafter: ECtHR), which states that*: "A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on"* (See, ECHR case *Ştefanica and Others v. Romania*, Judgment of 2 November 2010, paragraph 23).

36. Therefore, the Court will analyze the Applicants' complaints, relying on the alleged facts and the evidence attached to the Referral, in order to respond to the allegations of violations of the rights guaranteed by the Constitution and the Convention.

37. The Court notes that the Applicants challenge Judgment Ac. No. 530/2016 of the Court of Appeals, of 18 June 2018, which upheld Judgment C. No. 19/2015 of the Basic Court in Prishtina-Branch Lipjan of 11 November 2015. They allege that these judgments violated their right to "equality before the law" guaranteed by Article 24 of the Constitution and the right to a "fair trial" guaranteed by Article 6 of the Convention.

38. Regarding this case, the Court notes that the Applicants as the main allegation before the Court raise the issue of treating their case

differently, as compared to some other identical cases. The Applicants emphasize that the same court, alluding to the former Municipal Court in Prishtina, recognized the property rights to some other families on the basis of the acquisition by prescription, while in their case the courts did not take into account the same factual and legal circumstances. In support of this allegation, they have attached to the Referral three decisions of the same courts on identical cases. (see paragraph 25 of this Judgment).

39. The Court, based on the principle of subsidiarity, namely the exhaustion of effective legal remedies in the substantive sense, will assess whether the Applicants' allegation regarding the different treatment of cases under the same factual and legal circumstances was raised before the regular courts and if addressed by them, in accordance with the right to a reasoned decision, as guaranteed by Article 31 of the Constitution and Article 6 of the Convention.

40. In this regard, the Court recalls that Article 31 of the Constitution and Article 6 of the Convention, establish:

Article 31 [Right to Fair and Impartial Trial of the Constitution

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

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

Article 6.1 (Right to a fair trial) of the Convention

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".

General principles on the right to a reasoned decision developed by ECtHR case law

41. The Court notes, first of all, that the guarantees contained in Article 6 paragraph 1 of the ECHR include the obligation of the courts to provide a reasoning for their decisions. The reasoned court decision, shows to the parties, that their case has really been examined. (see

judgment of the ECtHR *H. v. Belgium*, application 8950/80, paragraph 53 of 30 November1987).

42. The Court also states that, according to the ECtHR case law, Article 6 paragraph 1 obliges the courts to give reasons for their judgments, but this cannot be understood as requiring a detailed answer to every argument (see ECtHR cases *Van de Hurk v. Netherlands*, judgment of 19 April 1994, *Garcia Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, paragraph 26, *Jahnke and Lenoble v. France*, *Perez v. France* [GC], paragraph 81.).

43. In this regard, the ECtHR adds that even though a domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, it is also obliged to justify its activities by giving reasons for its decisions (see ECtHR Judgment *Suominen v. Finland*, Case 37801/97, 1 July 2003, paragraph 36).

44. The Court also states that, in accordance with the ECtHR case law, when examining whether the reasoning of a court decision meets the standards of the right to a fair trial, the circumstances of the particular case should be taken into account. The court decision cannot be without any reasoning, nor will the reasoning be unclear. This applies in particular to the reasoning of the court decision deciding upon the legal remedy in which the legal position presented in the lower instance court decision has been changed (see: case of ECtHR *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61).

45. The Court wishes to reiterate that the notion of a fair procedure, in accordance with the case law of the ECtHR, requires that a national court which has given sparse reasons for its decisions, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court. This requirement is all the more important where a litigant has not been able to present his case orally in the domestic proceedings (see *Helle v. Finland*, ECHR Judgment, Case 157/1996/776/977, 19 December 1997, para. 60).

46. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and reflections when considering the proposed evidence on one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them (the Constitutional Court, cases: no.

KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; no. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI96/16 *IKK Classic*, Judgment of 8 December 2017).

Application of the abovementioned principles to the right to a reasoned decision in this case

47. The Court recalls that in examining allegations of a violation of the right to fair and impartial trial, the Court assesses whether the court proceedings in their entirety have been fair and impartial, as required by Article 31 of the Constitution (*see, inter alia, mutatis mutandis, Edwards v. United Kingdom,* 16 December 1992, p. 34, Series A, No. 247 and *B. Vidal v. Belgium,* 22 April 1992, p. 33, Series A. No. 235).

48. As mentioned above, the Court will assess whether the Applicants' allegation has been properly addressed by the regular courts and in accordance with the right to a reasoned and reasonable decision.

49. On the basis of the case file, the Court notes that the Applicants raised the allegation of unequal treatment before the regular courts, initially before the Basic Court in Prishtina, Branch in Lipjan, which by Judgment C. No. 19/2015 of 11 November 2015, reasoned that:

> "*...in the present case it has adjudicated and decided based on the Law and not in accordance with the case law and also following the instructions of the Court of Appeals of Kosovo".*

50. The Court notes that the same allegation was also raised by the Applicants in the Court of Appeals, where they specifically stated in their appeal that:

> "*...they presented to the court also a final judgment, whereby the same ground was acquired the ownership of an identical case similar to that of a refugee in the same village, however the court did not take into account this judgment on the grounds that it had decided based on the law and not according to the case law".*

51. However, the Court notes that the Court of Appeals upholds Judgment C. No. 19/2015 of the Basic Court in Prishtina, Branch in Lipjan, of 11 November 2015, without addressing the Applicants' allegation as to the decision of their case in line with the case law of the first instance court, as it had decided in the cases of other families in identical circumstances.

52. The Court notes that the same allegation was raised by the Applicants in their request for protection of legality with the Office of the Chief State Prosecutor. This request was rejected on the grounds that there was no legal basis for filing this extraordinary legal remedy.

53. In this regard, the Court recalls that the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, also includes the right to a reasoned judicial decision. The reasoning of decisions is an essential element of a fair decision. A further function of a reasoned decision is to demonstrate to the parties that they have been heard, and to afford a possibility to them to appeal against it. In addition, it is only by giving a reasoned decision that there can be public scrutiny of the administration of justice (see Judgment of the Constitutional Court, case KI72/12, Judgment of 17 December 2012).

54. The Court reiterates that the regular courts are not obliged to address all of the allegations submitted by the Applicants. However, they must address the main allegations underlying the case under consideration - and which are raised in all stages of the proceedings as it happened in the present referral. (see *mutatis mutandis*, Constitutional Court decisions: KI135/14, Judgment of 8 February 2016 and KI22/16, Judgment of 2 May 2017).

55. The Court reiterates that the right to fair and impartial trial includes, above all, the obligation of the courts to provide sufficient reasons for their decisions, both in procedural and in substantive terms (see Constitutional Court, case KI135/14, Judgment of 8 February 2016 and case KI22/16, Judgment of 2 May 2017).

56. The application of this principle was assessed by the Court on a case-by-case basis, depending on the concrete circumstances of the case, analyzing whether the challenged court decisions have sufficiently fulfilled the obligation to reason their decisions.. The extent to which this duty to give reasons applies may vary according to the nature of the court decision and must be determined in the light of the circumstances of the case (*Hirvisaari v. Finland,* ECtHR Judgment, of 27 September 2001, par. 30).

57. The Court considers that the Applicants' allegation of unequal treatment before the courts, which was raised before the regular courts, was substantial and supported by material evidence which raised issues under Article 24 of the Constitution, namely the question of inequality of the parties before the law. The proper addressing of the allegation in question by the regular courts would strengthen the Applicants' conviction that they were properly heard, in accordance

with the requirements of Article 31 of the Constitution and Article 6.1 of the Convention..

58. Had the Court of Appeals addressed the Applicant's substantive allegation of unequal treatment by the first instance court - irrespective of the response to that allegation (that is, whether this allegation would have been admissible or would be rejected as unfounded), then the condition of "the heard party" and proper administration of justice would be met.

59. The Court notes that it is not the task of the Constitutional Court to examine to what extent the Applicants' allegations in the proceedings before the regular courts are reasonable. However, the procedural fairness requires that the fundamental allegations raised by the parties before the regular courts should be properly answered - especially if they relate to important issues such as equality before the law. This especially applies for the reasoning of decisions where courts decide to change their legal position, for cases with the same factual and legal circumstances, namely, where they deviate from the previous case law.

60. After having assessed the proceedings in entirety, and in particular the reading of the Judgment of the Court of Appeals, the Court finds that the failure to address the Applicants' allegation constitutes an insuperable flaw of the Judgment and is therefore inconsistent with Article 31 of the Constitution and Article 6 of the Constitution.

61. The Court has just found that the Judgment of the Court of Appeals of 18 June 2018 is in contradiction with Article 31 of the Constitution and Article 6 of the Convention. Therefore, the Court considers it unnecessary at this stage to address the Applicants' allegations of violation of the rights guaranteed by Articles 3 and 24 of the Constitution and Article 14 of the Convention.

62. In conclusion, the Court finds that Judgment Ac. No. 530/2016 of the Court of Appeals of 18 June 2018, which rejected the Applicants' appeal, did not respect the constitutional standard of reasoning of the court decision. Accordingly, the Court finds that there has been a violation of Article 31 of the Constitution [Right to Fair and Impartial Trial] and Article 6.1 of the Convention [Right to a fair trial].

FOR THESE REASONS

The Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, Rule 59 (1) of the Rules of Procedure, in its session held on 19 July 2018, unanimously:

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO HOLD that there has been a violation of Article 31.1 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR;

III. TO DECLARE Judgment Ac. No. 530/2016 of the Court of Appeals, of 18 June 2018, invalid and REMAND it for retrial, in accordance with the Judgment of the Court;

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

V. TO ORDER that its Judgment KI145/18 be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VI. This Judgment is effective immediately.

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

KI128/17, Applicant: Naser Husaj, Constitutional review of Judgment Rev. No. 170/2017 of the Supreme Court of Kosovo of 23 August 2017

KI128/17, Judgment rendered on 29 July 2019, published on 28 August 2019

Keywords: *individual referral, Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 (Right to a fair trial) of the ECHR*

The Applicant alleged that the Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because the decision-making panel of the Supreme Court was biased due to the participation of Judge G.S., against whom the Applicant filed a criminal report in 2015 for rendering unlawful court decisions and conflict of interest, the criminal offenses foreseen by the Criminal Code of the Republic of Kosovo. The relevant criminal report according to the case file was related to another case of the Applicant, namely, Judgment [Rev. No. 335/2015] of 14 December 2015 and which thereafter, namely on 9 June 2017 was declared invalid by the Court in case No. KI22/16.

With regard to the Applicant's allegations relating to an impartial tribunal, the Court, *inter alia*, elaborated (i) the general principles of the European Court of Human Rights regarding the criteria for assessing the impartiality of a court; (ii) the concept of subjective and objective impartiality of the court; and (iii) the practice of the European Court of Human Rights in assessing the impartiality of the court, namely the concept of "*legitimate doubts"* and the fact that they must be "*objectively justified*" in order to establish the impartiality of a court.

In applying the abovementioned principles to the circumstances of the present case, the Court stated that the Judgment [Rev. No. 170/2017] of the Supreme Court of 23 August 2017 is in compliance with Article 31 [Right to Fair and Impartial Trial] of Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, because (i) despite the fact that the President of the Panel which rendered the challenged Judgment was a judge against whom the Applicant filed a criminal report, no other evidence or argument of the Applicant invalidates the presumption of impartiality of the respective judge; and, moreover, (ii) despite the fact that the participation of the respective judge in the Panel of the Supreme Court may have raised legitimate doubts of the Applicant as to the impartiality of the court, in the Court's assessment, these doubts, in the circumstances of the present case,

are not objectively justified under the objective test of the impartiality of the court.

Therefore, the Court found that the criminal report against Judge G.S., and unsupported by other circumstances and arguments, is not sufficient to determine that Judge G.S. was biased under the subjective test and that the Panel of the Supreme Court that rendered the challenged Judgment was biased in terms of the objective test.

Finally, the Court declared the Referral admissible and held that Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

JUDGMENT

in

Case No. KI128/17

Applicant

Naser Husaj

Constitutional review of Judgment Rev. No. 170/2017 of the Supreme Court of Kosovo of 23 August 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of**:**

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

Applicant

1. The Referral was submitted by Naser Husaj, a lawyer from Peja (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Judgment [Rev. No. 170/2017] of the Supreme Court of the Republic of Kosovo of 23 August 2017 (hereinafter: the Supreme Court) in conjunction with Judgment [CA. No. 3235/2013] of 6 September 2016 of the Court of Appeals and Judgment [C. No. 171/07] of 12 March 2013 of the Basic Court in Prishtina (hereinafter: the Basic Court).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's fundamental rights

and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (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 the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

5. On 31 May 2018, the Constitutional Court of the Republic of Kosovo (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 1 November 2017, the Applicant submitted the Referral to the Court.

7. On 3 November 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges: Ivan Čukalović, Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

8. On 8 November 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

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

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

11. On 22 August 2018, as the mandate as judges of the Court of four abovementioned judges was over, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision No. GJR. KI128/17 on the replacement of Judge Rapporteur and Gresa Caka-Nimani was appointed as Judge Rapporteur. Whereas, on 25 October 2018, the President of the Court rendered Decision No. KSH. KI128/17 on the replacement of the Presiding of the Review Panel and the Presiding was appointed: Arta Rama-Hajrizi.

12. On 29 July 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

13. On the same date, the Court unanimously found that Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

14. It follows from the case file that the Applicant was practicing a profession of a lawyer and at the same time was a member of the Kosovo Bar Association (hereinafter: the Bar Association).

With regard to criminal and administrative proceedings

15. During the period he was practicing as a lawyer, the criminal proceedings were initiated against the Applicant for the criminal offense of fraud established in paragraph 1 of Article 140 of the Criminal Law of Kosovo.

16. On 3 July 2002, the Municipal Court in Peja (hereinafter: the Municipal Court) by Judgment [P. No. 155/2002] found the Applicant guilty of committing the criminal offense of fraud established by the Provisional Criminal Code of Kosovo (hereinafter: PCCK), imposing a sentence of 9 (nine) months of imprisonment, provided that within 2 (two) years he does not commit any other criminal offense.

17. On an unspecified date, the Applicant filed an appeal against the abovementioned Judgment of the Municipal Court, on the grounds of essential violations of the criminal procedure provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law.

18. On 5 August 2002, the Bar Association, based on Article 46 of the Law on the Bar and other Legal Assistance of 24 December 1979 (hereinafter: the Law on the Bar), suspended, by Decision, suspended the right to practice the Applicant's profession, until the completion of the disciplinary proceedings and criminal proceedings against him. The Applicant filed a claim for administrative conflict with the Supreme Court against this Decision.

19. On 21 April 2004, the District Court in Peja (hereinafter: the District Court), by Judgment [AP. No. 1/2003] rejected the Applicant's appeal as ungrounded and upheld the abovementioned Judgment of the Municipal Court.

20. According to the case file, on the same date, namely on 21 April 2004, the Bar Association, by Decision No. 111, terminated the suspension measure against the Applicant and allowed the continuation of the practice of the relevant lawyer. The Bar Association reasoned that (i) the criminal proceedings against the Applicant was completed by the Judgment of the District Court; and (ii) the disciplinary procedure was not conducted.

21. Against the abovementioned Judgment of the District Court, the Applicant filed a request for protection of legality with the Supreme Court.

22. On 16 December 2004, the Supreme Court, deciding on the administrative conflict upon the claim of the Applicant, by Judgment [A. No. 442/2002] annulled the Decision of the Bar Association, *inter alia*, on the grounds that (i)) it was contrary to the applicable Law of the General Administrative Procedure; (ii) it was issued based on erroneous and incomplete determination of the factual situation; and (iii) did not contain sufficient reasoning.

23. On 18 March 2005, the Supreme Court by Judgment [PKL. No. 16/2004] partially approved the Applicant's request for protection of legality and modified the abovementioned Judgment of the District Court only with regard to the legal qualification of the criminal offense, stating that the actions of the accused, namely of the Applicant, satisfy the elements of the criminal offense of fraud, as stipulated by paragraph 1 of Article 261 (Fraud) of the KCCP.

Regarding civil procedure

24. According to the case file, it results that on 28 February 2005, the Applicant initiated the claim against the Bar Association for

compensation of damage. The Municipal Court, by Decision [C. No. 286/05] of 22 March 2005, declared itself incompetent with respect to its territorial jurisdiction, ordering the case to be referred in competence of the Municipal Court in Prishtina. The Applicant against this Decision filed appeal. The District Court, by Decision [CA. No. 121/05] of 4 December 2006, rejected as ungrounded the Applicant's appeal, upholding the Decision of the Municipal Court regarding the territorial jurisdiction.

25. Through the request for compensation of damage, the Applicant sought compensation for material and non-material damage. In respect of the former, he requested that the Bar Association pays the amount of € 210,000 in respect of the lost profit, while in respect of the latter, he requested that the Bar Association pays the amount of € 510,000 for the violation of moral and professional integrity, including 4.5% interest rate from 27 April 2004.

26. On 12 March 2013, the Basic Court by Judgment [C. No. 171/07] rejected the Applicant's statement of claim, reasoning, *inter alia*, that the requirements laid down in Articles 154 (Foundations of Liability), 155 (Injury or Loss), 189 (Common Damage and Profit Lost) and 198 (Particular Provisions For Redressing Property Damage in Case Of Insult to One's Honour And Spreading False Statements) of the Law on Obligational Relationship of 30 March 1978 (hereinafter: the LOR).

27. On an unspecified date, the Applicant challenged the abovementioned Judgment of the Basic Court before the Court of Appeals, on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law, with the proposal that the appealed Judgment be modified or annulled and the case be remanded to the first instance court for retrial.

28. On 2 February 2015, the Applicant filed a criminal report with the State Prosecution against Judge A.B., Judge in the Basic Court, Judge Q.A., Judge in the Court of Appeals, and against Judges of the Supreme Court, M.R., G.S., E.H. for the commission of the criminal offenses of (i) unlawful enactment of judicial decisions provided for in Article 432 and (ii) conflict of interest as defined in Article 424 of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK). The criminal report concerning the judges of the Supreme Court was related, *inter alia*, to their participation in a panel which by Judgment [Rev. No. 335/2015] of 14 December 2015, rejected the Applicant's request for revision as ungrounded in another case of the Applicant.

29. On 6 September 2016, the Court of Appeals by Judgment [CA. No. 3235/2013] rejected the Applicant's appeal and upheld the Judgment of the Basic Court.

30. On an unspecified date, the Applicant filed a revision against the aforementioned Judgment of the Court of Appeals with the Supreme Court, on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law.

31. On 23 August 2017, the Supreme Court by Judgment [Rev. No. 170/2017] upheld the Judgment of the Court of Appeals and rejected the Applicant's revision as ungrounded.

Applicant's allegations

32. The Applicant alleges that the Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court violated his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

33. With regard to the allegations of a violation of Article 31 in conjunction with Article 6 of the ECHR, the Applicant alleges that the challenged Judgment of the Supreme Court was rendered by a partial court, because a part of the decision-making panel was also Judge G.S., against whom the Applicant filed a criminal report on 2 February 2015, in conjunction with the Judgment [Rev. No. 335/2015] of the Supreme Court of 14 December 2015 and which thereafter, namely on 9 June 2017, was declared invalid by the Court in case No. KI22/16. (See Case of Court No. KI22/16 with Applicant *Naser Husaj*, Judgment of 9 June 2017).

34. Finally, the Applicant requests the Court to declare his Referral admissible, and that the challenged Judgment of the Supreme Court be declared invalid, by remanding the case for retrial.

Admissibility of the Referral

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

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

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

37. The Court further refers to the admissibility requirements as further specified in the Law. In that regard, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

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

Article 48
[Accuracy of 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...".*

38. As to the fulfillment of these criteria, the Court considers that the Applicant is an authorized party and challenges an act of a public authority, namely Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms which have allegedly been violated in accordance with Article 48 of the Law and has submitted the Referral in accordance with the deadlines foreseen in Article 49 of the Law.

39. The Court also finds that the Applicant's Referral meets the admissibility requirements established in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible based on the requirements laid down in paragraph 3 of Rule 39 of the Rules of Procedure.

40. Moreover, and finally, the Court considers that this Referral is not manifestly ill-founded on constitutional basis as established in paragraph 2 of Rule 39 of the Rules of Procedure and, therefore, it must be declared admissible. (See also case of ECtHR *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144).

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.

[...]

LAW No. 03/L-006 ON CONTESTED PROCEDURE

CHAPTER III

EXCLUSION OF THE JUDGE FROM THE CASE

Article 67

A judge may be excluded from the legal matter:

a) if he or she is itself a party, a legal representative or authorized representative or is a co-creditor or codebtor or obliged for repay or if in the same issue he or she has been examined as a witness or as an expert;

b) if he or she is the spouse, the extramarital partner, a relation by blood in a direct line to any degree or in a collateral line to the fourth degree or a relation by marriage to the second degree to the defendant, or his or her legal representative or authorized representative;

c) if he or she is a legal guardian, ward, adopted child, adoptive parent, foster parent or foster child of the defendant, or his or her legal representative or authorized representative;

d) if in the same case he or she has taken part in rendering a decision of a lower court or any other body or has taken part in mediation procedure;

e) if he or she has taken part in a matter for which was made a judicial settlement, and the claim that has been filed requests annulment of such a settlement;

f) if he or she is a shareholder or a member of the commercial association which is a party in the initiated procedure;

g) if there are other circumstances that challenge his or her impartiality.

Merits

41. The Court recalls that the Applicant was found guilty of the criminal offense of fraud in July 2002 by the Municipal Court. As a result of this Judgment, the Bar Association suspended his right to practice the profession of a lawyer. During 2004, three relevant decisions related to the criminal proceedings against the Applicant and also the administrative proceedings concerning the Decision of the Bar Association were rendered. First, the District Court upheld the Judgment of the Municipal Court in respect of the criminal offense of fraud. Secondly, as a result of this Judgment, the Bar Association terminated the measure of suspension of practicing the profession against the Applicant. Thirdly, the Supreme Court, acting upon the Applicant's appeal, declared the Decision of the Bar Association unlawful. The Court notes, however, that the latter was annulled by the Bar Association before the relevant Judgment of the Supreme Court regarding the administrative proceedings, based on the Judgment of the District Court regarding the criminal proceedings. In 2005, the Supreme Court upheld the judgments of the lower instance courts concerning the criminal offense of fraud, thus completing the criminal proceedings against the Applicant.

42. As of 2005, the Applicant sued the Bar Association for compensation of material and non-material damage as a result of the Decision, which suspended his right to practice his profession. His request for compensation of damage was rejected through three Judgments of the regular courts, namely Judgment [C. No. 17110] of 12 March 2013 of the Basic Court, upheld by Judgment [CA. No. 323/2013] of 6 September 2016 of the Court of Appeals and Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court. The latter is challenged by the Applicant before the Court, challenging the composition of the relevant decision-making Panel, in which the President of the Panel was Judge G.S., against whom the Applicant in 2015 filed a criminal report with the State Prosecution Office. According to the Applicant, the participation of Judge G.S. in the Panel of the Supreme Court, results in violation of his right to fair and

impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

43. The Court notes that the criminal report against Judge G.S., according to the case file and the Applicant's allegations, relates to her participation in the decisaion-making Panel of the Supreme Court regarding the Judgment [Rev. No. 335/2015] of 14 December 2015 of the Supreme Court and which the Court, on 9 June 2017, in the case KI22/16 declared invalid.

44. In this respect, the Court initially notes that the subject matter which the Court dealt with in case KI22/16 regarding the constitutional review of Judgment [Rev. No. 335/2015] of the Supreme Court of 14 December 2015 and the subject matter in the present case, regarding the constitutional review of Judgment [Rev. No. 170/2017] of the Supreme Court of 23 August 2017, are different and unrelated. In the former, namely in case KI22/16, the case concerned a certificate of ownership, while the Applicant's allegations before the Court related to the participation of Judge Q.A. in the Panel of the Court of Appeals and against whom the Applicant also filed a criminal report. In the present case, the Applicant alleged that the Panel of the Supreme Court, of which Judge G.S. was an integral part, rejected the Applicant's request for revision, by Judgment [Rev. No. 335/2015] of 14 December 2015, without justifying the Applicant's allegations of partial trial at the appeal level, due to the participation of Judge Q.A. at the respective Panel.

45. By Judgment in case KI22/16, the Court declared the Judgment of the Supreme Court invalid on the grounds of an unreasoned judicial decision in contravention of the guarantees enshrined in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, specifically because the Supreme Court did not address the Applicant's allegations regarding the participation of Judge Q.A. in decision-making in the Court of Appeals. (See, case KI22/16, cited above, paragraphs 39, 45, 46, 50 and 51).

46. Therefore, the Court notes that the Judgment of the Court in case KI22/16 declared invalid the Judgment [Rev. No. 335/2015] of the Supreme Court of 14 December 2015, only in respect of the lack of reasoning of the court decision. The Judgment of the Court in case KI22/16 is in no way related to the composition of the decision-making panel of the Supreme Court nor to the participation of Judge G.S. in its composition.

47. Moreover, unlike case KI22/16 in which the Applicant alleged that the Supreme Court did not reason the participation of Judge Q.A. in the decision-making in the Court of Appeals, because he filed a criminal report against the latter, in the circumstances of the present case, the Applicant challenges the participation of Judge G.S. in the Panel of the Supreme Court and against whom the Applicant also filed a criminal report.

48. In this regard, the Court notes that the Applicant's allegations that the Judgment [Rev. No. 170/2017] of the Supreme Court of 23 August 2017 was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because the decision-making panel of the Supreme Court was allegedly biased due to the participation of Judge G.S., will be examined based on the case law of the European Court of Human Rights (hereinafter: hereinafter: the ECHR), in accordance with which, the Court based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

49. In this regard, the Court first recalls that the impartiality of a tribunal under Article 31 of the Constitution in conjunction with Article 6 of ECHR, based on the consolidated case law of the ECtHR, must be determined according to (i) a subjective test, that is on the basis of the personal conviction and behaviour of a particular judge implying that a judge may have had personal prejudice or bias in a particular case; and (ii) an objective test, that is ascertaining whether the court, *inter alia,* its composition offered guarantees sufficient to exclude any legitimate doubt in this respect (See, inter alia, ECtHR cases, *Miracle Europe KFT v. Hungary*, Judgment of 12 April 2015, paragraphs 54 and 55, *Gautrin and Others v. France*, Judgment of 20 May 1998, paragraph 58, *San Leonard Band Club v. Malta* Judgment of 29 July 2004, paragraph 58, *Thomann v. Switzerland*, Judgment of 10 June 1996, paragraph 30, *Wettstein v. Switzerland*, Judgment of 21 December 2000, paragraph 42, *Korzeniak v. Poland*, Judgment of 10 January 2017, paragraph 46; and case of the Court KI06/12, with Applicant *Bajrush Gashi*, Judgment of 9 May 2012, paragraph 45).

50. More specifically, as regards the subjective test, based on the ECtHR case law, personal impartiality of a judge must be presumed until there is proof to the contrary. (See, *inter alia*, ECtHR cases, *Mežnarić v. Croatia*, Judgment of 30 November 2005, paragraph 30; *Padovani v. Italy*, Judgment of 26 February 1993, para. 26; *San Leonard Band Club v. Malta*, cited above, paragraph 59; *Hauschildt v. Denmark*, Judgment of 24 May 1989, paragraph 47; *Driza v. Albania*, Judgment

of 13 November 2007, paragraph 75; and *Korzeniak v. Poland*, cited above, paragraph 47). As regards the type of proof required to prove such a thing, the ECtHR, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons. However, to decide whether in a concrete case there are sufficient grounds to determine that a certain judge is not impartial, the standpoint of the applicant is important but not decisive. (See, *inter alia*, ECtHR case, *De Cubber v. Belgium*, Judgment of 26 October 1984, para. 25). However, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the ECtHR. (See, ECtHR cases, *Kyprianou v. Cyprus*, cited above, paragraph 119; *Micallef v. Malta*, Judgment of 15 October 2009, paragraphs 93-94; and *Tozicka v. Poland*, Judgment of 24 July 2012, paragraph 33).

51. Furthermore, according to the case law of the ECtHR, while in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the criteria and requirement of objective impartiality of the court provides a further important guarantee. (See case of ECtHR *Micallef v. Malta*, cited above, paragraphs 95 and 101). It must be noted, that in the vast majority of cases raising impartiality issues, the ECtHR has focused and found violations in the aspect of the objective test of the impartiality of the court. (see also case of ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*, Judgment of 6 November 2018, paragraph 146; and *Korzeniak v. Poland*, cited above, paragraph 48).

52. As to the objective test, the Court notes that based on the ECtHR case law, when it is applied on a trial panel, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise legitimate doubts as to impartiality of the court. In this respect even appearances may be of a certain importance or, in other words, *"justice must not only be done, it must also be seen to be done*". (In this context, see, *inter alia*, ECtHR case, *De Cubber v. Belgium*, cited above, paragraph 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. (See, *inter alia*, ECtHR cases, *Castillo Algar v. Spain*, Judgment of 28 October 1998, paragraph 45; *San Leonard Band Club v. Malta*, cited above, paragraph 60; and *Golubović v. Croatia*, cited above, paragraph 49). Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. (See, ECtHR case, *Micallef v. Malta,* cited above, paragraph 98).

53. Furthermore, based on the case law of the ECtHR, the situations within which issues may arise regarding the lack of impartiality may be of (i) functional nature and (ii) personal. The first one relates to the exercise of various functions within a judicial proceeding by the same person or hierarchical or other nature between the judge and other actors in the particular judicial process. With regard to the latter, the level and nature of this connection should be examined. These situations of a functional nature may include examples of cases in which were carried out (i) advisory and judicial functions (in this context, see, *inter alia*, cases of ECtHR *Procola v. Luxembourg*, Judgment of 8 September 1995 , paragraph 45, *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraph 200; *Sacilor Lormines v. France*, Judgment of 9 November 2006, paragraph 74); (ii) judicial and extra-judicial (in this context, see, *inter alia*, ECtHR case, *McGonnell v. the United Kingdom*, Judgment of 8 February 2000, para. 52-57); and (iii) various court cases. In this context, the ECtHR emphasizes that the assessment of whether the participation of the same judge at different stages of the trial may have resulted in a violation of the requirements related to the impartiality of the court, should be assessed case by case and depending on the circumstances of each case . The second, namely, issues of personal nature, are mainly related to the conduct of a judge regarding a case or the existence of links with one of the parties or his/her representative in one case. (See further in this context, ECtHR Guide of 31 December 2018, on Article 6 of the ECHR, Right to a fair trial (civil aspect), Part III. Institutional Requirements, C. Independence and Impartiality, 3. The Impartial Court).

54. The Court also notes that, based on the ECtHR case law, the assessment of court's impartiality under a subjective and objective test implies that, it must be determined whether in a given case there is a legitimate reason to fear that a particular judge and/or trial panel lacks impartiality. However, beyond legitimate doubts, according to ECtHR case law, it is more important to determine whether this fear can be held to be objectively justified.(See, *inter alia*, ECtHR cases, *Mežnarić v. Croatia*, cited above, paragraph 31; *Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, paragraph 58; *Wettstein v. Switzerland*, cited above, paragraph 44; *San Leonard Band Club v. Malta*, cited above, paragraph 60; *Korzeniak v. Poland*, cited above, paragraph 49 and *Tozicka v. Poland*, cited above, paragraph33).

55. In the light of these general principles and their application in the circumstances of the present case, the Court recalls that the Applicant alleges that the fact that Judge G.S. participated in the rendering of the challenged Judgment of the Supreme Court, resulted in rendering this

Judgment by a partial court, in violation of his right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Court will initially consider the Applicant's allegations under the criteria established by the ECtHR case law regarding the subjective test.

56. In this context, the Court recalls that (i) the judge's personal impartiality must be presumed until there is a proof to the contrary; (ii) the latter may be established, *inter alia*, by facts which would prove that a judge shows hostility or ill will for personal reasons; and that (iii) in examining whether there can be legitimate doubts regarding a relevant judge as to his/her impartiality, the Applicant's views are relevant but not decisive.

57. In this regard, the Court recalls that the Applicant alleges that Judge G.S. was biased, because the Applicant filed a criminal report against the latter in 2015. The Applicant, according to the case file in his criminal report, alleged that a number of judges, including Judge G.S., rendered unlawful judicial decisions.

58. The Court initially notes that, in addition to the fact that the Applicant has filed the relevant criminal report against Judge G.S., he has not presented any further argument to the Court that the respective Judge may have shown ill will or hostility towards the Applicant, the necessary evidence to overturn the presumption of impartiality of a judge based on ECtHR case law.

59. In addition, the nature of the criminal report relates to the decision-making of Judge G.S., namely, and allegedly, the issuance of unlawful judicial decisions provided for in Article 432 and in the conflict of interest set forth in Article 424 of the CCRK. The Court also notes that based on the case file, the criminal report was filed on 2 February 2015 and consequently still has not been decided by the relevant Panel regarding the Judgment [Rev. No. 335/2015] of 14 December 2015 of the Supreme Court, related to which, with respect to Judge G.S., the Applicant filed this criminal report.

60. The Court notes that the addressing and assessment of the Applicant's criminal report is within the competence of other institutions of the Republic of Kosovo, however, it also emphasizes the submission of criminal reports against judges as a result of the parties' dissatisfaction with the outcome of the court decisions, and without the support of other facts and circumstances, which could objectively justify legitimate doubts about a court's impartiality in its decision-making, cannot in itself substantiate allegations of an Applicant of the

impartiality of a court, nor overturn the presumption of the impartiality of a judge.

61. As noted above, in assessing the impartiality of the respective judge, an Applicant's view is important but not decisive. The Court considers that in the case file and moreover, in the assessment of the challenged Judgment [Rev. No. 170/2017] of the Supreme Court of 23 August 2017, where the President of Panel was Judge G.S., there is no indication that could result in legitimate and objectively justifiable doubts that Judge G.S. in rendering the challenged Judgment, acted with prejudice or personal animosity towards the Applicant. Accordingly, the Court notes that in rendering the Judgment [Rev. No. 170/2017] of the Supreme Court of 23 August 2017, no fact can support the finding that Judge G.S., in the circumstances of the present case, was not impartial within the meaning of the subjective test.

62. The Court recognizes the fact that it is difficult to find and present arguments and evidence which could overturn the presumption of impartiality of the judge under the subjective test. The ECtHR has recognized the same fact and, which as a result, beyond the application of the subjective test, in assessing the claims of the applicants, also applies the principles of the objective test, as an additional guarantee to determine whether a particular decision has been taken by an impartial tribunal. (See in this case, ECHR cases, *Pullar v. the United Kingdom*, Judgment of 10 June 1996, paragraph 32; *Micallef v Malta*, Judgment of 15 October 2009, paragraph 95; and *Korzeniak v. Poland*, cited above, paragraph 49).

63. Therefore, the Court will further assess the impartiality of the court, in the circumstances of the present case, also within the meaning of the objective test, and consequently, on the basis of the ECtHR case law, will examine whether (i) there are facts and circumstances sufficient and which may raise legitimate doubts as to the impartiality of the court; and (ii) these doubts about the impartiality of the court in the circumstances of the present case may be objectively justified.

64. Initially, the Court notes that the fact that in a panel of the Supreme Court participated a Judge as a Presiding Judge against whom the Applicant filed a criminal report presents a circumstance which may raise legitimate doubts about impartiality of the court. However, the Court must assess whether these doubts, in the circumstances of the present case, are objectively justified.

65. In this context, the Court recalls that the ECtHR consolidated case law with regard to the application of the objective test has determined that

a party's allegations of impartiality of the court may be of a functional or personal nature. As noted above, the first one, in principle, relates to the exercise of the different functions of a judge in the same court process; while the second relates, in principle, to the conduct of a judge or the existence of connection with one of the parties or his/her representatives in a case.

66. The Court notes that in the circumstances of the present case, Judge G.S. and none of the other members of the Panel, and who rendered the challenged Judgment of the Supreme Court have exercised different functions within the same court process. Moreover, the Applicant does not allege, and the circumstances of the case do not result that there have been connections of a personal nature with the Applicant.

67. However, the Court also recalls the fact that the ECtHR held that organizational issues are relevant in assessing the impartiality of a court. (See in this context the case of the ECHR, *Piersack v. Belgium*, Judgment of 1 October 1982, paragraph 30). In this respect, the existence of procedures that ensure impartiality, namely, the rules and procedures that also regulate the withdrawal/recusal of a judge, are relevant factors. The court must therefore consider such rules that ensure impartiality when assessing whether a court is impartial.

68. In this respect, the Court recalls that Chapter III of Law No. 03/L-006 on Contested Procedure (hereinafter: the LCP) regulates the recusal of a judge from trial. Article 67 of this law defines the circumstances under which a judge cannot proceed the consideration of a legal case and should therefore be excluded with or without the request of the party.

69. With regard to the first possibility, namely the exclusion of a judge at the request of the party, the Court notes that Article 68 of the LCP sets forth the obligation of the party to seek the dismissal of a judge in the event of the circumstances set out in Article 67 of the same law. Article 68 allows any party, in justifying the request, to name in advance a judge who cannot participate in rendering a decision due to the existence of the circumstances referred to in Article 67 of this Law. Article 69 of the LCP specifically determines the cases where such a request is not allowed, including in those circumstances, where the exclusion of a number of judges is required and which results in the court being unable to reach a decision. The latter is also supported by the case law of the Court and of the ECtHR. (See, Resolution on Inadmissibility Court of 19 December 2016 in Case KI108/16 with

Applicants *Bojana Ivković, Marija Perić and Miro Jaredić*, paragraphs 34, 35 and 36 and the references used therein).

70. In this respect, the Court first notes that the Applicant has not filed a request for the exclusion of Judge G.S. However, the Court recognizes the fact that the proceedings relating to the examination of an application of a request for revision do not provide for a public procedure in which the Applicant may participate because it is based solely on written submissions. Therefore, in similar cases the Court held in principle that the Applicants cannot be held responsible for not requesting the exclusion of a judge because they could not have been aware, until they received the court's decision, that the judge concerned was part of in the Panel of the Supreme Court.

71. The Court notes, however, that regardless (i) whether or not the Applicant may have been aware of the composition of the Supreme Court Panel, and in particular the participation of Judge G.S. in it; and (ii) the fact that the Applicant has not filed a request for recusal of the relevant judge, each judge should seek his or her own recusal from the decision-making, if the circumstances foreseen in Article 67 of the LCP exist.

72. In this regard, the Court recalls the second possibility established by the LCP, namely the obligation of each judge, as set out in paragraph 1 of Article 71 of the LCP, to notify the President of the Court and request recusal from the decision-making if the circumstances set forth in Article 67 of the LCP exist. The Court notes, however, that, in the circumstances of the present case, the Applicant does not substantiate any of the circumstances stipulated in Article 67 of the LCP and on the basis of which Judge G.S. should have requested her own exclusion from her participation in the Panel of the Supreme Court which resulted in rendering the challenged Judgment.

73. The Court reiterates that the mere fact that the Applicant filed a criminal report against Judge G.S., and unsupported by other circumstances and arguments, is not sufficient to determine that Judge G.S. was biased under the subjective test of the impartiality of the court and that the Panel of the Supreme Court that rendered the challenged Judgment was biased in terms of the objective test of the impartiality of the court. It follows that the Court must find that the doubts of the Court's impartiality in the circumstances of the present case are not objectively justified.

Conclusions

74. The Court notes that the independence and impartiality of the court, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the issues raised by the Applicant in the circumstances of the present case, are essential constitutional issues.

75. In the circumstances of the present case, the Court found that Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court was rendered by an impartial tribunal within the meaning of the subjective and objective test established by the case law of the European Court of Human Rights and therefore, in accordance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, because (i) despite the fact that the President of the Panel which rendered the challenged Judgment was a judge against whom the Applicant filed a criminal report, no other evidence or argument of the Applicant invalidates the presumption of impartiality of the respective judge; and, moreover, (ii) despite the fact that the participation of the respective judge in the Panel of the Supreme Court may have raised legitimate doubts of the Applicant as to the impartiality of the court, in the Court's assessment, the assessment based on the principles and criteria established by the relevant case law of the ECtHR, these doubts, in the circumstances of the present case, are not objectively justified.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 47 and 48 of the Law and Rule 59 (1) of the Rules of Procedure, on 29 July 2019, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that Judgment [Rev. No. 170/2017] of 23 August 2017 of the Supreme Court is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR;

III. TO NOTIFY this Decision to the Parties;

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

V. This Judgment is effective immediately.

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

Cases no. KI187/18 and KI11/19, Applicant: *Muhamet Idrizi*, Constitutional review of the Judgment PML. no. 226/2018 of the Supreme Court of Kosovo, of 16 October 2018, and Judgment PML. no. 293/2018 of the Supreme Court of Kosovo, of 3 December 2018

KI187/18 and KI11/19, Judgment of 29 July 2019, published on 29 August 2019.

Keywords: *individual referral, criminal charges, composition of the Court panel, right to a fair trial, impartiality of the Court*

The Applicant, with the Judgment [P.nr.25/2009] of the District Court, of 8 June 2009, firstly was acquitted of the charges related to the commission of a criminal act from Article 147 (Aggravated murder) in conjunction with Articles 20 (Attempt) and 23 (Co-perpetration). This Judgment was annulled with the Decision [AP. nr. 393/2012] of the Supreme Court of Kosovo of 7 March 2012, and the case was returned for a retrial. During 2017, by the Judgment [PKR.nr.107/2012] of the Basic Court, the Applicant was sentenced to three (3) years of imprisonment due to a commission of the aforementioned criminal act.
The Judgment of the Basic Court was confirmed also by the Court of Appeals. Against the latter, two requests for the protection of legality were filed with the Supreme Court. The first request was submitted by the defense lawyer of the Applicant upon which the Supreme Court rendered a decision [PML. nr. 226/2018] of 18 October 2018, in which the request was rejected as ungrounded. The second request was submitted by the Applicant himself, and, upon that request the Supreme Court rendered the Decision [PML. nr. 293/2018] of 3 December 2018, whereby the request for protection of legality was also rejected as ungrounded.
There were two referrals submitted before the Court for the constitutional review of the respective Judgments. The first one, namely Referral KI187/18 was submitted by the defense lawyer of the Applicant and the subject matter of the Referral was the constitutional review of the Judgment [PML. nr. 226/2018] of the Supreme Court, of 16 October 2018. On the other hand, the second, namely Referral KI11/19 was submitted by the Applicant himself and the subject matter of the Referral was the constitutional review of the Judgment [PML. nr. 293/2018] of the Supreme Court of 3 December 2018.
In relation to Referral KI187/18, the Applicant alleged before the Court that the challenged Judgment was rendered in serious violation of the provisions of the criminal procedure. In relation to this, the Court noted that the Applicant in its Referral KI187/18 did not explain which rights and fundamental freedoms guaranteed by the Constitution he alleges to have been violated with the acts of the public authorities, namely Judgment [PML.

nr. 226/18] of the Supreme Court, of 16 October 2018. Moreover, the Applicant did not exactly explain the facts and allegations related to the violation of the constitutional rights. Therefore, the Court concluded that Referral KI187/19, does not fulfill the admissibility requirements as stipulated in the Article 48 of the Law and item (d) of the paragraph 1 of Rule 39 of the Rules of Procedure, and therefore declared this Referral inadmissible.

In relation to Referral KI11/19, the Applicant challenged the Judgment [PML.nr.293/2018] of the Supreme Court of 3 December 2018, stating that, *inter alia,* the Judgment was rendered by the partial Court in violation of the Article 31 of the Constitution in conjunction with Article 6 ECHR. The Court concluded that the Referral fulfils the admissibility requirements and considered the merits of the case.

While considering the merits of the case, the Court, *inter alia,* considered (i) the basic principles of the European Court of Human Rights in relation to the criteria for Court impartiality review; (ii) concept of the subjective and objective impartiality of the Court; (iii) case-law of the European Court of Human Rights in relation to the Court impartiality review, namely the "*legitimate doubts*" concept and the facts that the same have to be "*objectively justified*" in order to ascertain the impartiality of a court; (iv) the relevant case-law regarding the participation of one Judge in different phases of the same criminal matter; and finally concluded that (v) the Judgment [PML.nr.293/2018] of the Supreme Court, of 3 December 2018, was rendered by a composition of the Panel in which the Judge who was in the previous phases of that same criminal matter was a part of the decision-making panels, and thus resulting in "*legitimate doubts*" of the impartiality of the court, which in the Court's assessment, under the circumstances of the present case, are "*objectively justified*".

Therefore, the Constitutional Court declared the Judgment [PML.nr.293/2018] of the Supreme Court of 3 December 2018, invalid. On the other hand, the Court rejected the request of the Applicant for interim measure, stating that, *inter alia,* the Judgment [PAKR.nr.108/2018] of the Court of Appeals, of 19 April 2018, in the circumstances of this particular case, is final and enforceable, until otherwise decided by the Supreme Court.

JUDGMENT

in

Case No. KI187/18 and KI11/19

Applicant

Muhamet Idrizi

Constitutional review of the Judgment PML.no.226/2018 of the Supreme Court of Kosovo of 16 October 2018 and Judgment PML.no.293/2018 of the Supreme Court of Kosovo of 3 December 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

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

Applicant

1. The Referral KI187/18 was submitted by Shemsedin Pira, lawyer from Gjilan as the representative of Muhamet Idrizi, residing in the Municipality of Viti/a; whereas the Referral KI11/19 was submitted personally by Muhamet Idrizi (hereinafter: the Applicant).

Challenged decision

2. The decision challenged by Referral KI187/18 is Judgment [PML.nr.226/2018] of 16 October 2018 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), while the decision challenged by Referral KI11/19 is Judgment [PML.nr.293/2018] of 3 December 2018 of the Supreme Court.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgments. In Referral KI187/18, the Applicant did not specify precisely what fundamental rights and freedoms guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution) he claims to have been violated by the challenged judgment. Whereas, in Referral KI11/19, the Applicant alleges that the regular courts have violated his fundamental rights and freedoms guaranteed by Articles 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the European Convention on Human Rights (hereinafter: ECHR).

4. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely "to stop the commencement of serving the sentence imposed [on him] by Judgment PKR. No. 107/2012" of 22 November 2017 of the Basic Court in Gjilan (hereinafter: the Basic Court), pending the resolution of the case at the Court.

Legal basis

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

Proceedings before the Court

6. On 30 November 2018, the Applicant, through his representative, submitted the Referral KI187/18 to the Court.

7. On 12 December 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and a Review Panel composed of Judges: Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban.

8. On 4 January 2019, the Court notified the Applicant's representative and the Supreme Court about the registration of Referral KI187/18.

9. On 14 January 2019, the Applicant submitted the Referral KI11/19 to the Court.

10. On 17 January 2019, pursuant to paragraph (1) of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, the President of the Court ordered the joinder of Referral KI11/19 with Referral KI187/18. By this order, it was decided that the Judge Rapporteur and the composition of the Review Panel be the same as the Judge Rapporteur and Review Panel appointed by the President in case KI187/18.

11. On 22 January 2019, the Court notified the Applicant's representative, the Applicant, and the Supreme Court about the registration of Referral KI11/19 and the joinder of the respective Referrals.

12. On 28 May 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously decided that the decision on the Applicants' Referrals should be postponed for review at one of the subsequent sessions.

13. On 28 May 2019, the Applicant requested from the Court to impose the interim measure, namely, to stop the commencement of serving the sentence imposed on the Applicant by Judgment [PKR.nr.107/2012] of the Basic Court of 22 November 2017, until his case be decided by the Court.

14. On 29 July 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court to declare Referral KI187/18 inadmissible, whereas Referral KI11/19 to be declared admissible and considered based on its merits.

15. On the same date, the Court unanimously ascertained that Judgment [PML. no. 293/2018] of the Supreme Court of 3 December 2018 is inconsistent with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the ECHR.

Summary of facts

16. On 29 December 2008, the District Prosecutor's Office in Gjilan (hereinafter: the District Prosecution) submitted the Indictment [PP.nr.168 / 08] against the Applicant, on the grounded suspicion that he has in co-operation with Sh.I. and being assisted by the E.I., committed the offense foreseen under Article 147 (Aggravated Murder) in conjunction with Articles 20 (Attempt) and 23 (Co-

perpetration) and Article 328 (Unauthorized Ownership, Control, Possession or Use weapons) of the Provisional Criminal Code of Kosovo (hereinafter: PCCK), after having attempted to deprive of life R.E. and Sh.E. on 2 September 2008.

17. On 8 June 2009, the District Court in Gjilan (hereinafter: the District Court), by Judgment [P.nr.25/2009] acquitted the Applicant of the abovementioned charges, whereas the person alleged to have had assisted in the commission of the offence, namely, E.I. was acquitted of the charge of committing the offence provided for in Article 147 of the PCCK, and found him guilty of committing the offense provided for in Article 328 of the PCCK.

18. The District Prosecution acting against the aforementioned Judgment of the District Court filed an appeal with the Supreme Court on the ground of substantial violations of the provisions of the criminal procedure and incomplete and erroneous determination of the factual situation, with the proposal that the case be remanded for retrial. The Applicant and E.I. submitted a response to the District Attorney's appeal, requesting that it be rejected as ungrounded.

19. On 7 March 2012, the Supreme Court, by Decision [AP.nr.393/2012], approved the appeal of the District Prosecutor as grounded and annulled the Judgment of the District Court [P.nr.25/2009] in the part concerning the Applicant and remanded the case for retrial.

20. On 22 November 2017, the Basic Court, through Judgment [PKR.nr.107/2012], found the Applicant guilty of committing the offence provided for in Article 147 (Aggravated Murder) in conjunction with Article 20 (Attempt) and 23 (Co-perpetration) of the PCCK and sentenced him to 3 (three) years imprisonment. Whereas, the charge of committing the offence provided for in Article 328 (Unauthorized Ownership, Control, Possession or Use of Weapons) of the PCCK was rejected. By the same Judgment, the accused E.I., was acquitted of the charge.

21. The Applicant and the Basic Prosecutor’s Office in Gjilan (hereinafter: the Basic Prosecution) submitted appeals against the aforementioned Judgment. The first, namely the Applicant, due to the substantial violations of the provisions of criminal procedure, the incomplete and erroneous determination of factual situation, the violation of criminal law and the decision on criminal sanction; while the second, namely the Basic Prosecution, due to the acquittal part of the Judgment concerning the accused E.I., and due to the substantial violations of the provisions of the criminal procedure and in relation to the criminal

sanction for the criminal offence for which the applicant was found guilty.

22. On 19 April 2018, the Court of Appeals by Judgment [PAKR.nr.108/2018], rejected the appeals of the Basic Prosecution and the Applicant and confirmed the abovementioned Judgment of the Basic Court, respectively, Judgment [PKR.nr.107/2012] of 22 November 2017.

23. The Applicant and his defence counsel filed separate requests for the protection of legality with the Supreme Court against Judgment [PAKR. no.108/2018] of the Court of Appeals in relation to Judgment [PKR.nr.107/2012] of the Basic Court, due to the substantial violations of the provisions of criminal procedure and the violation of criminal law. In their requests they alleged, inter alia, that the Basic Court, by changing the description of the criminal offence and finding that the Applicant has "committed the criminal offence with currently unknown persons", had exceeded the scope of the charge contrary to the provisions of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCRK). The State Prosecutor, through a submission [KMLP.nr.155/2018], submitted a response to the requests for protection of legality, proposing that they be rejected as unfounded.

24. On 18 October 2018, the Supreme Court, acting on a request for protection of legality filed by the Applicant's defence counsel, through Judgment [PML.nr.226/2018] rejected as ungrounded this request for protection of legality filed against Judgment [PAKR.no.108/2018] of the Court of Appeals in relation to Judgment [PKR.nr.107/2012] of the Basic Court.

25. On 3 December 2018, the Supreme Court, acting on a request for protection of legality filed by the convicted person, namely the Applicant, through Judgment [PML. no. 293/2018] rejected as ungrounded also this request for protection of legality against Judgment [PAKR.nr.108/2018] of the Court of Appeals concerning the Judgment [PKR.nr.107 / 2012] of the Basic Court.

Applicant's allegations

Allegations raised through Referral KI187/18

26. In the context of the present Referral, the Applicant has not clarified precisely what fundamental rights and freedoms guaranteed by the

Constitution he claims to have been violated by Judgment [PML.nr.226/2018] of the Supreme Court of 16 October 2018.

27. The Applicant alleges that the challenged Judgment was rendered in substantial violation of the provisions of criminal procedure, in particular: (i) item 1.10 of paragraph 38 of Article 384 (Substantial violation of the provisions of criminal procedure) due to exceeding the scope of the indictment; (ii) item 1.12 of paragraph 1 of Article 384; and (iii) paragraph 1 of Article 360 (Subjective Identity and Object of Judgment over the Indictment) of the CPCRK.

Allegations raised through Referral KI11/19

28. In the Referral KI11/19 the Applicant alleges that the Supreme Court through Judgment [PML.nr.293/2018] of 3 December 2018, has violated his fundamental rights and freedoms guaranteed by Articles 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the ECHR.

29. The Applicant specifically alleges that his rights to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been violated because (i) the challenged Judgment has been issued contrary to paragraph 2 of Article 39 (Basis for Disqualification of Judges) of the CPCRK, because one of the judges of the District Court Trial Panel, namely the Judge R.R., who issued the Judgment [P.nr.25/09] of 8 June 2009, has also participated as a member of the Supreme Court Panel when deciding on the request for protection of legality through Judgment [PML.nr.293/2018] of 3 December 2018; and (ii) his representative did not properly defend him during the trial process and, according to the Applicant, he has carried out the defence in violation of para.7 of Article 11 of the Law on the Bar No. 03/L-117 of 25 March 2009 (hereinafter: the Law on Bar), because there was a conflict of interest, a fact for which the Applicant was not informed. According to the Applicant, the lawyer in case of Sh.P., has been also a defence counsel for the R.E. person in another criminal case, who, he has also been the main witness in the criminal proceedings against the Applicant. Furthermore, according to the Applicant's allegations, the lawyer in question has reflected evident and continuous negligence during his defence.

30. The Applicant also alleges that the challenged Judgment was issued contrary to the provisions of the CPCRK because (i) the courts had exceeded the scope of the initial indictment in violation of item 10 of

paragraph 1 of Article 384 of the CPCRK, by pronouncing the accused, respectively the Applicant, guilty of the criminal offense of attempted aggravated murder in co-perpetration of "*with several other persons, currently unknown"*, while the alleged co-perpetrators involved in the initial indictment were acquitted of charges. Investigation against the first person, respectively SH.I., was terminated by the Ruling [PP.nr.168/08 and 231/09] of 26 July 2011 of the District Public Prosecutor's Office, whereas the second person, namely E.I., was acquitted of the charge by Judgment [PKR.nr.107/2012] of the Basic Court of 22 November 2017.

31. Lastly, the Applicant requests from the Court to declare his Referral admissible; annul all decisions of the regular courts and remand his case to the first instance court for retrial.

Admissibility of the Referral

32. The Court recalls that in the present case, two referrals have been submitted for constitutional review of the respective Judgments. The first, respectively, Referral KI187/18 was submitted by the Applicant's defence counsel and it seeks the constitutional review of Judgment [PML.nr.226/2018] of the Supreme Court of 16 October 2018. Whereas the second, respectively, Referral KI11/19 has been submitted by the Applicant himself and it seeks constitutional review of Judgment [PML.nr.293/2018] of the Supreme Court of 3 December 2018. The Court will further examine the admissibility of the two referrals separately.

Regarding the admissibility of the Referral KI187/18

33. With regard to the Referral KI187/18, the Court first examines whether the admissibility criteria established by the Constitution and further specified in the Law and Rules of Procedure have been met.

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

> *"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 the exhaustion of all legal remedies provided by law".

35. In addition, the Court also examines whether the Applicant has fulfilled the admissibility requirements as set out in the Law. In this respect, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide:

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 […]."

36. As to the fulfillment of these criteria, the Court considers that the Applicant in respect of Referral KI187 / 18 is an authorized party, challenging an act of a public authority, namely Judgment [PML.nr.226/2018] of 16 October 2018 of the Supreme Court, after having exhausted all legal remedies provided by law. In this regard, the Applicant's Referral complies with the criteria set out in paragraphs 1 and 7 of Article 113 of the Constitution and Article 47 of the Law. The Applicant has also submitted the Referral in accordance with the deadline foreseen in Article 49 of the Law.

37. However, in assessing whether the Applicant has fulfilled the admissibility criteria laid down by law, the Court also refers to Article 48 of the Law, which specifies the Applicant's obligation to accurately specify in his Referral submitted with the Court what fundamental rights and freedoms he claims to have been violated.

38. The same criteria are clearly set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39, paragraph (1) (d) provides:

> *(1) The Court may consider a referral as admissible if:*
>
> *(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.*

39. In this context, the Court emphasizes that in order to consider a Referral as meeting the admissibility criteria, the Applicant is required to accurately clarify in his Referral what fundamental rights and freedoms he claims to have been violated and to adequately present facts and allegations for violation of constitutional rights or provisions (in this context see, the Court's case KI91/17, *Enver Islami*, Resolution of Inadmissibility of 22 November 2018, paragraph 31).

40. The Court notes that the Applicant in Referral KI187/18 has not clarified what fundamental rights and freedoms he alleges to have been violated by the act of public authority, namely Judgment [PML. no. 266/18] of the Supreme Court of 16 October 2018, which he challenges in the Court. Furthermore, the Applicant does not accurately clarify the facts and allegations for violation of constitutional rights.

41. Consequently, Referral KI187/18 is in compliance with the criteria set out in paragraphs 1 and 7 of Article 113 of the Constitution and Articles 47 and 49 of the Law. However, this referral does not meet the admissibility criteria as set out in Article 48 of the Law and item (d) of paragraph 1 of Rule 39 of the Rules of Procedure.

42. In conclusion, pursuant to Article 48 of the Law and Rule 39 (1) (d) of the Rules of Procedure, Referral KI187/19 is inadmissible.

Regarding the admissibility of the Referral KI11/19

43. As regards the fulfillment of the admissibility criteria stipulated by the Constitution and the Law elaborated above, the Court finds that the Applicant in relation to Referral KI11/19, is an authorized party

challenging an act of a public authority, namely Judgment [PML.nr.293/2018] of 3 December 2018 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant has also clarified the rights and freedoms which he claims to have been violated pursuant to the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set forth in Article 49 of the Law.

44. Consequently, the Court therefore finds that the Applicant's Referral also meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure. It cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure.

45. Moreover, and finally, the Court considers that this Referral is not manifestly ill-founded as established in paragraph (2) of Rule 39 of the Rules of Procedure and should therefore be declared admissible (see also the case of European Court of Human Rights, *Alimuçaj v. Albania*, Application no. 20134/05, Judgment of 9 July 2012, paragraph 144).

The merits of the case in respect of Referral KI11/19

46. In addressing the merits of this Referral, the Court recalls that by Judgment [P.nr.25/2009] of the District Court of 8 June 2009, the Applicant was initially acquitted of the charges of committing the offence under Article 147 (Aggravated Murder) in conjunction with Articles 20 (Attempt) and 23 (Co-perpetration) of the PCCK. This Judgment was annulled by Ruling [AP. no. 393/2012] of the Supreme Court of 7 March 2012 and the case was remanded for retrial. In 2017, by Judgment [PKR.nr.107/2012] of the Basic Court, the Applicant was sentenced to 3 (three) years of imprisonment for having committed the aforementioned criminal offence. Two other persons, namely, SH.I. and E.I., who allegedly were co-perpetrators of the criminal offence, were acquitted of the charges during the proceedings of regular courts.

47. The Judgment of the Basic Court was confirmed by the Court of Appeals. Two requests for the protection of legality were filed with the Supreme Court against the said judgment. The first request was filed by the Applicant's defence counsel, and subsequently the Judgment [PML.nr.226/2018] of 18 October 2018 rejecting the request as unfounded was rendered by the Supreme Court. The second request was submitted by the Applicant himself, as a result of which the Judgment [PML.nr.293/2018] of 3 December 2018 which as well

rejected the request for assessment of legality as unfounded was issued by the Supreme Court.

48. With respect to the latter, namely Judgment [PML.nr.293/2018] of the Supreme Court of 3 December 2018, the Court recalls that the Applicant alleges that the said Judgment (i) violates Article 31 of the Constitution in conjunction with Article 6 of the ECHR because it was issued by a biased court; (ii) his defence counsel had acted contrary to the Law on Bar, thereby harming his interests; and (iii) the challenged Judgment has been issued in violation of certain provisions of the criminal procedure.

49. In dealing with the Applicant's first allegation relating to the right to a fair and impartial trial, the Court will apply the case law of the European Court of Human Rights (hereinafter: ECtHR), on the basis of which, under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, as to the interpretation of the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the ECtHR case law.

50. In this aspect, the Court recalls that the impartiality of a court under Article 31 of the Constitution in conjunction with Article 6 of the ECHR, based on the consolidated case law of the ECtHR, must be determined according to (i) a subjective test, that is on the basis of a personal conviction and behaviour of a particular judge, implying that a judge may have had personal prejudice or bias in a particular case; and (ii) an objective test, that is ascertaining whether the court itself, inter alia, its composition has offered sufficient guarantees to exclude any legitimate doubt in this respect (see, inter alia, ECtHR cases, *Miracle Europe KFT v. Hungary*, Judgment of 12 April 2015, paragraphs 54 and 55; *Gautrin and Others v. France*, Judgment of 20 May 1998, paragraph 58; *San Leonard Band Club v. Malta*, Judgment of 29 July 2004, paragraph 58; *Thomann v. Switzerland*, Judgment of 10 June 1996, paragraph 30; *Wettstein v. Switzerland*, Judgment of 21 December 2000, paragraph 42; *Korzeniak v. Poland*, Judgment of 10 January 2017, paragraph 46; and case of the Court KI06/12, with Applicant *Bajrush Gashi*, Judgment of 9 May 2012, paragraph 45).

51. More specifically, as regards the subjective test, based on the ECtHR case law personal impartiality of a judge must be presumed until there is proof to the contrary (see, inter alia, ECtHR cases, *Mežnarić v. Croatia*, Judgment of 30 November 2005, paragraph 30; *Padovani v. Italy*, Judgment of 26 February 1993, paragraph 26; *Morel v. France*,

paragraph 41; *San Leonard Band Club v. Malta*, cited above, paragraph 59; *Hauschildt v. Denmark*, Judgment of 24 May 1989, paragraph 47; *Driza v. Albania*, Judgment of 13 November 2007, paragraph 75; and *Korzeniak v. Poland*, cited above, paragraph 47). As regards the type of proof required to prove such a thing, the ECtHR, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons. However, in deciding whether in a specific case there is sufficient basis to determine that a particular judge is not impartial, the Applicant's point of view is important but not decisive (see, inter alia, the case of the ECtHR, *De Cubber v. Belgium*, Judgment of 26 October 1984, paragraph 25). However, the principle that a court shall be presumed to be free from prejudice or personal bias is for a long-established in the case law of ECtHR (see ECtHR cases, *Kyprianou v. Cyprus*, cited above, paragraph 119; *Micallef v Malta*, Judgment of 15 October 2009, paras 93-94; and *Tozicka v. Poland*, Judgment of 24 July 2012, paragraph 33).

52. Furthermore, according to the case law of ECtHR, while in some cases it may be difficult to find facts with which to rebut the presumption of a judge's subjective impartiality may be invalidated, the criteria and requirements for objective impartiality establish an additional guarantee for an impartial judgment (see the ECtHR case *Micallef v. Malta*, cited above, paragraphs 95 and 101). It should be noted that in the vast majority of cases raising impartiality issues, the ECtHR has focused and found violations in terms of objective test (see also the case of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*, Judgment of 6 November 2018, paragraph 146; and *Korzeniak v. Poland*, cited above, paragraph 48).

53. As to the objective test, the Court notes that based on the ECtHR case law, when it is applied on a trial panel, it must be determined whether, quite apart from the judge's conduct, there may be sufficient facts which may raise doubts as to impartiality of the court. In this respect appearance/perception may also be important, because *"justice must not only be implemented, but it must be seen to be implemented"* (in this context, see, *inter alia*, the case of ECtHR, *De Cubber v. Belgium*, cited above, paragraph 26). The essential issue is the confidence which the courts in democratic society must inspire in public (see, *inter alia*, ECtHR cases*, Castillo Algar v. Spain*, Judgment of 28 October 1998, paragraph 45*; San Leonard Band Club v. Malta*, cited above, paragraph 60; and *Golubović v. Croatia*, cited above, paragraph 49). Thus, any judge in respect of whom there may be a legitimate reasons to suspect a lack of impartiality must withdraw from decision-making (see ECtHR case, *Micallef v Malta*, cited above, paragraph 98).

54. Furthermore, based on the case law of the ECtHR, situations in which issues of impartiality may arise regarding the lack of impartiality may be (i) of a functional nature; and (ii) personal. The first one relates to the exercise of various functions within a judicial proceeding by the same person or hierarchical or other nature between the judge and other actors in judicial process. With regard to the latter, the level and nature of this connection should be examined. These situations of a functional nature may include examples of cases in which were carried out (i) advisory and judicial functions have been exercised in the same case (for this context, see, inter alia, ECtHR cases *Procola v. Luxembourg*, Judgment of 8 September 1995 paragraph 45; *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraph 200; and *Sacilor Lormines v. France*, Judgment of 9 November 2006, paragraph 74); (ii) judicial and extrajudicial (in this context, see, *inter alia*, the ECtHR case, *McGonnell v. the UnitedKingdom*, Judgment of 8 February 2000, paras 52-57); and (iii) various court cases. In this context, the ECtHR emphasizes that the assessment of whether the participation of the same judge in different stages of the trial may have resulted in a violation of the requirements related to the impartiality of the court must be assessed, should be assessed case-by-case basis and depending on the circumstances of each case. Whereas the second, namely, issues of personal nature, are mainly related to the conduct of a judge regarding a case or the existence of links with one of the parties or his/her representative in a case (in his context for more details see, ECHR Guidelines of 30 April 2019 on Article 6 of the ECHR, Right to a Fair Trial (criminal aspect), Part IV. General Guarantees: Procedural Criteria, C. Independence and Impartiality, 2. The Impartial Court, a. Criteria for assessing impartiality).

55. In applying these general principles to the circumstances of the present case, the Court first recalls that the Applicant alleges precisely the exercise of the various functions of a judge within a same judicial process, respectively the fact that Judge R.R. had participated as a member of the trial panel also in (i) issuing the Judgment [P.nr.25/09] of 8 June 2009 of the District Court; and (ii) issuance of Judgment [PML.nr. 293/2018] of the Supreme Court of 3 December 2018, and which, according to the Applicant, has resulted in a violation of his right to a fair and impartial trial.

56. In this context and based on the case law of the ECtHR, the Court will first examine the Applicant's allegations concerning the impartiality of the court under the criteria of subjective test.

57. The Court reiterates that as regards the subjective test, the personal impartiality of the judge must be presumed until proven otherwise.

The Applicant has not presented any evidence which could put in doubt the impartiality of Judge R.R. Consequently, the Court finds that in issuing Judgment [PML.nr.293/2018] of 3 December 2018, no fact can support the finding that the court has not been impartial in terms of subjective test.

58. Consequently, in accordance with the principles of the case law of ECtHR, and as an additional guarantee of the circumstances of the present case, the Court will examine the Applicant's allegations under the criteria of objective test and consequently, (i) whether the circumstances of the present case may raise legitimate doubts on the part of the Applicant about the impartiality of the court; and if this is the case (ii) if these doubts are objectively justified. Determination of these issues is done in each case separately (in this context see, ECtHR cases, *Mežnarić v. Croatia*, cited above, paragraph 31; *Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, paragraph 58; *Wettstein v. Switzerland*, cited above, paragraph 44; and *San Leonard Band Club v. Malta*, cited above, paragraph 60; *Korzeniak v. Poland*, cited above, paragraph 49; and *Tozicka v. Poland*, cited above, paragraph 33).

59. In this respect, and as stated above, the exercise of various functions within the same judicial process by the same judge, and which relates to the circumstances of the particular case, presents categories of issues of a functional nature which are relevant in the assessment of the impartiality of a court. In suchlike cases, the ECtHR has in principle held that there are legitimate doubts as to the impartiality of the court (see, *inter alia*, the case of the ECtHR, *Korzeniak v. Poland*, cited above, paragraphs 51 and 52). The Court as well will hold the same position. Consequently, based on the case law of the ECtHR, the Court will in the following assess whether such doubts, in the circumstances of the present case, can be objectively justified.

60. In terms of assessing legitimate doubts in the context of circumstances where a judge has exercised more than one function within the same judicial case, two categories of cases are relevant. First, special attention should be paid to the characteristics of the law and the rules applicable to a particular case (see, *inter alia*, ECtHR cases, *Warsicka v. Poland*, Judgment of 16 January 2007, paragraph 40; *Toziczka v. Poland*, Judgment of 24 July 2012, paragraph 36; and *Korzeniak v. Slovakia*, cited above, paragraph 50). In this context, the ECtHR has emphasized that organizational issues are also important (see, *inter alia*, the case of the ECtHR, *Piersack v. Belgium*, Judgment of 1 October 1982, paragraph 30). For example, the existence of procedures that ensure impartiality, namely the rules and procedures

that also govern the withdrawal/exclusion of a judge, are relevant factors (see ECtHR cases, *Pfeifer and Plankl v. Austria*, Judgment of 25 February 1992, paragraph 6; *Oberschlick v. Austria (no. 1)*, Judgment of 23 May 1991, paragraph 50; and *Pescador Valero v. Spain*, Judgment of 24 September 2003. paragraphs 24-29). Secondly, it is necessary to assess whether the interrelationship between the issues relating to the content dealt with by the same judge at different stages of the proceedings is so close/evident that it casts doubt on the impartiality of the judge who participated in the decision-making during these stages. This determination is also made on a case-by-case basis and taking into account their specific characteristics and circumstances (see, inter alia, the ECtHR cases, *Warsicka v. Poland*, cited above, paragraph 40; *Toziczka v. Poland*, cited above, paragraph 36; and *Korzeniak v. Slovakia*, cited above, paragraph 50).

61. In this respect, the Court, in the light of the ECtHR case law elaborated above, must first address the legal and regulatory issues. The Court recalls that the procedures governing the withdrawal / exclusion of a judge from decision-making are of a particular importance.

62. In this context, the Court notes that in the Applicant's case in the proceedings which concern the requests for protection of legality, the Supreme Court has applied the provisions of the CPCRK. The mentioned Code, in Articles 39 and 40 it specifically regulates the circumstances in which judges are excluded from the decision-making process. The Court emphasizes that paragraph 2 of Article 39 of the CPCRK, which the Applicant alleges, provides that *"A judge shall be excluded as the single trial judge, presiding trial judge, a member of the trial panel, a member of the appellate panel or Supreme Court panel if he or she has participated in previous proceedings in the same criminal case, except for a judge serving on a special investigative opportunity panel"*.

63. This wording of the aforementioned Article of the CPCRK, which puts the emphasis on the participation of a judge in "previous proceedings in the same criminal case", differs from the content of Articles 40 and 41 of the previous Code of Criminal Procedure, namely the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK), wherein the circumstances of the exclusion of judges in this context were more limited. More specifically, item 5 of paragraph 1 of Article 40 of the PCPCK stated that a judge shall be excluded from the exercise of judicial functions in a particular the case *"if in the same case he or she has taken part in rendering a decision which is being challenged by an appeal"*.

64. In this context, the Court notes that the legislator, by adoption of the new Code of Criminal Procedure, incorporated a more comprehensive provision in terms of exclusion of a judge from exercising various functions in the same criminal process. The Court also emphasizes that the provisions of the CPCRK manifest the legislator's concern to remove all reasonable doubts as to the impartiality of the court (in this context, see the case of the Court KI06/12, with Applicant: *Bajrush Gashi*, cited above, paragraph 49; and the case of the ECtHR *Oberschlick v. Austria*, cited above, paragraph 50).

65. The Court should also point out that in the circumstances of the present case, that in the time period between the Judge R.R. having taking part in the District Court Panel, respectively, in the issuance of Judgment [P.nr.25/2009] of 8 June 2009, and his participation in the panel of the Supreme Court, namely, the issuance of Judgment [PML.nr.293/2018] of 3 December 2018, through Ruling [AP. no. 393/2012] of the Supreme Court of 7 March 2012, the Applicant's case had been remanded for retrial. In the new trial, Judge R.R. had participated only in the Supreme Court panel which reviewed the request for protection of legality against Judgment [PAKR.nr.108/018] of the Court of Appeals of 19 April 2018. However, the Court notes that the content of paragraph 2 of Article 39 of the CPCRK, namely *"the participation in previous proceedings in the same criminal case"*, which is applicable in the circumstances of the present case, is inclusive and has forced Judge R.R. to be excluded from decision-making in the respective panel of the Supreme Court.

66. The Court also notes that in such circumstances, the disqualification of a judge is not necessarily dependent on the parties' request in the proceedings. On the basis of the provisions of the CPCRK, the judge himself should seek disqualification from decision-making. This is stipulated in Articles 39 to 42 of the CPCRK, and is also supported by the ECtHR case law, which, by emphasizing the importance of the perception and confidence that courts have to reflect in public in a democratic society, have repeatedly stated that any judge who believes that his or her participation in a court case may raise doubts about the impartiality of the court should be excluded from decision-making.

67. Moreover, the Court also recalls that the procedure relating to the protection of legality does not provide for a public procedure in which the Applicant may participate. This procedure is based on written submissions only. Therefore, due to the written nature of the proceedings, neither the Applicant nor his defence counsel could have known until the Supreme Court had rendered the decision that the

same judge who was part of the trial panel in the District Court has also taken part in the panel of the Supreme Court decided on his request for protection of legality. Therefore, the responsibility for not excluding the respective judge cannot be attributed to the Applicant and it cannot be concluded that he has waived the right to have his case decided by an impartial court (in this context, see the case of the Court KI06/12, Applicant: *Bajrush Gashi*, cited above, paragraph 36, and the case of the ECtHR, *Oberschlick v. Austria*, cited above, paragraph 51).

68. The Court recalls that the issue of whether the number of judges to decide on the requirements for the protection of legality is sufficient or not is a matter entirely under the jurisdiction, and for discussion, if necessary, between the judiciary and other responsible bodies. The primary responsibility for the proper administration of justice rests with the relevant institutions, and organizational issues cannot be used as a justification for disregarding the Constitution (in this context, see the Court's case, KI06/12, Applicant: *Bajrush Gashi*, cited above, paragraph 51; and case KO4/11, Applicant: *Supreme Court of Kosovo*, Constitutional Review of Articles 35, 36, 37 and 38 of the Law on Expropriation of Immovable Property, No. 03 / L-139, Judgment of 1 March 2012).

69. Consequently and in such circumstances, the Court must find that legitimate doubts as to the impartiality of the court arise as a result of the exercise of the various functions of a judge within a same judicial process are objectively justified. The Court must also ascertain that in issuing the Judgment [PML.nr.293/2018] of 3 December 2018, the court has not been impartial in terms of objective test and that, consequently, the Applicant's right to fair and impartial trial by a tribunal as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated.

70. As stated above, the Court recalls that in the context of assessing the impartiality of the court, beyond legal and regulatory issues, the link between substantive issues dealt with by the same judge at different stages of the proceedings is also relevant. However, given that the Court has already ascertained that in the circumstances of the present case, doubts about impartiality are objectively justified, it considers that it is not necessary to examine other aspects of the impartiality of the court in the terms of the objective test.

71. The Court notes that this conclusion concerns exclusively the challenged Judgment of the Supreme Court, namely Judgment [PML. no. 293/2018] of 3 December 2018, from the point of view of the

impartiality of the court in the sense of objective test, and in no way it relates to or has prejudiced the outcome of the merits of the case.

72. The Court recalls that the Applicant has raised also other allegations regarding the Judgment [PML. no. 293/2018] of 3 December 2018 of the Supreme Court. The Applicant refers to a violation of Article 30 [Rights of the Accused] of the Constitution, while in relation to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, he also alleges that (i) his defence counsel had acted contrary to the Law on Bar, thus damaging his interests; and (ii) the challenged judgment was issued in violation of certain provisions of the criminal procedure.

73. As regards Article 30 of the Constitution, the Court notes that the mere mentioning of Articles of the Constitution is not sufficient to build an allegation for a constitutional violation. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (in this context, see the Court's case KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33). Whereas, given the fact that the Court has already found that the relevant Judgment was issued in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, by declaring this Judgment invalid and consequently remanding the case back to the Supreme Court, it will not consider the other allegations of the Applicant relating to these Articles.

74. Finally the Court notes that by this Judgment, it has declared invalid only one of the Judgments of the Supreme Court, namely the Judgment [PML.nr.293 /2018] of 3 December 2018, issued as a result of the request for protection of legality of the defendant, respectively the Applicant, filed against the Judgment [PAKR.nr.108/2018] of the Court of Appeals of 19 April 2018. While it did not address the allegations regarding the Judgment [PML.nr.226/2018] of the Supreme Court of 18 October 2018, because as regards the constitutional review of the said Judgment it has declared the Referral inadmissible. This result of the constitutional review of two Judgments of the Supreme Court that deal with the requests for protection of legality filed against the same Judgment of the Court of Appeals derives from the fact that the Supreme Court, in the circumstances of the present case, has treated separately the requests for protection of the legality filed by the defendant and his defence counsel, by deciding through two Judgments.

75. The Court notes that the CPCRK in Article 433 (Persons Authorized to File Requests for Protection of Legality) provides that the persons authorized to file a request for protection of legality, are the Chief State

Prosecutor, the defendant and his or her defence counsel. The CPCRK does not specifically foresee whether the requests for protection of legality filed by the above-mentioned authorized persons, and in the circumstances of the present case, filed separately the defendant and his defence counsel, must necessarily be dealt with together in a single decision by the Supreme Court. In case of their separate treatment, each of the decisions of the Supreme Court has a respective effect on the decision which is challenged by the extraordinary legal remedy.

Request for Interim Measure

76. The Court recalls that the Applicant has requested the imposition of interim measures seeking to suspend the commencement of the execution of his prison sentence until a decision is rendered by the Court.

77. In relation to his request for interim measures the Applicant states: *"Given that the sentenced person is awaiting the decision of the Constitutional Court of the Republic of Kosovo regarding his referral, by this request I request from the Court to impose the interim measure and stop the commencement of serving the sentence imposed by Judgment PKR no. 107/2012 of 22.11.2017, pending the resolution of this matter"*.

78. In this respect, the Court initially recalls that pursuant to Article 27 (Interim Measures) of the Law, the Court may order interim measures in a case which is a subject of proceeding (i) if such measures are necessary to avoid any risk or irreparable damages; or (ii) if such an interim measures is in the public interest. These criteria are further specified in paragraph (4) of Rule 57 of the Rules of Procedure.

79. The Court reiterates that in the circumstances of the present case, the Court declared the Referral of the Applicant for Constitutional Review of Judgment [PML.nr.226/2018] of 16 October 2018 inadmissible, whereas it declared invalid the Judgment [PML.nr.293/2018] of 3 December 2018, by remanding the same to the Supreme Court for reconsideration. Consequently, the Supreme Court, pursuant to this Judgment, will once again consider the request for protection of legality filed by the defendant, namely the Applicant with the Supreme Court against the Judgment of the Court of Appeals. The Court notes that the latter, namely Judgment [PAKR.nr.108/2018] of the Court of Appeals of 19 April 2018 is final and enforceable pursuant to Article 485 (Finality and Enforceability of Decisions) of the CPCRK and, in the circumstances of the present case, until decided otherwise by the

Supreme Court pursuant to the provisions of Article 418 (Extraordinary Legal Remedies) of the CPCRK.

80. This Judgment of the Court has declared invalid only the Judgment [PML.nr.293/2018] of 3 December 2018 of the Supreme Court and does not directly affect the legal effect which, under the applicable law, produces the Judgment [PAKR.nr.108/2018] of 19 April 2018 of the Court of Appeals in relation to Judgment [PKR. no. 107/2012] of 22 November 2017 of the Basic Court. Therefore, pursuant to Article 27.1 of the Law and Rule 57 (4) of the Rules of Procedure, the Applicant's request for interim measures must be rejected.

Conclusions

81. In the circumstances of the present case, the Court has found that Judgment [PML. no. 293/2018] of 3 December 2018 of the Supreme Court has been issued in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because (i) it has been issued by the composition of a Panel, contrary to the respective provisions of the criminal procedure, and the case law of the ECtHR and the Court, since in that panel has taken part a judge who was also part of the decision making in earlier stages of the same criminal case, namely he has participated as a member of the Trial Panel in the District Court when it was decided on the criminal charge against the Applicant and has been also a member of the Panel when deciding on the Applicant's request for protection of legality in the Supreme Court; and in such circumstances, (ii) legitimate doubts about the court's lack of impartiality are objectively justified.

82. Whereas, the Court has declared inadmissible the Referral of the Applicant's defence counsel for the Constitutional Review of Judgment [PML. no. 226/2018] of the Supreme Court of 16 October 2018 because it did not meet the admissibility criteria stipulated by Article 48 of the Law and item (d) of paragraph (1) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law, and Rule 59 (a) of the Rules of Procedures, in its session held on 29 July 2019, unanimously

DECIDES

I. TO DECLARE the Referral KI187/18 as inadmissible;

II. TO DECLARE the Referral KI11/19, admissible for a review based on the merits;

III. TO HOLD that in the Judgment PML.nr.293/2018 of 3 December 2018 of the Supreme Court there have been violations of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1, Article 6 (Right to a Fair Trial) of the European Convention on Human Rights;

IV. TO DECLARE INVALID The Judgment of the Supreme Court of Kosovo, PML.nr.293/2018, of 3 December 2018;

V. TO REMAND the Judgment of the Supreme Court, PML.nr.293/2018, of 3 December 2018, for reconsideration in accordance with the Judgment of this Court;

VI. TO ORDER the Supreme Court, pursuant to Rule 66 (4) of the Rules of Procedure, to notify the Court, within six (6) months of the publication of this Judgment, about the measures taken to implement the Judgment of this Court;

VII. TO REJECT the request for interim measure;

VIII. TO REMAIN strongly engaged in this matter pending the compliance with this order;

IX. TO ORDER that this Judgment be notified to the parties, and pursuant to Article 20.4 of the Law, be published in the Official Gazette;

X. TO DECLARE that this Judgment is effective immediately.

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

KI10/18, Applicant: Fahri Deqani, Constitutional review of Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017

KI10/18, Judgment of 8 October 2019, published on 22 October 2019

Keywords: *Individual referral, right to liberty and security, extension of detention pending trial, failure to reason decisions, alternative measures, admissible referral, violation of constitutional law*

Following his arrest, the Applicant was placed in detention on 31 July 2010. His detention pending trial lasted until 3 September 2012, when the District Court rendered the decision, which found him guilty and sentenced him to imprisonment. The Applicant filed an appeal against the aforementioned Judgment of the District Court. The Court of Appeals upheld the Applicant's appeal, annulling the judgment of the District Court and remanding the case to the Basic Court for retrial.

During the period between 3 September 2012 and 26 November 2013, the Applicant's detention on remand was a detention on remand within the meaning of Article 29, paragraph 1, item 1, of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 367 [Detention on Remand after Announcement of Judgment], paragraph 2 of the Criminal Procedure Code of the Republic of Kosovo. Whereas, as a result of the Judgment of the Court of Appeals, by which the case against the Applicant was remanded for retrial, the second period of detention pending trial within the meaning of Article 29, paragraph 1, item 2 of the Constitution, in conjunction with Article 5, paragraph 3, of the European Convention on Human Rights (hereinafter: the ECHR), began on 26 November 2013 and continued until the date the Judgment of the Basic Court in Ferizaj [PKR No. 155/15], of 6 April 2018, was rendered, by which the Applicant was found guilty and sentenced to effective imprisonment.

The Applicant alleged that the decisions of the regular courts on the extension of detention pending trial against the Applicant, namely, the challenged decision of the Supreme Court violated his right guaranteed by Article 29 [Right to Liberty and Security], paragraph 4, and Article 31 [Right to Fair and Impartial Trial] of the Constitution.

The Court, regarding the Applicant's allegation of a violation of Article 29 [Right to Liberty and Security] of the Constitution, in conjunction with Article 5 (Right to liberty and security) of the ECHR, held that the reasoning of the Basic Court on the extension of detention on remand, confirmed by the Court of Appeals and the Supreme Court through the challenged Judgment, does not justify its decision to extend detention on remand to the Applicant. Therefore, the regular courts failed to provide concrete and sufficient

reasoning as to why the alternative measures were not applicable in the Applicant's case.

Accordingly, the Court held that the challenged Judgment Pml. No. 357/2017, of the Supreme Court of 22 December 2017, which rejected the Applicant's request for protection of legality against Decision PN1. No. 2156/2017 of the Court of Appeals, of 6 December 2017, and Decision PKR. No. 155/15 of the Basic Court in Ferizaj of 24 November 2017, was not in compliance with Article 29, paragraph 1, item (2) of the Constitution, in conjunction with Article 5, paragraph 3 of the ECHR.

The Court is aware of the fact that the Applicant was found guilty and sentenced to effective imprisonment through the Judgment of the Basic Court in Ferizaj [PKR. No. 155/15 of 6 April 2018], as part of the criminal proceedings conducted against him. In this regard, the Court recalls that this procedure was not the subject of review by the Court, and that only the assessment of the challenged Judgment of the Supreme Court regarding the extension of the detention pending trial against the Applicant is the subject of review.

In this regard, the Court, through this Judgment, clearly and directly conveys the request and instruction that should serve to the regular courts, that in order to comply with the constitutional requirements of Article 29 of the Constitution, as well as with the requirements of Article 5 of the ECHR, as widely interpreted by the ECtHR in its case law, their reasoning for extension of detention pending trial must contain detailed reasoning and an individualized assessment according to the circumstances and facts of the case, explaining and proving why the detention pending trial is necessary and why other alternative measures are not appropriate for the smooth and successful conduct of the criminal proceedings.

The Court, with regard to the Applicant's allegation concerning the length of the detention pending his conviction, found that it did not fall within the scope of Article 31 of the Constitution.

JUDGMENT

in

Case No. KI10/18

Applicant

Fahri Deqani

Constitutional review of Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu, 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 Fahri Deqani (hereinafter: the Applicant), represented by Ekrem Shabani, a lawyer in Ferizaj.

Challenged decision

2. The Applicant challenges Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo, of 22 December 2017 which rejected as ungrounded the Applicant's request for protection of legality against Decision PN1. No. 2156/2017 of the Court of Appeal of 6 December 2017, and Decision PKR. No. 155/15 of the Basic Court in Ferizaj, Department for Serious Crimes (hereinafter: the Basic Court in Ferizaj), of 24 November 2017.

3. The challenged decision was served on the Applicant on 28 August 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged judgment which allegedly violates the Applicant's right as guaranteed by Article 29 [Right to Liberty and Security] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of 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).

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

Proceedings before the Constitutional Court

7. On 17 January 2018, the Applicant submitted his Referral to the Court.

8. On 19 January 2018, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

9. On 23 January 2018, the Court notified the legal representative of the Applicant about the registration of the Referral and requested him to submit the power of attorney for representation before the Constitutional Court, and additional documents and information pertaining to the Referral. A copy of the Referral was sent to the Supreme Court of Kosovo (hereinafter: the Supreme Court).

10. On 6 February 2018, the Applicant submitted only the power of attorney for representation.

11. On 8 February 2018, Kosovo Rehabilitation Center for Torture Victims (hereinafter: the KRCT) submitted a letter *"in capacity of the third party regarding Referral KI10/18 submitted to the Constitutional Court concerning the criminal case against Fahri Deqani."*

12. On 1 March 2018, the Court requested the legal representative of the Applicant to submit the regular courts' decisions regarding the extension of detention on remand and information pertaining to the stage of the criminal proceedings against the Applicant.

13. On 9 March 2018, the legal representative of the Applicant submitted the requested documents to the Court.

14. 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.

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

16. On 22 August 2018, the President appointed Judge Nexhmi Rexhepi as Judge Rapporteur.

17. On 1 October 2018, the President appointed a new Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu - Krasniqi and Safet Hoxha.

18. On 19 October 2018, the Court requested the Applicant to inform it about the latest developments regarding the proceedings of extension of the detention on remand and the criminal proceedings against him. The Applicant's representative did not submit the information requested by the Court.

19. On 22 July 2019, the Court requested the Basic Court in Ferizaj to submit other decisions regarding the case.

20. On 7 August 2019, the Basic Court in Ferizaj submitted to the Court: Judgment PKR No. 155/15 of the Basic Court in Ferizaj of 6 April 2018, Judgment PAKR No. 324/2018 of the Court of Appeals of Kosovo, of 7

August 2018, as well as Judgment PML. No. 19/2019 of the Supreme Court of Kosovo, of 19 February 2019.

21. On 8 October 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

22. On the same date, the Court, by a majority vote, found that Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017 is not in compliance with Article 29 [Right to Liberty and Security], paragraph 1, item (2) of the Constitution, in conjunction with Article 5 (Right to liberty and Security), paragraph 3 of the ECHR.

Summary of facts

Initial criminal proceedings

23. On 31 July 2010, the implementation of the measure of detention on remand against the Applicant commenced.

24. On 16 February 2011, the District Public Prosecutor in Peja filed Indictment PP. No. 283/2010 against the Applicant, because of the reasonable suspicion that he had committed the criminal offences of "*inciting the commission of criminal offence of aggravated murder*" under Article 147 [Aggravated Murder], paragraph 1, sub-paragraph 4, in conjunction with Article 24 [Incitement] of the Provisional Criminal Code of Kosovo (hereinafter: PCCK) and "attempted murder" under Article 146 [Murder] in conjunction with Articles 20 [Attempt] and 23 [Co-perpetration] of the PCCK.

25. On 3 September 2012, by Judgment P. No. 137/2011 of the District Court in Peja (hereinafter, the District Court), the Applicant was found guilty of committing the criminal offences of "incitement to commit a criminal offense of aggravated murder" and "attempted murder" and was sentenced to fifteen (15) years imprisonment.

26. On an unspecified date, against the aforementioned Judgment of the District Court, the Applicant filed an appeal on the grounds of essential violations of criminal procedure provisions, erroneous and incomplete determination of factual situation, violation of criminal law and decision on punishment.

27. On 26 November 2013, by Decision PAKR. No. 100/2013, the Court of Appeals approved the Applicant's appeal, annulled the Judgment of the

District and remanded the criminal case to Basic Court in Peja, Department for Serious Crimes (hereinafter: Basic Court in Peja) for retrial. In addition, the Court of Appeals decided to extend the Applicant's detention on remand.

28. In its decision, the Court of Appeals found that the Judgment of the first instance court was rendered in violation of criminal law and criminal procedure. First, the Court of Appeals found that the enacting clause of the Judgment of the District Court was unclear, incomprehensible and contradictory with the content of the Judgment. Second, the Court of Appeals noted that it is not clear on the basis of which indictment the District Court adjudicated in the criminal case. Third, the Court of Appeals stated that the District Court did not clarify what facts or evidence support its judgment. In this regard, the Court of Appeals noted that the District Court had only described the statements of witnesses and evidence admitted during the main trial, without assessing their accuracy. Consequently, in relation to this finding, the Court concluded that the Judgment of the District Court contains essential violation of the provisions of criminal procedure, namely Article 403, paragraph 12, of the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK). Fourth, the Court of Appeals found that the District Court did not correctly and completely determine the factual situation. Finally, the Court of Appeals concluded that the first instance court should eliminate all remarks given by the Court of Appeals, assessing and examining all the evidence accurately and rendering fair and lawful decision.

29. Based on the submissions submitted by the Applicant on 9 March 2018, the Basic Court in Peja held eighteen (18) sessions, however, until the abovementioned date, namely 9 March 2018, it did not render decision regarding the Applicant.

Procedure pertaining to the extension of Applicant's detention on remand

30. The Court recalls that on 26 November 2013, the Court of Appeals by Judgment PAKR. no. 100/2013 of 26 November 2013, decided to extend the detention on remand to the Applicant. Accordingly, since 26 November 2013 to this date, the Applicant's detention on remand has been extended every two months by the Basic Court in Ferizaj.

31. In his Referral, the Applicant only submitted the court's decisions with respect to the extension of his detention on remand rendered in 2017 and 2018, namely the decisions of the Basic Court in Ferizaj, PKR. No.

155/15 of 30 March 2017; of 29 May 2017; of 27 July 2017; of 26 September 2017; of 24 November 2017; and of 23 January 2018.

32. In each of the decisions of the Basic Court in Ferizaj, submitted to the Court, the reasoning of the Basic Court was as follows:

"According to the assessment of the presiding judge against the defendant Fahri Deçani, there are still legal reasons for extending the detention on remand as provided for in Article 187 par. 1, sub. 1.1 and 1.2 point 1.2.3 of the CPCK, since there is a reasonable suspicion that he has committed the criminal offenses for which he is charged by the Indictment, and which is a suspicion resulting from the submissions attached to the indictment which are an integral of the case file.

The Presiding Judge considers that there are still reasons for extending the detention on remand against the accused pursuant to Article 187 par. 1 sub. 1.1 and 1.2, point 1.2.3 of the CPCK, taking into account the gravity of criminal offenses, the manner and circumstances under which the criminal offenses are suspected to be committed, and given the fact that the relations between the family of the accused's Fahri Decani and of the deceased [B.K.] have been deteriorated, hence there is a real danger that if the defendant at liberty he could repeat such criminal offenses or similar ones.

The Presiding Judge took also into account other measures as provided by Article 173 paragraph 1 of the CPCK, but according to the court's assessment it would not be sufficient for the successful implementation of criminal proceedings and for preventing repetition of criminal offenses by the defendant."

33. The Applicant filed an appeal against the aforementioned decisions of the Basic Court in Ferizaj with the Court of Appeals.

34. In his appeals against the Basic Court decision filed in 2018, the Applicant states that the Basic Court "*has not provided any legal basis for which this measure could be extended*" and that the reasoning of the Basic Court that he could repeat the criminal offenses is ungrounded. Furthermore, the Applicant alleged that after eight (8) years of detention on remand "*any reason for the detention on remand has ceased [...]*". Finally, the Applicant specifies that the extension of his detention on remand is a violation of all fundamental rights provided "*by domestic law as well as by international conventions*", because *"[...] the detention on remand of about 8 years constitutes a*

fundamental violation of the principle of fair trial and at reasonable time and supersedes the principle of presumption of innocence […]".

35. The Court of Appeals rejected the Applicant's appeals as ungrounded. In four (4) Decisions of the Court of Appeals [PN1. No. 2156/2017, of 5 April 2017; of 2 August 2017; of 5 October 2017 and of 6 December 2017] with regard to the Applicant's allegations, the court's reasoning was as follows:

> *"[…] since the reasonable suspicion exists that the accused person committed the above mentioned criminal offenses, there are legal grounds for extending the detention against him because the legal reasons under Article 187, paragraph 1, sub paragraph 1.1 and 1.2, item 1, 2 and 3 of the CPCK, still exist, by taking into consideration the serious gravity of the criminal offense, the manner of commission of the criminal offense, the circumstances and environment where the criminal offense was committed, and especially the fact that the relationship between the family of the defendant Fahri Deçani and the family of the late [B.K.] ihas been deteriorated, it makes us believe that by releasing the defendant, it could come to the repetition of the criminal offense of the same nature or any other criminal offense; […]."*

36. Therefore, the Court of Appeals concluded that the Basic Court in Ferizaj acted correctly when it extended the Applicant's detention on remand.

37. On an unspecified date, the Applicant filed a request for protection of legality with the Supreme Court against Decision PN1. No. 2156/2017, of the Court of Appeals, alleging violation of criminal procedure and of criminal law. In addition, the Applicant requested the Supreme Court to annul the decisions of the Basic Court in Ferizaj and the Court of Appeals, terminate the measure of detention on remand and impose another alternative measure, namely the house arrest.

38. On 22 December 2017, by Judgment PML. No. 357/2017, the Supreme Court rejected the Applicant's request for protection of legality as ungrounded.

39. In its Judgment, the Supreme Court assessed that:

> *"According to the assessment of this Court, the above mentioned allegations are ungrounded because in this criminal - legal matter, by the case files, mainly by the criminal charge, minutes of*

questioning of witnesses and other collected evidence based on which the indictment was filed, it results that it exists the grounded suspicion that the defendant is the perpetrator of the criminal offence, which fulfills the legal conditions of Article 187, paragraph 1, sub paragraph 1.1, of the CPCK for extending the detention, while it will be assessed in the further criminal proceedings whether these facts will be substantiated.

Further on, this Court assesses that there is legal ground for extending the detention on remand pursuant to Article 187, paragraph 1, sub paragraph 1.2, item 1, 2 and 3, of the CPCK, by taking into consideration the serious gravity of the criminal offense, the manner of commission of the criminal offense, the circumstances and environment where the criminal offense was committed, and especially the fact that the relationship between the family of the defendant Fahri Deçani and the family of the deceased [B.K.],has been deteriorated, it makes us believe that by freeing the defendant, it could come to the repetition of the criminal offense".

40. Finally, the Supreme Court concluded that in the present case there is no essential violation of the criminal procedure provisions "*because both the first and the second instance courts have made the proper assessment and reasoning, and on the basis of such assessment they have rendered the judgments giving sufficient reasons, which this court accepts as correct".*

41. Based on the decisions available to the Court, the Basic Court in Ferizaj extended the Applicants' detention on remand until 23 March 2018.

Criminal proceedings against the Applicant after his case was remanded for retrial

42. Based on the submissions submitted by the Applicant on 9 March 2018, the Basic Court in Peja from the moment the proceedings was remanded for retrial to the abovementioned date, namely 9 March 2018, had held eighteen (18) sessions.

43. In the meantime, on the basis of the submissions submitted by the Basic Court in Ferizaj, as requested by the Court, the Applicant by Judgment of the Basic Court in Ferizaj [PKR No. 155/15], of 6 April 2018, was found guilty of committing the criminal offense of aggravated murder under Article 147, item 4 in conjunction with Article 24 of the CCK, and in co-perpetration for the criminal offense of

attempted murder under Article 146, in conjunction with Articles 20 and 23 of the CCK, and sentenced him to imprisonment.

44. The Applicant filed appeal against the aforementioned Judgment of the Basic Court in Ferizaj.

45. On 7 August 2018, the Court of Appeals, by Judgment [PAKR. No. 324/2018] rejected the Applicant's appeal and upheld the Judgment of the Basic Court. Against the Judgment of the Court of Appeals, the Applicant filed a request for protection of legality with the Supreme Court.

46. On 19 February, 2019, the Supreme Court, by Judgment [PML. No. 19/2019] rejected as ungrounded the request for protection of legality against the aforementioned Judgment of the Court of Appeasl filed by the Applicant.

Applicant's allegations

47. In his Referral, the Applicant explicitly challenges the regular court's decisions pertaining to the extension of the Applicant's detention on remand, namely Decision of the Basic Court in Ferizaj, PKR. No. 155/15 of 24 November 2017, Decision of the Court of Appeals PN1. No. 2156/2017 of 6 December 2017 and the Judgment of the Supreme Court PML. No. 357/2017 of 22 December 2017.

48. In this regard, the Applicant alleges that the challenged decisions violated his right as guaranteed by Article 29 [Right to Liberty and Security], paragraph 4 and Article 31 [Right to Fair and Impartial Trial] of the Constitution.

49. With regard to Article 31, paragraph 2 of the Constitution, the Applicant alleges that *"[...] by the above mentioned decisions, for more than 7 years the detention measure was extended by allegations that there is grounded suspicions and in fact his basic constitutional right was not respected, since it is not known when this matter will be completed".*

50. The Applicant further alleges that: "*[t]he stay of the defendant under the measure of detention is a violation of all fundamental rights determined by national acts and also international covenants, and also the stay under the measure of detention for more than 7 years represents a basic violation of the principle of fair trial and it suppresses the principle of presumption of innocence, by taking into consideration that the defendant is serving a sentence and not a security measure as defined by the Law"*

51. Finally, the Applicant requests the Court to: *"[...] ascertain that in the case of the accused Fahri Deqani there has been a serious violation of his fundamental constitutional rights, namely of Article 29 and 31 of the Constitution of the Republic of Kosovo, in order to declare invalid the decisions of regular courts regarding the imposition of detention measure and to release [the Applicant] from [detention]".*

Relevant legal provisions

Constitution of the Republic of Kosovo

Article 29 [Right to Liberty and Security]

"1. Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:

(1) pursuant to a sentence of imprisonment for committing a criminal act;
(2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;

[...]

2. Everyone who is deprived of liberty shall be promptly informed, in a language he/she understands, of the reasons of deprivation. The written notice on the reasons of deprivation shall be provided as soon as possible. Everyone who is deprived of liberty without a court order shall be brought within forty-eight (48) hours before a judge who decides on her/his detention or release not later than forty-eight (48) hours from the moment the detained person is brought before the court. Everyone who is arrested shall be entitled to trial within a reasonable time and to release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial.

[...]
4. Everyone who is deprived of liberty by arrest or detention enjoys the right to use legal remedies to challenge the lawfulness of the arrest or detention. The case shall be speedily decided by a

court and release shall be ordered if the arrest or detention is determined to be unlawful".

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.

3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.

4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.

5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

6. Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.
7. Judicial proceedings involving minors shall be regulated by law respecting special rules and procedures for juveniles.

European Convention on Human Rights

Article 5 (Right to liberty and security) of the ECHR:
1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

[...]

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

[...]

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

[...]

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.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Code No. 04/L-123 of the Criminal Procedure of the Republic of Kosovo (published in the Official Gazette on 28 December 2012)

Article 5
Right to Fair and Impartial Trial within a Reasonable Time

1. Any person charged with a criminal offence shall be entitled to fair criminal
proceedings conducted within a reasonable time.
2. The court shall be bound to carry out proceedings without delay and to prevent any abuse of the rights of the participants in proceedings.
3. Any deprivation of liberty and in particular detention on remand in criminal
proceedings shall be reduced to the shortest time possible.
4. Anyone who is deprived of liberty by arrest shall be promptly informed, in a language he or she understands, of the reasons for the deprivation of liberty. Everyone who is deprived of liberty without a court order shall be brought before a judge of the Basic Court in the jurisdiction of arrest within forty-eight (48) hours. That judge shall decide on his or her detention in accordance with Chapter X of the present code.

Article 187
Findings Required For Detention on Remand

1. The court may order detention on remand against a person only after it explicitly finds that:
1.1. there is a grounded suspicion that such person has committed a criminal
offence;
1.2. one of the following conditions is met:

1.2.1. he or she is in hiding, his or her identity cannot be established or
other circumstances indicate that there is a danger of flight;
1.2.2. there are grounds to believe that he or she will destroy, hide, change
or forge evidence of a criminal offence or specific circumstances indicate
that he or she will obstruct the progress of the criminal proceedings by
influencing witnesses, injured parties or accomplices; or
1.2.3. the seriousness of the criminal offence, or the manner or circumstances in which it was committed and his or her personal characteristics, past conduct, the environment and conditions in which he or she lives or other personal circumstances indicate a risk that he or she will repeat the criminal offence, complete an attempted criminal offence or commit a criminal offence which he or she has threatened to commit;
and
1.3. the lesser measures to ensure the presence of defendant listed in Article 173 of the present Code would be insufficient to ensure the presence of such person, to prevent re-offending and to ensure the successful conduct of the criminal proceedings.

[...]

Article 193
Detention on Remand After Indictment is Filed

1. After the indictment has been filed and until the conclusion of the main trial, detention on remand may only be ordered, extended or terminated by a ruling of the single trial judge or presiding trial judge or the trial panel when it is in session. The single trial judge or presiding trial judge shall first hear the opinion of the state prosecutor, if proceedings have been initiated at his or her request, and the opinion of the defendant or the defense counsel. The parties may appeal against the ruling. Article 189 paragraphs 3 and 4 of the present Code shall apply mutatis mutandis.

2. Upon the expiry of two (2) months from the last ruling on detention on remand, the single trial judge or presiding trial judge, even in the absence of a motion by the parties, shall examine whether reasons for detention on remand still exist and render a ruling by which detention on remand is extended or terminated. The parties may appeal against the ruling. Article 189 paragraphs 3 and 4 of the present Code shall apply mutatis mutandis.

Article 367
Detention on Remand after Announcement of Judgment

1. In rendering a judgment by which the accused is punished by imprisonment, the single trial judge or trial panel may:
1.1. order extend detention on remand if conditions set forth in Article 187 paragraph 1 of the present Code are met, or
1.2. terminate detention on remand if the accused is in detention on remand and the grounds on which it was ordered have ceased to exist.
2. If a single trial judge or trial panel imposes a sentence with imprisonment of five (5) ormore years, and imposes detention on remand, for the accused if he or she is not indetention, or extends it when the accused is already in detention.

Assessment of the admissibility of the Referral

52. The Court first examines whether the admissibility requirements established by the Constitution, and as further specified by the Law and foreseen by the Rules of Procedure have been fulfilled.

53. 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."*

54. The Court further examines whether the Applicant has fulfilled the admissibility requirements as provided by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

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

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... ."

55. Regarding the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely Judgment PML. No. 357/2017 of the Supreme Court, of 22 December 2017, after exhaustion of all legal remedies. The Applicant has also clarified the right 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 of Article 49 of the Law.

56. In addition, the Court should examine whether the Applicant has met the admissibility requirements specified in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (1) (d) of the Rules of Procedure sets out the criteria on the basis of which the Court may consider the Referral, including the criterion that the Referral is not manifestly ill-founded. Specifically, Rule 39 (1) (d) states that:

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

[...]

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

57. In this regard, having examined the Applicant's allegations, the Court considers that the Referral raises serious issues of fact and law which are of such complexity that their determination must depend on the review of the merits.

58. The Court finally considers that this Referral is admissible within the meaning of Rule 39 (1) (d) of the Rules of Procedure, and that it is not inadmissible on any other grounds as set out in the Rules of Procedure (See, the ECtHR *cases A and B v, Norway,* [GC], applications nos. 24130/11 and 29758/11, Judgment of 15 November 2016, paragraph 55, *Alimuçaj v. Albania*, application no. 20134/05, Judgment of 9 July 2012, paragraph 144, and see cases of the Court, case No. KI132/15, *Visoki Decani Monastery,* Judgment of the Constitutional Court of the Republic of Kosovo of 20 May 2016 and case KI97/16, Applicant *IKK Classic*, Judgment of 9 January 2018, paragraph 38).

Merits of the Referral

59. The Applicant alleges that the extension of his detention violates his rights guaranteed under Article 29 and Article 31 of the Constitution.

I. With regard to the Applicant's allegation on violation of Article 29 of the Constitution

60. Concerning his allegation of a violation of Article 29 of the Constitution, the Applicant states that "*further stay in detention on remand of the defendant is a violation of all the fundamental rights set forth in both domestic acts and international convention [...].* "

61. The Court initially notes that the rights and standards to be guaranteed in the case of deprivation of liberty have been widely interpreted by the European Court of Human Rights (hereinafter: the ECtHR) through its case law, in accordance with which the Court based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

62. Therefore, with regard to the allegations of a violation of Article 29 of the Constitution in conjunction with Article 5 of the ECHR, the Court

refers to the principles and standards set forth in the ECtHR case law concerning the determination and length of detention on remand.

1. Criteria established for detention on remand

63. In this regard, the Court recalls that, in order to comply with the Constitution and the ECHR, the arrest or deprivation of liberty must be based on one of the grounds for the deprivation of liberty laid down in Article 29 of the Constitution in conjunction with Article 5 of the Convention.

64. The Court recalls Article 29, paragraph 1, items 1 and 2 of the Constitution, which provide that:

> *"1. Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:*
>
> *(1) pursuant to a sentence of imprisonment for committing a criminal act;*
> *(2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law".*
>
> *[...]".*

65. The Court notes that under Article 29 paragraph 1, item 2 of the Constitution and Article 5.1 (c) of the Convention, the deprivation of liberty may be conducted in the case of a grounded suspicion of committing the criminal offence, and such a thing is considered necessary to prevent the commission of another offense or removal after its commission.

66. Therefore, the Court notes that in order to comply with the Constitution and the ECHR, the detention on remand must be based on one of the grounds for deprivation of liberty set forth in Article 29 of the Constitution in conjunction with Article 5, paragraph 1 (c) of the Convention.

67. The ECtHR, in its case law, has identified three basic criteria to be examined to assess whether deprivation of liberty is lawful and non-arbitrary (see ECHR case, *Merabishvili v. Georgia*, [GC] application No. 72508/13, Judgment of 28 November 2017, paragraph 183).

68. First, there must exist a "reasonable suspicion" that the person deprived of liberty has committed the criminal offense (see ECHR case, *Merabishvili v. Georgia*, [GC] application No. 72508/13, Judgment of 28 November 2017, paragraph 184). Secondly, the purpose of deprivation of liberty "is that it should in principle be in the function of the conduct of criminal proceedings" (see, case of the Court KI63/17, Applicant *Lutfi Dervishi*, Resolution on Inadmissibility of 16 November 2017, paragraph 57, see also the case of the ECHR, *Ostendorf v. Germany*, No. 15598/08, Judgment of 7 March 2013, paragraph 68), and moreover, it must be proportionate in the sense that it should be necessary "to ensure the appearance of the person affected by the relevant competent authorities" (see, case of the Court KI63/17, Applicant *Lutfi Dervishi*, Resolution on Inadmissibility of 16 November 2017, paragraph 57, see also the abovementioned EDtHR case *Merabishvili v. Georgia*, paragraph 185). Third, the deprivation of liberty or the detention on remand must have been done following the procedure prescribed by law (see the abovementioned ECtHR case *Merabishvili v. Georgia*, paragraph 186).

1.1. Application of the criteria regarding the detention on remand in the Applicant's case

69. In the light of the foregoing, the Court notes that the imposition of the detention on remand in question is based on Article 29.1.2 of the Constitution in conjunction with Article 5.1 (c) of the ECHR.

1. General principles regarding detention on remand pending trial

70. Initially, the Court notes that the basic legal criteria regarding detention on remand pending punishment will refer to the principles and standards set forth in ECtHR case law, within the meaning of Article 29 of the Constitution and Article 5 of the ECHR. agency. Specifically, in the context of the Applicant's case, the Court will focus on the principles and standards of the ECtHR within the meaning of Article 29, paragraph 1, item 2, of the Constitution and Article 5, paragraph 3, of the ECHR, dealing with detention on remand pending trial.

71. The Court notes that in determining the length of detention pending trial under Article 29, paragraph 1, item 2 of the Constitution, in conjunction with Article 5, paragraph 3 of the ECHR, the period of detention on remand begins on the date the accused is taken in

detention, and ends on the day he is released or the court of first instance decided regarding the indictment (see ECHR cases, *Štvrtecký v. Slovakia*, No. 55844/12, Judgment of 5 June 2018, paragraph 55; *Solmaz v. Turkey*, application No. 27561/02, Judgment of 16 January 2017, paragraphs 23 and 24).

72. The Court, referring to Article 29, paragraph 1, item 2 of the Constitution and Article 5, paragraph 3 of the ECHR, states that the grounded suspicion that a person deprived of his liberty has committed a criminal offense is regarded as an essential element in determining the detention on remand, and/or the extension of detention pending trial.

73. In its case law, the ECtHR has highlighted that the reasonableness of a period spent in detention on remand cannot be assessed in abstract terms, but must be assessed on the basis of the facts of each individual case and the specific characteristics of the case. The extension of detention on remand may be justified in a particular case only if there is evidence of a genuine public interest claim which, despite the presumption of innocence, is of greater weight than the norm of respect for individual liberty set out in Article 5 of the ECHR (see, ECtHR case, *Buzadji v. Moldova*, no. 23755/07, Judgment of 5 July 2016, paragraph 90; see also *Labita v. Italy*, [GC], No. 26772/95, paragraph 152, and case *Kudła v. Poland* [GC], application no. 30210/96, paragraph 110).

74. According to the practice and assessment of the ECtHR there is no fixed time-frame applicable to each case (see ECtHR case *McKay v. the United Kingdom*, [GC] application no. 543/03, Judgment of October 3, 2006, paragraphs 41-45)

75. The ECtHR highlights that the domestic courts must review and establish whether in addition to the grounded suspicion, there other grounds which justify the deprivation of liberty pending trial (See ECtHR Cases *Letellier versus France*, Application No. 12369/86, Judgment of 26 June 1991, paragraph 35; and case *Yağcı and Sargın v. Turkey*, Application nos. 16419/90 and 16426/90, Judgment of 8 June 1995, paragraph 50).

76. Thus, the domestic courts must examine and address all the circumstances arguing for or against the existence the detention measure (namely the existence of public interest in that sense), with due regard to the principle of the presumption of innocence. On the basis of the reasoning given by the domestic courts, the ECtHR assesses whether there has been a violation of Article 5, paragraph 3, of the

ECHR. (see *Peša v. Croatia*, ECHR Judgment of 8 April 2010, paragraph 91; and *Perica Oreb v. Croatia*, no. 20824/09, paragraph 107).

77. Consequently, the ECtHR case law has developed four basic reasons as relevant for continuing a persons' pre-trial detention, namely: i) the risk of flight; ii) interference with the court of justice; iii) prevention of crime; iv) the need to preserve public order (See ECtHR Cases *Tiron v. Romania*, Application No. 17689/03, Judgment of 7 April 2009, paragraph 37; *Smirnova versus Russia*, Application nos. 46133/99 and 48183/99, Judgment of 24 July 2003, paragraph 59; *Piruzyan versus Armenia*, Application No. 33376/07, Judgment of 26 September 2012, paragraph 94).

78. However, the ECtHR has continuously asserted in its case law that the existence of reasonable suspicion that the person in detention is a perpetrator of the criminal offence is essential (*conditio sine qua non*) for extension of the detention, but not sufficient after a certain lapse of time (See ECtHR cases *Stögmüller versus Austria*, Application No. 1602/62, Judgment of 10 November 1969; and case *Clooth versus Belgium*, Application No. 12718/87, Judgment of 12 December 1991, paragraph 36).

79. However, according to ECtHR, these fundamental reasons, on which the detention measure may be imposed, should be considered and placed in the spirit of the obligation of the public authorities concerned to consider other alternative measures to ensure the presence of the defendant in the successful conclusion of the respective criminal proceedings (See, the ECtHR case *Idalov v. Russia*, Application No. 5826/03, Judgment of 22 May 2012, paragraph 40).

80. In this regard, and in accordance with the principles developed by the ECtHR, the reasoning of the courts' decision to extend detention pending trial should always be evident, namely a detailed and well-founded reasoning on the facts and circumstances of the case. In this context, the ECHR has consistently emphasized that "*it is only by giving a reasoned decision that there can be public scrutiny of the administration of justice*" (See ECtHR cases: *Suominen v. Finland*, application no. 37801/97, Judgment of 1 July 2003, paragraph 37, *Tase v. Romania*, application no. 29761/02, Judgment of 10 June 2008, paragraph 41).

81. In the light of the foregoing, the ECtHR also found that *"quasi-automatic prolongation of detention contravenes the guarantees set*

forth" in Article 5 paragraph 3 of the ECHR (see, *mutatis mutandis, Tase v. Romania*, cited above, paragraph 40). Therefore, the ECtHR held that even if the aforementioned reasons existed at the time of the pre-trial detention, the nature of those reasons or circumstances may change over time (see ECtHR case cited above, *Merabishvili v. Georgia*, paragraph 234).

2.1 Application of the ECtHR criteria with regard to the extension of detention pending trial in the Applicant's case

82. In the following, based on the foregoing explanation of the main principles of the ECtHR case law, the Court will examine whether the Applicant has proved and sufficiently substantiated the allegations of a violation of the procedural guarantees set out in the Constitution and the ECHR in relation to the extension of his detention.

83. Initially, the Court reiterates that the Applicant's detention on remand is based on Article 29, paragraph 1, item (2) of the Constitution and Article 5, paragraph 3 of the ECHR, namely the detention pending trial.

84. The Court recalls that the Applicant alleges that "*the further detention on remand of the defendant is a violation of all the fundamental rights set forth in domestic law as well as in international conventions [...]*". The Applicant further alleged that after eight (8) years of detention on remand "*any reason for which such detention was imposed has ceased*."

85. Therefore, with regard to the Applicant's allegation that decisions concerning the extension of his detention on remand were rendered in violation of Article 29 of the Constitution, the Court will first refer to the period of the Applicant's detention on remand of the judgment, within the meaning of Article 29, paragraph 1, item 2 of the Constitution, in conjunction with Article 5, paragraph 3 of the ECHR and the criteria set forth in the case law of the ECHR.

(a) Applicant's detention on remand pending trial

86. In the present case, the Court notes that the Applicant, following his arrest has put on detention on remand on 31 July 2010. His detention on remand pending trial lasted until 3 September 2012 when the District Court rendered the Decision [Judgment P. No. 137/2011, of 3 September 2012], by which the Applicant was found guilty and sentenced to imprisonment.

87. The Court recalls that against the aforementioned Decision of the District Court, the Applicant filed an appeal. The Court of Appeals by Decision PAKR. No. 100/2013, on 26 November 2013, approved the Applicant's appeal, annulled the Judgment of the District Court and remanded the criminal case to Basic Court.

88. In this regard, the Court notes that during the period between 3 September 2012 and 26 November 2013, namely after the Judgment of the District Court until rendering the decision of the Court of Appeals to remand the criminal case for reconsideration to the Basic Court, the detention on remand the Applicant does not fall within pre-trial detention within the meaning of Article 29, paragraph 1, item 2 of the Constitution and Article 5, paragraph 3 of the ECHR.

89. Therefore, the Court considers that during the period between 3 September 2012 and 26 November 2013, the Applicant's detention on remand was a detention on remand within the meaning of Article 29, paragraph 1, item 1, of the Constitution and Article 367 [Detention on Remand after Announcement of Judgment], paragraph 2 of the CPCK.

90. The Court recalls that the Court of Appeals by Decision PAKR. No. 100/2013, of 26 November 2013, through which remanded the criminal case to Basic Court for reconsideration, also decided to extend the Applicant's detention on remand.

91. Based on the above, the Court notes that the second period of Applicant's detention pending trial, within the meaning of Article 29, paragraph 1, item 2 of the Constitution, in conjunction with Article 5, paragraph 3 of the ECHR, started on 26 November 2013 and continued until the date of the Judgment of the Basic Court in Ferizaj [PKR No. 155/15], of 6 April 2018 was rendered, by which the Applicant was found guilty and sentenced to effective imprisonment.

92. Therefore, since 26 November 2013 until 6 April 2018 [date of issuance of the Judgment of the Basic Court in Ferizaj [PKR No. 155/15], the Applicant's detention pending trial of his case was extended every two months by the Basic Court in Ferizaj.

(a) Assessment regarding the justification for extending detention pending trial

93. In the present case, Court initially recalls that the CPCK, namely Article 187 thereof, establishes the procedure and legal criteria for imposition of the detention measure, including: 1) the existence "the grounded

suspicion"; 2) fulfillment of the conditions for extension of detention on remand that based on the circumstances of the commission of the criminal offense there is a risk that the Applicant may repeat the criminal offense; as well as 2) the lesser measures to ensure the presence of the defendant are insufficient to ensure the presence of such a person, to prevent the repetition of the criminal offense and ensure the successful conduct of the criminal proceedings (see also the case of the Court KI63/17, Applicant *Lutfi Dervishi*, Resolution on Inadmissibility of 16 November 2017, paragraph 68).

94. The Court recalls that the ECtHR case law has established four basic reasons as relevant for continuing a persons' pre-trial detention, namely: i) the risk of flight; ii) interference with the court of justice; iii) prevention of crime; iv) the need to preserve public order (See ECtHR abovementioned cases, *Tiron v. Romania*, paragraph 37; *Smirnova v. Russia*, paragraph 59; and case *Piruzyan v. Armenia*, paragraph 94).

95. However, according to the ECtHR, these detention grounds should be examined and considered together with the possibility of considering other measures provided for by the provisions of the Criminal Procedure Code.

96. In the Applicant's case, the Court recalls that the Basic Court in Ferizaj referring to Article 187 of the CPCK held that in addition to the grounded suspicion of having committed the criminal offense, it also found that there was a legal basis for the extension of the detention on remand. for the following reasons: 1) taking into account the seriousness of the criminal offense; 2) the manner in which the criminal offense was committed and the circumstances and environment in which the criminal offense was committed; 3) the fact that the relationship between the Applicant's family and the victim's family has been deteriorated ; and 4) there is a risk that the release of the Applicant may lead to the repetition of a criminal offense or similar offenses.

97. This reasoning of the Basic Court was upheld by the Court of Appeals, as well as by the Supreme Court through the challenged Judgment.

98. Court recalls the challenged Judgment of the Supreme Court, which provides the following reasoning:

> *"According to the assessment of this Court, the above mentioned allegations are ungrounded because in this criminal - legal matter, by the case files, mainly by the criminal charge, minutes of questioning of witnesses and other collected evidence based on*

which the indictment was filed, it results that it exists the grounded suspicion that the defendant is the perpetrator of the criminal offence, which fulfills the legal conditions of Article 187, paragraph 1, sub paragraph 1.1, of the CPCK for extending the detention, while it will be assessed in the further criminal proceedings whether these facts will be substantiated.

Further on, this Court assesses that there is legal ground for extending the detention on remand pursuant to Article 187, paragraph 1, sub paragraph 1.2, item 1, 2 and 3, of the CPCK, by taking into consideration the serious gravity of the criminal offense, the manner of commission of the criminal offense, the circumstances and environment where the criminal offense was committed, and especially the fact that the relationship between the family of the defendant Fahri Deçani and the family of the deceased [B.K.],has been deteriorated, it makes us believe that by freeing the defendant, it could come to the repetition of the criminal offense".

99. In this regard, the Court notes that in relation to the extension of the detention on remand the Supreme Court, in addition to upholding the reasoning and finding of the first and second instance courts, used exactly the same reasoning as that given in the Decision above of the Basic Court PKR. No. 155/15, of 24 November 2017.

100. In this respect, with regard to the regular courts' reasoning on the issue of detention on remand, the Court finds that the severity of the charge of the criminal offense committed and the likelihood to repeat the commission of the criminal offense may be important factors in the extension of the detention, but in itself may not be a reason for the prolongation of detention. According to the ECtHR case law, the possibility to repeat the criminal offense should be based on concrete facts and also take into account the principle of presumption of innocence (see case *Perica Oreb v. Croatia*, ECtHR Judgment of 13 October 2013, paragraph 113).

101. The Court also notes that the argument put forward in the decisions of the three regular courts "*in particular the fact that relations between the family of the defendant Fahri Deçani and the family of the deceased [B.K,] are still deteriorated, with the release of the defendant at liberty may lead to the repetition of the criminal offense*", cannot be infinitely the basis for the extension of detention on remand. Furthermore, it should be noted that as established in the ECtHR case law, "*one of the common positive obligations of the states, where the ECHR is applied, is that the responsible state authorities*

have a duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery, and also to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual" (see *Osman v. Kingdom United Kingdom*, ECHR Judgment of 28 October 1998, paragraph 115).

102. The Court concludes that mainly during 2017 the extension of detention on remand to the Applicant by the Basic Court ceased to be based on relevant and sufficient reasoning. Specifically, the Court finds that the Basic Court in its last five Decisions (of 30 March 2017; of 29 May 2017; of 27 July 2017; of 26 September 2017; of 24 November 2017) consistently provided identical reasoning.

103. In this regard, the Court notes that the ECtHR found a violation of Article 5 (3) of the ECHR in a large number of cases in which the domestic courts had used generalized wording ("stereotypical wording") to extend the detention on remand, without having regard and without convincingly substantiating the need to extend the detention on the basis of the specific facts and circumstances of the case (see, *Orban v. Croatia*, ECHR Judgment of 19 December 2013, paragraph 59; *Sulaoja v. Estonia*, No. 55939/00, 15 February 2005, paragraph 64; *Tsarenko v. Russia*, No. 5235/09, 3 March 2011, paragraph 70).

104. Therefore, the Court considers that the reasoning of the Basic Court in these Decisions, upheld by the Court of Appeals and the Supreme Court through the challenged Judgment, is general and insufficiently justified reasoning, clearly lacking a reasoned and convincing analysis and assessment of the facts and the concrete circumstances of the case.

105. Moreover, the regular courts failed to provide a concrete and sufficient reasoning as to why the extension of detention pending trial against the Applicant was necessary and why the alternative measures were not applicable in the Applicant's case.

106. Therefore, a proper reasoning and elaboration of all the concrete circumstances, including the detailed reasoning why other alternative measures could not be applied in the Applicant's case would be clear evidence of individualized assessment in accordance with the specifics of the case, as well as grounded justifications for the need to decide, as in the case of the challenged decisions of the regular courts, regarding

the extension of detention on remand pending trial against the Applicant.

107. Therefore, even if the reasons for extension of detention continue to be present, the Court reiterates that these reasons always require a continuous and individualized examination in accordance with the specifics of the particular case, as the nature of these reasons or circumstances, which initially justified the imposition and/or extension of detention may change over time.

108. In this regard, the Court recalls the case law of the ECHR which held that *"quasi-automatic prolongation of detention contravenes the guarantees set forth"* in Article 5 paragraph 3 of the ECHR (see, *mutatis mutandis,* the ECtHR case cited above *Tase v. Romania*, paragraph 40), finds that the lack of concrete and detailed reasoning, and the extension of detention pending trial by regular courts, is not in accordance with the principles and the standards established by the ECtHR.

109. Accordingly, the Court considers that the extension of detention on remand pending trial of the Applicant, confirmed by the challenged Judgment Pml. No. 357/2017 of the Supreme Court of 22 December 2017 constitutes a violation of Article 29, paragraph 1, pitemoint (2) of the Constitution, in conjunction with Article 5, paragraph 3 of the ECHR.

II. With regard to the Applicant's allegation on Article 31 of the Constitution

110. Regarding the Applicant's allegation that regular courts have violated the rights guaranteed by Article 31 of the Constitution because *"[...] by the above mentioned decisions, for more than 7 years the detention measure was extended by allegations that there is grounded suspicions and in fact his basic constitutional right was not respected, since it is not known when this matter will be completed."*

111. The Court notes that the Applicant expressly alleges a violation of Article 31 of the Constitution by extending his detention on remand every two months by the Basic Court in Ferizaj. Therefore, the Applicant did not raise any allegations of a violation of Article 31 of the Constitution because the Basic Court in Peja had not yet decided on his case in the proceedings.

112. In this regard, the Court notes that the ECtHR case law explained that the review of claims "within a reasonable time" brought by a person remanded in detention that just concern the stages of the proceedings to which Article 5 paragraph 3 apply, more specifically, from arrest to conviction by the trial courts, fall only under the scope of Article 6 (1) of the ECHR (See ECtHR Case *Abdoella v. Netherlands*, Application No. 12728/87, Judgment of 25 November 1992, paragraph 24).

113. Therefore, the Court notes that the Applicant's allegations regarding the length of the detention pending his conviction do not fall within the scope of Article 31 of the Constitution.

Conclusion

114. The Court, in relation to the Applicant's allegation of a violation of Article 29 [Right to Liberty and Security] of the Constitution, in conjunction with Article 5 (Right to liberty and security) of the ECHR, considers that the reasoning of the Basic Court on extension of detention on remand, confirmed by the Court of Appeals and the Supreme Court through the challenged Judgment, does not justify its decision to extend the detention on remand to the Applicant. Therefore, the regular courts failed to provide concrete and sufficient reasoning as to why the alternative measures were not applicable in the Applicant's case.

115. The Court finds that the challenged Judgment of the Supreme Court Pml. No. 357/2017, of 22 December 2017, which rejected the Applicant's request for protection of legality against Decision PN1. No. 2156/2017 of the Court of Appeals, of 6 December 2017 and the Decision PKR. No. 155/15 of the Basic Court in Ferizaj of 24 November 2017 is not in compliance with Article 29, paragraph 1, item (2) of the Constitution, in conjunction with Article 5, paragraph 3, of the ECHR.

116. The Court is aware of the fact that the Applicant was found guilty and sentenced to effective imprisonment through the Judgment of the Basic Court in Ferizaj [PKR. No. 155/15 of 6 April 2018], within the criminal proceedings against him. In this regard, the Court recalls that this procedure was not subject to review by the Court, and that only the assessment of the challenged Judgment of the Supreme Court regarding the extension of the detention pending trial of the Applicant is subject to review.

117. It is, therefore, understandable that this judgment cannot have any effect as to the status of the Applicant. However, the Court considers

that it is very important that through this Judgment of the Constitutional Court will be set a new standard in the case law in the Republic of Kosovo and, consequently, the regular courts will in future have to comply with the principles and standards elaborated in this Judgment, which have been interpreted in accordance with the ECtHR case law.

118. In this regard, the Court, through this Judgment, clearly and directly conveys the request and instruction that should serve to the regular courts in order to comply with the constitutional requirements of Article 29 of the Constitution, as well as with the requirements of Article 5 of the ECHR, as widely interpreted by the ECHR in its case law, their reasoning for extension of detention pending trial must contain detailed reasoning and an individualized assessment according to the circumstances and facts of the case, explaining and proving why the detention pending trial is necessary and why other alternative measures are not appropriate for the smooth and successful conduct of the criminal proceedings.

119. The Court further clarifies that it has no legal authority to determine any form or manner of compensation in cases where it finds a violation of the relevant constitutional provisions, in the specific case of Article 29 of the Constitution (see also the case of the Constitutional Court in case KI108/18, Applicant *Blerta Morina*, Resolution on Inadmissibility of 1 October 2019, paragraph 196). The Court also recalls that in the ECtHR case law, based on the specific circumstances of the case, the ECtHR considers that the finding of a violation itself constitutes "*just satisfaction*" even for the non-pecuniary damage that an Applicant may have suffered. (See in this respect the operative part of the ECHR case, *Roman Zaharov v. Russia*, Judgment of 4 December 2015, see also case of the Constitutional Court KI108/18, Applicant *Blerta Morina*, paragraph 197).

120. However, the foregoing reasons do not imply that the individuals have no right to seek redress from the public authorities in the event of finding of a violation of their rights and freedoms under the laws applicable in the Republic of Kosovo (see Constitutional Court case KI108/18, Applicant *Blerta Morina*, Resolution on Inadmissibility of 1 October 2019, paragraph 197).

FOR THESE REASONS

The Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 8 October 2019:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD with majority vote that Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017 is not in compliance with Article 29 [Right to Liberty and Security], paragraph 1, item (2) of the Constitution of the Republic of Kosovo, in conjunction with Article 5 (Right to liberty and security), paragraph 3 of the European Convention on Human Rights;

III. TO NOTIFY this Decision to the Parties;

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

V. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

DISSENTING OPINION of Judge Selvete Gërxhaliu – Krasniqi in case KI10/18

I respect the decision of the majority of the judges of the Constitutional Court (hereinafter: the majority). However, I cannot agree with this decision reached by the majority for the following reasons:

I dissent from the decision of majority because:

1. Failure of the majority to clearly define what period of the Applicant's detention on remand it declares in violation of the Constitution;

2. Failure of the majority to address the right to compensation under paragraph 5 of Article 29 of the Constitution; and

3. The majority failed to assess the reasons for the extension of detention on remand, in accordance with the ECtHR case law.

SCOPE OF THE REFERRAL

1. The Applicant requested the Court to assess the constitutionality of his stay in detention on remand, stating*: "The further stay of the defendant under the measure of detention is a violation of all fundamental rights determined by national acts and also international covenants, and also the stay under the measure of detention for more than 7 years represents a fundamental violation of the principle of fair trial and it supersedes the principle of presumption of innocence, by taking into consideration that the defendant is serving a sentence and not a security measure as defined by the law".*

2. The Applicant alleges that: "*by the decisions of the regular courts, namely Judgment PML. No. 357/2017 of the Supreme Court, of 22 December 2017, Decision PN1. No. 2156/2017 of the Court of Appeals, of 6 December 2017, Decision PKR. No. 155/15 of the Basic Court in Ferizaj, it was decided in an unlawful manner regarding the detention on remand of the accused [....]"* .

3. In the present case the Applicant alleges that *"[...] the abovementioned decisions extended for more than 7 years the detention measure, with the allegation that there is grounded suspicion and in fact his basic constitutional rights were [not] disregarded, since it is not known when this matter will be completed."*

4. The Applicant alleges these decisions infringed and violated the fundamental constitutional rights of the accused, "***lawfulness of arrest or detention*** **",** Article 29, paragraph 1 item (2) of the Constitution in conjunction with Article 5 paragraph 1 of the ECHR. The Applicant also requests the assessment of his constitutional rights: **"*that the case is speedily decided*",** Article 29, paragraph 4 of the Constitution, in conjunction with Article 5 paragraph 4 of the ECHR.

5. In the allegations concerning the violation of Article 31 of the Constitution, the Applicant requests the Court to make an assessment of the: "[...] ***constitutional right to trial within a reasonable time".***

6. The decision of the majority rightly identifies that "[...] *the review of claims "within a reasonable time" brought by a person remanded in detention that just concern the stages of the proceedings to which Article 5 paragraph 3 apply, more specifically, from arrest to conviction by the trial courts, fall only under the scope of Article 5 and not the scope of Article 6 (1) of the ECHR (See ECtHR Case Abdoella v. Netherlands, Application No. 12728/87, Judgment of 25 November 1992, paragraph 24*)"[1].

7. Therefore, the constitutional referral must be dealt within the meaning of Article 29 of the Constitution in conjunction with Article 5 of the ECHR. In the following I will briefly explain the reasons for my disagreement with the decision of the majority, specifying the majority's failures to deal with the constitutional referral, in accordance with Article 29 of the Constitution in conjunction with Article 5 of the ECHR.

What period of the Applicant's detention on remand the decision of the majority declares in violation of the Constitution

8. It follows from the case file that the Applicant was arrested on 31 July 2010. The Applicant requested from the Court the constitutional review of the arrest and detention on remand until 22 December 2017.[2] *In this case the Applicant states that "the further detention on remand of the defendant is a violation of all the fundamental rights*

[1] Judgment, paragraph 112.
[2] The Court did not deal with the period after 22 December 2017 until 6 April 2018, this period relates to the decisions by which the regular courts have decided regarding the Applicant's criminal liability as well as the period of review of appeals until 19 February 2019. Judgment of the Basic Court in Ferizaj PKR no. 155/15 of 6 April 2018, Judgment of the Court of Appeals of Kosovo, PAKR no. 324/2018 of 7 August 2018, as well as the Judgment of the Supreme Court of Kosovo, PML. Nr. 19/2019 of 19 February 2019.

set forth in domestic law as well as in international conventions […].”[3]

9. *The decision of the majority held that “…..Judgment Pml. No. 357/2017 of the Supreme Court of Kosovo of 22 December 2017 is not in compliance with Article 29 [Right to Liberty and Security], paragraph 1, item (2) of the Constitution of the Republic of Kosovo, in conjunction with Article 5 (Right to liberty and security), paragraph 3 of the European Convention on Human Rights.”*[4]

10. The question arises, what period of time between 31 July 2010 and 22 December 2017 of the Applicant's detention on remand is covered by the judgment of the majority, which was declared contrary to Article 29 of the Constitution in conjunction with Article 5 of the ECHR.

11. I consider that, due to the specific importance of the right to liberty and security within the individual rights and freedoms, and because of the Applicant’s stay in detention on remand for a long period of time, the Court should clearly state what is the duration of detention on remand that the Court has declared to be not in compliance with Article 29 of the Constitution in conjunction with Article 5 of the ECHR.

12. In its case law, the ECtHR has addressed and clarified the importance of the right to liberty and security in a democratic society, its relation to the principle of legal certainty and rule of law, specifying that the general purpose of the right to liberty and security is to ensure that no one can be arbitrarily deprived of liberty. (See, *mutatis mutandis*, ECtHR Judgment of 13 December 2013, *El-Masri v. The Former Yugoslav Republic of Macedonia*, No. 39630/09, paragraph 230).[5]

13. The ECtHR in the same Judgment, in item 7 “[…] *holds that the applicant’s detention in the hotel for twenty-three days was arbitrary, in breach of Article 5 of the Convention, (see* ECtHR Judgment of 13 December 2013, *El-Masri v. the Former Yugoslav Republic of Macedonia,* no. 39630/09, item 7).

14. The right to liberty and security in constitutional democracies is an essential right of the individual. The arrest and detention as a form of deprivation of liberty has a special place in the Constitution and in the

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[3] Judgment, paragraph 60.
[4] Judgment ,item II.
[5] See, case of the Court KI63/17, Applicant *Lutfi Dervishi*, Resolution on Inadmissibility, 16 November 2017, paragraph 47.

ECHR. Any decision on the basis of which an individual has been detained or extended the detention is subject to judicial review, based on clear criteria of the ECtHR case law.

Failure of the Court to address the right to compensation pursuant to paragraph 5, of Article 29 of the Constitution

15. The accurate determination of the Applicant's detention on remand, which in the decision of the majority was declared to be contrary to Article 29 of the Constitution in conjunction with Article 5 of the ECHR, is crucial because:

a) accurate determination of the right to compensation of the individual in case the decisions of the regular courts are declared in violation of Article 29 of the Constitution, and

b) the impact of the Judgment on the advancement of the constitutional order, and the protection of human rights and freedoms in the Republic of Kosovo, in the application of Article 29 paragraph 5 of the Constitution.

16. With regard to the right to compensation, the Constitution in Article 29 paragraph 5 expressly states that: *"Everyone who has been detained or arrested in contradiction with the provisions of this article has a right to compensation in a manner provided by law".*

17. The decision of the majority rightly assesses the issue of compensation in the Applicant's case. The decision of the majority states: "[...] *the Court further clarifies that it has no legal authority to determine any form or manner of compensation in cases where it finds a violation of the relevant constitutional provisions, in the specific case of Article 29 of the Constitution (see also the case of the Constitutional Court in case KI108/18, Applicant Blerta Morina, Resolution on Inadmissibility of 1 October 2019, paragraph 196*)."[6]

18. The finding of the majority that the Court does not have legal authority to determine any type or manner of compensation referring to case KI108/18, is ungrounded. Case KI108/18 has absolutely nothing to do with Article 29 of the Constitution, namely the right to liberty and security. In case KI108/18 the subject matter was the constitutional review of Article 23 [Human Dignity]; Article 24 [Equality Before the Law], and Article 36 [Right to Privacy] of the Constitution in

[6] Judgment, paragraph 119.

conjunction with Article 8 [Right to respect for private and family life] of the ECHR.[7]

19. I regret to note that the decision of the majority does not even take into account the existence of the constitutional norm, which is embodied in Article 29 of the Constitution itself, paragraph 5. It is the primary duty of the Court to interpret and, in the present case, to apply the constitutional norm. It is equally important to note that Judgment KI10/18 is the first Judgment of the Court under Article 29 of the Constitution in conjunction with Article 5 of the ECHR.

20. In this Judgment, the Applicant's right to compensation was ignored by the majority, which failed to consider and deal with it within the constitutional norm. The Constitution recognizes the right of a person detained or arrested contrary to the provisions of Article, 29 to enjoy the right to compensation in the manner provided by law.

21. In addition, the majority in this Judgment has failed to bring to the attention of the competent authorities the positive obligation to issue a law[8] that would compensate individuals detained or arrested in breach of the provisions of Article 29 of the Constitution.

22. It is incomprehensible, the hesitancy of the majority with the decision it has rendered itself, the decision of the majority states:'[...] *It is, therefore, understandable that this judgment cannot have any effect as to the status of the Applicant. However, the Court considers that it is very important that through this Judgment of the Constitutional Court will be set a new standard in the case law in the Republic of Kosovo and, consequently, the regular courts will in future have to comply with the principles and standards elaborated in this Judgment, which have been interpreted in accordance with the ECtHR case law."*[9] What new standard for case law is set by this judgment?

Majority failed to assess reasons for extension of the detention measure on the basis of ECtHR case law

23. The majority finds that, *"'[...] the challenged Judgment of the Supreme Court Pml. No. 357/2017, of 22 December 2017, which rejected the Applicant's request for protection of legality against Decision PN1. No. 2156/2017 of the Court of Appeals, of 6 December*

[7] Resolution on Inadmissibility Case KI108/18, Applicant Blerta Morina, of 1 October 2019, paragraph 4.
[8] The Assembly of the Republic of Kosovo as a legislative body is obliged by the Constitution to issue a special law pursuant to paragraph 5, Article 29 of the Constitution.
[9] Judgment, paragraph 117.

2017 and the Decision PKR. No. 155/15 of the Basic Court in Ferizaj of 24 November 2017 is not in compliance with Article 29, paragraph 1, item (2) of the Constitution, in conjunction with Article 5, paragraph 3, of the ECHR."[10]

24. The majority considers that the decisions of the three regular courts are not in compliance with Article 29, paragraph 1, item (2) of the Constitution, in conjunction with Article 5, paragraph 3, of the ECHR, reasoning that " [...] *The Court also notes that the argument given in the decisions of the three regular courts "in particular the fact that the relations between the family of the defendant Fahri Deçani and the family of the deceased [B.K,] are still deteriorated, the release of the defendant at liberty may lead to the repetition of the criminal offense", cannot be infinitely the basis for the extension of detention on remand".*[11]

25. Does this mean that only these three decisions (24 November 2017-22 December 2017) [12] of the regular courts are not reasoned in accordance with Article 29 paragraph 1, item (2) of the Constitution, in conjunction with Article 5, paragraph 3 of the ECHR!

26. The Applicant requested the Court to assess whether the decisions of the regular courts imposing and extending detention on remand for 7 years are in accordance with the Constitution. The Applicant has raised this allegation within the right, **that the case be decided by the court within the shortest possible time, and in case the arrest or detention is unlawful, to order the release of the person**. This request of the Applicant falls under Article 29, paragraph 4 of the Constitution in conjunction with Article 5 paragraph 4 of the ECHR. Dealing with the request within the meaning of paragraph 4 of Article 29 of the Constitution would bring the decision of the majority, in a *corpus habeas*, within the criteria of Article 5 of the ECHR.

27. However, let us return to the line of reasoning of the decision of the majority. The majority in the decision never addressed the question of whether the facts and the legal reasoning of the three regular courts[13] are well-founded and proven, and if they are well-founded and proven,

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[10] Judgment, paragraph 115.
[11] Judgment, paragraph 101.
[12] Judgments that have been declared incompatible with the Constitution: Judgment of the Supreme Court Pml. no. 357/2017 of 22 December 2017 rejecting the Applicant's request for protection of legality against Decision of the Court of Appeals PN1. no. 2156/2017 of 6 December 2017 and the Decision of the Basic Court in Ferizaj PKR. no. 155/15, of 24 November 2017.
[13] Judgment, paragraph 101.

what are the obligations of the authorities responsible when it comes to physical security, and the right to life of an arrested person, who is in detention pending trial.

28. If the facts and legal reasoning of the three regular courts are well founded, then is there a sufficient basis for the decisions of the three regular courts to be declared incompatible with the Constitution solely on the basis of the "*stereotype*" wording?[14]

29. In order to clarify to the Applicant what are the fundamental reasons for extending detention on remand under the ECtHR case law, also applicable in the present case, and with a view to establishing a standard of treatment of the right to liberty and security in the case law of the Republic of Kosovo, in this Judgment, the majority should have considered and explained the four fundamental reasons which serve as basic principles for the continuation of the detention of persons pending trial.

30. It is noteworthy that the majority properly identified the fundamental reasons for the extension of detention on remand, although it reiterates twice in the Judgment the reasons for the extension and detention under the ECHR case law, but does not consider those reasons at all.[15]

31. According to the case law of the ECtHR, the fundamental reasons for continuing detention on remand are:*[...] 1) the risk of flight; 2) interference with the court; 3) prevention of crime; 4) the need to preserve public order (See ECtHR cases cited above, case Tiron v. Romania, paragraph 37; case Smirnova v. Russia, paragraph 59; and case Piruzyan v. Armenia, paragraph 94".*[16]

32. The four fundamental reasons for extension of detention of persons pending trial are required to be met cumulatively, in each case considering the imposition and extension of detention measure.

Conclusion:

I respectfully express my dissent with the decision of the majority:

[14] Judgment, paragraph 103.
[15] Judgment, paragraphs 77 and 94.
[16] For more see. Guide to Article 5 of the Convention, Right to Liberty and Personal Security, Council of Europe / ECtHR, 2014 , p. 27-29.

1. Because, the Court missed the opportunity that Judgment KI10/18, produces a positive effect in improving the constitutional order of the Republic of Kosovo, in the sense of protecting individual rights and preventing arbitrariness in the application of Article 29 of the Constitution in conjunction with Article 5 of the ECHR;

2. The decision of the majority is unclear in defining what period of time of the Applicant's detention on remand declares in violation of the Constitution;[17]

3. The decision of the majority failed to put into motion paragraph 5 of Article 29 of the Constitution. Article 29 is the only constitutional norm, enshrined in the Constitution of the Republic of Kosovo, which expressly provides for the right to compensation in the event that a person is detained or arrested contrary to the provisions of this Article.

4. The majority in the present case failed to assess the fundamental principles for the extension of the detention measure based on the ECtHR case law..

Respectfully submitted,

Selvete Gërxhaliu- Krasniqi

Judge

[17] The Applicant has spent 7 years in detention on remand, expressed in 2555 days, while if expressed in months, 84 months.

KI32/18 Applicant: J.S.C. "Kosovik", constitutional review of Judgment AC-I-17-0469 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 26 October 2017

KI32/18, Resolution on Inadmissibility of 11 December 2018, published on 28 January 2018

Keywords*: legal person, individual referral, constitutional review of the challenged judgment of the Special Chamber of the Supreme Court, manifestly ill-founded*

The Referral is based on Article 21.4 and 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, and Rule 29 of the Rules of Procedure of the Constitutional Court.
The Applicant is a company, which was founded in April 1992 as a socially owned-enterprise.
After the establishment of the Privatization Agency of Kosovo (hereinafter: the PAK), the PAK initiated the liquidation procedure of the Applicant.
The Applicant submitted the statement of claim to the Specialized Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel), requesting confirmation of its status as a private company, which is not under the administration of PAK, annulment of the decision on liquidation, as well as the imposition of interim measure.
The Specialized Panel rejected the Applicant's claim as ungrounded considering that the Applicant had not met the requirements for the transition from a socially-owned to a private enterprise.
The Appellate Panel upheld the Judgment of the Specialized Panel.
The Applicant claims that the regular courts have erroneously determined the facts and erroneously interpreted the law, which caused a violation of Article 31 and 46 of the Constitution, as well as Article 1 of Protocol No. 1 of the ECHR.
The Court notes that the Applicant did not substantiate by evidence that the challenged decisions violated his rights and freedoms guaranteed by the Constitution and the ECHR.
The Court considers that the Applicant did not present facts indicating that the decisions of the regular courts caused in any way a constitutional violation of his rights guaranteed by the Constitution.
Therefore, the Court considers that on constitutional basis, the Referral is manifestly ill-founded and is to be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI32/18

Applicant

J.S.C. "Kosvik"

Constitutional review of Judgment AC-I.-17-0469 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 26 October 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by company J.S.C. "Kosvik" from Zubin Potok, (hereinafter: the Applicant), represented by Habib Hashani, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Judgment AC-I.-17-0469 of 26 October 2017 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel). The Applicant was served with the challenged decision on 8 November 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 1 of Protocol No. 1 [Protection of Property] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

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

Proceedings before the Constitutional Court

6. On 7 March 2018, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 9 March 2018, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Arta Rama-Hajrizi and Selvete Gërxhaliu-Krasniqi.

8. On 19 March 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

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

10. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi, with a 9 (nine) year mandate.

11. On 17 August 2018, the President of the Court appointed Judge Safet Hoxha, instead of Judge Ivan Čukalović.

12. On 22 October 2018, the President of the Court rendered a decision to replace Judge Rapporteur Almiro Rodrigues as Presiding Judge of the Review Panel and in his place as Presiding Judge of the Review Panel appointed Arta Rama-Hajrizi.

13. On 22 October 2018, the President of the Court rendered a decision on the appointment of Judge Radomir Laban as a new member of the Review Panel.

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

Summary of facts

15. The Applicant is a company established in April 1992 as a limited liability company in the socially owned company „Kosvik", with its seat in Zubin Potok.

16. In 1993, the Applicant's status was changed to a joint stock company, which was registered at the Commercial District Court in Prishtina (Fi. 11338/93, 30.12.1993).

17. On 21 May 2008, the Assembly of the Republic of Kosovo (hereinafter: the Assembly) adopted the Law No. 03/L-067 on Privatization Agency of Kosovo (hereinafter: the Law on PAK). Article 1 of the Law on PAK states that "the Agency is established as an independent public body ..." and "... is established as the successor of the Kosovo Trust Agency (KTA) regulated by UNMIK Regulation 2002/12 on the Establishment of the Kosovo Trust Agency.

18. On 14 February 2014, the Privatization Agency of Kosovo (hereinafter: the PAK) initiated the process of liquidation of the Applicant.

19. On 18 May 2017, the Applicant filed a statement of claim with the Specialized Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel), requesting confirmation of his status as a private company, which is not under the administration of the PAK, annulment of the decision on liquidation, and the imposition of an interim measure.

20. On 11 July 2017, the Specialized Panel [Decision C-I.-17-0012] approved the request for the imposition of interim measure and interrupted the further liquidation process of the Applicant before the PAK.

21. On 3 August 2017, the PAK filed an appeal against the decision of the Specialized Panel with the Specialized Sub-Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Sub-Panel), alleging violation of the contested procedure provisions, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.

22. On 18 August 2017, the Specialized Sub-Panel deciding on the merits of the claim [Judgment C-I.-17-0012] rejected the Applicant's claim as ungrounded, concluding that *„the evaluation of the SOE and the payment of the shares are crucial elements of the privatization, none of them were proven as objectively correct, therefore the court concludes that the claimant failed to prove that the transformation from SOE to J.S.C. (private joint stock company) was carried out in line with the basic legal provisions*. [...] *as the status of the SOE, whereas the transformation of the SOE into J.S.C. through registration is indisputable in accordance with Article 5 of the Law on Privatization Agency of Kosovo does not prevent the respondent from taking control of the enterprise, the Applicant's request to annul the final decision and confirm the status of the enterprise into J.S.C., is ungrounded.“*

23. On 11 September 2017, the Applicant filed an appeal with the Appellate Panel against the Judgment of the Specialized Sub-Panel.

24. On 26 October 2017, the Appellate Panel [Judgment AC-I.-17-0469] rejected the Applicant's appeal as ungrounded, cancelled the interim measure and upheld the judgment of the Specialized Panel.

Applicant’s allegations

25. The Applicant alleges that the challenged decision: “*violated his right to property under Article 46 item 1 of the Constitution of the Republic of Kosovo with regard to the right to a fair trial under Article 31 item 1 of the Constitution, which are also protected by the provision of Article 6 (and other provisions) of the Convention, in conjunction with Article 1, Protocol No. 1 of this Convention.”*

26. Furthermore, the Applicant alleges that the status of a *private company* throughout the judicial process was proved by the *presentation and the indication* of a number of evidence which he stated could be found *in the state authorities of Serbia*.
"*But the Court all the evidence proposed, either has not taken into consideration - without any relevant legal reasoning, or has not attempted to treat the evidence in question, as foreseen by law.*"

27. In fact, the Applicant alleges that *"the acts of the court, as its judgments (both of second instance and first instance), as well as the challenged decisions, entirely deny all acquired property rights and other material rights, while also violating the right to a fair trial."*

28. The Applicant requests the Court to annul the three decisions of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, that is:

1. Judgment of the second instance AC-I-17-0469 of 26.10.2017.
2. Judgment of the first instance, C-I-17-0012 of 18.08.2017 and
3. Decision AC-I-17-0690-A0001 of 28.12.2017.

Admissibility of the Referral

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

30. In this respect, the Court refers to Articles 21.4 and 113.7 of the Constitution, which provide:

Article 21

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

Article 113

„(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.“

31. The Court also refers to Article 49 [Deadlines] of the Law, which foresees:

„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.“

32. In this regard, the Court considers that the Applicant is an authorized party, has exhausted all legal remedies and has submitted the Referral within the prescribed time limit.

33. However, the Court further refers to Article 48 of the Law, which provides:

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

34. In addition, the Court takes into account Rule 39 (2) [Admissibility Criteria] of the Rules of Procedure, which establishes:

„(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim.“

35. The Court notes, first of all, that the Applicant brings the alleged violation of Article 31 para. 1 of the Constitution and Article 6 of the ECHR in connection with the fact that the regular courts did not accept his evidence, which he *presented and indicated.*

36. In this respect, the Court notes that Article 31 paragraph 1 [Right to Fair and Impartial Trial] of the Constitution, foresees:

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

37. Furthermore, the Court notes that the Applicant also referred to Article 6, para. 1 of the ECHR, but from his allegations it essentially follows that he considers that he did not have a fair trial because the

guarantees within the meaning of Article 6, para. 1 of the ECHR were not respected, and accordingly, the Court will also examine the allegations of the Applicant together (see the judgment of the European Court of Human Rights (hereinafter: the ECtHR) *Popov v. Russia*, application No. 26853/04 of 13 July 2006, para 175).

38. In this regard, the Court notes that Article 6.1 (Right to a fair trial) of the ECHR states:

> *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.*
> *[...]."*

39. With regard to the Applicant's allegations indicating that his right to a fair trial has been violated due to refusal of his proposal of evidence, the Court emphasizes that Article 6 of the ECHR does not guarantee the right that all evidence proposed to the panel to have to be accepted. Also, the right to a fair trial does not require that any specific rules in the assessment of evidence before the court be followed (see, *inter alia*, the ECtHR judgment, *Barbera, Messeque and Jabardo v. Spain,* of 6 December 1988, series A, number 146, item 68).

40. The Court further recalls the ECHR case law, according to which Article 6, para. 1 of the ECHR only requires the court to state the reasons why it has decided not to adduce the proposed evidence, requested in an explicit way by the Applicant (see ECtHR Judgment, *Vidal v. Belgium*, of 22 April 1992, series A, number 235, item 34).

41. Bringing the above-mentioned paragraphs in relation to the facts of the present case, the Court notes that the Sub-Specialized Panel regarding the examination of its proposed evidence, clearly and reasonably stated that: *"The claimant did not introduce concrete evidence, based on which it could be determined that the new shareholders have been paid their shares. The document determining the amount of money, which should be paid does not present evidence that the money was actually paid. The receipt has not been submitted. The payment was contested (reply to the claim, 19 June 2017, p. 174 [Alb] / 211 [Eng]) and in this case the burden of proof to substantiate the allegations and to present evidence falls on the claimant. The question whether or not the alleged shareholders qualify as witnesses for their payment of shares remains still open, as they were neither presented in the hearing nor the claimant sought from the court*

within time limit and duly as provided for in Article 36 paragraph 1.2 of the Annex to the Law on the SCSC, requested the court to summon them prior to the hearing by providing their full names and address."

42. Furthermore, the Court notes that the Appellate Panel also dealt with this question in the appeal proceedings, concluding that: *"New evidence, pursuant to Article 65 of the Annex to the Law on SCSC at this stage of the procedure cannot be accepted, because this evidence could be provided during the first instance proceeding, but the claimant did not provide them. But even if the Appellate Panel would accept new evidence, this would not help the claimant. The payment slips in the Social Accounting Service attached to the complaint, as noted by the complainant in the complaint, are not sufficient to establish that the total value of the social capital of SOE was covered by the shareholder payments",* giving a full legal reasoning for such a position, which this Court does not find as incorrect, arbitrary or discriminatory, which would be to the detriment of the Applicant.

43. Therefore, the Court considers that the regular courts have fulfilled their obligation under Article 31 para. 1 of the Constitution and Article 6 paragraph 1 of the ECHR, and therefore the Applicant's allegations that the challenged decisions violated the right to a fair trial are ungrounded in that segment.

44. The Court considers that nothing in the case presented by the Applicant indicates that the proceedings before the regular courts were unfair or arbitrary so that the Constitutional Court would be satisfied that the Applicant was denied any procedural safeguards, which would result in violation of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, namely Article 6 of the ECHR.

45. The Court recalls that the Applicant also alleges that the challenged decision was rendered in violation of the freedom guaranteed by Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol No. 1 [Protection of Property] of the ECHR. However, the Applicant does not justify the claim that his constitutional right to property has been violated.

46. The Court recalls that Article 1 of Protocol No. 1 of ECHR and Article 46 of the Constitution do not guarantee the right to acquisition of property (see, *Van der Mussele v. Belgium*, paragraph 48, ECtHR

Judgment of 23 November 1983, *Slivenko and others v. Lithuania,* paragraph 121, ECtHR Judgment of 9 October 2003).

47. The Applicant may further allege a violation of Article 1 of Protocol No. 1 of the ECHR and Article 46 of the Constitution only in so far as the challenged decisions relate to his "*possessions*"; within the meaning of this provision "*possessions*" can be "*existing possessions*", including claims, in respect of which the applicants can argue a "*legitimate expectation*" that they will acquire an effective enjoyment of any property right.

48. No "*legitimate expectation*" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and where the applicant's submissions are subsequently rejected by the national courts (see *Kopecký v. Slovakia*, paragraph 50 of the Judgment of the ECtHR, of 28 September 2004).

49. Consequently, the Court finds that the Applicant has not submitted any *prima facie* evidence, nor has he substantiated the allegations as to how and why the challenged decision violated his right to property guaranteed by Article 46 of the Constitution and Article 1 of Protocol No. 1 to the ECHR.

50. In conclusion, the Court considers that the Applicant has not presented any evidence indicating that the decisions of the regular courts have in any way caused a constitutional violation of his rights guaranteed by the Constitution.

51. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39 paragraph (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, in the session held on 11 December 2018, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18, Applicants: Fehmi Hoti and 15 others, Constitutional review of 16 decisions of the Supreme Court of Kosovo rendered between 26 March and 12 April 2018

KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18 Resolution published on 27.02.2019

Keywords: Individual referral, manifestly ill-founded referral

The Applicants filed a claim with the Basic Court in Mitrovica - Branch in Skenderaj against the Government of the Republic of Serbia, for compensation of material and non -material damage that was caused during the war.

The regular courts were declared incompetent to decide on this matter and, finally, referring to the relevant provisions of the Law on Contested Procedure, the Supreme Court reasoned that in these cases the norms of international law apply, and the domestic courts are not competent to decide on these disputes, but competent in this legal matter is the court in the territory of which is the seat of the Assembly of the Republic of Serbia.

The Applicants before the Constitutional Court alleged a violation of their rights established in the Constitution, namely Articles 21, 22, 53 and 54. The Applicants had three main categories of allegations: (i) the application of the principle *"per loci"* [*ratione loci]* (ii) the obligation to apply the international human rights standards and (iii) their right to judicial protection of rights and the right of access to justice.

The Constitutional Court, after considering the Applicants' allegations, reasoned that the findings of the regular courts were reached after a detailed examination of all the arguments and interpretations presented by the Applicants and they were given the opportunity at all stages of the proceedings to present the arguments and legal interpretations that they consider relevant to their cases. The Constitutional Court also recalled the case law of the ECtHR in several cases where the procedural barriers imposed by the principle of sovereign state immunity have been highlighted in relation to judicial proceedings that may be conducted against a state in the domestic courts of another state. The Court also considers that it is important to emphasize the fact that the regular courts of Kosovo did not adjudicate on the Applicants' right to seek compensation of damage, but only regarding the

territorial jurisdiction of the Kosovo courts to conduct a procedure against another state.

Therefore, the Constitutional Court found that the referrals are manifestly ill-founded on constitutional basis and are to be declared inadmissible, whereas in one of the referrals (KI125/18) it found that it was submitted out of time.

RESOLUTION ON INADMISSIBILITY

in

cases no. KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18

Applicant

Fehmi Hoti and 15 others

Constitutional review of 16 decisions of the Supreme Court of Kosovo rendered between 26 March and 12 April 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. Referral KI96/18 was submitted by Fehmi Hoti; Referral KI97/18 was submitted by Kada Gjinovci; Referral KI98/18 was submitted by Avdie Mehmeti; Referral KI99/18 was submitted by Hamze Fekaj; Referral KI100/18 was submitted by Brahim Hasani; Referral KI101/18 was submitted by Ramadan Azemi; Referral KI102/18 was submitted by Hamdi Sejdiu; Referral KI103/18 was submitted by Xhevat Hoti; Referral KI104/18 was submitted by Enver Osaj; Referral KI105/18 was submitted by Bahtir Meziu; Referral KI106/18 was submitted by Mursel Shala; Referral KI107/18 was submitted by Haki Rushiti; Referral KI116/18 was submitted by Hafiz Gjinovci; Referral KI117/18 was submitted by Fazli Ramadani; Referral KI119/18 was submitted by Xhafer Hetemi and Referral KI125/18 was submitted by Nuhi Dibrani.

2. All of the abovementioned (hereinafter: the Applicants) are residing in the Municipality of Skenderaj.

Challenged decision

3. The Applicants challenge 16 decisions of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), as follows:

9. Fehmi Hoti- Decision Rev No. 91/2018, of 5 April 2018;

10. Kada Gjinovci- Decision Rev No. 82/2018, of 12 April 2018;

11. Avdie Mehmeti- Decision Rev No. 87/2018, of 3 April 2018;

12. Hamze Fekaj- Decision Rev No. 70 /2018, of 26 March 2018 (which was served on him on 3 May 2018);

13. Brahim Hasani - Decision Rev. No. 71/2018, of 3 April 2018;

14. Ramadan Azemi - Decision Rev. No. 74/2018, of 11 April 2018;

15. Hamdi Sejdiu - Decision Rev. No. 88/2018, of 26 March 2018 (which was served on him on 17 April 2018);

16. Xhevat Hoti- Decision Rev. No. 67/2018, of 26 March 2018 (which was served on him on 18 April 2018);

17. Enver Osaj - Decision Rev. No. 85/2018, of 5 April 2018;

18. Bahtir Meziu - Decision Rev No. 73/2018, of 26 March 2018 (which was served on him on 7 April 2018);

19. Mursel Shala - Decision Rev. No. 106/2018, of 12 April 2018;

20. Haki Rushiti - Decision Rev. No. 89/2018, of 3 April 2018;

21. Hafiz Gjinovci - Decision Rev. No. 81/2018, of 3 April 2018 (which was served on him on 5 May 2018);

22. Fazli Ramadani - Decision Rev. No. 64/2018, of 3 April 2018 (which was served on him on May 2018);

23. Xhafer Hetemi - Decision Rev No. 76/2018, of 12 April 2018 (which was served on him on 8 May 2018);

24. Nuhi Dibrani- Decision Rev. No. 86/2018, of 26 March 2018.

Subject matter

4. The subject matter of the Referrals is the constitutional review of the challenged decisions, which allegedly violated the Applicants' rights guaranteed by Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and Article 15 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

Legal basis

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

Proceedings before the Court

6. On 25 July 2018, the Applicant Fehmi Hoti submitted the Referral to the Court.

7. On 27 July 2018, the Applicants Kada Gjinovci, Avdie Mehmeti, Hamze Fekaj, Brahim Hasani, Ramadan Azemi, Hamdi Sejdiu, Xhevat Hoti, Enver Osaj, Bahtir Mziu and Mursel Shala submitted their Referrals to the Court.

8. On 30 July 2018, the Applicant Haki Rushiti submitted the Referral to the Court.

9. On 9 August 2018, the Applicant Hafiz Gjinovci submitted the Referral to the Court.

10. On 13 August 2018, the Applicant Fazli Ramadani submitted the Referral to the Court.

11. On 14 August 2018, the Applicant Xhafer Hetemi submitted the Referral to the Court.

12. On 17 August 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu-Krasniqi and Bajram Ljatifi (members).

13. On the same date, in accordance with Rule 40.1 of the Rules of Procedure, the President of the Court ordered the joinder of the Referrals KI97/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 with Referral KI 96/18.

14. On 17 August 2018, the Court notified the Applicants about the registration and joinder of the Referrals and requested them to submit additional documents to the Court.

15. On 17 August 2018, the Court also notified the Supreme Court about the registration of the Referrals. On the same date, the Court submitted the Referral to the Basic Court in Mitrovica - Branch in Skenderaj to present evidence regarding the date of receipt of the challenged decisions of the Supreme Court by three (3) Applicants.

16. On the same date, the Court also requested the Applicant Avdie Mehmeti to sign the referral form and to attach additional documents. From the Applicants Hamdi Sejdiu, Enver Osaj and Bahtir Meziu requested the signature of the form, and from the last mentioned to attach additional documents.

17. On 27 August 2018, the Applicant Nuhi Dibrani submitted the Referral to the Constitutional Court.

18. On 24 September 2018, the Applicant Bahtir Meziu notified the Court in writing that his son S.M. is authorized to bring the documents and sign the form.

19. On 27 September 2018, the Applicant Avdie Mehmeti notified the Court in writing that her husband A.M. was authorized to bring the documents and to sign the form.

20. On an unspecified date, the two other Applicants signed the form at the request of the Court.

21. On 28 September 2018, the Basic Court submitted to the Court the acknowledgment of receipts indicating the dates when three (3) Applicants (Hafiz Gjinovci, Fazli Ramadani and Xhafer Hetemi) received the challenged decisions, as requested by the Court on 18 August 2018.

22. On 30 October 2018, in accordance with Rule 40.1 of the Rules of Procedure, the President of the Court ordered the joinder of the Referral KI125/18 with Referrals KI96/18 KI97/18, KI99/18, KI100/18, KI 101/18, KI102/18, KI 103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18 and KI119/18.

23. On 1 November 2018, the Court notified the Applicant Nuhi Dibrani and the Supreme Court about the registration and joinder of Referral KI125/18 with 15 (fifteen) previous Referrals.

24. On 27 December 2018, the Court sent the Referral to the Basic Court in Mitrovica - Branch in Skenderaj to present evidence regarding the date of receipt of the challenged decisions of the Supreme Court by 4 (four) Applicants (Hamze Fekaj, Hamdi Sejdiu , Bahtir Meziu and Xhevat Hoti).

25. On 10 January 2019, the Basic Court submitted to the Court the acknowledgment of receipts containing the dates when the four Applicants received the challenged decisions, as requested by the Court on 27 December 2018.

26. On 10 January 2019, J.B. in the capacity of the Director of the Association „Ngritja e Zërit“ submitted to the Court a document which, although expressly does not refer to any concrete case before the Court, reiterates the allegations and arguments contained in the Applicants' Referral.

27. On 30 January 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

28. Between 17 May 2010 and 25 May 2015, the Applicants individually filed a claim with the Basic Court in Mitrovica, Branch in Skenderaj (hereinafter: the Basic Court) against the Government of the Republic of Serbia for compensation of material and not -material damage that was caused during the war between 1998 and 1999.

29. During the period 22 July 2013 - 10 February 2016, the Basic Court, by individual decisions, dismissed the Applicants' claims and declared itself incompetent to decide.

30. The Applicants filed individual appeals against the decisions of the Basic Court with the Court of Appeals of Kosovo (hereinafter: the Court of Appeals), on the grounds of essential violation of the provisions of the contested procedure. The Applicants requested that the decisions of the Basic Court be annulled and the Applicants' Referrals be declared admissible.

31. Between 16 January 2016 and 17 January 2018, the Court of Appeals rendered separate decisions by rejecting each of the Applicants' appeals and upholding the decisions of the Basic Court.

32. Each of the Applicants, individually, filed individual request for revision with the Supreme Court, alleging that there has been a violation of the provisions of the contested procedure. They requested that their requests for revision be approved, the decisions of the Court of Appeals and of the Basic Court be annulled and their legal matter be referred for reconsideration to the Basic Court. The Applicants alleged that there are other provisions of the Law on Contested Procedure which regulate the issue of jurisdiction in their cases. In the present case, according to them, the provisions of Article 28 of the Law on Contested Procedure related to the jurisdiction of the courts should have been applied in disputes with an international element.

33. Between 26 March and 12 April 2018, the Supreme Court rendered separate decisions (as stated in paragraph 3), rejecting the request for revision of each of the Applicants as ungrounded. The main arguments of the Supreme Court in each of these decisions were as follows:

> "*Taking into account the [provisions of the Law on Contested Procedure] LCP as well as the fact that by the request the respondent Republic of Serbia - Government of R.S. in Belgrade [...], in the present case it is about the legal-property dispute in the foreign state, the norms of international law apply, for which the domestic court is not competent to decide, therefore, the Supreme Court of Kosovo assesses that the Basic Court and the Court of Appeals have correctly applied the provisions of Article 18.3 and Article 39 par. 1 and 2 of the LCP, when they declared itself incompetent to adjudicate this legal matter and dismissed the claim [of the Applicants], since the court with territorial jurisdiction is the court in the territory of which is the seat of the Assembly of the Republic of Serbia, [and] the seat of the Assembly*

of the Republic of Serbia as a responding party is not in the territory of the Courts of the Republic of Kosovo.
[...]
The provision of Article 28 of LCP, which the Applicants refer to, foresee the jurisdiction of domestic courts in disputes with an international (foreign) elements, cannot be applied in the present case, due to the fact that this case does not have to do with foreign natural persons nor with foreign legal persons, but with a foreign state, with which to the present moment the state of Kosovo, on which territory was caused the damage, has never been any international agreement [...] regarding the jurisdiction of the local courts for these types of disputes [...]. The allegation in the revision [of the Applicants] that in the present case we are dealing with the territorial jurisdiction is ungrounded, based on Articles 47, 51 and 61 of the LCP, because according to the assessment of the Supreme Court, these provisions do not relate to the present case [...], the lower instance courts have correctly applied the provision of Article 18.3 of the LCP, taking into account the other reasons mentioned above".

Applicant's allegations

34. The Applicants allege that the decisions of the Supreme Court violated their rights guaranteed by Articles: 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution, Article 6 (Right to a fair trial) of the ECHR and Article 15 of the UDHR.

35. The Applicants have three main categories of allegations: (i) the application of the principle „*per loci*" [*ratione loci*], which, according to the Applicants, implies that the regular courts have competence to review the claims based on the country where the damage is caused; (ii) the obligation of the regular courts to apply international human rights standards, (iii) their right to judicial protection of rights and the right to access to justice.

36. The Applicants initially refer to the issue of territorial jurisdiction (namely the principle „*per loci*") and the allegations that the regular courts have "*incorrectly applied the applicable law referred to the territorial jurisdiction of the Basic Court [...], since the court with territorial jurisdiction for the adjudication on legal matters, is always the court in the territory of which the crime was committed, moral and material damage! This valid legal definition and position corresponds to the interest of the injured party, the principle of*

economy in judicial and administrative proceedings, and in accordance with the international principle per loci, the resolution of claims based on the place where the crime was committed".

37. The Applicants further refer to some examples of the international case law whereby, according to them, the Second World War victims were allowed to "*file individual indictments before the national courts for compensation of damage caused by Germany".* In this regard, they specify that in the cases of Greece, Italy and the United States of America, the individuals were afforded the opportunity to seek compensation for the *"damage caused by Germany during World War II in accordance with international principle "per loci."*

38. The Applicants, referring to Article 21 paragraph 1 of the Constitution, claim that the regular courts "*did not apply international advanced human rights standards. One of the standards is to allow the injured party to initiate the issue of compensation for moral and material damage caused as a result of direct action by the Serbian authorities".*

39. The Applicants also allege that "*The obligation to apply Geneva Conventions [...] is also foreseen by the International Humanitarian Law of Kosovo*". According to the Applicants, the regular courts have violated the constitutional provisions because they have not applied the provisions of international conventions as a category of domestic legal order.

40. The Applicants, referring to Article 54 of the Constitution, also state that "*the right to judicial protection of rights, the right to access to justice at the national level and the institutional guarantees for the protection of human rights have been denied".*

41. The Applicant Nuhi Dibrani (KI125/18) has also attached a document, requesting to return to the previous situation as to the deadline for filing a referral with the Constitutional Court. He reasoned that since he was not notified, the deadline for filing the referral to the Court has expired. He emphasizes that "*[...] he was not informed about the possibility of addressing the Constitutional Court [...] the legal deadline has expired for 14 days".*

42. Finally, the Applicants request the Court to annul the decisions of the Supreme Court, of the Court of Appeals and of the Basic Court and remand the case for reconsideration to the Basic Court in Mitrovica - Branch in Skenderaj.

Relevant legal provisions

LAW NO. 03/L-006 ON CONTESTED PROCEDURE

Article 18

[...]
18.3 If the court during all stages of proceeding determines that the local court is not competent, it will be declared incompetent, all the proceeding will be nullified and the claim will be dropped. However, such an action will not be taken if the jurisdiction of the court is dependent on the approval of the defendant and the defendant has already given his or her permission.
[...]

Article 28

28.1 The rules of international law apply regarding the competence of our courts for settlement of disputes of foreign citizens that enjoy immunity, foreign countries and international organizations.

28.2 The local court is competent to settle a dispute when its competence to settle a dispute which includes international elements is expressly determined by law or international contract.

28.3 If by our law or international contract there are no decisive provisions for competence of court for a certain type of disputes, the local court is competent to proceed for such disputes even when its competence derives from the provisions of this law on territorial jurisdiction of the local court.

Article 39

39.1 In the adjudication of disputes against Kosovo, a self-governing unit or any other territorial organization, the general territorial jurisdiction is vested in the court within whose territory is the headquarters of its assembly.

39.2 In the adjudication of the disputes against other legal persons, the general territorial jurisdiction is vested in the court within whose territory their headquarters is registered.

Article 47

47.1 In the adjudication of disputes related to non-contractual responsibility for the damage, the competency, apart from the court with general territorial jurisdiction, is also with the court in whose territory it was committed the act of damage or the court in whose territory the consequence from the damage has appeared.

Article 51

In the adjudication of the matter of dispute against a legal person whose unit is not within the territory of its headquarter, and if the dispute results from the legal relationship of the unit of the legal person, apart from the court with general territorial jurisdiction, it is also competent the court in whose territory the unit of the legal person is located.

Article 61

The disputes with the physical or legal person with a residence or headquarters out of our country regarding the obligations created in Kosovo or that need to be fulfilled in Kosovo, the claim may be filed at the court in whose territory is situated his or her permanent representative office for Kosovo or the headquarters of the body trusted to execute such duties.

Admissibility of the Referral

43. The Court will first examine whether the Referrals have fulfilled the admissibility requirements established in the Constitution and further specified in the Law, and foreseen in the Rules of Procedure.

44. 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.*

45. The Court further refers to the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 48

[Accuracy of the Referral] and 49 [Deadlines] of the Law, which foresee:

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... ."

46. In addition, the Court also refers to the Rules of Procedure, namely paragraphs 1 (c) and (2) of Rule 39 [Admissibility Criteria], which define the following:

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

[...]

c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant,

"(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."

Regarding 15 Applicants

47. The Court finds that the 15 Applicants (not including Nuhi Dibrani, whose case will be dealt with separately) are authorized parties who challenge an act of a public authority after exhaustion of all legal remedies. The Applicants have also specified the rights and freedoms which have allegedly been violated in accordance with Article 48 of the Law and have submitted the Referral in accordance with the deadline set out in Article 49 of the Law and 39.1 (c) of the Rules of Procedure.

48. In addition, the Court examines whether the Applicants' Referral meets the admissibility requirement foreseen in Rule 39 (2) of the Rules of Procedure. In this regard, the Court recalls that the Applicants allege that the regular courts violated certain rights protected by the Constitution, the ECHR and the UDHR, with particular emphasis on the right to fair and impartial trial and the right to judicial protection of rights.

49. In this regard, the Court notes that the Applicants allege that the regular courts erroneously interpreted the law in force when referring to the territorial jurisdiction of the Basic Court. They further claim that the court in which territory the damage is caused is the competent court to adjudicate their cases. Consequently, according to the Applicants, they were denied "*the right to judicial protection and access to justice"*.

50. The Court considers that the Applicants' allegations, in substance, relate to the interpretation by the regular courts of the relevant legal provisions that regulate their territorial jurisdiction, namely the competence to deal with the claims of the Applicants.

51. The Court emphasizes its general view that correct and complete determination of factual situation, as well as relevant legal interpretations, in essence, fall within the jurisdiction of the regular courts. The role of the Constitutional Court is to ensure that the standards and rights guaranteed by the Constitution are respected and consequently it cannot act as a "fourth instance court" (see: *mutatis mutandis*, the European Court of Human Rights Judgment 16 September 1996, *Akdivar v. Turkey*, No. 21893/93, paragraph 65, see: also *mutatis mutandis*, case of the Constitutional Court, KI86/11, Applicant *Milaim Berisha*, Resolution on Admissibility of 5 April 2012, paragraph 33).

52. In the present case, the Court notes that the Supreme Court considered the Applicants' allegations regarding the interpretation by the Court of Appeals and the Basic Court of the relevant provisions legally related to the competence to adjudicate in the cases of the Applicants.

53. In reviewing the Applicants' allegations, the Supreme Court reasoned that the Basic Court and the Court of Appeals have correctly applied the provisions of the Law on Contested Procedure when they found that they had no jurisdiction to adjudicate in these court cases. Therefore, the Supreme Court rejected the Applicants' allegations, reasoning that the general territorial jurisdiction is in the court in the

territory of which is the seat of the Assembly of the Republic of Serbia which is not in the territory of the Kosovo courts.

54. Therefore, in some of its cases (see, for example, Decision in Rev. No. 91/2018), the Supreme Court, *inter alia*, reasoned:

> *"[...] according to the provision of Article 28.2 of the LCP, when it comes to disputes with a foreign element, the domestic court is competent only if this international competence derives expressly from an international agreement or by the law itself [...] Article 39.1 of LCP foresees that "for the adjudication of disputes against Kosovo [...] of the general territorial jurisdiction is the court in which territory is the seat of its assembly. While in paragraph 2 it is foreseen 'in the adjudication of the disputes against other legal persons, the general territorial jurisdiction is vested in the court within whose territory their headquarters is registered.' Thus, also by provision of Article 54.1 of the Law on the conflict resolution of the law with the provisions of other states provides that in the legal-property disputes the jurisdiction of the domestic court exists if the property of the respondent or the thing sought by lawsuit is located in our country".*

55. The Supreme Court further specified that in the case of the Applicants "*we are dealing with a foreign state, with which until now the state of Kosovo in the territory of which the damage was caused has not concluded any international agreement regarding the jurisdiction of the domestic courts for these kinds of disputes".*

56. The Court considers that the findings of the Basic Court, the Court of Appeals and of the Supreme Court were reached after a detailed examination of all the arguments and interpretations presented by the Applicants. In this way, the Applicants were given the opportunity to present at all stages of the procedure the arguments and legal interpretations they consider relevant to their disputes.

57. Therefore, the Court concludes that the proceedings before the regular courts, viewed in their entirety, were fair and that the allegation of arbitrary legal interpretation by the regular courts cannot be substantiated.

58. With regard to the Applicants' allegations as to "*their right to judicial protection and access to justice*", the Court emphasizes the case law of the European Court of Human Rights (ECtHR), on which it is obliged to refer to under Article 53 of the Constitution. The Court notes that the ECtHR has in some cases noted procedural barriers imposed by

the principle of sovereign state immunity - as one of the fundamental principles of international public law - in relation to judicial proceedings that may be conducted against a state in the domestic courts of another state (see, *mutatis mutandis*, *Jones and Others v. United Kingdom*, Judgment of 14 January 2014, *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001).

59. In addition, in the case *Al-Adsani v. The United Kingdom*, the ECtHR argued as follows: "*The right of access to court may be subject to limitations, unless the essence of the very right is impaired. Such limitations must pursue a legitimate aim and be proportionate [...] The recognition of sovereign state immunity in civil proceedings follows the legitimate aim of respecting the international law [...]. As far as proportionality is concerned, the Convention should, as far as possible, be interpreted in accordance with other rules of international law, including those relating to the immunity of States. Thus, the measures taken by the state which reflect the general rules of international law on the immunity of States cannot, in principle, be regarded as a disproportionate limitation of the right of access to the court".* Such an attitude, as far as concerns the tension between the principle of sovereign immunity of states and the right to access to justice (court), was emphasized by the International Court of Justice (see, for example, *Germany v Italy*; Greece *as an intervening party*, Judgment of 3 February 2012).

60. In the light of the foregoing arguments, the Court considers that it is important to emphasize the fact that the regular courts of Kosovo did not deal with, namely, did not adjudicate regarding the Applicants' right to seek compensation of damage, but only with respect to the territorial jurisdiction of the courts of Kosovo to conduct proceedings against another state.

61. Referring to the Applicants' allegations regarding the application of the Geneva Convention in their court cases, the Court notes that the Applicants have only referred to this Convention, but did not provide further arguments in relation to this allegation.

62. The Court emphasizes its general view that the mere fact that the Applicants do not agree with the outcome of the decisions of the Supreme Court, as well as mentioning of articles of the Constitution or international instruments, are not sufficient to build a reasoned allegation of constitutional violations (See: *mutatis mutandis*, case of the Constitutional Court, Resolution on Inadmissibility of 10 February 2015, *Abdullah Bajqinca*, KI136/14, paragraph 33).

63. The Court also notes that the presented facts and the Applicants' allegations are almost identical to some of the earlier Referrals, where the Court found that they were inadmissible, as manifestly ill-founded on constitutional basis (see: *mutatis mutandis*, cases of the Constitutional Court, KI73/17 KI78/17 and KI85/17, *Istref Rexhepi and 28 others*, Resolution on Inadmissibility of 23 October 2017 and cases KI KI97/17, KI99/17, K115/17 and KI121/17 *Mala Mala, Ali Salihu, Nurija Beka and Xhevat Xhinovci*, Resolution on Inadmissibility of 10 January 2018).

64. In sum, the Court considers that the Applicants' referrals do not prove that the proceedings before the regular courts committed a violation of their rights guaranteed by the Constitution, namely Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution, as well as Article 6 of the ECHR and Article 15 of the UDHR.

Regarding the Applicant Nuhi Dibrani

65. The Court considers that the Applicant Nuhi Dibrani (KI125/18) is an authorized party and has exhausted available legal remedies.

66. The Court recalls that the Applicant challenges the constitutionality of Decision Rev. No. 86/2018 of the Supreme Court of 26 March 2018, while he submitted Referral KI125/18 to the Court, on 27 August 2018.

67. Regarding the delay in filing the Referral, the Court recalls that the Applicant requests a return to the previous situation, on the grounds that the deadline for submitting the Referral to the Court expired because he was not notified, however, for this referral he did not provide arguments or accompanying documents.

68. Therefore, the Court finds that the Applicant did not substantiate his Referral regarding the restitution of the time limit in accordance with Article 50 of the Law and, accordingly, his Referral should be rejected.

69. The Court recalls that the purpose of the 4 (four) months legal deadline under Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedures, is to promote legal certainty by ensuring that cases raising constitutional matters are dealt within a reasonable time and that past decisions are not continually open to constitutional review. (See: case *O'Loughlin and Others v. United Kingdom*, Application No. 23274/04, ECHR, Decision of 25 August 2005, and see also: the

Constitutional Court Case no. KI140/13, *Ramadan Cakiqi*, Resolution on Inadmissibility of 17 March 2014, paragraph 24).

70. Based on the foregoing, it results that the Applicant's Referral (KI125/18) of the Applicant Nuhi Dibrani was submitted out of the legal deadline foreseen in Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure and as such is inadmissible.

71. In conclusion, the Court finds that:

i) with regard to all 15 Applicants, their Referrals (KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18) are manifestly ill-founded on constitutional basis and are to be declared inadmissible in accordance with Article 48 of the Law and Rule 39 (2) of the Rules of Procedure;

ii) with regard to Applicant Nuhi Dibrani (KI125/18), his Referral was submitted out of the legal deadline provided by Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure and as such is inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.7 of the Constitution, Articles 48, 49 and 50 of the Law and Rules 39 (1) (c) and (2) of the Rules of Procedure, on 30 January 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

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

KI06/18, Applicant: Shkumbin Mehmeti, constitutional review of Decision Pzd. No. 94/2017 of the Supreme Court of Kosovo of 13 November 2017

KI06/18 Resolution on Inadmissibility, adopted on 16 January 2019, published on 27 February 2019

Keywords*: individual referral, criminal procedure, right to fair trial, the rights of the accused, ratione materiae, inadmissible referral.*

The Applicant alleged that the regular courts by rejecting his request for extraordinary mitigation of punishment violated his rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 33 [The Principle of Legality and Proportionality in Criminal Cases] and 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Articles 6 (Right to a fair trial) and 14 (Prohibition of Discrimination) of the European Convention on Human Rights (hereinafter: the ECHR).

The Court, after assessing the case in entirety, concluded that even in cases where the request for extraordinary mitigation of the sentence is not successful, Article 31 of the Constitution, in the light of the interpretation of Article 6 of the European Convention on Human Rights, is not applicable. Therefore, the Court considered that the Applicant did not fulfill the admissibility criteria established in the Constitution and foreseen by the Law and the Rules of Procedure. Therefore, the Court concluded in this case that the Applicant's Referral is incompatible *ratione materiae* with the Constitution, and as such the Referral was declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI06/18

Applicant

Shkumbin Mehmeti

Constitutional review of Decision [Pzd. No. 94/2017] of the Supreme Court of Kosovo of 13 November 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Shkumbin Mehmeti from Podujeva (hereinafter: the Applicant), who is represented by a lawyer Besian Syla.

Challenged decision

2. The Applicant challenges Decision [Pzd. No. 94/2017] of the Supreme Court of Kosovo of 13 November 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments],

31 [Right to a Fair and Impartial Trial], 32 [Right to Legal Remedies], 33 [The Principle of Legality and Proportionality in Criminal Cases] and 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Articles 6 (Right to a fair trial) and 14 (Prohibition of discrimination) 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 the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

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 12 January 2018, the Applicant submitted the Referral to the Court.

7. On 16 January 2018, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama- Hajrizi.

8. On 18 January 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.

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

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

11. On 6 September 2018, the Applicant notified the Court about the replacement of lawyer S. M., and instead of him authorized the lawyer Besian Syla, from the municipality of Podujeva.

12. On 31 October 2018, the President of the Court appointed the new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Nexhmi Rexhepi.

13. On 16 January 2019, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

14. The Applicant submits the Referral to the Court for the second time.

Facts regarding first Referral KI145/11

15. On 10 November 2011, the Applicant submitted to the Constitutional Court the Referral KI145/11 requesting the constitutional review of: 1) Judgment P. No. 2003/2006 of the District Court of 9 November 2007; 2) Judgment AP. no. 190/2009 of the Supreme Court of 27 January 2010; 3) Judgment API. No. 1/2010 of the Supreme Court of 26 November 2010, and 4) Judgment PKL-36/n of the Supreme Court of 10 August 2011. By these Judgments, the Applicant was convicted of a number of criminal offenses and was imposed an aggregate punishment for all indictments with 30 (thirty) years of imprisonment.

16. Among other things, in the Referral KI145/11, the Applicant alleged that the regular courts violated essential provisions of the criminal procedure, he complained that the trial was unfair and partial, that the right to effective legal remedies was violated. On 12 July 2012, the Constitutional Court by Resolution on Inadmissibility rejected the Referral KI145/11 as a manifestly ill-founded.

Facts regarding present Referral KI06/18

17. On an unspecified date, the EULEX prosecutor submitted a request for extraordinary mitigation of sentence to the Supreme Court of Kosovo with a proposal that the court against the Applicant *"impose a*

sentence of not more than twenty (20) years of imprisonment pursuant to Article 71 (2) of the CPCK, as well as the application of a law that is more favorable for the accused," alleging that the regular courts with the interpretation of the legal provisions: "*... have directly violated Article 33.3 of the Constitution of the Republic of Kosovo, which provides that the degree of punishment cannot be disproportional to the criminal offense*".

18. At the same time, the Applicant's defense counsel filed a request for extraordinary mitigation of the sentence with the Supreme Court of Kosovo with a proposal that the request be approved as grounded and the Applicant be imposed a more lenient sentence, reasoning that: "*... that the convict has been serving his sentence for 13 years and 30 days now and that he has been rehabilitated completely and that, owing to that rehabilitation, he has begun to cooperate with the EULEX Prosecution, which is why has confessed to partaking in the commission of the criminal offence together with some other persons and gave the names of seven other partakers who were involved in the commission of the criminal offences, whereby he has detailed the type of weaponry that they have used, the crime scene, the positions that each participant has taken and the actions that each of them has taken. (...)"*

19. On 8 September 2017, the Basic Court in Prishtina by proposal Kp. No. 921/2017, proposed to the Supreme Court of Kosovo to reject the request for extraordinary mitigation of the sentence as ungrounded.

20. On 21 September 2017, the State Prosecutor's Office, by letter No. 120/2017 proposed that the request for extraordinary mitigation of sentence be rejected as ungrounded.

21. On 13 November 2017, the Supreme Court of Kosovo, by Decision [Pzd. No. 94/2017] rejected as ungrounded the requests for extraordinary mitigation of sentence of the EULEX prosecutor, as well as of the Applicant's defense, "*imposed by Judgment P. No. 203/2005 of the District Court in Prishtina, of 9.11.2007, modified by Judgment Ap. Kz. No. 190/2009 of the Supreme Court of Kosovo of 27.01.2010, and Judgment Api. Kzi. No. 1/2010 of the Supreme Court of Kosovo of 26.11.2010"*.

22. The Supreme Court of Kosovo by Decision Pzd. No. 94/2017 reasoned that: "*The provision of Article 429 of the CPCK stipulates that an extraordinary mitigation of a finally imposed punishment is permissible where, after the judgment has become final,*

circumstances occur which did not exist when the judgment was rendered or, although they existed, were unknown to the court at that time, and such circumstances obviously would have led to a less severe punishment".

Applicant's allegations

23. The Applicant firstly alleges that " *Decision Pzd. No. 94/2017, of 13.11.2017 is contrary to Article 31 of the Constitution of the Republic of Kosovo, because a fair and impartial trial is not guaranteed.*"

24. The Applicant considers that in his request for extraordinary mitigation of the punishment, he presented new evidence, in particular those provided by the EULEX Prosecutor's Office with the number PPS No. 10-2013 and PPRKR No. 30/2013.

25. In addition, the Applicant alleges that a number of legal provisions have been violated and that new evidence has been presented about the Applicant's role in the commission of the criminal offense, the weapons which the Applicant possessed, which were not known to the first instance court, and which, according to the Applicant, would substantially affect in a pronouncement of lower imprisonment sentence.

26. The Applicant further alleges that *"without the application of the provisions of the Constitution, especially Article 31 and 33, a fair trial and rule of law cannot be exercised, which contribute to the security that the right of no person will be violated through arbitrary trials, irregular court procedures, which attempt to distort the presentation of new facts and evidence and the existing ones that are in absolute compliance with the provisions of CPCRK, Article 429 and 431, paragraph 1.*"

27. The Applicant considers that the Supreme Court did not sufficiently assess and reason the new evidence presented by the Applicant, which allegedly violated Article 31 of the Constitution, and resulted further in violation of Articles 22 32, 33 and 102 of the Constitution as well as Articles 6 and 14 of the ECHR.

28. In addition, the Applicant alleges "*If we had a fair court process and it would be complied with the provisions of Article 22, paragraph 1, 2, 3 and 5, Article 31, paragraph 1, Article 32 and Article 33 of the Constitution of the Republic of Kosovo. the request for extraordinary mitigation of the sentence would be approved since it met the legal*

conditions that are required by CPCRK, namely Article 429, 430 and 431, paragraph 6, because new evidence have been presented for which the Court of the first instance was not aware at the time of adjudication, the request was submitted by the authorized persons such as the Prosecutor and defense counsel, it was proposed to the Supreme Court of Kosovo to modify the final Judgment regarding the Decision on pinishment".

29. Finally, the Applicant requests the Court: *"... to annul Decision Pzd. No. 94/2017, of the Supreme Court of Kosovo, which was rendered by violating the constitutional provisions and also to modify Judgment P. No. 203/2005, regarding the Decision on punishment".*

Admissibility of the Referral

30. The Court must first examine whether the Applicant has fulfilled the admissibility requirements established in the Constitution and further specified in the Law, and foreseen in the Rules of Procedure.

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

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

32. The Court also examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which foresee:

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

33. Regarding the fulfillment of these requirements, the Court finds that the Applicant filed the Referral as an authorized party; exhausted all available legal remedies; specified the act of the public authority, which he challenges before the Court and has submitted the Referral in time.

34. However, the Court should also assess whether the Applicants have fulfilled the admissibility requirements foreseen by Rule 39 (3) (b) of the Rules of Procedure, which stipulates:

(3) A referral may also be deemed inadmissible in any of the following cases:

[. ..]
(b) the Referral is incompatible ratione materiae with the Constitution.

35. The Court first notes that the Applicant submits the Referral to the Court for the second time and that the Judgments which found the Applicant guilty and sentenced him to 30 (thirteen) years of imprisonment, were reviewed by the Court in case KI145/11, therefore, the Court will not enter the assessment of these Judgments.

36. In fact, in the present Referral KI06/18, the Applicant challenges the constitutionality of Decision Pzd. No. 94/2017 of the Supreme Court of 13 November 2017, alleging violation of the rights guaranteed by Articles 22, 31, 32, 33 and 102 of the Constitution, as well as Articles 6 and 14 of the ECHR.

37. The Court notes that the Applicant bases his allegations on erroneous assessment of the new evidence and erroneous interpretation of the legal norms which, according to the Applicant, are contrary to Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR. In addition, the Applicant alleges that other Articles 22, 32, 33 and 102 of the Constitution, and Article 14 of the ECHR have been violated in conjunction with Article 31 of the Constitution and Article 6 of the ECHR. Furthermore, the Applicant reasons that the violation of these articles relates to a violation of the right to fair and impartial trial.

38. From this standpoint, the Court will assess the Applicant's allegations only in relation to the alleged violations of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

39. Before reviewing the Referral, the Court recalls that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

Applicability of Article 6 of ECHR

40. Initially, the Court reiterates that, in accordance with ECHR case law, Article 6 of the ECHR applies throughout the entirety of proceedings for the determination of "any criminal charge", including the sentencing process (for instance, confiscation proceedings enabling the national courts to assess the amount at which a confiscation order should be set: (see, *Philips v. United Kingdom*, ECtHR Judgment, No. 41087/98, 5 July 2001, paragraph 39).

41. In addition, Article 6 of the ECHR applies in all cases where by extraordinary remedies is allowed the review or reopening of criminal proceedings after which the conduct of new proceedings is required. (see ECtHR, case *Vanyan v. Russia*, application no. 53203/99, decision of 15 March 2006, paragraph 56, referring to cases *Löffler v. Austria*, application no. 30546/96, paragraphs 18-19, decision 3 October 2000 and *José Maria Ruiz Mateos and Others v. Spain*, Application No. 24469/94, decision of Commission of 2 December 1994, Decisions and Reports 79, page 141).

Non-applicability of Article 6 of ECHR

42. The Court considers that Article 6 of ECHR is not applied in the proceedings for bringing the Applicant's sentence into conformity with the new criminal law. (See, *Nurmagomedov v. Russia*, Judgment of ECtHR, No. 30138/02 of 7 June 2007, paragraph 50).

43. Likewise, Article 6 of the ECHR is not applicable to the procedure concerning the execution of sentencing decisions, such as the procedure for the application of an amnesty *(Montcornet de Caumont v. France* ECtHR Decision No 59290/00 of 13 May 2003), parole proceedings (*Aldrian v. Austria*, Commission Decision No 16266/90 of 7 May 1990, see also *Macedo da Costa v. Luxemburg*, ECtHR Decision No 26619/07 of 5 June 2012).

44. In addition, Article 6 does not apply to proceedings for the reopening of a case because a person whose sentence has become final and who applies for his case to be reopened is not „charged with a criminal offence" within the meaning of Article 6 of the Convention (see ECtHR cases *Franz Fischer v. Austria* No. 27569/02, Decision on Inadmissibility of 6 May 2003).

45. In addition, Article 6 of the ECHR does not apply even in cases where the request for annulment of a decision by which an accused was found guilty is rejected by extraordinary remedies, and because of his non-participation in the trial, claims restoring the deadline to the previous state. (see, ECtHR, case *Zois Kokkonis v. Greece and Nikolitsa Chalilopoulou v. Greece*, applications 76386/11 and 76408/11 of 23 November 2017, paragraph 14).

46. In addition, the Court also recalls that even in cases where an Applicant requests the conviction of a third party, Article 6 of the ECHR is not applicable under the ECtHR jurisprudence. (see, case *Perez v. France*, Judgment (47287/99) of 12 February 2004, paragraphs 70-71; see also the Constitutional Court, Case KI97/14, Applicant *Velibor Jevtic*, Resolution on Inadmissibility of 8 December 2014, paragraphs 35-38).

Application of the abovementioned principles in the present case

47. In the present case, the Court notes that the Applicant's request for extraordinary mitigation of sentence filed with the Supreme Court, ` in fact concerned the allegation that in his case new circumstances were created which allow the reopening of the proceedings, as regards the

decision on punishment, namely affect as a mitigating circumstance for the mitigation of punishment.

48. In this regard, the Court notes that in the reasoning of the challenged Decision, the Supreme Court reasoned that: *"The provision of Article 429 of the CPC stipulates that an extraordinary mitigation of a finally imposed punishment is permissible where, after the judgment has become final, circumstances occur which did not exist when the judgment was rendered or, although they existed, were unknown to the court at that time, and such circumstances obviously would have led to a less severe punishment".*

49. The Supreme Court further reasons: "*Therefore, these circumstances cannot be the basis for this extraordinary legal remedy because they do not have the nature of the circumstances under Article 429 of the CCRK which, according to the law, cannot be challenged and are allowed by this legal remedy (...)*".

50. As it can be noted from the abovementioned reasoning of the Supreme Court, the latter rejected the request for extraordinary mitigation of sentence, as it came to the conclusion that the legal requirements have not been fulfilled, which allowed the reopening of the proceedings as regards the decision on punishment.

51. In this regard, the Court considers that the requirement for extraordinary mitigation of sentence also requires the fulfillment of the legal criteria for the reopening of the proceedings, namely of the final decisions in relation to the punishment.

52. In this context, the Court recalls that in all cases where by extraordinary remedies the review or reopening of completed proceedings (civil, criminal, enforcement) is required by final decisions, when the regular courts dealt only with the admissibility criteria of the applications and not the merits of the case. The Court, in accordance with the ECtHR jurisprudence, has found that Article 31 of the Constitution and Article 6 of the ECHR are not applicable. (See, cases of the Constitutional Court KI159/15, *Sabri Ferati*, Resolution on Inadmissibility of 13 June 2016, KI80/15, KI81/15 and KI82/15, *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, and KI07/17, *Pashk Mirashi*, Resolution on Inadmissibility of 29 May 2017).

53. Therefore, the request for extraordinary mitigation of the sentence falls in the category of claims that are incompatible *ratione materiae*

with the Constitution, because Article 31 of the Constitution, viewed in the light of Article 6 of the ECHR is not applicable, as the requirements to allow reopening of the procedures regarding the decision on the punishment, have not been met.

54. In addition, the extraordinary legal remedies seeking the extraordinary mitigation of punishment do not normally involve the determination of „civil rights and obligations" or the grounds of „any criminal charge" and therefore, Article 6 is deemed inapplicable to them (see, inter alia, *X v. Austria,* 7761/77, Commission Decision of 8 May 1978, DR 14, p.171, *Zawadzki v. Poland* (Decision) No 34158/96 of 6 July 1999, *Hurter v. Switzerland* (decision), No. 48111/07, May 15, 2012; *Dybeku v. Albania* (decision), No. 557/12, paragraph 30 of 11 March 2014).

55. In this regard, the Court emphasizes that the compatibility *ratione materiae* of a Referral with the Constitution derives from the Court's substantive jurisdiction. The right (s) relied on by the Applicant (s) must be protected by the Constitution, in order for a constitutional complaint to be compatible *ratione materiae* with the Constitution. (See: the Constitutional Court, case No. KI07/17, Applicant *Pashk Mirashi*, Resolution on Inadmissibility of 29 May 2017, paragraph 66).

56. In sum, the Court considers that the Applicant did not meet the admissibility requirements established by the Constitution and as further specified by the Law and foreseen by the Rule of Procedure.

57. Therefore, the Court concludes that the Applicant's Referral is incompatible *ratione materiae* with the Constitution, therefore as such, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (3) (b) and 56 (2) of the Rules of Procedure, on 16 January 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI09/18 Applicant: "FINCA" Kosovo, constitutional review of Decision CML. No. 3/2017 of the Supreme Court of 21 September 2017

KI09/18, Resolution on Inadmissibility of 30 January 2019, published on 14 March 2019

Keywords: legal persons, individual referral, constitutional review of the decision of the Supreme Court, manifestly ill-founded.

The Referral is based on Articles 21.4 and 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo and Rule 29 of the Rules of Procedure of the Constitutional Court.
The Applicant in 2010, after the disciplinary procedure, terminated the employment relationship to his employee M.B.
After that, the employee by a claim initiated an administrative proceeding against the Applicant that went through all stages before the regular courts. In the enforcement proceeding, the employee realized claims under the statement of claim.

Upon revision of the Applicant, the Supreme Court quashed the first instance judgment and remanded to the latter for retrial in the parts related to financial claims from the statement of claim.

In the repeated proceedings, the employee withdrew his claim regarding the property claims from the statement of claim. After that, the Applicant initiated the procedure against the enforcement in order to realize his property claim. The first instance court approved the procedure on the request for counter enforcement and the Court of Appeals upheld it, however, the Supreme Court, upon the request for the assessment of legality of the state prosecutor, quashed the first instance and the second instance decision upon the request for counter enforcement regarding the fulfillment of its property claim.

The Applicant alleges that the regular courts violated its rights and freedoms guaranteed by Article 102 of the Constitution and Article 1 of Protocol No. 1 of the ECHR. The Applicant also essentially initiates an allegation of violation of the right to fair and impartial trial, but it does not refer to any specific constitutional provision, however, the Court concludes that the Applicant also refers to a violation of the rights and freedoms guaranteed by Article 31 of the Constitution.

The Court notes that the Applicant did not substantiate by evidence that the challenged decisions violated his rights and freedoms guaranteed by the Constitution and the ECHR.

The Court considers that the Applicant failed to provide facts indicating that the decisions of the regular courts in any way caused a constitutional violation of his rights guaranteed by the Constitution.

Therefore, the Court considers that the Referral, on constitutional basis, is manifestly ill-founded and is to be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI09/18

Applicant

"FINCA" Kosovo

Request for constitutional review of Decision CML. No. 3/2017 of the Supreme Court of 21 September 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by "FINCA" Kosovo, Microfinance Institution with its seat in Prishtina (hereinafter: the Applicant), represented by the authorized representative Auberon Kelmendi from Prishtina.

Challenged decision

2. The Applicant challenges Decision CML. No. 3/2017 of the Supreme Court of 21 September 2017, which approved as grounded the request for protection of legality of the state prosecutor filed against Decision AC. No. 1176/2015 of the Court of Appeals of Kosovo of 16 December 2016 and Decision CP. No. 1856/2013 of the Basic Court in Prizren of 26 January 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged decision of the Supreme Court, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 1 of Protocol No. 1 [Protection of property] of the European Convention on Human Rights (hereinafter: the ECHR). The Applicant also raises in essence the allegation of violation of the right to fair and impartial trial, but does not refer to any specific constitutional provision.

Legal basis

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

5. On 31 May 2018, the Court adopted in 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 Constitutional Court

6. On 15 January 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 16 January 2018, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu.

8. On 29 January 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

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

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

11. On 22 August 2018, the President of the Court rendered decision on replacement of Judge Rapporteur Almiro Rodrigues, and appointed Judge Bajram Ljatifi as Judge Rapporteur.

12. On 10 October 2018, the President of the Court appointed a new Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gerxhaliu Krasniqi and Nexhmi Rexhepi.

13. On 30 January 2019, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

14. On 23 June 2010, based on the decision of the Disciplinary Committee, the Applicant terminated the employment relationship to the employee M.B. (hereinafter: M.B.).

15. On an unspecified date, M.B. filed a claim with the Municipal Court in Prizren requesting the annulment of that decision, the reinstatement to the previous working place and the payment of personal income for the period when his employment relationship was terminated.

16. On 28 October 2011, the Municipal Court in Prizren, (by Judgment C. No. 531/10), approved the statement of claim of M.B, annulled the decision of the Applicant which terminated the employment relationship of M.B. and obliged the Applicant to reinstate M.B. to his previous working place ad to pay personal income for the period when his employment relationship was terminated.

17. The Applicant against the Judgment of the Municipal Court in Prizren filed appeal with the District Court *"on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and incorrect application of the substantive law*".

18. On 5 November 2012, the District Court (by Judgment Ac. No. 519/11) rejected, as ungrounded, the Applicant's appeal and upheld in entirety the Judgment of the Municipal Court.

Enforcement procedure of Judgment of the Municipal Court

19. After the Judgment (C. No. 531/10) of the Municipal Court in Prizren became final, M.B initiated the enforcement procedure of the aforementioned judgment before the Basic Court in Prizren, specifically the part concerning the payment of personal income for the period when his employment relationship was terminated.

20. On 11 February 2013, the Basic Court (by Decision E. No. 2192/12), allowed the enforcement of the Judgment of the Municipal Court.

21. On 27 May 2013, the Basic Court (by Decision E. No. 2192/12) ordered the competent bank to transfer funds from the account of the Applicant to the account of the employee, in the name of the payment of unpaid personal income and the court expenses.

22. After that, a payment was made from the account of the Applicant to the account of M.B.

Proceedings upon the Applicant's request for revision

23. On an unspecified date, the Applicant filed a request for revision with the Supreme Court against Judgment Ac. No. 519/11 of the District Court of 5 November 2012.

24. On 11 July 2013, the Supreme Court, (by Judgment Rev. No. 66/2013) partially approved the Applicant's revision so that it upheld the judgment of the first instance court in the part concerning the reinstatement of the employee to his previous working place, while the part regarding the payment of personal income for the period when his employment relationship was terminated remanded to the first instance court for retrial.

25. The enacting clause of the Judgment of the Supreme Court reads:

> "*I. The revision of the respondent submitted against the Judgment Ac. No. 519/2011 of the District Court in Prizren of 5.11.2012, and of the Judgment C. No. 532/201 of the Municipal Court in Prizren of 28.10.2011, by which the statement of claim of the claimant was approved as grounded and the decision of the respondent of 22.6.2010, was annulled as unlawful by which the claimant's employment relationship was terminated and the respondent was obliged to reinstate him at his working place, at the position that used to work, within period time of 7 days under the threat of forced execution, is rejected as ungrounded.*

I. The revision of the respondent in the part concerning the obligation of the respondent to acknowledge all claimant's rights that he has been entitled prior to the termination of employment relationship and compensate the personal income in accordance with the employment contract effectively form the date of termination and in the part that has to do with the compensation of the costs of the contested procedure in amount of 550 € is approved as grounded, and in these parts the Judgment Ac.nr. 519/2011 of the District Court in Prizren of 5.11.2012, and the Judgment C.nr. 531/2010 of the Municipal Court in Prizren of 28.10.2011, are quashed and the matter is remanded to the court of first instance for retrial".

26. Following this, the proceedings before the Basic Court in Prizren was repeated, based on the statement of claim of M.B., specifically the part concerning the personal income for the period when his employment relationship was terminated.

27. On 21 January 2014, M.B at the main hearing stated that he "*withdraws the claim against the respondent, reasoning that the personal income that belonged to him was realized in the enforcement procedure E. No. 2192/12, while now there is no legal interest in proceeding with this procedure*".

28. On 22 January 2014, (by Decision C. No. 721/13), the Basic Court in Prizren in the repeated proceedings found that the claim of the employee was withdrawn because *"pursuant to Article 261, paragraphs 2 and 3 of the LCP, the court assesses that the legal requirements have been met to establish that the claimant withdrew the claim".*

Procedure for counter-enforcement after Judgment of the Supreme Court of 11 July 2013

29. After Judgment Rev. No. 66/2013 of the Supreme Court, the Applicant also initiated counter-enforcement proceedings before the Basic Court in Prizren in the enforcement case (Decision E. No. 2192/12) of the Municipal Court in Prizren.

30. On 19 September 2013, the Basic Court in Prizren, (by Decision CP No. 1856/13), permitted the counter-enforcement in the enforcement case (E. No. 2192/12) of the Municipal Court in Prizren.

31. On an unspecified date, the employee submitted an objection against the Decision of the Basic Court in Prizren of 19 September 2013.

32. On 18 April 2014, the Basic Court (CP No. 1856/13) rejected as ungrounded the objection of the employee and upheld the previous decision.

33. Against this decision, the employee filed an appeal with the Court of Appeals on the grounds of "*violation of the contested procedure, erroneous determination of factual situation and erroneous application of substantive law*".

34. On 17 December 2014, the Court of Appeals (by Decision CA No. 1754/14), approved the appeal of the employee, annulled the aforementioned decision and remanded the case for retrial to the Basic Court in Prizren. The Court of Appeals "*after review of the case file, found that part of this matter and the judgment of the Basic Court in Prizren C. No. 721/13 of 22.01.2014, which judgment in the proceeding of rendering the decision (C. No. 721/13) found that the claim was withdrawn (...)*".

35. On 26 January 2015, in the repeated proceedings the Basic Court (by Decision CP. No. 1856/13) considered again the proposal for counter-enforcement of the Applicant, and found that: "*the objection of lawyer Ymer Kora from Prizren, the representative of the counter-enforcement debtor Minafir Berisha from Prizren, filed against the decision of this court CP. No. 1856/13 of 19.09.2013 on the permission of the counter-enforcement, is ungrounded*". Accordingly, the decision (CP No. 1856/13) of the Basic Court of 19.09.2013 on the permission of the counter-enforcement was upheld.

36. On an unspecified date, against the Decision of the Basic Court of 26 January 2015, the employee filed the appeal with the Court of Appeals *„on the grounds of violation of the contested procedure, erroneous determination of factual situation and erroneous application of the substantive law.*

37. On 16 December 2016, the Court of Appeals (by Decision AC. No. 1176/15) rejected as ungrounded the appeal of the employee and upheld the decision of the Basic Court in Prizren (CP No. 1856/13) of 26.01.2015. The reasoning reads:

> *„The first instance court based on the evidence available in the case file rendered fair decision and based on the concrete legal provisions, therefore, the legal conclusion of the first instance court regarding this case is approved in entirety by the Court of Appeals of Kosovo, due to the reason the decision did not contain*

essential violation of provisions of the contested procedure pursuant to Article 182, paragraph 2 item (b), (g), (j), (k) and (m) of LCP, and the appealed reasons have been considered by the second instance court ex officio in compliance with Article 194 of LCP."

38. On 15 March 2017, upon the proposal of the employee, the State Prosecutor submitted to the Supreme Court the request for protection of legality (KMLC No. 21/2017).

39. On 21 September 2017, the Supreme Court of Kosovo (by Decision CML. No. 3/2017) approved as grounded the request for protection of legality of the State Prosecutor, and reasoned:

"The request for protection of legality of the State Prosecutor of Republic of Kosovo, KMLC No. 21/2017 of 15.03.2017 is approved as grounded, the decision Ac. No. 1176/2016 of the Court of Appeals of Kosovo of 16.12.2016 and the decision CP.nr.1856/2013 of the Basic Court in Prizren of 26.01.2015 are modified and the proposal for counter-enforcement of creditor 'Finca – Kosovo' with the seat in Prishtina is rejected as ungrounded for realization of the debt in the amount of 17.703.12 euro against debtor Minafir Berisha from Prizren".

40. The Supreme Court approved as grounded the request for protection of legality of the Republic State Prosecutor. The Supreme Court by decision modified the decision of the Court of Appeals, as well as the decision of the Basic Court in Prizren, and rejected as ungrounded the proposal of the Applicant for counter enforcement.

41. In fact, the Supreme Court found that "*The provision of Article 21 of Law No. 04/L-139 of the Law on Enforcement Procedure stipulates that the enforcement authority shall award, respectively perform enforcement only on the basis of enforcement document (titulus executions) and authentic document unless otherwise foreseen by this law*".

Applicant's allegations

42. The Applicant alleges that the challenged decision "*is unconstitutional and in contradiction with Article 102 item 3 and 4 of the Constitution, which guarantees a fair and impartial trial based on the Constitution and law*".

43. The Applicant further alleges that the challenged decision denies it the rights to: "*counter-enforcement for the restitution of its property- as there is no and there was no court decision which obliges it to pay – is in contradiction with Protocol No. 1, Article 1 of the European Convention on Human Rights (...), which applicability and priority of which is guaranteed by Article 22 of the Constitution of the Republic of Kosovo".*

44. In fact, the Applicant considers that *„Decision 3/2017 of the Supreme Court denies it the enjoyment of legal certainty and of the constitutional principles by applying Rev. No. 66/2013 in a selective manner, as it takes into account only item I (whereby the revision of IMF against the reinstatement to work is rejected), by totally ignoring item II of the decision which concerns the amount of the compensation and the reasons for which the matter is remanded for retrial".*

45. The Applicant, finally requests the Court to declare the Referral admissible, to declare the Decision (CML No. 3/2017) of the Supreme Court invalid, and to take the necessary measures to ensure that it enjoys its rights.

Admissibility of the Referral

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

47. In this respect, the Court refers to 21.4 and 113.7 of the Constitution which establish:

Article 21

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

Article 113

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[...]
7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by

the Constitution, but only after exhaustion of all legal remedies provided by law".

48. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

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

49. In this regard, the Court considers that the Applicant is an authorized party, that it has exhausted all legal remedies and filed the Referral within the prescribed time limit.

50. However, the Court further refers to Article 48 of the Law, which stipulates:

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

51. In addition, the Court refers to Rule 39 (2) [Admissibility Criteria] of the Rules of Procedure, which stipulates:

> *"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".*

52. The Court notes that the Applicant first alleges that the challenged decision of the Supreme Court violated its rights guaranteed under Article 102 [General Principles of the Judicial System] of the Constitution.

53. The Court recalls that Article 102 of the Constitution falls within Chapter VII [Justice System] of the Constitution. As such, the Court considers that provisions of Article 102 of the Constitution do not contain individual rights and freedoms as protected by the provisions contained in Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution. Consequently, the Court finds that Article 102 cannot be relied upon in a Referral based on Article 113.7 of the Constitution (see: Constitutional Court case KI46/17, Applicants: *Privatization Agency of Kosovo*, Resolution on Inadmissibility of 7 September 2017, paragraph 39).

54. The Court notes that the Applicant essentially raises the allegation of violation of the right to fair and impartial trial without specifying concrete constitutional provisions. The Court recalls that the right to a fair trial is protected by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of ECHR.

55. The Court recalls Article 31 of the Constitution, which foresees:

> *"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 [...] within a reasonable time by an independent and impartial tribunal established by law".*

56. The Court also refers to Article 6.1 of the ECHR, which establishes:

> *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 [...] by [...] tribunal.*

57. The Court takes into account Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which establishes: *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

58. In this respect, the Court recalls the case law of the ECtHR, which has established *mutatis mutandis "that the jurisdiction of the Court to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable*". (see: case of the European Court of Human Rights (hereinafter: ECtHR), *Anheuser-Busch Inc. v. Portugal*, application no. 73049/01, judgment of 11 January 2007, paragraph 83).

59. The Court also recalls that *"[...] the [ECtHR] will not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness (see, mutatis mutandis, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008), in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or*

a denial of justice (see, mutatis mutandis, Farbers and Harlanova v. Latvia (dec.), no 57313/00 6 September 2001, and, albeit in the context of Article 1 of Protocol No. 1, Beyeler v. Italy [GC], no. 33202/96, para. 108, ECHR 2000-1; see also: ECtHR case Andjelković v. Serbia, application No. 1401/08, Judgment of 9 April 2013, para. 24).

60. In light of the above, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (see: *mutatis mutandis*, ECtHR case *García Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, para. 28).

61. The Court notes that the Supreme Court in its decision reasoned: "*In the present case, in the repeated procedure, in the main hearing held on 22.01.2014, the claimant (here the debtor) stated that he will withdraw the claim against the respondent (here the creditor), with justification that the personal income which it has been entitled to, it realized it in the enforcement procedure E.nr. 2192/12, but now it has no legal interest to continue the procedure, whereas the representative of the respondent IMF 'Finca' did not object withdrawal of the claim. [...] Debtor IMF 'Finca – Kosove' has paid something that within the meaning of Article 315 of the Law on Enforcement Procedure, it has been obliged to pay. Therefore, according to the Supreme Court of Kosovo, the lower instance courts have erroneously applied the provisions of the LEP when they found that the enforcement court has enforced the executive title in the part in which the executive title has been quashed by the Supreme Court*".

62. In these circumstances, the Court considers that the reasoning provided by the Supreme Court when deciding on the Applicant's requests in clear, comprehensive and coherent, and that the proceedings before the regular courts were not unfair or arbitrary (see: the ECtHR Judgment of 30 June 2009, *Shub v. Lithuania*, No. 17064/06).

63. Therefore, the Court concludes that the Applicant did not substantiate the allegation of violation of the right to fair and impartial trial as provided for in Article 31 of the Constitution and Article 6.1 of the ECHR.

64. In the light of the other allegations of the Applicant, the Court recalls that the Applicant also states that the challenged decision of the Supreme Court was rendered in violation of the freedom guaranteed by Article 1 of Protocol No. 1 [Protection of property] of the ECHR. However, the Applicant does not justify the allegation that his constitutional right to property has been violated.

65. The Court recalls that Article 1 of Protocol No. 1 of ECHR and Article 46 of the Constitution do not guarantee the right to acquisition of property (See, *Van der Mussele v. Belgium*, paragraph 48, ECtHR Judgment of 23 November 1983, *Slivenko and others v. Lithuania,* paragraph 121, ECtHR Judgment of 9 October 2003).

66. The Applicant may further allege a violation of Article 1 of Protocol No. 1 of the ECHR and Article 46 of the Constitution only in so far as the challenged decisions relate to his "*possessions*"; within the meaning of this provision "*possessions*" can be "*existing possessions*", including claims, in respect of which the applicants can argue a "*legitimate expectation*" that they will acquire an effective enjoyment of any property right.

67. No "*legitimate expectation*" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and where the applicant's submissions are subsequently rejected by the national courts (see *Kopecký v. Slovakia*, paragraph 50 of the Judgment of the ECtHR, of 28 September 2004).

68. Accordingly, the Court finds that the Applicant has not submitted any *prima facie* evidence, nor has he substantiated the allegations as to how and why the Supreme Court violated his right to property guaranteed by this provision.

69. In conclusion, the Court considers that the Applicant has not presented any evidence indicating that the decisions of the regular courts have in any way caused a constitutional violation of his rights guaranteed by the Constitution.

70. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39, paragraph (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, in the session held on 30 January 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Arta Rama-Hajrizi

KI138/18, Request for constitutional review of Order, I. GJA. No. 1/2018-141, of the President of the Basic Court in Prizren, Mr. Ymer Hoxha, of 8 August 2018

KI138/18, Gent Gjini Resolution on Inadmissibility of 23 January 2019

Keywords*: Individual referral, premature referral, non-exhaustion of legal remedies, request for interim measure, request for a hearing; administrative procedure*

The Applicant is a lawyer practicing his profession of a lawyer in Prizren.

The subject matter was the constitutional review of an Order, rendered by the President of the Basic Court in Prizren, by which "*The security employees and the receptionist are ordered not to allow the entrance of attorneys at law and parties in the building of the Court, without invitations or oral permits of the President of the Court, or judge, except at the office of submitting letters*".
The Applicant alleged that the Order violated his rights guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution. The Applicant also alleged violation of Article 41 of the Law on Bar, Article 25 of the Law on Courts and Article 6.1. of the Statute of the Bar Association. With respect to these allegations, the Applicant also requested the imposition of an interim measure to stop the implementation of the challenged Order as well as to schedule a hearing session where the arguments relating to the case would be presented.

The Constitutional Court declared the Referral inadmissible, as it was filed before the Applicant had exhausted all legal remedies in administrative proceedings, and as such is premature. To reach this conclusion, the Court highlighted all relevant constitutional and legal provisions clearly indicating that the Applicant had an opportunity to challenge the Order in question in an administrative proceeding. The Court referred to the fundamental principles of exhaustion of legal remedies built over the years by the European Court of Human Rights as its case law. In this regard, the Court also stated that the Applicant had not substantiated that the legal remedies provided by the Law on Contested Procedure were ineffective in his case. He merely considered, even after the Court's request for clarification, that the Constitutional Court is the only legal remedy.

For many reasons, which were extensively elaborated in the resolution, the Court did not agree with this allegation of the Applicant that he did not have available legal remedies, and as a result declared the Referral inadmissible

due to non-exhaustion of all legal remedies under Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure. As the Referral was declared inadmissible, the Court also rejected the Applicant's request for interim measure and a hearing - considering them as ungrounded and unnecessary.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI138/18

Applicant

Gent Gjini

Constitutional review of Order, I. GJA. No. 1/2018-141, of the President of the Basic Court in Prizren, Mr. Ymer Hoxha, of 8 August 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Gent Gjini, a lawyer from Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Order [I. GJA. No. 1/2018-141] of the President of the Basic Court in Prizren of 8 August 2018 (hereinafter: the Order).

Subject matter

3. The subject matter is the constitutional review of the challenged Order, which allegedly violated the Applicant's rights guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 55

[Limitation on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). The Applicant also alleges a violation of Article 41 of the Law on the Bar, of Article 25 of the Law on Courts, as well as a violation of Article 6.1 of the Statute of the Bar Association.

4. The Applicant also requests to impose the interim measure against the challenged Order on the grounds that "*leaving this Order in force, the consequences would be irreplaceable and irreparable*" and that there may be situations of escalation of "*physical and verbal violation by the court guards, who are authorized to use violence"*.

5. The Applicant also requests to schedule a hearing in which "*verbally and entirely"* would be discussed the circumstances of the case and where his Referral would be substantiated, which is based on "*law and facts"*.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 14 September 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 19 September 2018, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

9. On 26 September 2018, the Court notified the Applicant about the registration of the Referral and requested him to complete the remaining parts of the official form of the Court, namely to specify the challenged decision and to make a statement regarding the exhaustion of legal remedies, by responding to the question of whether he has taken any procedural step for challenging the Order of the President of the Basic Court in Prizren. The Court requested the Applicant to

submit the completed form and the requested clarifications to the Court within fifteen (15) days of the receipt of the Court's letter.

10. On 8 October 2018, the Applicant submitted the requested clarifications to the Court. Regarding the exhaustion of legal remedies, the Applicant stated that the challenged order "*cannot be definitively challenged, namely, there is no legal remedy for the latter*". Along with the requested clarifications, the Applicant also filed a request for interim measure.

11. On 11 October 2018, the Court notified the President of the Basic Court in Prizren, Ymer Hoxha (hereinafter: the responding party) about the registration of the Referral and invited him to submit his comments, if any, within seven (7) days of the receipt of the Court's letter.

12. On 19 October 2018, the responding party submitted his comments to the Court.

13. On 22 October 2018, the Court notified the Applicant about the receipt of the comments by the responding party, and sent a copy of it.

14. On 23 October 2018, the Applicant sent an electronic letter in the Court electronic mail through which he repeated his request related to the need to impose an interim measure.

15. On 1 November 2018, the Applicant submitted additional comments in response to the comments submitted by the responding party.

16. On 19 November 2018, the Applicant also submitted another letter to the Court requesting that "*the constitutional referral be processed as promptly within a reasonable deadline*" because the challenged order is still in force.

17. On 27 November 2018, the Court notified the responding party about the receipt of additional comments by the Applicant in response to his comments, and sent a copy of them.

18. On the same date, the Court also notified the Kosovo Judicial Council about the registration of the Referral and invited it to submit comments, if any, within seven (7) days of receipt of the Court's letter. The Kosovo Judicial Council did not submit any comments.

19. On 4 December 2018, the Applicant submitted another additional letter by which he repeated the request that the case submitted to the Court to be considered urgently.

20. On 14 December 2018, the Applicant submitted another letter to the Court requesting it to decide on "*the interim measure because the situation is very sensitive*".

21. On 23 January 2019, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts of the case

22. The Applicant is a lawyer from Prizren, who exercises his lawyer activity in the Municipality of Prizren.

23. On 8 August 2018, the President of the Basic Court in Prizren, Mr. Ymer Hoxha, issued an Order [I. GJA. No. 1/2018-141], by which it prohibited the entrance of lawyers and parties in the premises of the Basic Court in Prizren, without invitations or without prior verbal permission, except for access to the office for filing the documents. Specifically, the order in question, which constitutionality is being challenged before this Court, has the following content:

> *"BASIC COURT IN PRIZREN, President of the Court Ymer Hoxha, with the purpose of establishing order at the Court, on 8 August 2018, issues the following:*
>
> *ORDER*
>
> *The security employees and the receptionist are ordered not to allow the entrance of attorneys at law and parties in the building of the Court, without invitations or oral permits of the President of the Court, or judge, except at the office of submitting letters.*
>
> *If the attorneys at law or the parties do not apply the order then the security personal takes them away by force.*
>
> *If the security personnel or the receptionist do not apply the order, the disciplinary procedure will be initiated against them".*

Applicant's allegations

24. The Applicant alleges that the President of the Court in Prizren, Ymer Hoxha, by his Order [I. GJA. No. 1/2018-141 of 8 August 2018] violated the rights guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 55 [Limitations on Fundamental Rights

and Freedoms] of the Constitution. The Applicant also alleges violation of Article 41 of the Law on Bar, Article 25 of the Law on Courts and Article 6.1. of the Statute of the Bar Association.

25. The Applicant states that the order in question "*cannot be appealed, has no legal advice and there is no instance which assesses its legality*". Therefore, the Applicant states that the only remedy in this case is the submission of a Referral to the Constitutional Court.

26. As to the allegation of a violation of Article 23 of the Constitution, the Applicant states that this constitutional provision guarantees to each person to be treated with respect, to not be insulted, humiliated or underestimated. The challenged order, according to the Applicant, insults the lawyers with the word "*will be removed by force*". He further states that the lawyers from Prizren are professional and have conscience, that they know how to behave and it is ridiculous to say that "*we can break the order in court*", and that violence against lawyers will not be tolerated.

27. As to the allegation of a violation of Article 24 of the Constitution, the Applicant states that this Order calls into question equality "*if it is about the mentality of the President of the Court* [Basic Court in Prizren]" for the reason why the Order presents red lines for lawyers and citizens regarding the breaking of law and order and is not valid as such for some judges and administrative staff who, according to the Applicant, cause noise in the corridors of the court with their conduct. Further, the Applicant considers that the challenged Order treats the court as the property of several judges and administrative staff, allowing them to enter and leave whenever they want - and forgetting that the court belongs "*to the state, society, citizens, and to us lawyers, who pay taxes to the state of Kosovo. We [the lawyers] are the ones who mostly maintain the court by correcting their actions almost every day".*

28. As to the allegation of a violation of Article 55 of the Constitution, the Applicant states that it is precisely this article that "*denies the Order*" because, according to him, only such an arbitrary Order of the responding party suffices to violate this constitutional principle. The latter, according to the Applicant, is violated as the Order does not have legal support and there is no law, article or statute in which the phrase "*forced removal of lawyers*" can be found because of disturbing peace and order. Paragraph 4 of Article 55, as stated by the Applicant, gives the legal authority only to the court to limit the freedom and within the limits of certain preconditions. The Applicant concludes by emphasizing that this Order is "*unconstitutional*",

"*tendentious*" and as such is the most "*scandalous*" order in Kosovo justice.

29. With respect to other alleged violations, the Applicant states that this Order also violates Article 41 of the Law on Bar, as well as the Statute of the Bar Association, since the latter "*interferes with the independence of the activity of lawyers and regular performance of our work*". The Applicant further states that, pursuant to Article 25 of the Law on Courts, the challenged order also violates the Rules of Procedure of the Internal Organization of Courts, as this Order "*does not have the approval or permission by the Judicial Council of the Republic of Kosovo*". According to the Applicant, only the Kosovo Judicial Council may, by the vote of all members, grant approval "*for imposing a condition for the compulsory (forced) removal of lawyers from the courtroom by its guards".*

30. The Applicant also alleges that his response to this constitutional complaint "*is also supported by the civil society in Prizren and the intellectuals of the city of Prizren*" and that this response is in coordination with "*all intellectual actors".*

31. Finally, the Applicant requests the Constitutional Court to annul the challenged order because of its non-compliance with the aforementioned Articles of the Constitution and because of its unlawfulness.

Comments submitted by the President of the Basic Court in Prizren, Mr. Ymer Hoxha, in the capacity of the responding party

32. Regarding the Applicant's Referral, the President of the Basic Court in Prizren, Mr. Ymer Hoxha, as a responding party in this case, in his comments stated that in the present case there is no violation of Articles 23, 24 or 55 of the Constitution.

33. Regarding Article 23 of the Constitution, the responding party stated that his Order does not affect the dignity of anyone, either of the court staff, the parties to the proceedings or of the lawyers representing their clients. According to him, the Applicant did not specify what dignity has been specifically violated, but merely raised hypothetical doubts. The order in question, the responding party continues, was issued for the purpose of establishing order in the court where the lawyers for the invitations for representation of their clients are given the opportunity to represent, and in certain cases, based on verbal permission can approach the office of the judge, and all this with a

single purpose to create peace and order in court, where none of the citizens suffer because of the lack of peace and order.

34. With regard to Article 24 of the Constitution, the responding party alleges that the challenged order in its content and purpose embodies the equality before the law. According to him, this Order does not discriminate against any category of citizens or professionals, but it stipulates that in the court no one can enter without invitations, not even the lawyers. The responding party states that no one in the court should enter without invitations because the communication of the court with the parties is impaired, which endangers to come to unilateral *ex-parte* communication. To eliminate the risk of such communication, which would constitute a violation of the Code of Ethics of Judges, the Court by the Order prohibited the entrance of parties without invitations, including the lawyers. An exception is foreseen when the communication and verbal contact with the court is enabled when a judge asks or allows such a thing. According to the responding party, the question arises as to which of the lawyers is individually favored or harmed, while the Order applies the same to all parties, without privileging any and without questioning equality before the law.

35. Regarding Article 55 of the Constitution, the responding party states that the Applicant used an erroneous approach and interpretation in relation to the constitutional articles and what rights and freedoms are limited. According to him, no basic provision protected by domestic or international legislation has been violated by the challenged Order. In this regard, he asks *"if a person, who does not have any job is not allowed to enter the court only because he wants that"* can be considered a limitation of human rights and fundamental freedoms. According to him, not allowing access to the court without any work cannot be considered a violation because through this prohibition is maintained the order, peace, integrity and security of the court and its judges. Furthermore, the access to the court, he continues, is not limited, as everyone without exception has access to the administration service in order to realize their rights by submitting documents and receiving various certificates and evidence.

36. According to the responding party, all state institutions have peace and order and do not allow anarchy that would enable causing a chaos or questioning the independence of the court and thus losing confidence to the public. So, no one can freely enter, without any restrictions, certain institutions without being allowed by the respective officer. The order in question is not directed against the lawyer Gent Gjini [the Applicant], but applies to lawyers, parties,

prosecutors. The entrance of lawyers without invitations to court and the obstruction they cause in the work of judges have been considered also in the collegiums of judges held on 5 September 2018, where all the judges unanimously supported the challenged Order. This was also because there existed the possibility of misuse and the transfer of inaccurate information to the parties that "*allegedly the matter was resolved with the judge.*"

37. As to the Applicant's request for interim measure, the responding party states that the latter should not be granted because it is ungrounded and there is no irreparable consequence that may be caused.

Additional comments submitted by the Applicant

38. In response to the comments submitted by the responding party, the Applicant submitted some additional comments.

39. In this regard, the Applicant states that the responding party is personally dealing with him and makes an attempt to justify, in the absence of facts, "*his order", "dealing with issues that are outside his referral"*. The Applicant further states that in his Referral submitted to the Court he focuses on non-acceptance of using force-violence against lawyers, which allows guards and authorizes them to use violence against lawyers.

40. In addition, in his additional comments, the Applicant states that the responding party deals with him personally, despite the fact that by the Referral submitted to the Court, as he states "*I certainly represent the community of lawyers in Prizren* [...] *and not [only] myself*". This Order, according to the Applicant, was promulgated only in the Basic Court in Prizren and does not appear as such in the other basic courts in the Republic of Kosovo. The Applicant further states that he submitted the present Referral to the Court "*in the interests of the lawyers in Prizren"* and that "*all of us [lawyers] are affected by this Order*". He further continues, by claiming that: "*I have the support and also the solidarity of all lawyers, I say this under both professional and human responsibility"*.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 32 [Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

Law No. 05/L-031 on General Administrative Procedure of 25 May 2016, promulgated by decree of the President of the Republic of Kosovo on 13 June 2016

Article 13
[The principle of the right to legal remedies]

1. Except when explicitly excluded by law, any person has the right to use the legal administrative and judicial remedies, as provided by law against any administrative action or omission, which affects his subjective right or legitimate interests.

Article 52
[Unlawfulness of an administrative act]

1 An administrative act is unlawful when:
1.1. it was issued without legal authorisation according to paragraph 2. Article 4, of this Law;
1.2. the issuing public organ acted without having the competence;
1.3. it came into being through the infringement of provisions regulating the proceeding;
1.4. it contradicts the provisions regulating the form or the statutory elements of the act;
1.5. it violates substantive law;
1.6 discretion was not lawfully exercised, or
1.7. it does not comply with the principle of proportionality.

Article 83
[Institution of administrative proceeding]

1. The administrative proceeding shall be instituted either on request of a party or ex officio. [...]

PART VII
ADMINISTRATIVE LEGAL REMEDIES
CHAPTER I GENERAL RULES ON ADMINISTRATIVE LEGAL REMEDIES

Article 124
[Locus standi and grounds to an administrative remedy]

1. A party shall have the right to legal remedy against every administrative action or inaction, if it claims that its right or legitimate interests are infringed by such action or inaction. [...]

2. Unless otherwise provided by law, administrative remedy may be filed on the grounds of unlawfulness of the action.

3. Ordinary administrative remedies shall be:

3.1. administrative appeal;;
3.2. administrative complaint;
4. Exceptional administrative remedies shall be the reopening of the proceeding.
5. A party is not entitled to a second ordinary administrative remedy on the same case.
6. The exhaustion of respective ordinary administrative remedy is a preliminary requirement for any dispute before a competent court for administrative disputes. Direct access to the court without preceded administrative remedy is allowed, when:
6.1. a superior organ does not exist;
6.2. a third party claims that its rights or legitimate interests are infringed by an administrative act resolving an administrative remedy; or
6.3 explicitly provided by law.

CHAPTER II
APPEAL
SECTION I
General rules and eligibility terms of the appeal

Article 125
[Administrative appeal]

1. Unless otherwise provided by law, an administrative appeal, may be submitted against an administrative act. It may also be submitted against administrative inaction, if the public organ has kept silent within the established deadline (hereinafter referred to as “appeal against administrative silence”). [...]

Admissibility of the Referral

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

Regarding the authorized party and challenging decision of the public authority

42. 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.*

43. As to the fulfillment of the requirements of Articles 113.1 and 113.7, the Court notes two important elements to be considered.

44. The first element concerns whether the Applicant is an authorized party to submit this constitutional referral in (i) his personal name as a natural person, and (ii) on behalf of all Prizren lawyers.

45. As to item (i) of the first element, the Court notes that the Applicant initially filed his referral in the capacity of a natural person, namely a lawyer practicing his profession of a lawyer, seeking protection of his rights and freedoms guaranteed by the Constitution, which he claims to have been violated. In this regard, the Court considers that he is an authorized party to submit this individual referral.

46. As to item (ii) of the first element, the Court recalls that the Applicant states that he has filed his Referral on behalf of all Prizren lawyers who are affected by this Order and that for this referral he has also the support of the intellectuals and civil society of Prizren. Regarding this part, the Court considers that the Applicant is not an authorized party to raise allegations on behalf of all Prizren lawyers and that such representation has not been proven to the Court in any way. Moreover, such requests are the requests of a character *actio popularis* for which the Court has already stated that it has no jurisdiction to deal with.

(See the case of the Constitutional Court declared inadmissible in terms of *actio popularis* as the referral was filed on behalf of third persons and as a consequence they were not authorized parties to raise allegations for the third parties, KI03/11, *Organization Çohu*, Resolution on Inadmissibility of 19 May 2011, paragraphs 16-18).

47. Therefore, the Court will consider this referral only with regard to the Applicant as an individual, namely a natural person, and not as a representative of all Prizren lawyer. Therefore, the Court concludes that the first element of Article 113 with respect to individual referrals is partially met and only as regards item (i) above.

48. The second element concerns the determination of what decision is challenged before this Court and whether that decision is a decision of a public authority. In this regard, the Court finds that the Order [I. GJA. No. 1/2018-141 of 8 August 2018] issued by the President of the Basic Court in Prizren, Mr. Ymer Hoxha, is the decision of a public authority. Therefore, the Court concludes that this element of Article 113 is fully met.

49. In sum of the fulfillment of the criteria for an authorized party and challenging a decision of a public authority, the requirements established in Article 113 of the Constitution, the Court concludes that the Applicant is an authorized party to submit this referral in his personal name and in terms of his rights guaranteed by the Constitution and that he challenges the decision of a public authority.

As to exhaustion of legal remedies

50. The Court notes that in addition to the two above-mentioned elements, Article 113.7 of the Constitution also contains a very clear requirement, which is the exhaustion of all legal remedies "*established by law*".

51. In this respect, the Court also refers to Article 47 [Individual Requests] of the Law, which further specifies Article 113.7 of the Constitution regarding the exhaustion of legal remedies, providing the following:

> *"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."*

52. In addition, the Court refers finally to paragraph (b) of paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure, which foresees:

> *"(1) The Court may consider a referral as admissible if:*
>
> > *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,"*

53. Consequently, referring to the constitutional basis for the exhaustion of legal remedies provided by Article 113.7 of the Constitution; legal basis foreseen by Article 47.2 of the Law; and the regulatory basis specified in Rule 39 (1) (b) of the Rules of Procedure, the Court will answer the question whether the Applicant in the present case has exhausted all effective legal remedies available to him under the law, before submitting his individual referral to the Constitutional Court.

54. In reaching this answer, the Court will also refer to the well-established case law of the European Court on Human Rights (hereinafter: the ECtHR), in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret the human rights and fundamental freedoms guaranteed by the Constitution. In addition to the ECtHR case law, the Court will also refer to its own case law which can now be considered a consolidated case law as regards the exhaustion of legal remedies.

55. In this regard, the Court recalls that the Referral was submitted by the lawyer Gent Gjini, in his capacity as an individual and a natural person, who requests the constitutional review of the Order [I. GJA. No. 1/2018-141] of 8 August 2018] issued by the President of the Basic Court in Prizren, Mr. Ymer Hoxha.

56. The Court first recalls that in the part of the form asking for an explanation of whether all legal remedies have been exhausted, the Applicant stated that against the challenged order "*cannot be appealed, has no legal advice and there is no instance which assesses its legality*". Further, the Applicant emphasized that "*the legal remedy in this case is only the Constitutional Court of the Republic of Kosovo".*

57. Upon receipt of the Applicant's Referral, the Court, based on the regular proceedings for the review of individual referrals, notified the Applicant about the registration of the Referral and, for the purpose of

confirmation, asked "*whether he has taken any procedural step to challenge the Order".* In his response submitted to the Court, the Applicant replied by stating that the challenged order *"definitely cannot be challenged, namely, there is no legal remedy against it."*

58. The Court therefore notes that the Applicant's final position is that there is no legal remedy under which the legality and constitutionality of this Order may be challenged.

59. In this regard, the Court recalls the relevant legal provisions (see the part of the constitutional and legal provisions cited between paragraphs 40-41 of this Resolution) applicable in the Republic of Kosovo, according to which the alleged unlawfulness of any administrative act issued by a public authority can be challenged. These legal provisions clearly state that "*any person has the right to use the legal administrative and judicial remedies [...] against an administrative action or omission of a public body which affects his subjective right or legitimate interests*." (See, *inter alia*, Articles 13, 52, 83, 124, 125 of the Law on General Administrative Procedure).

60. Therefore, the Court holds that the Applicant had the legal possibility, that pursuant to the applicable law, present all his allegations of violation of the law or of his constitutional rights guaranteed by Articles 23, 24 and 55 of the Constitution - the allegations he is raising for the first time before this Court. Thus, he had the legal opportunity to challenge the "*action*" taken by the President of the Basic Court in Prizren, Mr. Ymer Hoxha, which action in this case is of an administrative nature. He could also submit his complaints to the Kosovo Judicial Council. Challenging of the administrative actions has clear legal ways and their challenge in administrative procedures is a legal right recognized to all parties who consider that their rights have been violated.

61. In addition, the challenging of such acts is also guaranteed by Article 32 [Right to Legal Remedies] of the Constitution, which provides that every person has the right to pursue legal remedies against "*judicial and administrative decisions which infringe on his/her rights or interests in the manner provided by law*". The Constitution itself refers to "the law" to show that persons who claim a constitutional and legal violation should follow the foreseen legal procedures to seek protection of their rights.

62. Only after exhaustion of such legal remedies the Applicant could submit to the Constitutional Court an individual referral for constitutional review of the final decisions of the regular courts if

he/she would still remain unsatisfied with the way his allegations are reviewed or resolved. This could then be done in accordance with Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

63. In the light of the foregoing facts, the Court concludes that the Applicant has not exhausted the legal remedies available to him, foreseen by the legislation in force in the Republic of Kosovo, and that he submitted a premature Referral to this Court. (See similar cases of the Constitutional Court, No. KI84/17, Applicant *Bahri Maxhuni*, request for constitutional review of the Decision of the Government of the Republic of Kosovo, Resolution on Inadmissibility of 19 April 2018, paragraphs 28-30; KI38/17, Applicant *Meleq Ymeri*, Request for constitutional review of the Decisions of the Ministry of Labor and Social Welfare, paragraphs 26-28).

64. The Court recalls that the rule of exhaustion of remedies is a reflection of the principle of subsidiarity as a fundamental principle in the constitutional judiciary, which aims to afford the regular courts or relevant public authorities the opportunity to prevent or put right the alleged constitutional violation. The rule is based on the assumption reflected in Article 32 of the Constitution and in Article 13 of the European Convention on Human Rights (hereinafter: ECHR) that the Kosovo legal order provides an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery. (See ECtHR, *Selmouni v. France*, Application No. 25803/94, Judgment of 28 July 1999, paragraph 74 and, *inter alia*, cases of Constitutional Court, No. KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility of 8 December 2016, paragraph 61, Case No. KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility, of 7 August 2017, paragraph 35, Case No. KI41/09, Applicant *University AAB-RIINVEST LLC*, Resolution on Inadmissibility, of 3 February 2010, paragraph 16, and Case No. KI94/14, Applicant *Sadat Ademi*, Resolution on Inadmissibility of 17 December 2014, paragraph 24).

65. The Court has consistently adhered to the principle of subsidiarity, maintaining that all applicants are required to exhaust all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. The Court reiterates that this approach requires that, before addressing the Court, the Applicants must exhaust all procedural possibilities within the institutions which allegedly have infringed any right, in regular administrative or judicial proceedings, to prevent violations of human rights and freedoms guaranteed by the

Constitution or, if any, to remedy such a violation of the rights guaranteed by the Constitution. (See: as the most recent authority, the case of the Constitutional Court of the Republic of Kosovo, No. KI84/17, Applicant *Bahri Maxhuni*, cited above, paragraphs 28-30, Case No. KI62/16, Applicant *Bekë Lajçi*, Resolution on Inadmissibility, of 10 February 2017, paragraphs 59-60, and also see Case No. KI07/09, Applicant: Demë *Kurbogaj and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 18-19, Case No. KI109/15, Applicant: *Milazim Nrecaj*, Resolution on Inadmissibility of 17 March 2016, paragraphs 27-28; KI148/15, Applicant: *Xhafer Selmani*, Resolution on Inadmissibility of 15 April 2016, paragraphs 27-28).

66. The Court further notes that the exhaustion of legal remedies is a procedural precondition which must be fulfilled in order for the Court to review a referral. Although the responding party has not raised as an allegation the fact that this referral is inadmissible in procedural aspect, the Court *ex officio* assesses in every case and at any time whether all admissibility requirements apply to a certain case. In principle, in addition to the regular exhaustion of legal remedies provided by law, the only other way to overcome this procedural requirement - without exhaustion - is that the Applicant proves that the legal remedies provided by law are ineffective.

67. In this regard, it is already a recognized position of the case law of this Court and of the ECtHR that the obligation to exhaust legal remedies is limited to making use of those remedies the existence of which is sufficiently certain, not only in theory, but also in practice; which are available, accessible and effective; and which are capable of redressing directly the alleged violation of the Convention. (See, *inter alia case cited above Selmouni v. France*, paragraphs 71 to 81, *Akdivar and Others v. Turkey*, paragraphs 55-77, *Demopolous and Others v. Turkey*, paragraphs 50-129; *Ocalan v. Turkey*, paragraphs 63-72; and *Kleyn and others v. the Netherland*, paragraphs 155-162). In addition, an Applicant cannot be considered to have exhausted legal remedies if he can demonstrate, by providing relevant case law or other appropriate evidence that a legal remedy available to him, which he has not used would fail. (see: Case *Kleyn and Others v. The Netherlands*, paragraph 156 and references cited therein).

68. The Court notes that, in the present case, the Applicant did not provide any argument and evidence that he had used any legal remedy or if the legal remedies available to him were inadequate and ineffective by which he could argue that the rule of exhaustion of legal remedies should be considered fulfilled and waived in that specific case. (see:

case of the Constitutional Court of the Republic of Kosovo, KI116/14, Applicant *Fadil Selmanaj*, Resolution on Inadmissibility of 26 January 2015, paragraphs 45-46 and references cited in that decision). He simply maintained the view that there is no legal remedy and that the Constitutional Court is the only legal remedy – a position which, for the reasons mentioned above, does not prove to be correct.

69. In conclusion, the Court finds that the Referral was submitted before the Applicant exhausted all legal remedies and as such is premature and is to be declared inadmissible in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

Request for interim measure

70. The Court recalls that the Applicant also requested the Court the following: "*Pursuant to Article 57 item (a), (b), (c) Decision on interim measure, of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, we, the lawyers in principle request to impose interim measure against this Order"*. In addition to the request for interim measure, the Applicant submitted four additional documents which he called "*urgencies*" and in all these documents is reiterated the need, according to him, for the Court to decide on the present referral within the shortest time limit.

71. To support the request for interim measure, the Applicant states that "*leaving this Order in force, the consequences would be irreplaceable and irreparable and that there may be situations of escalation of physical and verbal violation by the court guards, who are authorized to use violence"*.

72. The Court reiterates the conclusion that the Applicant's Referral was declared inadmissible because he filed a premature referral, and as a result, he did not exhaust all legal remedies.

73. Therefore, in accordance with the foregoing findings and in accordance with Article 116 (2) of the Constitution, Article 27 (1) of the Law and Rule 57 (1) of the Rules of Procedure, the request for interim measure is rejected as ungrounded.

Request to hold a hearing

74. The Court recalls that the Applicant also requested the Court to hold a hearing in which would be discussed "*verbally and completely*" the

facts of the case and his referral, according to him, based on "*the law and the facts"* would be substantiated.

75. The Court recalls that, pursuant to paragraph (2) of Rule 42 [Right to Hearing and Waiver] of the Rules of Procedure, the Court may order a hearing only *"if it believes a hearing is necessary to clarify issues of fact or of law"*

76. The Court reiterates the finding that the Applicant's Referral was declared inadmissible because he did not exhaust all legal remedies. In this regard, and since there is no issue of evidence or law to clarify, the Court rejects the request for scheduling a hearing as ungrounded.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Article 47 of the Law and Rules 39 (1) (b) of the Rules of Procedure, on 23 January 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measure;

III. TO REJECT the request for a hearing;

IV. TO NOTIFY this Decision to the Parties;

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

VI. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI78/18 - Constitutional review of Decision No. AC-I-17-0466-Ao01 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (SCSC), of 12 April 2018

KI78/18, Applicant Pashk Malota

Resolution on Inadmissibility of 27 February 2019

Keywords*: Individual referral, court fee, manifestly ill-founded*

The Applicant challenged the constitutionality of a Decision of the Appellate Panel of the SCSC. The latter concluded that the Applicant's appeal had to be considered withdrawn as he had not paid the court fee of € 20.

The Applicant alleged that such a decision violated his rights guaranteed by Articles 21, 22, 53, 46 and 54 of the Constitution in conjunction with Article 6 of the ECHR. In this regard, he alleged that the Appellate Panel in violation of the legal provisions considered the appeal of the Applicant withdrawn and also denied him right of access to justice, namely access to the Court.

Referring to its case law and that of the ECtHR, the Court reiterated and reemphasized that it is not the role of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts, when assessing evidence or applying the law (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law.

The Court finds that the Applicant failed to present evidence, facts and arguments indicating that the amount of the court fee for which the Applicant was liable, his ability to pay as well as the circumstances of his case in general have affected his right to access to the court as provided for in Article 31 of the Constitution and Article 6 of the ECHR.

Therefore, the Court concludes that the Referral was rejected as manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI78/18

Applicant

Pashk Malota

Constitutional review of Decision No. AC-I-17-0466-A001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 12 April 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Pashk Malota from the village Zhdrella, Municipality of Gjakova (hereinafter: the Applicant), who is represented by Teki Bokshi, a lawyer from Gjakova.

Challenged decision

2. The Applicant challenges Decision No. AC-I-17-0466-A001 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 12 April 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights guaranteed by Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 46 [Protection of Property] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) of the European Convention on Human Rights (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 the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

5. On 31 May 2018, the 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 Constitutional Court

6. On 6 June 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

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

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

9. On 16 August 2018, the President of the Court appointed Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of

Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

10. On 14 September 2018, the Court notified the Applicant's representative about the registration of the Referral and requested him to complete the official form of the Court and to submit the power of attorney for the representation of the Applicant before the Court within 15 (fifteen) days from the receipt of the document.

11. On 1 October 2018, within the prescribed time limit, the Applicant submitted the requested documents to the Court.

12. On 9 October 2018, the Court sent a copy of the Referral to the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters (hereinafter: the Special Chamber) and the Privatization Agency of Kosovo (hereinafter: the PAK).

13. On 27 February 2019, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts of the case

14. In the 1990ies, the Applicant's employment relationship with the social enterprise "Bec" (hereinafter: the Socially-Owned Enterprise) was terminated without his consent. Regarding the annulment of the employment relationship, the Municipal Court in Gjakova (hereinafter: the Municipal Court) rendered
Decision [No. 125/94] of 6 September 1994.

15. On an unspecified date, the Applicant submitted a proposal for the annulment of the aforementioned decision.

16. On 27 January 1998, the Municipal Court by Judgment [C. No. 242/94] approved the proposal of the Applicant and annulled Decision [No. 125/94] of the Municipal Court. On that occasion, the Municipal Court ordered the Socially-Owned Enterprise to reinstate the Applicant to work.

17. On 18 April 1998, the Socially-Owned Enterprise filed an appeal against Judgment [C. No. 242/94] of the Municipal Court.

18. On 9 June 2006, the District Court in Peja [Ac. No. 125.02] annulled Judgment [C. No. 242/94] of the Municipal Court and remanded the case for retrial and reconsideration.

19. On 18 May 2012, the Municipal Court [Decision C. No. 486/06), was declared incompetent to decide the case and the lawsuit was sent to the Specialized Panel of the Special Chamber on the Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel).

20. On 21 January 2016, the Specialized Panel forwarded the claim and accompanying documentation to the PAK.

21. On 2 February 2016, the PAK, as a representative of the Socially-Owned Enterprise, filed a response to the lawsuit and filed a request for suspension of the proceedings in this case, as the Socially-Owned Enterprise was subject to the Liquidation Procedure.

22. On 18 July 2017, the Specialized Panel by Decision C-II-14-0036-C0001 decided that: the proceedings in respect of the Applicant's case should be suspended after the Socially-Owned Enterprise is in Liquidation Procedure; that any request for reopening a suspended matter will be treated as a new one; and that the case suspended due to the liquidation of the socially-owned enterprise is considered a closed case. The Specialized Panel noted that the Applicant should have addressed the Liquidation Commission of the Socially-Owned Enterprise, since this Liquidation Authority is the only entity entitled to control, handle, and respond to the claims/requests in which the responding party is the socially-owned enterprise in liquidation.

23. On 2 August 2017, the Applicant filed an appeal against the Decision of the Specialized Panel [C-II.-14-0036-C0001] with the Appellate Panel, requesting to annul the Decision of the Specialized Panel and remand the case for reconsideration.

24. On 30 January 2018, the Special Chamber sent to the Applicant remarks on the payment of the court fee in the amount of 20 (twenty) Euros.

25. On 12 April 2018, the Appellate Panel, by Decision No. AC-I-17-0466-A0001, found that the Applicant's appeal against the Decision of the Specialized Panel [C-II.-14-0036-C0001] is considered as withdrawn as the Applicant failed to pay the court fee. The Appellate Panel, *inter alia*, reasoned:

> *"Pursuant to Article 3.1 of Administrative Instruction No. 01/2017 (AI) of the Kosovo Judicial Council (KJC), the determination of the court fee to be paid at the time the submission was*

presented/filed is based on the value of the dispute, namely the nature of the submission.

Article 2.4 of the AI stipulates that the term "submission" is used for a claim, counterclaim, appeal, objection, request, revision, proposal for execution. This Administrative Instruction, applicable from 1 May 2017, for the unification of the court fee of the SCSC, determines that the complainant has to pay the fixed amount of 20 euro for filing the appeal.

As the complainant [the Applicant] did not pay the court fee as requested from him with the notice of 30 January 2018, which was filed with the complainant's representative on 31 January 2018, and he did not file a request for exemption from court fees, the Appellate Panel considers that the appeal has been withdrawn".

Applicant's allegations

26. The Applicant alleges that the Appellate Panel by Decision [AC-I-17-0466-A0001], violated his rights guaranteed by Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 46 [Protection of Property] and 54 [Judicial Protection of Rights] of the Constitution and Article 6 (Right to a fair trial) of the ECHR.

27. The Applicant initially alleges erroneous application of the law by the Appellate Panel, stating that the request of the Appellate Panel to pay the court fee within 15 (fifteen) days regarding the appeal filed at the Appellate Panel is unlawful, as Administrative Instruction No. 1/2017 on the Unification of Judicial Fees of the Kosovo Judicial Council was erroneously interpreted, which [in Article 5.5.1] foresees:*" if the fee for the submission is not paid until the final date under this article and when there are no conditions for exemption from the obligation to pay it, the court shall reject the submission, with the exception of complaints concerning the remedies of challenging".* In this regard, the Applicant alleges that the right to "*access to justice*" guaranteed by Article 6 of the ECHR has been violated".

28. As to the alleged violation of the right to protection of property, the Applicant refers to the issue of property restitution in Kosovo, claiming that they should be returned to the former owners. He states that "*the Court should take into account the Comprehensive Proposal for the Kosovo Status Settlement [Ahtisaari's package] and in*

particular Article 8.6 that stipulates, inter alia, that "Kosovo shall address property restitution issues [...], as a matter of priority, in accordance with Annex VII "of the Ahtisaari's Package.

29. According to the Applicant, Ahtisaari's Package also requires that the Assembly of Kosovo adopts, among other things, the "*Law on Restitution of Property*". He claims that under Article 1.1 of the Constitution, "*the Constitution shall be consistent in all its provisions with Ahtisaari's package and should be interpreted in accordance with Ahtisaari package*". He also refers to Article 46 of the Constitution which guarantees the protection of property, further specifying that the fact that a law on restitution property has not yet been approved constitutes a violation of the Constitution and of the Ahtisaari package thus denies the right to restitute the property guaranteed by the ECHR.

30. Regarding this item, the Applicant states that the "*restitution of property*" is a fundamental right guaranteed by the ECHR and in view of Articles 22 and 53 of the Constitution, the Constitutional Court must interpret his rights in accordance with the court decisions of European Court of Human Rights (hereinafter: ECtHR).

31. Finally, the Applicant requests the Court to annul and declare unconstitutional the Decision [C-II.-14-0036-C0001] of the Specialized Panel and Decision [AC-I-17-0466-A0001] of the Appellate Panel.

Admissibility of the Referral

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

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

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

34. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

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

35. In the present case, the Court notes that the Applicant filed the Referral as an individual and as an authorized party, he filed the Referral within the time limits set forth in Article 49 of the Law and after the exhaustion of all legal remedies provided by law.

36. However, the Court also refers to Article 48 [Accuracy of the Referral] of the Law, which stipulates:

> *"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".*

37. The Court also refers to paragraph (2) of Rule 39 [Admissibility Criteria] of the Rules of Procedure, which foresees:

> *"(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".*

38. The Court recalls that the Applicant initially alleges that the Appellate Panel [Decision No. AC-I-17-0466-A0001] violated his right to fair and impartial trial. In this regard, he alleges that the Appellate Panel, in contradiction with the legal provisions, considered the appeal of the Applicant withdrawn and also denied him the right of access to the justice, namely access to the Court.

39. As to the Applicant's allegations in the present Referral, the Court notes that they are almost identical to the allegations raised in the Referral KI62/18, on which the Court has already decided. Both, the facts of the case and the proceedings conducted by the public authorities are almost identical to those in the present case. (See the case of the Constitutional Court, KI62/18, Applicant *Nadlije Gojani*, Resolution on Inadmissibility of 27 September 2018, paragraphs 22-28 as to the allegations and paragraphs 36-49 as to the reasoning of the Court).

40. In this regard, as in Case KI62/18, the Court reiterates and reemphasizes that it is not the role of the Constitutional Court to deal

with errors of facts or law allegedly committed by the regular courts, when assessing evidence or applying the law (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law (see, *mutatis mutandis*, Judgment of the European Court of Human Rights (hereinafter: the ECtHR) of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, paragraph 28; see also the case of Constitutional Court KI62 / 18, Applicant *Nadlije Gojani*, cited above).

41. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as a "fourth instance court" (see cases of the Constitutional Court, KI86/11, Applicant: *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012 and KI62/18, Applicant *Nadlije Gojani*, cited above).

42. In the Applicant's case, the Court recalls that the Appellate Panel considered his appeal withdrawn merely for procedural reasons and did not deal at all in substance with the Applicant's appeal against the Specialized Panel, as, in spite of the objection sent by the Appellate Panel he did not pay the court fee foreseen in Article 13 of the Administrative Instruction No. 01/2017 of the Kosovo Judicial Council, which stipulates that for *"appeals of former employees against first instance decisions regarding unpaid salaries by socially-owned enterprises that are in the process of privatization/liquidation [*court fee is*] 20 euro"*.

43. The Court notes that the Appellate Panel assessed and interpreted the legal provisions regarding the court fee and reasoned its decision based on the Law on Contested Procedure, and based on Article 3.1 of Administrative Instruction No. 01/2017 (AI) of the Kosovo Judicial Council. In this regard, the Appellate Panel reasoned that the Applicant *"did not pay the court fee as requested from him, by notice of 30 January 2018, which was served on the complainant's representative on 31 January 2018"* and, furthermore, *"did not file a request to be exempted from the court fee"*.

44. The Court considers that the conclusions of the Appellate Panel were reached after a detailed examination of the relevant provisions regarding to court fees and the fact that the Applicant did not pay the court fee and did not file a request for exemption from this payment.

45. All issues, which were relevant to the decision regarding the non-payment of the court fee by the Applicant were properly reviewed by the Appellate Panel. All material and legal reasons related to the challenged decision were analyzed and as a result, the Court concludes that the proceedings before the regular courts, viewed in their entirety, were fair (See, *mutatis mutandis*, the ECtHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, para. 29 and 30; see also the case of Constitutional Court KI62/18, Applicant *Nadlije Gojani*, cited above).

46. As to the Applicant's allegation of a violation of his right of access to the court as a result of the request of the Appellate Panel for payment of the court fee, the Court recalls that, according to the ECtHR case law, the requirement to pay fees to civil courts in connection with claims, or appeals, they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible, *per se*, with the right to fair and impartial trial (See, ECtHR Judgment of 30 November 2005, *Podbielski and PPU Polpure v. Poland*, no. 39199/98, para. 64).

47. However, the amount of the court fees assessed in the light of the particular circumstances of a given case, including the applicant s' ability to pay them, and the phase of the proceedings at which that court fee has been imposed, are factors which are material in determining whether or not a person enjoyed his right of access to the court (See, *mutatis mutandis*, ECtHR Judgment, *Podbielski and PPU Polpure v. Poland*, no. 39199/98, of 30 November 2005, para. 64).

48. In this regard, the Court considers that the Applicant did not provide evidence, facts and arguments indicating that the amount of the court fee for which the Applicant was liable, his possibilities to pay it and the circumstances of his case in general have affected his right of access to the court, as provided for by Article 31 of the Constitution and Article 6 of the ECHR. In addition, the Applicant, despite the objection filed by the Appellate Panel, did not even submit a request for exemption from the court fee, as foreseen in the applicable legal framework. Regarding the Applicant's alleged violations of the right to protection of property under Article 46 of the Constitution, and the right to restitution of property to former owners, namely the Applicant's request for the issuance of a property restitution law, in addition to references to the Constitution, does not present any fact or evidence as to how these provisions are relevant to his case.

49. However, the Court considers it necessary to clarify the issue of property restitution in light of the Applicant's general allegations and exclusively in line with the ECtHR case law in this respect. Consequently, as to the Applicant's allegation that "*the restitution of property is a fundamental right guaranteed by the ECHR*", namely Article 1 of Protocol No. 1 of the ECHR, the Court will further refer to the main decisions of the ECtHR in which were discussed the issue of property restitution, the applicability of the safeguards of Article 1 of Protocol No. 1 to the ECHR in respect of the restitution of property, and the obligations which the Member States of the Council of Europe (hereinafter: the Contracting States) have in this respect. (See, among other authorities, ECHR Judgment of 4 March 2003, *Jantner v. Slovakia*, No. 39050/97, paragraph 34; Judgment of the ECtHR [GC], of 10 July 2002, *Gratzinger and Gratzingerova v. the Czech Republic* , No. 39794/98, paragraphs 70-74.)

50. The Court notes that in the abovementioned ECHR decisions, in the specific paragraphs cited above, *inter alia*, it is stated that Article 1 of Protocol No. 1 of the ECHR cannot be interpreted as imposing any restrictions on the Contracting States to restore property which had been transferred to them before they ratified the ECHR. This is the first basic principle. This article cannot also be interpreted as restricting the freedom of the Contracting States to determine the scope of property restitution or the choice of conditions under which property restitution will be made to their former owners. This is the second basic principle. (See ECtHR Judgment, *Jantner v. Slovakia*, cited above, paragraph 34).

51. The ECtHR case law further shows that, in particular, the Contracting States enjoy a "wide margin of appreciation" with respect to the exclusion of certain categories of former owners from such a right. Where certain categories of owners are thus excluded, their claims for restitution ca not be regarded as constituting a "legitimate expectation", which thus attracts the protection of Article 1 of Protocol no. 1 of the ECHR. This is the third important principle. (See ECHR Judgment [GC], of 10 July 2002, *Gratzinger and Gratzingerova v. the Czech Republic*, No. 39794/98, paragraphs 70-74). On the other hand, as the fourth basic principle, it is important to emphasize that, once a Contracting State which has ratified the ECHR, including Protocol no. 1, issues a law on the basis of which it envisions the total or partial restitution of property confiscated from a past regime, then such legislation is considered as a law which generates a new property right which is protected, in this case, from Article 1 of Protocol no. 1 of the ECHR, for all those persons who meet the requirements laid down by that law. (See ECHR decisions cited above).

52. As a conclusion, the Court notes that the ECHR and the case law of the ECtHR: (i) does not oblige the Contracting States to issue a Law on Restitution of Property; (ii) allows the Contracting States considerable freedom in the establishment and determination of the scope of the restitution of property and the choice of the conditions applicable to it; (iii) enables the Contracting States to define and/or exclude certain categories from the right to property restitution; and (iv) obliges the Contracting States to respect the right to protection of property guaranteed by Article 1 of Protocol No. 1 of the ECHR, if they have decided to issue a law on restitution of property, as in such cases the protection by this article is a right guaranteed by the ECHR. These are the four general principles regarding the issue of "restitution of property", based on the ECHR and the case law of the ECtHR, already consolidated in this regard.

53. In the present case, the Court notes that there is no special law in the Republic of Kosovo on the property restitution and, consequently, the claims for restitution of property cannot be based on the guarantees provided by Article 1 of Protocol no. 1 of the ECHR or, *mutatis mutandis*, in the safeguards of Article 46 [Protection of Property] of the Constitution. This is, as explained above, for the sole reason that the property restitution claims cannot be considered to constitute a "legitimate expectation" as long as there is no law on property restitution.

54. Likewise, with regard to other alleged violations of the Applicant in relation to Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions], and 54 [Judicial Protection of Rights], the Court notes that, apart from reference to the provisions of the Constitution, the Applicant does not present any fact or evidence as to how these rights have been violated by the Appellate Panel.

55. The Court recalls that the mere fact that the Applicant is not satisfied with the outcome of the decisions of the regular courts, or the mentioning of articles of the Constitution is not sufficient to build an allegation of constitutional violation. When alleging such violations of the Constitution, the Applicant must present reasoned allegations and compelling arguments (See case of the Constitutional Court No. KI136/14, Applicant *Abdullah Bajqinca,* Resolution on Inadmissibility of 10 February 2015, paragraph 33).

Summary

56. The Court finds that the Applicant failed to present evidence, facts and arguments indicating that the proceedings before the Appellate Panel have in any way constituted a constitutional violation of his rights guaranteed by the Constitution, to which the Applicant refers.

57. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, on 27 February 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Arta Rama-Hajrizi

KI59/18 Applicant: Strahinja Spasić, constitutional review of Decision AA–UŽ. No. 58/2017 of the Supreme Court, of 1 December 2017

KI59/18, resolution on inadmissibility of 27 March 2019, published on 15 April 2019

Keywords: individual referral, constitutional review of the challenged decision of the Supreme Court, out of time

The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, and Rule 32 of the Rules of Procedure of the Constitutional Court.

On 22 October 2017, the elections in the Republic of Kosovo for local self-government bodies were held. The Applicant was a candidate for the Serb List for the Mayor of the Municipality of Kllokot.

After the first round of elections, the Applicant and another candidate went to the second round. After the second round of elections, the Applicant filed a complaint with the Election Complaints and Appeals Panel (hereinafter: the ECAP) alleging that there were irregularities in the electoral process.

Upon reviewing the Applicant's appeal and all relevant evidence, the ECAP rejected as ungrounded the Applicant's complaint, this ECAP decision was fully accepted and supported by the Supreme Court. After that, the Central Election Commission announced the election results according to which the Applicant did not win the highest number of votes. Against this decision of the Central Election Commission, the Applicant filed a complaint to the ECAP with identical allegations as in the first complaint. The ECAP rejected this complaint of the Applicant as inadmissible and *res judicata* because it had already been decided on the matter. The Central Election Commission subsequently announced the final election results, confirming the preliminary election results.

The Applicant alleges that the ECAP and the Supreme Court violated his rights guaranteed by Article 21 [General Principles], Article 32 [Right to Legal Remedies], Article 45 [Freedom Election and Participation] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

The Court notes that the Supreme Court, on 1 December 2017, rendered the final Decision AA. UŽ. No. 58/2017 regarding the complaint [1112], which the Applicant initiated before the ECAP.

The Court also notes that the Applicant subsequently filed complaint again [1127] with the ECAP with identical allegations regarding Decision [No. 2470-2017] of CEC of 7 December 2017. The ECAP, after considering this complaint of the Applicant, rendered Decision ZL. A. No. 1127/2017 of 8 December 2017, in which emphasized that these allegations of the Applicant were reviewed and reasoned in the previous decision, and, accordingly, the case has already been decided, and therefore, the Applicant's complaint was inadmissible.

Based on the above, the Court considers that the final decision of the Applicant is Decision AA. UŽ. No. 58/2017 of the Supreme Court of 1 December 2017. Therefore, the time limit started to run from 1 December 2017, which is the date when the decision in question was served on the Applicant. The Applicant submitted his Referral on 12 April 2018. The deadline of four months for submitting the Referral expired on 1 April 2018.

Therefore, the Court finds that the Applicant’s Referral is inadmissible as out of time.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 59/18

Applicant

Strahinja Spasić

Constitutional review of Decision AA–UŽ. No. 58/2017 of the Supreme Court of 1 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Strahinja Spasić from Kllokot (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Decision AA-UŽ. No. 58/2017 of the Supreme Court of 1 December 2017 and in connection with Decision ZL. ANo. 1127/2017 of the Election Complaints and Appeals Panel (hereinafter: the ECAP) of 8 December 2017, and Decision No. 2585-2017 of the Central Election Commission (hereinafter: the CEC) of 14 December 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violated the Applicant's rights guaranteed by Article 21 [General Principles], Article 32 [Right to Legal Remedies], Article 45 [Freedom of Election and Participation], and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Articles 113.1 and 7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

5. On 31 May 2018, the 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 12 April 2018, the Applicant submitted the Referral through mail service to the Court.

7. On 18 April 2018, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

8. On 30 April 2018, the Court notified the Applicant about the registration of the Referral. On the same date, a copy of the Referral was sent to the ECAP, the Supreme Court and the CEC, giving them the opportunity to submit their comments regarding the claims raised in the Referral KI59/18.

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

10. On 18 June 2018, the Applicant submitted to the Court additional documents in which he specified his Referral in more detail.

11. 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.

12. On 22 August 2018, the President rendered decision on the appointment of Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur instead of Judge Snezhana Botusharova.

13. On 1 February 2019, the Court notified the Political Entity Srpska Lista (hereinafter: Serbian List) about the registration of the Referral. The Court sent them the copies of the Referral and requested them to submit their comments regarding the referral within seven (7) days from the date of receipt of this notice. The Serbian List did not submit comments regarding the Referral.

14. On 5 February 2019, the President of the Court appointed new Review Panel composed of Judges: Bekim Sejdiu (Presiding), Radomir Laban and Remzie Istrefi -Peci.

15. On 19 February 2019, Judge Bajram Ljatifi requested the President of the Court to be excluded from the review of Referral No. KI59/18, because he participated before in the decision on the same referral related to the proceedings conducted before the Central Election Commission (hereinafter: the CEC).

16. On 25 February 2019, in accordance with Article 18.1 (1.3) of the Law and Rule (9) of the Rules of Procedure, the President rendered the decision approving the request for exclusion from the review proceeding and decision-making in connection with the case KI59/18.

17. On 27 March 2019, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

18. On 22 October 2017, the elections were held in the Republic of Kosovo for local self-government bodies. The Applicant was the candidate of the Serbian List for the Mayor of the Kllokot Municipality.

19. In the first round of elections for local self-government bodies, none of the candidates for the president of the municipality of Kllokot won more than 50% plus 1 (one) vote out of the total number of valid votes given in that municipality, as provided for by Article 9.9 of the Law on Local Elections in the Republic of Kosovo (No. 03/L-072).

20. On 19 November 2017, a second round of elections for the president of the municipality of Kllokot was held, in which the candidates were the Applicant, the candidate of the Serbian List and Božidar Dejanović, the candidate of the civic initiative Kllokot-Vrbovc.

21. On 24 November 2017, the Applicant filed a complaint [no. 1112] to the ECAP requesting the annulment of the second round of local elections for the President of the Municipality of Kllokot, held on 19 November 2017, claiming that the irregularities occurred in counting votes received by mail.

22. On 26 November 2017, the Serb List notified the ECAP that it withdraws from the appeal proceedings, while the Applicant remained in his appeal.

23. On 27 November 2017, the ECAP by [Decision ZL. A. No. 1112/2017] rejected as ungrounded the complaint of the Applicant. The ECAP assessed that the Applicant failed to substantiate in a secure and convincing manner the allegations in the complaint regarding irregularities in the counting of votes sent by mail.

24. The relevant part of the abovementioned decision of the ECAP establishes: *"From the investigation conducted by the investigative team of the ECAP, in the ballot box BM137/001, it was determined that there were 19 open envelopes in the box. These envelopes were in three different types, of which 11 are of the same type, 5 of the same type and 3 of the same type. There were 19 ballot papers in the box and all the ballot papers were marked with a ball pen and a sign (√), and they were not copied, marked for Bozidar Dejanovic, candidate of the political entity GI Klokot - Vrbovac, while the candidate Strahinja Spasić from the political subject Srspka Lista had no votes".*

25. The Applicant filed an appeal with the Supreme Court against the abovementioned decision of the ECAP, on the grounds of the Violation the provisions of the Law on General Elections, erroneous and incomplete determination of factual situation, with a proposal that the appeal be approved and the decision of the ECAP be annulled.

26. On 1 December 2017, the Supreme Court by Decision AA-UŽ. No. 58/2017 rejected as ungrounded the Applicant's appeal, the Supreme Court found that the factual situation was correctly determined and that the law was not violated to the detriment of the Applicant.

27. The relevant part of the reasoning of the decision of the Supreme Court states, *„when deciding the ECAP considered in correct way the relevant facts and applied the provisions of the law on the basis of this, given the fact that in this particular case the Applicant failed to substantiate his claims with relevant and convincing evidence. Statements of witnesses attached to the appeal, this Court considers irrelevant and cannot have impact on different decision making, taking into consideration that such statements may be contrary to the will of the voters, as confirmed from the checked ballot papers by the ECAP."*

28. On 7 December 2017, the CEC by Decision No. 2470-2017 announced final election results for the second round of voting in the local elections for the President of the municipality of Kllokot.

29. The Applicant against CEC Decision [no. 2470-2017] filed an appeal [no. 1127] with the ECAP, claiming that there have been irregularities in counting the votes received by mail.

30. On 8 December 2017, the ECAP by Decision ZL. A. No. 1127/2017 dismissed the Applicant's appeal on the grounds that the ECAP has responded to these allegations of the Applicant by Decision [ZL. A. No. 1112/2017] of 27 November 2017, and the ECAP accordingly concludes that the issue has already been decided (*res judicata*) and that this appeal be dismissed as inadmissible.

31. On 14 December 2017, the CEC by Decision No. 2585-2017 confirmed the final election results for the second round of voting in the local elections for the President of the Municipality of Kllokot.

Applicant's allegations

32. The Applicant alleges that the challenged decision violates his rights guaranteed by Article 21 [General Principles], Article 32 [Right to Legal Remedies], Article 45 [Freedom of Election and Participation] and Article 54 [Judicial Protection of the Rights] of the Constitution.

33. With regard to the alleged violation of Article 21 of the Constitution, the Applicant alleges, *"the failure to comply with the positive legal rules by the ECAP, and the pressures I have been exposed by the Office for Kosovo and Metohija that I have to give up the candidacy, as well as the pressure by the media, I consider that in this way my constitutional right under Article 21 (Human Rights and Fundamental Freedoms) was violated".*

34. With regard to the alleged violation of Article 32 of the Constitution, the Applicant states, *"The ECAP not only failed to accept the appellant's appealing allegations, as a first instance body, but declared the appeal inadmissible, and also the appeal to the second instance body is not allowed, thus violating Article 32 of the Constitution of Kosovo "Right to Legal Remedies".*

35. As regards the alleged violation of Article 45 of the Constitution, the Applicant states, *"by rigging and abusing the 19 votes received through mail from the special voter list for voting outside Kosovo by the Office for Kosovo and Metohija in Belgrade, I am deprived the election victory and by the rigged votes wins the candidate according to the will of the Office in Belgrade".*

36. As regards the alleged violation of Article 54 of the Constitution, the Applicant states *"the ECAP did not comply with the Law on local and general elections, nor the electoral rules clearly regulating the manner of registering and voting of the voters from a special election register outside Kosovo, but on the same day when the Appellant's appeal was filed, it rendered an unintelligible decision no. ZL. Ano. 1127/2017 of 08.12.2017 on inadmissibility without the right to appeal to the Supreme Court of Kosovo as a second instance body".*

37. Finally, the Applicants requests the Court:

> *"- To annul by mail ballot papers from the Special Voting List outside of Kosovo.*
> *-To annul CEC decision no. 2470/2017 of 07.12.2017 on the announcement of the final results, the decision of the ECAP ZL.*

Ano. 1127/2017 of 08.12.2017, and CEC decision no. 2585/2017 of 14.12.2017 on confirmation of the final results of the second round of local elections for the municipality of Kllokot.
- To order the ECAP and the CEC to modify the decision on confirmation of the final results in favor of the complainant."

Relevant legal provisions

Law no. 003 /L-073

ON GENERAL ELECTIONS IN THE REPUBLIC OF KOSOVO

of 5 June, 2008
[...]

CHAPTER XX

ELECTION COMPLAINTS AND APPEALS COMMISSION
[...]

Article 118
Decisions

118.1 The ECAC shall accept a complaint that is well-grounded and dismiss a complaint that does not meet this standard.

118.2 The ECAC shall provide the legal and factual basis for its decision in writing. The ECAC shall provide copies of its written decisions to the parties involved in the matter within two (2) days of the issuance of the decision if it affects the certification of the election results. For other decisions the ECAC shall provide copies of its written decisions to the parties involved in the matter within five (5) working days.

118.3 ECAC decisions shall be published in accordance with ECAC's rules of procedure.

118.4 An appeal may be made from a decision of the ECAC, as ECAC may reconsider any of its decisions upon the presentation by an interested party of new evidence or for good cause shown. An appeal to the Supreme Court of Kosovo will be accepted if the fine involved is greater than 5,000 Euro or if the matter affects a fundamental right. The Supreme Court shall give priority to any such appeal.

118.5 The ECAC decision is binding upon the CEC to implement, unless an appeal allowed by this law or by the constitution is timely filed and the higher court determines otherwise.

Rule No. 02/2015
RULES AND PROCEDURES
The Election Complaint and Appeals Panel
of 04 December 2015
[…]

Article 6

Review of complaints

6.1 Each complaint will be marked with the number of protocol after the submission in the ECAP and will be part of the case and permanent register of the ECAP.

6.2 Until the main decision on review of complaint is taken, the parties may withdraw the previously filed compliant.

6.3 A complaint that does not meet the criteria provided for in Article 5.7 of this Rule shall be returned to the complainant for the correction and supplementation within twenty-four (24) hours. The complaint will be deemed withdrawn if it is submitted again to the ECAP within the prescribed time limit, and if it is submitted uncorrected or incomplete, the complaint will be dismissed.

6.4 Complaints that are inadmissible and out of time, shall be rejected by the ECAP by its decision.

6.5 The ECAP by decision approves-rejects complaints in accordance with the legal provisions.

6.6 In cases where the ECAP considers the complaint to be correct, the party against whom the complaint is filed shall be notified and shall be advised that it has the right to respond to the complaint within twenty-four (24) hours from the moment of receiving the complaint together with the evidence.

6.7 A party notified by the ECAP that a complaint has been filed against it may take remedial measures within the time limit set by the ECAP of twenty-four (24) hours from receipt of the order for remedy.

Admissibility of Referral

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

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

Article 113

„(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. The Court also refers to Article 48 of the Law, which stipulates:

„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."

41. As regards the fulfillment of this requirement, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely decision ZL. A. No. 1127/2017 of the ECAP, the Applicant also specified the rights and freedoms which have allegedly been violated, in accordance with the requirements of Article 48 of the Law.

42. However, the Court also refers to Article 49 [Deadlines] of the Law, which provides:

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

43. The Court also takes into account Rule 39 (1) (c) of the Rules of Procedure, which foresees:

The Court may consider a referral as admissible if:

> *"[...]*
>
> *(c) referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant [...].*

44. Initially, the Court notes that on 1 December 2017, the Supreme Court of the Court submitted to the Court the final decision AA. UŽ. No. 58/2017 on the complaint [1112] filed by the Applicant before the ECAP.

45. The Court also notes that the Applicant subsequently filed complaints again [1127] with the ECAP with identical allegations and in relation to the CEC decision [no. 2470-2017] of 7 December 2017. The ECAP, after considering this complaint by the Applicant, rendered Decision ZL. A. No. 1127/2017 of 8 December 2017, in which it emphasized that these allegations of the Applicant were considered and reasoned in the previous decision, and that, accordingly, it has already been decided matter, and therefore, the Applicant's complaint is inadmissible.

46. Subsequently, the CEC, by Decision no. 2585-2017 of 14 December 2017, confirmed the final results for local elections 2017 for the President of the Kllokot Municipality.

47. In addition, the Court recalls that the Applicant's appeal was dismissed by the ECAP as inadmissible because it was not filed in accordance with Article 118. 1 of the Law on General Elections in Kosovo, which stipulates: "*The ECAC shall accept a complaint that is well-grounded and dismiss a complaint that does not meet this standard.*"

48. In this respect, the Court considers that the Applicant attempted to use the legal remedies for which he knew, or should have known, however, this legal remedy was not provided for in this case by law, and therefore, was not admissible.

49. The Court reiterates that "*only those remedies which are effective, may be taken into account as the Applicant cannot extend the strict time-limit imposed under the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue".* See: *mutatis mutandis*, the European Court on Human Rights (hereinafter: the ECtHR), *Fernie v. the United*

Kingdom, Application No. 14881/04, Decision as to Admissibility, of 5 January 2006.

50. The Court recalls that a period of four months runs from the date of service of that final decision. See: *mutatis mutandis*, the case of the ECtHR *Paul and Audrey Edwards v. U.K.*, application no. 46477/99, Judgment of 14. March 2002.

51. In addition, the Court considers that the 4 (four) month period starts to run from the date of service of the final decision resulting from the exhaustion of legal remedies which are adequate and effective to provide redress in the respect of the matter complained of. See: ECtHR case *Norkin v. Russia,* Application No. 20156/11, Decision as to Admissibility, of 5 February 2013; see also: the case of the Constitutional Court KI201/13, *Applicant Sofa Gjonbalaj*, Resolution on Inadmissibility of 2 April 2014, paragraph 32.

52. The Court recalls that *"if no legal remedies are available or if they are assessed to be ineffective",* the four month time-limit foreseen in Article 49 of the Law in principle runs from the date of service of the act complained of. See: ECtHR case *Bayram and Yildirim v. Turkey*, Application No. 38587/97, Decision of 29 January 2002.

53. The Court further recalls that the purpose of the four months legal deadline under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedures is to promote legal certainty by ensuring that cases raising issues under the Constitution are dealt within a reasonable time and that past decisions are not continually open to be challenged (See: ECHR case, *O'Loughlin and Others v. United Kingdom*, Application No. 23274/04, Decision on admissibility of 25 August).

54. Based on the above, the Court considers that the final decision of the Applicant is Decision AA. UŽ. No. 58/2017 of the Supreme Court of 1 December 2017. Therefore, the time limit started to run from 1 December 2017, which is the date when the decision in question was served on the Applicant. The Applicant submitted his Referral on 12 April 2018. The deadline of four months for submitting the Referral expired on 1 April 2018.

55. Therefore, the Court concludes that the Referral was not filed within the legal time limit established in Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure.

56. In sum, the Court finds that the Applicant's Referral is inadmissible as out of time.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 49 of the Law and Rules 39 (1) (c) of the Rules of Procedure, in the session held on 27 March 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI 113/17, Applicant: X, Request for constitutional review of Decision Rev. A. (U) No. 13/2017 of the Supreme Court, of 4 August 2017

KI 113/17, Resolution, inadmissible referral, published on 23 April 2019

Keywords: Individual referral, right to fair and impartial trial, the rights of children, manifestly ill-founded,

On 29 June 2011, the Applicant was returned by the Swedish authorities to Kosovo, after spending about a year trying to benefit from the refugee status there.

Upon return, the Applicant filed a request with the authorities of the Municipality where he resided and those of the central level to realize the benefits of repatriation status and at the same time requested the construction of a residential house.

On 27 June 2014, the Central Commission for Reintegration (CCR) and on 22 July 2014, the Appeals Commission for Reintegration as a second instance rejected the Applicant's request.

The Applicant, unsatisfied with the administrative decisions of the MIA commissions, initiated the administrative conflict proceedings by the lawsuit and on 24 November 2016, the Basic Court in Prishtina, by Judgment A. No. 1643/2014 rejected the Applicant's statement of claim as ungrounded, whereas on 31 May 2017, the Court of Appeals, by Judgment AA. No. 91/2017, rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Basic Court.

The Applicant were also rejected the extraordinary legal remedies presented as a request for revision by the Supreme Court by Decision Rev. A. (U) No. 13/2017, of 4 August 2017, which was rejected as inadmissible as well as the request for protection of legality by the Office of the Chief State Prosecutor, which by notification KMLA. No. 12/17 of 15 September 2017, was declared as ungrounded.

After reviewing the Applicant's allegations, the Court did not find that the challenged decisions, neither the administrative decisions nor those of the regular courts, are indicative of constitutional violations, therefore, in accordance with Rule 39 (2) of the Rules of Procedure, declared the Referral inadmissible as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI113/17

Applicant

X

Request for constitutional review of Decision Rev. A. (U) No. 13/2017 of the Supreme Court, of 4 August 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by X from Podujeva (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision Rev. A. (U) No. 13/2017 of the Supreme Court, of 4 August 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights and freedoms guaranteed by Article 22.1 of the Constitution [Direct Applicability of International Agreements and Instruments] in conjunction with Article 25.1 of the Universal Declaration of Human Rights and Article 50.4 [Rights of Children] of the Constitution.

4. The Applicant has requested that his identity be not disclosed because of his material condition and "*the shame he would feel in the environment where he lives*".

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

6. On 31 May 2018, the Court adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (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 Constitutional Court

7. On 22 September 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 22 September 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur. On the same date, the President of the Court appointed the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

9. On 2 October 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

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

11. 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.

12. On 18 October 2018, the President of the Court rendered the decision to replace the Judge Rapporteur and the Review Panel, where Remzije

Istrefi-Peci was appointed as Judge Rapporteur, while to the panel were appointed: Arta Rama-Hajrizi (Presiding), Bajram Ljatifi and Safet Hoxha (members).

13. On 13 March 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

14. On 5 June 2010, the Applicant went to Sweden with his family.

15. On 29 June 2011, the Applicant was returned by the Swedish authorities to Kosovo.

16. On 29 June 2011 until 1 February 2013, the Applicant lived in his brother's house in a residential room.

17. On 18 May 2012, the Applicant states that he filed a claim with the Municipal Office for Communities and Returns (MOCR) of Municipality of Podujeva for construction of a house and emergency housing assistance due to difficult living conditions and his incapability to resolve the housing issue for him and his family.

18. On 18 May 2012, on the same date, MOCR-Podujeva officially submitted the Applicant's request to the Executive Board for Reintegration of Repatriated Persons in the Ministry of Internal Affairs (DRRP of MIA) stating that the Applicant requested "*housing, food packages and then the construction of a house*".

19. The Applicant alleges that he personally did not receive any decision regarding this request and neither MOCR- Podujeva notified him to have receive any response.

20. On 1 February 2013, the Applicant was accommodated in a rented apartment by the DRRP of the MIA. The contract for accommodation expired at the end of July 2014.

21. On 18 July 2014, the President of the Municipality of Podujeva rendered a decision by which the Applicant was granted the request for benefit from the Reintegration Program for the extension of the housing for another six months.

22. On 30 July 2014, the DRPR of MIA, addressed the Municipal Reintegration Commission in Municipality of Podujeva, which finds that the Applicant ... *["All deadlines foreseen for housing through rent*

expired to X" ...] and ... "*He requests that this decision be reviewed by the Municipal Reintegration Commission and decided on this case according to Regulation 20/2013 of Article 7 item 5"...].*

23. On 27 June 2014, the Central Commission for Reintegration (CCR) issues a decision by which the Applicant's request for housing construction upon the request filed by the Municipality of Podujeva is rejected.

24. On 27 June 2014, the Applicant filed an appeal with the Appeals Commission against the decision of the Central Commission for Reintegration.

25. On 22 July 2014, the Appeals Commission for Reintegration as a second instance renders a decision, which rejected the Applicant's appeal and upheld the decision of the first instance Commission.

26. On 21 August 2014, the Applicant filed a lawsuit with the Basic Court in the administrative conflict proceedings due to: 1. Erroneous application of the substantive law; 2. Erroneous application of procedural law; and 3. Erroneous determination of factual situation.

27. On 12 January 2015, the Ministry of Justice, on behalf of the Government of the Republic of Kosovo, submitted a response to the lawsuit.

28. On 24 November 2016, the Basic Court in Prishtina - Department for Administrative Matters by Judgment A. No. 1643/ 2014 rejected the Applicant's statement of claim as ungrounded.

29. On 7 February 2017, the Applicant filed an appeal with the Court of Appeals on the grounds of: violation of the provisions of the Law on Administrative Conflict, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.

30. On 31 May 2017, the Court of Appeals, by Judgment AA. No. 91/2017, rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Basic Court.

31. On 14 July 2017, the Applicant submitted a request for revision to the Supreme Court requesting the review of all decisions regarding the legal case where he is a party to the proceedings.

32. On 4 August 2017, the Supreme Court rendered Decision Rev. A. (U) No. 13/2017, which rejected the Applicant's request for revision as inadmissible.

33. On 12 September 2017, the Applicant through the Basic Court in Prishtina filed a request for protection of legality.

34. On 15 September 2017, the Office of the Chief State Prosecutor, by the notification KMLA. No. 12/17, notified the Applicant that "*it did not find sufficient legal basis for filing a request for protection of legality*", therefore it did not approve his proposal for filing this extraordinary legal remedy.

Applicant's allegations

35. The Applicant alleged that the challenged decisions violate Articles 22.1 [Direct Applicability of International Agreements and Instruments] and 50.4 [Rights of Children] of the Constitution and Article 25 of the Universal Declaration of Human Rights but without specifying the manner and conditions under which these alleged violations have been committed.

36. The Applicant requested that "*to have a roof over my head*" because he is not able to construct it by himself, and that he is convinced that during the examination of his case there have been "*procedural violations".*

Admissibility of the Referral

37. The Court first examines whether the admissibility requirements established by the Constitution, as further specified by the Law and by the Rules of Procedure have been met.

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

> *"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".*

39. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

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

40. The Court finds that the Applicant's Referral fulfills the criteria of Article 113.7 with regard to the authorized party and the exhaustion of legal remedies, the Referral was filed within the deadlines of Article 49 of the Law, and therefore, the Court will further assess whether the Referral has met the criteria of Rule 39 (2) of the Rules of Procedure [Admissibility Criteria], which stipulates:

> *"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".*

41. The Court recalls that the Applicant alleged that the Decision of the Supreme Court Rev. A. (U) No. 13/2017, of 4 August 2017, violated human rights, as in the request, and this was especially due to the fact that the request for construction of a house from the repatriation fund for returnees in Kosovo was rejected to him.

42. The Court finds that the Applicant in his Referral has merely mentioned the provisions of Article 22.1 of the Constitution and of Article 25.4 of the Universal Declaration of Human Rights.

43. The Court recalls that Article 22 of the Constitution defines which International Agreements and Instruments are directly applicable in the Republic of Kosovo. As such, this constitutional provision in relation to the Applicant cannot be a subject of a "*violation by public authorities of individual rights and freedoms"*, guaranteed by the Constitution, as set forth in Article 113.7 of the Constitution.

44. The Court notes that in relation to Article 50.4 of the Constitution, the Applicant has only emphasized in the Referral and has not provided any explanation or attached any evidence as to how and in what way has this constitutional provision was violated and what rights of children were violated by the action of public authority.

45. The Court further finds that both the administrative bodies and the regular courts when deciding on the Applicant's request, where he was a party to the proceedings, rendered the rejecting decisions on the basis of the Applicant's procedural action (non-application in time and the issue of the owner of the property) and not, on the basis of erroneous determination of facts or erroneous application of law as the Applicant alleges. In these circumstances, the Court cannot

conclude that "*the actions ... taken... by the institutions of public authority"* are not *"in the best interest of children*" as foreseen by Article 50.4 of the Constitution, because in the legal case throughout the whole process, it was decided on "*a right of the Applicant and not directly of the children, although the final outcome of the case certainly affects the children".*

46. With respect to Article 25 of the Universal Declaration of Human Rights, the Applicant has also not provided any explanation or evidence of this alleged violation as to how this right was violated. In fact, the Court finds that, from the decisions presented in the Referral, the Applicant and his family have been offered support "*including food, clothing, shelter*" ... even on a temporary basis. In addition, it appears that the Applicant assumes that the rights envisaged by the declaration have been infringed by the final outcome of his case, and the Court reiterates that he has no competence to assess that outcome of judicial and administrative proceedings.

47. The Court recalls that under Article 53 of the Constitution [Interpretation of Human Rights Provisions] "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*" [ECtHR], therefore, in reviewing the cases before it, the Court refers to the case law of the ECtHR.

48. In this regard, the Court finds that although the Applicant did not expressly mention in the Referral Article 31 of the Constitution [Right to Fair and Impartial Trial], throughout the reasoning of his Referral submitted to the Court, he refers to the case of application of law and procedural flaws made by the administrative and judicial bodies. The Applicant also raised these issues in the complaints he filed with the relevant institutions, which based on the case law of the Court are elements related to Article 31 of the Constitution, namely based on the case law of the ECHR are elements relating to Article 6 of the European Convention on Human Rights [ECHR].

49. Accordingly, the Court, taking into account its own case law, the ECtHR case law, the substance of the Applicant's Referral and the facts presented in the Referral (a copy of the lawsuit in the Basic Court, the content of the appeals in the regular courts, court decisions, etc.) concludes that it should also refer to Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 of the ECHR, which establish:

Article 31 of the Constitution [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".

and

Article 6.1 (Right to a fair trial), of the ECHR, which establishes:

"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".

50. When examining the allegations of violation of human rights to fair and impartial trial, the Court examines whether the court proceeding in its entirety was fair and impartial, as provided by Article 31 of the Constitution (see, among others, *mutatis mutandis*, *Edwards v. the United Kingdom*, 16 December 1992, p. 34, Series A. No. 247, and B. *Vidal v. Belgium*, 22 April 1992, p. 235).

51. The Court notes that the Applicant's argument regarding constitutional violations consists in the erroneous and incomplete determination of factual situation, procedural errors and the fact that he was not guilty for missing a deadline in the administrative procedure which, according to him, resulted in rejection of his request.

52. The Court finds that MIA-CCR as a first instance body in the administrative procedure when it rejected the Applicant's request for construction of the house, *inter alia*, reasoned: "*The Commission reviewed all the documents presented and according to the evidence presented to the Commission ascertains: that the repatriated person does not meet the criteria for support from the reintegration program set out in the GRK Regulation No. 20/2013 ...* (*Article 13, par. 1)".*

53. The Court further notes that the Appeals Commission of MIA-CCR as second instance body in administrative procedure after reviewing the appeal filed against the first instance decision decided to reject this appeal and, among other things, reasoned "*when referring to Article 2, paragraph 4 of the GRK Regulation. No.20/2013 on the*

Reintegration of Repatriated Persons and the Management of the Reintegration Program on the basis of which the Appeals Commission has mandates to review and decide on the complaints of the repatriated persons, it is considered that the repatriated under this provision, the second benefit claim from the program for reintegration, namely for the house construction, have filed out of legal deadline, i.e. the request was not filed within 12 months from the repatriation day".

54. The Appeals Commission of MIA-CCR further reasoned the issue of the first request of the Applicant for which he claims to have submitted in time. The Commission emphasizes in the decision that at that time in force, the Regulation on Program Management No. 10/2012, which required the Applicant to present property on his behalf in order to benefit from the program and that the Applicant, due to the length of administrative proceedings and even lack of financial resources, could not have transferred the immovable property in his name he did not meet the conditions required by the regulation on the first request.

55. The Court further finds that the Applicant challenged the final decision in the administrative procedure by a lawsuit in the administrative conflict procedure, going through all the instances of the regular judicial system.

56. The Basic Court in Prishtina - Department for Administrative Matters, by Judgment A. No. 1643/2014 decided to "*reject the statement of claim of the claimant (Applicant) as ungrounded, by which he requested the Court to annul the decision of the respondent, the Government of the Republic of Kosovo, the Complaints Commission for Reintegration, No. 108/2014 of 22 July 2014".*

57. The Basic Court in Prishtina - Department for Administrative Matters assessing the legality of the decision challenged by the lawsuit referred to GRK Regulation No. 20/2013 on Reintegration of Repatriated Persons, Article 2, paragraph 4 of the latter, which stipulates that "*Repatriated persons may submit the request for the benefits defined in Article 13 and 17 of this Regulation within twelve (12) months from the date of repatriation*." The Court further finds that "*the claimant filed a claim with the respondent out of the deadline of 12 months, after the deadline set forth in paragraph 4 of Article 2 of Regulation GRK No. 20/2013.*

58. The Basic Court in Prishtina - Department for Administrative Matters, by Judgment A. No. 1643/2014 "*assesses that in this administrative matter the factual situation was correctly determined by the*

respondent, has correctly applied the provisions of the administrative procedure and of substantive law when rejecting the claimant's appeal and upheld the decision of the first instance body of 27.06.2014 namely the Central Commission for Reintegration of MIA".

59. The Court of Appeals, acting upon the Applicant's appeal, by Judgment AA. No. 91/2017, decided to reject his appeal as ungrounded and uphold the Judgment of the Basic Court in Prishtina - Department for Administrative Matters, A. No. 1643/2014 of 24 November 2016.

60. The Court of Appeals in its Judgment reasoned as follows: "*The legal position of the court of first instance, as regular and based on the law, is approved in entirety by this court, because the appealed judgment does not contain essential violation of the provisions of the Law on Administrative Conflicts, which violations the second instance court regards ex officio, pursuant to Article 194 of the Law on Contested Procedure, applicable under Article 63 of the Law on Administrative Conflicts. The first instance court, assessing the legality of the challenged decision within the meaning of Article 44 par. 1 of the Law on Administrative Conflicts, in respect of the allegations in the claim, the evidence administered in the court session and after reviewing the other case files, has concluded that the statement of claim of the claimant is ungrounded".*

61. Against the Judgment of the Court of Appeals, the Applicant filed a request for revision with the Supreme Court of Kosovo.

62. The Supreme Court by Decision Rev. A. (U). No. 13/2017 reasoned, *inter alia*, that "*Article 24 of the Law on Administrative Conflicts (LAC) states that against the final form decision of the Competent Court for administrative matters of second instance, the party may submit to the Supreme Court of Kosovo the request for extraordinary review of the legal decision. The request may be submitted only in case of violation of material right or violation of procedure provisions, that may influence on solving the issue".*

63. The Supreme Court, by applying the applicable Law on Administrative Conflicts in the present case, found that the Applicant exercised an erroneous legal remedy that did not comply with the provisions of the law and therefore rejected his request.

64. The Applicant further submitted the request for protection of legality to the Office of the Chief State Prosecutor but from this office received

the notification KMLA. No. 12/17 which rejected his request with the reasoning that "*After reviewing your proposal as well as the case file A. No. 1643114, we inform you that the Office of the Chief State Prosecutor did not find sufficient legal basis for filing the request for protection of legality, therefore, it did not approve your proposal for filing this extraordinary legal remedy".*

65. In this respect, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality), allegedly committed by the regular courts or administrative authorities, unless and in so far as they may have infringed the Applicant's rights and freedoms protected by the Constitution (constitutionality).

66. Based on the principle of subsidiarity, the Court cannot take the role of the fourth-instance court and does not adjudicate on the final outcome of the court decisions (see *FeMetrebi v Georgia*, paragraph 31, the ECtHR Judgment of 31 July 2007, see also case the Resolution of the Court in case KI70/11 of the Applicants *Faik Hima, Magbule Hima and Bestar Hima* of 16 December 2011)

67. The Court notes that the Applicant has had ample opportunities to present his case before the administrative bodies- respective commissions of MIA and the Basic Court in Prishtina, the Court of Appeals and the Supreme Court. The Court finds that using the appeal remedies, the Applicant has actively participated in all stages of the court proceedings, therefore, the proceedings in its entirety cannot be qualified as arbitrary or unfair.

68. In the circumstances of the case, the Court does not find that the decisions of the regular courts are arbitrary or are indicative of a violation of the right to fair and impartial trial, more so when all the Applicant's allegations were related to legal and non-constitutional violations, on which occasion the Applicant merely mentioned in the Referral the constitutional norms, he did not in any way provided evidence of how and under what circumstances the alleged constitutional right was violated.

69. In conclusion, the Court concludes that the Applicant does not prove and sufficiently substantiate his allegation of a violation of the rights guaranteed by the Constitution. Therefore, pursuant to Rule 39 (2) of the Rules of Procedure, the Referral is to be declared inadmissible as manifestly ill-founded on constitutional basis.

Request for non-disclosure of identity

70. Having regard to the Applicant's request and the explanation of his material situation, the Court approves the Applicant's request for non-disclosure of identity pursuant to Rule 39 (6) of the Rules of Procedure. Therefore, throughout the procedure it refers to him as Applicant X.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 39 (2) and (6) of the Rules of Procedure, in the session held on 13 March 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzie Istrefi-Peci	Arta Rama-Hajrizi

KI94/18, Applicant: Miodrag Šešlija, Constitutional review of Judgment GSK-KPA-A-211/15 of the Supreme Court – of the Appellate Panel of the Kosovo Property Agency

KI94/18, Resolution on Inadmissibility of 10 April 2019, published on 15 May 2019

Keywords: individual referral, Resolution on inadmissibility, maniestly ill-founded

The Applicant stated in the referral that the KPCC and the Appellate Panel of the KPA have erroneously interpreted and applied the provisions of Article 11.4 of UNMIK Regulation No. 2006/50, and that, therefore, they could not take into consideration his arguments and evidence he had submitted and presented, by which he proves that he was entitled to the right to the said property.

The Applicant further alleged that such a position of the KCCP and of the Appellate Panel of the KPA violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution as well as the rights provided by Article 6 (Right to fair trial) and Article 1 of Protocol No. 1 (Protection of Property) of the ECHR.

The Court notes that the Applicant has conducted two court proceedings relating to the immovable property in question.

As to the first court proceedings, the Court found that it started in 2005 and was completed on 26 March 2007, when the subject of the Applicant's dispute was resolved by the final decision HPCC/REC/94/2007. By the same decision, the Applicant was recognized one aspect of the property in the form of compensation, which he could exercise as an Applicant of the C category in accordance with Article 4 of UNMIK Regulation 2000/60.

The Court further noted that the Applicant commenced the second court proceeding on 23 November 2007, when he filed the claim with the KPA requesting confirmation of the right to use the immovable property, namely the apartment, the Court concludes that the second court proceeding was completed on 21 February 2018, by Judgment GSK-KPA-A-211/15 of the Appellate Panel of KPA, rejecting the Applicant's appeal as ungrounded.

In addition, the Court found that the Applicant did not provide relevant arguments to justify his allegations that in the second court proceedings in any way there has been a violation of the constitutional rights invoked by

him, apart from the fact that he was dissatisfied with the outcome of the proceedings in which the challenged decision and judgment were rendered.

Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and as such is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI94/18

Applicant

Miodrag Šešlija

Request for constitutional review of Judgment GSK-KPA-A-211/15 of the Supreme Court – of the Appellate Panel of the Kosovo Property Agency, of 21 February 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Miodrag Šešlija from Prishtina, with permanent address in Kragujevc, Republic of Serbia (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment GSK-KPA-A-211/15 of the Supreme Court - the Appellate Panel of the Kosovo Property Agency (hereinafter: the Appellate Panel of the KPA) of 21 February 2018, which was served on him on 23 March 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged decision and judgment, which allegedly violated the Applicant's rights

guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as the rights guaranteed by Article 6 (Right to a fair trial) and Article 1 of Protocol no. 1 (Protection of property) of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 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 Constitutional Court

5. On 12 July 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. 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.

7. On 16 August 2018, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Gresa Caka-Nimani and Safet Hoxha.

8. On 27 August 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Appellate Panel of the KPA.

9. On 10 April 2019, after considering the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. The Applicant until 1999 lived in an apartment located in the Dardania neighborhood in Prishtina.

11. In 1999, the Applicant left the apartment.

12. The Applicant in 2005, filed a claim with the Housing and Property Directorate (hereinafter: the HPD), requesting the restitution of the property rights over the apartment in which he lived until 1999. The HPD marked the Applicant's claim as C category claim, and registered it with the sign DS001562.

13. Person M.R. also submitted a claim to the HPD in 2005, requesting the restitution of the occupancy right over the same apartment as the Applicant. The HPD marked the claim of person M.R., as a category A claim, and registered it with the sign DS002602.

14. On 30 April 2005, the Housing and Property Claims Commissions (hereinafter: the HPCC), rendered the Decision HPCC/d/180/2005/A&C, which rejected the claim DS001562 of the person M.R., stating that "*the claim of the person of category A was rejected because it does not meet the requirements of UNMIK/REGULATION/1999/23 and section 2.2 of UNMIK/Regulation 2000/60*". The reasoning of the decision states:

> *„The Applicant with sign DS002602 received decision an allocation, entered into possession of the claimed property and signed a contract on use with the Public Housing Enterprise. However, he lost his property right not as a result of discrimination, but because he ceased to use the apartment for more than one year in contravention to Article 29.1 of the Law on Housing Relations."*

15. By the same decision, the HPCC acknowledged the repossession of the abovementioned apartment to the Applicant.

16. Person M.R. filed a request to the HPCC second instance authority, requesting the review of first instance decision HPCC/d/180/2005/A&C, of 30 April 2005.

17. On 26 March 2007, the HPCC upheld the request for review of the decision of the person M.R., and rendered decision HPCC/REC/94/2007. By this decision the property right of the mentioned apartment was restored to the person M.R. The reasoning of the decision reads:

> *„Person M.R., in the request for review of the decision, stated that was in the same firm for 15 years as the applicant, and that the relevant property was assigned to him accordingly. However, due to the imposition of the interim measure, he was dismissed*

from work and evicted from the property in question, and the then firm which was the holder of the right to dispose the said apartment decided to terminate his occupancy right. In the opinion of the HPCC, this was a discriminatory act. Accordingly, the HPCC is a category A claim of person M.R., registered with sign DS002602, and ordered that the property right be returned to the apartment in question.“

18. As regards the Applicant, the HPCC stated in the same decision:

„The Applicant of category A (person M.R.) with claim DS002602, is entitled to a restitution of property and to exercise his right to a restitution, he has to pay the amount under Section 4.2 (a) to the Directorate within 120 days from the day when the Commission renders a decision on the right to restitution.

If the Applicant of category A (person M.R), by claim DS002602, pays the amount from the previous paragraph, the Commission will give the final order to assign ownership of the property. The Applicant of the C category of claim DS001562 (the Applicant) will then be entitled, after submitting the request on compensation for his damage, which will be paid from the amount paid by the Applicant of A category in accordance with section 4.2 (c) of UNMIK/Regulation /2000/60“.

19. On 23 November 2007, the Applicant filed a claim with the Kosovo Property Agency (hereinafter: the KPA) requesting confirmation of the right to use the immovable property. In the claim, the Applicant stated that he was the owner of the apartment in question, that the apartment was occupied by M.R., and in the name of usurpation be paid the compensation for the unauthorized use of the apartment.

20. On 7 October 2008, person M.R. addressed the KPA, stating that the apartment in question has already been allocated to him by the HPCC decision.

21. On 18 June 2014, the KPCC rendered Decision KPCC/D/A/247/2014, rejecting the Applicant's claim. The reasoning of the decision states*: “[…] the evidence submitted by the parties to proceedings, and which were verified by the Executive Secretariat have shown that the case was decided by a final decision and based on the provisions of the section 11.4 of the UNMIK Regulation 2006/50, as amended by the Law No 03/L-079, the the claim must be dismissed, because it has been previously decided.*“

22. On 17 June 2015, the Applicant filed an appeal with the Appellate Panel of the KPA against the decision of the KPCC of 18 June 2014, stating that *„[...] he disagreed with the KPCC decision that it was not competent to deal with the case, because the matter has already been decided*". The Applicant alleges that in 2007 he filed a claim for the recognition of the property rights over the said property and that the claim was not the same as the previous claim on which the courts had already decided.

23. On 21 February 2018, the Appellate Panel of the KPA rendered Judgment GSK-KPA-A-211/15, rejecting the Applicant's appeal as ungrounded. The reasoning of the judgment reads:

> *"Based on Article 2.7 of UNMIK Regulation No. 1999/23 the following is provided: Final decisions of the Kosovo Property Claims Commission are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo". Therefore, the KPCC Decision to consider the case as decided by a final decision is based on the Law and well-reasoned."*

Applicant's allegations

24. At the outset, the Applicant in the Referral alleges that in 2005 he filed a claim for repossession with the HPD and that in 2007 he filed a second claim in which he requested the confirmation of the right to use the immovable property and that, the position of the KPCC and of the Appellate Panel of the KPA, that this claim has already been decided in the previous proceedings, is erroneous.

25. The Applicant alleges that the KPCC and the Appellate Panel of the KPA have erroneously interpreted and applied the provisions of Article 11.4 of UNMIK Regulation No. 2006/50, and that, therefore, they could not take into consideration his arguments and evidence he had submitted and presented, by which he proves that he was entitled to the right to the said property.

26. The Applicant further alleges that such a position of the KPCC and of the Appellate Panel of the KPA violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution as well as the rights provided by Article 6 (Right to fair trial) and Article 1 of Protocol no. 1 (Protection of Property) of the ECHR.

27. The Applicant requests the Court to restitute the said property to his possession, or to be paid a fair compensation at the market value of the property.

Admissibility of the Referral

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

29. 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."*

30. The Court further examines whether the Applicant fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Article 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... ."*

31. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (2) of the Rules of Procedure, which stipulates:

> *"(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."*

32. Regarding the fulfillment of these requirements, the Court notes that the Applicant submitted the Referral as an authorized party, challenging an act of a public authority, namely Judgment GSK-KPA-A-211/15 of the Appellate Panel of the KPA, after exhaustion of all legal remedies. The Applicant also clarified the 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 of Article 49 of the Law.

33. At the beginning of the analysis of the grounds of the Applicant's allegations of violation of the constitutional rights and the rights guaranteed by the ECHR, the Court notes that the Applicant has conducted two court proceedings relating to the immovable property concerned and both court proceedings have been completed by the relevant decisions and judgments.

34. As to the first court proceedings, the Court finds that it started in 2005 and was completed on 26 March 2007, when the subject of the Applicant's dispute was resolved by the final decision HPCC/REC/94/2007. By the same decision, the Applicant was recognized one aspect of the property in the form of compensation, which he could exercise as an Applicant of the C category in accordance with Article 4 of UNMIK Regulation 2000/60.

35. The Court further notes that the Applicant commenced the second court proceeding on 23 November 2007, when he filed the claim with the KPA requesting confirmation of the right to use the immovable property, namely the apartment, the Court concludes that the second court proceeding was completed on 21 February 2018, by Judgment GSK-KPA-A-211/15 of the Appellate Panel of KPA, which rejected the Applicant's appeal as ungrounded.

36. In this regard, the Court will examine the Applicant's allegations of alleged violations of Articles 31 and 46 of the Constitution, in conjunction with Article 6 of the ECHR and Article 1 of Protocol No. 1 of the ECHR, exclusively in connection with the second court proceeding, as it is stated by the Applicant.

37. Accordingly, the Court first of all notes that the Applicant considers that the KPCC and the Appellate Panel of the KPA, violated his rights guaranteed by the Constitution and the ECHR, because they made a mistake and did not correctly interpreted UNMIK Regulation 2006/50, namely Article 11.4, which resulted in conclusion that this case has already been decided and that a final decision is rendered

accordingly. In the opinion of the Applicant, it made impossible for them to consider the evidence by which he proves that the said property belongs to him.

38. In this regard, the Court finds that the Applicant's allegations of alleged violations primarily relate to the erroneously determined factual situation and erroneous application and interpretation of the substantive law, namely Article 11.4 of UNMIK Regulation 2006/50.

39. The Court reiterates that it is not its task to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). The Court may not itself assess the facts that draw hypotheses which have led the regular courts to that point to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would be to disregard the basis of the subsidiarity principle and limits established in the Constitution regarding its jurisdiction.

40. In fact, it is the role of regular courts is to interpret and apply the relevant rules of procedural and substantive law (see: case *García Ruiz v. Spain*, ECtHR, No. 30544/96 of 21 January 1999, paragraph 28 and see also the case: KI70/11, applicants: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011).

41. The Constitutional Court is obliged by constitutional competences to assess and decide on alleged violations of fundamental rights and freedoms guaranteed by the Constitution. Thus, the Court assesses whether the manner in which the regular courts applied the law was manifestly erroneous or otherwise arbitrary or discriminatory. (See, for example, ECtHR cases *Koshoglu v. Bulgaria*, Judgment of 10 May 2007, No. 48191/99; *Anheuser-BuschInc. v. Portugal*, Judgment of 11. January 2007, No. 73049/01, *Kuznetsov and others v. Russia*, Judgment of 11 January 2007, No. 184/02, *Khamidov v. Russia*, Judgment of 15 November 2007, No. 72118/01, *Andelković v. Serbia*, Judgment of 9 April 2013, No. 1401/08, *Dulaurens v. France*, Judgment of 21 March 2000, No. 34553/97).

42. The Court, having in mind that the Applicant claims that the regular courts have manifestly made a mistake and arbitrary application of Article 11.4 of UNMIK Regulation 2006/50, when they rejected his claim for confirmation of the right to use the property in question, finds that KPCC rejected the Applicant's claim for purely procedural

reasons, without entering the very essence of the claim that referred to the said immovable property.

43. The Court notes that such a position was taken by the KPCC based on Article 11.4 of UNMIK Regulation No. 2006/50, which reads:

> *„The Commission shall dismiss the whole or part of the claim where*
> *[...]*
> *c) The claim has previously been considered and decided in a final administrative or judicial decision.“*

44. Furthermore, the Court notes that the same conclusion was also reached by the Appellate Panel of the KPA in its Judgment GSK-KPA-A-211/15, responding to the Applicant's appealing allegations.

45. The Court also notes that such views of the KPCC and of the Appellate Panel of the KPA were taken on the basis of the first court proceedings commenced by the Applicant in 2005 and ended in 2007, which resulted in a final judgment in the case of property in question.

46. Based on the foregoing, the Court does not find the Applicant's allegation of erroneous application and interpretation of Article 11.4 of UNMIK Regulation 2006/50, as grounded.

47. In these circumstances, the Court considers that nothing in the case presented by the Applicant shows that the proceedings before the KPCC and the Appellate Panel of the KPA were unfair or arbitrary for the Constitutional Court to be satisfied that the core of the right to a fair and impartial trial has been violated or that the Applicant was denied any procedural guarantees, which would lead to a violation of that right under Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.

48. In addition, the Applicant alleges that the challenged decision of KPCC and the Judgment of the Appellate Panel of the KPA also violate his rights to property under Article 46 of the Constitution and Article 1 of Protocol No. 1 of the ECHR.

49. With regard to these allegations, the Court points to the consistent case law of the ECtHR, according to which the “possessions” within the meaning of Article 1 of Protocol No. 1 of the ECHR may be either “existing possessions” or “assets”, including claims in respect of which an applicant can argue that he has at least a “legitimate expectation” that they will be realised (see: ECtHR judgment, *Peter Gratzinger and*

Eva Gratzingerova v. Czech Republic, decision on admissibility of 10 July 2002, application number 39794/98, paragraph 69).

50. In that regard, and with respect to the allegations of the Applicant, the Court emphasizes that, in the circumstances of the present case, the property in question cannot be regarded as "property: within the meaning of Article 1 of Protocol No. 1 of the ECHR because the necessary requirements were not fulfilled, namely, because on the said property it has already been decided during the first court proceedings by a final decision, which was confirmed in the KPCC decision, and in the judgment of the Appellate Panel of the KPA.

51. The Court further adds that the Applicant has not acquired the property in question within the meaning of Article 1 of Protocol No. 1 of the ECHR. However, based on Decision KPCC/D/A/247/2014 of KPCC, and Judgment GSK-KPA-A-211/15 of the Appellate Panel of the KPA, the Court notes that the Applicant has been recognized a form of "*adequate compensation for the property in question, which he can realize.*"

52. In this regard, as underlined in the judgment of the Appellate Panel of the KPA, GSK-KPA-A-211/15 of 21 February 2018, when deciding on the court proceedings in relation to the said property, the Applicant's allegation of A category that he lost the property on the basis of the discriminatory legislation were upheld and, on this basis, the right to restitute the disputed property has been recognized to him, while the Applicant was recognized the right of adequate compensation, as provided for in Article 4 of UNMIK Regulation 2000/60.

53. In this respect, the Court finds the Applicant's allegations of violation of Article 46 of the Constitution and Article 1 of Protocol No.1 1 of the ECHR, as ungrounded.

54. In addition, the Court indicates that the Applicant did not provide relevant arguments to justify his allegations that in the second court proceedings in any way there has been a violation of the constitutional rights invoked by him, apart from the fact that he was dissatisfied with the outcome of the proceedings in which the challenged decision and judgment were rendered.

55. The Court reiterates that it is the Applicant's obligation to substantiate his constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR. That assessment is in compliance with the case law of the

Court (see: case of the Constitutional Court No. K119/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

56. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and as such is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 paragraphs 1 and 7 of the Constitution, Article 47 of the Law and Rule 39 (2) of the Rules of Procedure, in the session held on 10 April 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI185/18, Applicant: Limak Kosovo International Airport J.S.C. "Adem Jashari", Constitutional review of Judgment Rev. No. 271/2018 of the Supreme Court of Kosovo of 10 October 2018

KI185/18, Resolution of 27 May 2019, published on 10 July 2019

Keywords: individual referral, legal person, manifestly ill-founded,

The Applicant and the Government of the Republic of Kosovo signed a Public Private Partnership Agreement (PPP), and based on this agreement, the Applicant had an obligation to keep all employees in employment relationship for another 3 (three) years.

As a consequence, the Applicant notified the employee F. M. that his employment contract would not be renewed. The employee F.M. filed a lawsuit before the first instance court and his lawsuit was approved. On the other hand, the Applicant before the regular courts claimed that the regular courts did not take into account Article 9.18 of the PPP Agreement, according to which the Applicant was obliged to keep in work the employees for 3 (three) years.

In the proceedings before the regular courts, the latter explained to the Applicant that since the employee F.M. had more than ten (10) years of work, pursuant to Article 10.5 of the Law on Labor, it is considered as a contract for an indefinite period of time so even for the termination of the employment contract the prescribed legal procedures must be respected, which procedures according to the regular courts, the Applicant did not respect.

In his referral before the Constitutional Court, the Applicant alleged a violation of Article 31 of the Constitution due to an unreasoned decision as well as Articles 24, 32 and 46 of the Constitution, and reiterated his allegations before the regular courts.

The Constitutional Court, addressing the Applicant's allegations, found that the latter failed to submit evidence, facts and arguments that show the proceedings before the regular courts violated its right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, and the Court did not enter the assessment of the Applicant's further allegations, because the violations of other rights guaranteed by Articles 24, 32 and 46 of the Constitution, are allegedly as a result of violation of the right to fair and impartial trial.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI185/18

Applicant

Limak Kosovo International Airport J.S.C. "Adem Jashari"

Constitutional review of Judgment Rev. No. 271/2018 of the Supreme Court of Kosovo of 10 October 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 Joint Stock Company Limak Kosovo International Airport J.S.C, "Adem Jashari" (hereinafter: the Applicant), based in Vrellë village, Lipjan Municipality, which is represented with power of attorney by Fazli Gjonbalaj and Leonora Fejzullahu.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 271/2018 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 10 October 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's rights guaranteed

by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] Article 32 [Right to Legal Remedies] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) and Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention).

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 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 of the Constitutional Court

5. On 23 November 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 12 December 2018, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur, and the Review Panel, composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha.

7. On 20 December 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 12 April 2019, the Applicant submitted to the Court the letter entitled *"[...] regarding the cases registered with the Constitutional Court AND in particular the case registered with [...] number KI132/18* and attached to the Court the Public Private Partnership Agreement (hereinafter: the PPP).

9. On 16 May 2019, the Applicant submitted to the Court a submission entitled "*Submission, regarding the cases registered with the Constitutional Court.*

10. On 27 May 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts of the case

11. On 12 August 2010, the Government of the Republic of Kosovo and the Applicant signed a Public-Private Partnership Agreement (hereinafter: the PPP Agreement). Prior to the signing of the PPP Agreement, the name of Prishtina Airport was Prishtina International Airport (hereinafter: the PIA).

12. Based on the case file, it is noted that the employee F.M. (hereinafter: the employee) was employed with the PIA. Pursuant to the PPP Agreement, the Applicant assumed the obligation to keep all employees in employment relationship for another three (3) years.

13. The employee had a regular employment relationship with the Applicant for the period from 4 April 2011 to 3 April 2014. On 3 March 2014, namely 30 (thirty) days before the expiry of the contract, the Applicant notified the employee that *"... in accordance with the policies of the Board of Directors and the Law on Labor of Kosovo and the decision on future human resource planning [...] the Employment Contract will not be extended after 03.04.2014*".

14. On 17 March 2014, the employee filed a complaint with the Applicant "*... with the proposal that the notice of non-extension of the employment contract of 03.03.2014, be annulled as unlawful and to reinstate the claimant to the previous working place, with all the rights under the employment relationship*".

15. On 24 March 2014, the Applicant rejected as ungrounded the employee's complaint.

16. The employee filed the statement of claim with the Basic Court in Prishtina - Branch in Lipjan (hereinafter: the Basic Court), requesting the annulment of the notice of 3 March 2014 issued by the Applicant, and obliging the Applicant to reinstate the employee to work with all rights and obligations, and to compensate the material damage.

17. On 15 May 2015, the Basic Court, by Judgment (C. No. 201/2014), (i) approved the statement of claim of the employee as grounded, (ii) annulled the Applicant's notification of 3 March 2014, as well as the Applicant's reply of 24 March 2014 for non-extension of the

employment contract, (iii) obliged the Applicant to reinstate the employee to the same working place, (iv) obliged the Applicant to pay to the employee a certain amount in the name of the material damage and (v) obliged the Applicant to cover the costs of the contested procedure.

18. The Applicant filed an appeal with the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) against the Judgment (C. No. 201/2014) of the Basic Court stating that the challenged Judgment was rendered with essential violation of the procedural provisions and that there is an erroneous determination of factual situation and erroneous application of the substantive law.

19. The Applicant in his appeal in essence stated that the Basic Court has erroneously determined the factual situation regarding the duration of the employee's work experience, claiming that the employee has no more than 3 years of work experience. The Applicant considers that due to such erroneous determination of factual situation was committed erroneous application of substantive and procedural law, and that the Judgment of the Basic Court is in violation of Article 9.18 of the Public Private Partnership Agreement signed by the Government of the Republic of Kosovo and Limak Kosovo International Airport, of 12 August 2010.

20. On 18 June 2018, the Court of Appeals by Judgment (Ac. No. 3644/2015) rejected the Applicant's appeal as ungrounded and upheld the Judgment (C. No. 201/2014) of the Basic Court, considering that the latter is fair and lawful and emphasizing that the first instance court had given concrete reasons for the decisive facts and provided appropriate explanations for such a decision on the basis of the relevant legal provisions.

21. On 11 July 2018, the Applicant submitted a request for revision to the Supreme Court against the Judgment of the Basic Court and the judgment of the Court of Appeals of Kosovo, alleging that there was an essential violation of the procedural provisions and erroneous application of the substantive law. The Applicant alleged that the lower instance courts did not take into account Article 9.18 of the PPP Agreement, according to which the Applicant took over the obligation to keep the employees in work for 3 (three) years. In addition, the Applicant alleges that "*the court merged the work by two different employers*".

22. On 10 October 2018, the Supreme Court, by Judgment Rev. No. 271/2018 rejected the Applicant's revision as ungrounded, reasoning that "*the allegations of revision are ungrounded by the fact that in the judgment of the first instance and second instance are given sufficient reasons regarding the decisive facts legally valid for a fair trial in this legal case which are also admissible by this Court. The second instance court, when deciding on the appeal of the respondent, assessed all appealing allegations, for which it has provided sufficient and convincing reasons which are also accepted by the court of revision*".

Applicant's allegations

23. The Court recalls that the Applicant alleges that *"The Supreme Court of Kosovo, by its Judgment Rev. No. 272/ 2018, [...] has violated his right to fair and impartial trial, as guaranteed by Article 31 [Right to Fair and Impartial Trial], on the grounds of unreasoned decision, further claiming that "As a result of the absence the reasoning, the challenged decision deprived the Applicant of the constitutional right to an effective legal remedy" and thereby violated his constitutionally right guaranteed by Article 32 and as a result of these violations, the Applicant's right of property under Article 46 [Protection of Property] of the Constitution has also been violated. The Applicant also alleges that there is a violation of Article 6 (Right to a fair trial) of the ECHR"*.

24. The Applicant in substance justifies his referral by stating that the regular courts have erroneously determined the factual situation and that the procedural and substantive law was erroneously applied, stating that the decisions of the regular courts did not sufficiently reasoned the following issues:

    (i) That the regular courts have erroneously determined the factual situation regarding the duration of the employee's work experience, claiming that the employee has no more than 3 years of work experience;
    (ii) That the Applicant was entitled to terminate the employment relationship by notice in accordance with the employment contract, Article 1.1 and Article 67 paragraph 1.3, as well as Article 71 paragraph 2 of the Law on Labor No. 03/L-212;
    (iii) That the regular courts have erroneously interpreted Article 10.5 of the Law on Labor No. 03/L-212, because it cannot be applied for Limak company, because the employee did not

have ten (10) years of uninterrupted work experience with the respondent;

(iv) That the regular courts failed to take into account Article 9.18 of the PPP Agreement, according to which the Applicant took over the obligation to keep the employees in work for a period of 3 (three) years.

25. The Applicant also cites the Judgment of the Constitutional Court KI138/15 and states that "*the application of the substantive law, which may have been a fact, has been a decisive factor in obtaining the judgment of that court, but the Supreme Court did not resolve this issue, at all but only found that the lower instance courts have correctly applied the provisions of the substantive law*".

26. The Applicant alleges that "*the Constitutional Court should assess whether the trial in its entirety was fair and impartial, as required by Article 31 of the Constitution (see, inter alia, mutatis mutandis, Edwards v. United Kingdom, 16 December 1992, p. 34, Series A, No. 247 and B. Vidal v. Belgium, 22 April 1992, p. 33, Series A. No. 235).*

27. The Applicant requests the Court to annul the Judgment of the Supreme Court and to remand the case for retrial.

Relevant legal provisions

Law on Labor No. 03/L-212

Article 10
Employment Contract
[...]

5. A contract for a fixed period of time that is expressly or tacitly renewed for a continued period of employment of more than ten (10) years shall be deemed to be a contract for an indefinite period of time.

Article 67
[Termination of Employment Contract on Legal Basis]

1. Employment contract, on legal basis, may be terminated, as follows:
[...]
1.3. With the expiry of duration of contract.

Article 70

[Termination of Employment Contract by the Employer]

1. An employer may terminate the employment contract of an employee with the prescribed period of notice of cancellation, when:

1.1. Such termination is justified for economic, technical or organizational reasons;

1.2. The employee is no longer able to perform the job;

1.3. The employer may terminate the employment contract in the circumstances specified in sub-paragraph 1.1 and 1.2 of this paragraph, if, it is impracticable for the employer to transfer the employee to other employment or to train or qualify the employee to perform the job or other jobs;

1.4. An employer may terminate the employment contract of an employee with providing the period of notice of termination required, in:

1.4.1. . serious cases of misconduct of the employee; and

1.4.2. *because of dissatisfactory performance of of work duties;*

1.5. An employer shall notify the employee about his/her dismissal immediately after the event which leads to this decision or as soon as the employer has become aware of it.

1.6. An employer may terminate the employment contract of an employee without providing the period of notice of termination required, in the case when:

1.6.1. the employee is guilty of repeating a less serious misconduct or breach of obligations;

1.6.2. the employee's performance remains dissatisfactory in spite of the written warning.

2. The employer may terminate the employment contract of an employee under subparagraphs 1.6 of paragraph 1 of this Article only when after the employee has been issued previous written description of unsatisfactory performance with a specified period of time within which they must improve on their performance as well as a statement that failure to improve the performance shall result with dismissal from work without any other written notice.

Article 71

[Notification period for termination of employment contract]

1. The employer may terminate an employment contract for an indefinite period according to Article 70 of this Law with the following periods of notification:

1.1. from six (6) months - 2 years of employment, thirty (30) calendar days;

1.2. from two (2)- ten (10) years of employment: fourty-five (45) calendar days;
1.3. above ten (10) years of employment: sixty (60) calendar days

2. The employer may terminate an employment contract for a fixed term with thirty (30) calendar days notice. The employer who does not intend to renew a fixed term contract must inform the employee at least thirty (30) days before the expiry of the contract. Failure to do so entitles the employee to an extension of employment with full pay for thirty (30) calendar days.

Public-Private Partnership Agreement for the Operation and Expansion of Prishtina International Airport

9.18 [Termination of Personnel]

„*The Private Partner may terminate the employment or other engagement of any PIA Employee (i) at any time for cause in accordance with applicable laws, rules, administrative regulations and decrees, (ii) upon mutual agreement and (iii) without limitation, after the third (3rd) anniversary of the Effective Date*".

Admissibility of the Referral

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

29. 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".

30. The Court also refer to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

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

31. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms applicable both to individuals and to legal persons (See case of the Constitutional Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

32. The Court further examines whether the Court has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

3. 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.
4. 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 [...]".

33. Regarding the fulfillment of these requirements, the Court considers that the Applicant is an authorized party, challenging an act of a public authority, after exhaustion of all legal remedies. The Applicant also clarified the 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 established in Article 49 of the Law.

34. However, the Court should further assess whether the criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure have been met, including the requirement that the Referral is not manifestly ill-founded. Thus, Rule 39 (2) of the Rules of Procedure provides that:

> *"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".*

35. Initially, the Court notes that the Applicant alleges that his right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR has been violated, because the decisions of the regular courts were not sufficiently reasoned, while the violations of other rights guaranteed by the Constitution and the ECHR are presented by the Applicant as a result of the violation of the right to fair and impartial trial.

36. The Applicant in essence justifies his Referral by repeating the same allegations that he had filed before the regular courts, which pertain to erroneous determination of factual situation and erroneous application of the procedural and substantive law, pointing out that the decisions of the regular courts did not sufficiently reason the following issues:

(i) That the regular courts have erroneously determined the factual situation regarding the duration of the employee's work experience, claiming that the employee has no more than 3 years of work experience.
(ii) That the Applicant was entitled to terminate the employment relationship by notice in accordance with the employment contract, Article 1.1 and Article 67 paragraph 1.3, as well as Article 71 paragraph 2 of the Law on Labor No. 03/L-212.
(iii) That the regular courts have erroneously interpreted Article 10.5 of the Law on Labor No. 03/L-212, because it cannot be applied for Limak company, because the employee did not have ten (10) years of uninterrupted work experience with the respondent.
(iv) That the regular courts failed to take into account Article 9.18 of the PPP Agreement, according to which the Applicant took over the obligation to keep the employees in work for a period of 3 (three) years.

37. The Constitutional Court will assess the constitutionality of the challenged decisions of the regular courts with respect to the Applicant's allegation that the decisions of the regular courts have not been sufficiently reasoned, referring to each individual allegation of the Applicant.

38. First, as to the Applicant's allegation that (i) the regular courts have erroneously determined the factual situation regarding the duration of the employee's work experience, claiming that the employee has not more than 3 years of work experience.

39. With regard to these allegations of the Applicant, the Court notes that the Basic Court reasoned that "*based on the factual situation determined by the evidence administered above, to which the court entirely gave trust, it was established that the claimant with the predecessor of the respondent PIA „Adem Jashari" j.s.c., has established employment relationships since 21.11.2003 and worked with the latter uninterruptedly until 03.04.2011, whereas since 04.04.2011 until 03.04.2014 has continuously worked for the respondent and has completed over 10 years of uninterrupted work with the predecessor of the respondent and with the respondent, based on the provision of Article 10.5 of the Law on Labor, the court came to the conclusion that the employment contract on indefinite term with the respondent is considered to be an indefinite employment relationship, therefore the court considers that in this situation, the respondent to terminate the indefinite employment relationship to the claimant, was obliged to conduct an internal procedure for termination of the employment relationship, a procedure which was not conducted with the respondent but the claimant has only been notified by the notice on non-extension of the employment contract", the Basic Court also "... considers that the notification of the respondent for the non-extension of the employment contract to the claimant, without conducting any internal procedure for termination of the employment relationship is unlawful*".

40. Second, as to the Applicant's allegations (ii) that the Applicant was entitled to terminate the employment relationship in accordance with the employment contract, Article 1.1 and Article 67, paragraph 1.3, and Article 71, paragraph 2 of the Law on Labor No. 03/L-212.

41. With regard to these allegations of the Applicant, the Court notes that the Basic Court first concluded that "*... the notice of the respondent for*

the non-extension of the employment contract of the claimant, without conducting any internal procedure for termination of the employment relationship is unlawful" .

42. The Basic Court, by the same Judgment, further reasoned when and under what conditions the employer could use this opportunity, reasoning in detail what preliminary measures should be taken, stating that "*... if eventually the termination of the employment relationship has to do with technical, economic or organizational reasons, in conformity with the provisions of Article 70 in conjunction with Article 76 of the Law on Labor, the respondent was obliged to draft a written program and to apply these provisions of the LL, and in addition to notifying the claimant one month before termination of the employment relationship, it was obliged to notify the trade union of the employee about the planned changes, by attempting in advance for the internal re-systematization of the employees, by limiting overtime working hours, reducing working hours of employees, providing vocational training and other measures determined by law, the measures which none of them were taken by the respondent, namely until the completion of the first instance procedure did not provide evidence that it did something in this direction".*

43. Also, regarding these allegations of the Applicant, the Court of Appeals responded in detail when rejected as ungrounded "*the appealing allegations that from the moment of signing the Agreement between the Government of Kosovo and the respondent, the claimant does not have more than 3 years of work experience, this is for the Court of Appeals without any influence, because it is important that the claimant in the same working place worked for more than 10 years and that his employment contract is considered within the meaning of Article 10 paragraph 5 of Law on Labor, as a contract for an indefinite period of time, so that the it was possible to terminate the employment relationship to the latter, only under the conditions laid down in the provision of Article 70 of the Law on Labor, and not based on Article 67, paragraphs 1 and 3 of this Law, which states that the employment contract on legal basis may be terminated with the expiry of the duration of contract*".

44. Third, as to the Applicant's allegations (iii) that the regular courts have erroneously interpreted Article 10.5 of the Law on Labor No. 03/L-212, because it cannot be applied for Limak company, because the employee did not have ten (10) years of uninterrupted work experience with the respondent.

45. The Court notes that the Court of Appeals "*The appealing allegation that in the present case it is about employment relationships of a temporary character, in duration of three years is ungrounded, because Limak Kosavo has continued the legal subjectivity of the former Prishtina Airport and is its legal successor, which means that it took over the responsibility for airport workers, so the claimant must take into account his work at this airport as of 21.11.2003. Given that this working place in which the claimant worked still exists and that the claimant has been performing these works for 10 years, it follows that they are of a permanent nature*".

46. Fourth, as to the Applicant's allegations (iv) that the regular courts did not take into account Article 9.18 of the PPP Agreement, under which the Applicant took over the obligation to keep the employees at work for a term of 3 (three) years.

47. As to the concrete Applicant's allegations regarding the application of Article 9.18 of the PPPA, the Supreme Court reasoned that *"The Court also assessed the allegations of the revision that the first and second instance courts did not take into account the legal fact and that of Article 9.18 of the Public Private Partnership Agreement signed by the Government of the Republic of Kosovo and the Private Company "Limak" of 12.8.2010, based on this agreement, the company "Limak" takes over to keep the employees at work for 3 years, after which there is no definition after the third anniversary of the date of entry into force of the employment contract, the court considers them as ungrounded since the respondent continued the subjectivity of the former Prishtina Airport taking responsibility for the Airport employees and that there was no legal reason and that the respondent could terminate the employment relationship only under the conditions set forth in Article 70 of the Law on Labor, and not based on Article 67.1 and Article 3 of this Law, which states that the employment contract on legal basis, is terminated with the expiry of duration of contract. In the present case by notice, as the respondent acted, there was no possibility that the employment contract of the claimant is not extended, where the employment contract is considered as a contract for an indefinite period"*.

48. The Court further recalls that the Applicant also refers to the Judgment of the Constitutional Court KI138/15 and claims that " *the application of substantive law, which may have been a fact, has been a decisive factor for rendering the judgment of that court, but the Supreme Court did not resolve this issue at all, but only found that*

the lower instance courts correctly applied the provisions of the substantive law".

49. As to this allegation of the Applicant, the Court recalls that the present case differs from the case before us, because of this reasoning: (i) the issue of disciplinary proceedings against the employee in the Applicant's case has been reviewed differently by the regular courts; (ii) there was no clear legal basis under which disciplinary proceedings were conducted; and (iii) contradictory elements existed in decisions of the lower instance courts. In addition, the Court of Appeals applied and used for explanation the Administrative Instruction which derived from the Civil Service Regulation, not the Law on Labor. This argument, although raised by the Applicant in this case, was not reviewed by the Supreme Court (see the case of the Constitutional Court KI138/15, *Sharr Beteiligung GmbH,* Judgment of 4 September 2017).

50. The Court first reiterates that it is not its function to deal with the errors related to the factual situation or the erroneous application of the law, allegedly committed by the regular courts, unless the errors and erroneous application of the law are not such as to violate the rights and freedoms protected by the Constitution (*Garcia Ruiz v. Spain* [GC], no. 30544/96, paragraph 28, ECHR 1999-I).

51. However, it is the primary role of the regular courts to resolve the issues of interpretation of the domestic legal rules. This applies in particular to the interpretation of substantive and procedural law by the courts (*Pekinel v. Turkey*, No. 9939/02, 18 March 2008). The role of the Court is only to determine whether the effects of such interpretation are in accordance with the Constitution in entirety and with the principle of legal certainty, in particular those guaranteed by Article 6 of the ECHR.

52. The Court reiterates that Article 6 of the ECHR and Article 31 of the Constitution oblige the courts to give reasons for their decisions, but this cannot be understood as an obligation of the court to give a detailed answer to any arguments of the Applicant. (see, *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994, Series A. No. 288, p. 20, para. 61). The extent to which the duty to give reasons applies may vary according to the nature of the decision. It should also take into account, *inter alia*, the variety of submissions submitted by a party to proceedings that may make the courts give various legal opinions and conclusions when rendering decisions. Therefore, the question whether the court has fulfilled the obligation to explain the reasons for

its decision, stemming from Article 6 of the ECHR, can only be determined in the light of the circumstances of each individual case.

53. Accordingly, the Court notes that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle, to adduce the arguments and evidence he considered relevant to his case at the various stages of those proceedings, he was given the opportunity to challenge effectively the arguments and evidence presented by the responding party, all the arguments, viewed objectively, relevant for the resolution of his case were heard and reviewed by the regular courts, the factual and legal reasons against the challenged decision were examined in detail; and therefore, the proceedings, viewed in entirety, were fair (see, *mutatis mutandis,* ECtHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, no. 30544/96, paragraphs 29 and 30).

54. Therefore, the Court finds that the right to fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, has not been violated by the decisions of public authorities.

55. Having in mind that the Applicant failed to present evidence, facts and arguments showing that the proceedings before the regular courts violated his right to fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, the Court will not deal with the examination of further allegations of the Applicant because the violations of other rights guaranteed by Articles 24, 32 and 46 of the Constitution and Article 1 of Protocol 1 of the ECHR, are presented by the Applicant as a result of the violation of the right to fair and impartial trial.

56. The Court recalls that the mere fact that the Applicant does not agree with the outcome of the decisions of the Supreme Court, as well as mentioning of articles of the Constitution, are not sufficient to build a reasoned allegation of constitutional violations. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (See, *mutatis mutandis*, case of the Constitutional Court Resolution on Inadmissibility of 10 February 2015, KI136/14, *Abdullah Bajqinca*, , paragraph 33).

57. Therefore, the Referral is manifestly ill-founded on constitutional basis and is declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, and Rule 39 (2) of the Rules of Procedure, on 27 May 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KI02/19, KI03/19, KI04/19 and KI05/19, Applicant: Halil Mustafa and 3 others, Constitutional review of 4 decisions of the Supreme Court of Kosovo rendered between 27 July 2011 and 14 October 2013

Halil Mustafa (KI02/19), Zeqir Rexhepi (KI03/29), Remzi Rushiti (KI04/19), Hasan Geci (KI05/19), Resolution on Inadmissibility, rendered on 20 June 2019, published on 17 July 2019

Keywords: Individual referral, "Ngritja e Zërit", war damages, manifestly ill-founded referral

The Applicants filed a claim with the Basic Court in Mitrovica - Branch in Skenderaj, against the Government of Serbia, for compensation for material and non-material damage caused to them during the war.

The regular courts were declared incompetent to decide on this matter and, finally, referring to the relevant provisions of the Law on Contested Procedure, the Supreme Court reasoned that in these cases the norms of international law apply for which the courts of the country are not are competent to decide, but competent in this legal matter is the court in the territory of which is the seat of the Assembly of Serbia.

The Applicants before the Constitutional Court alleged that their rights established in the Constitution were violated, namely Articles 21, 22, 53 and 54. The Applicants had three main categories of allegations: (i) the application of the principle *"per loci"* [*ratione loci*] (ii) the obligation to implement international human rights standards and (iii) their right to judicial protection of rights and the right of access to justice.

The Constitutional Court, after considering the allegations of the Applicants, reasoned that the findings of the regular courts were reached after a detailed examination of all the arguments and interpretations put forward by the Applicants and they were given the opportunity that in all stages of the proceedings present the arguments and legal interpretations that they consider relevant to their cases. The Constitutional Court also recalled the case law of the ECtHR in several cases where the procedural barriers imposed by the principle of sovereign state immunity have been highlighted in relation to judicial proceedings that may be conducted against a state in the domestic courts of another state. The Court also considered it important to emphasize the fact that the regular courts of Kosovo did not adjudicate on the Applicants' right to seek the compensation of damage, but only regarding the territorial jurisdiction of the courts of Kosovo to conduct a proceeding against another state.

Therefore, the Constitutional Court found that the referrals are manifestly ill-founded on constitutional basis and should be declared inadmissible, whereas in one of the Referrals (KI05/19) it found that it was submitted out of time.

RESOLUTION ON INADMISSIBILITY

in

Cases No. KI02/19, KI03/19, KI04/19 and KI05/19

Applicant

Halil Mustafa and 3 others

Constitutional review of 4 decisions of the Supreme Court of the Republic of Kosovo rendered between 26 March and 10 October 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. Referral KI02/19 was submitted by Halil Mustafa; Referral KI03/19 was submitted by Zeqir Rexhepi; Referral KI04/19 was submitted by Remzi Rushiti and Referral KI05/19 was submitted by Hasan Geci.

2. All of the above (hereinafter: the Applicants) reside in the Municipality of Skenderaj and are represented by Jahir Bejta, director of the association "Ngritja e Zërit".

Challenged decision

3. The Applicants challenge 4 decisions of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), as follows:

    1. Halil Mustafa- Decision Rev. No. 279/2018, of 6 September 2018;

2. Zeqir Rexhepi- Decision Rev. No. 305/2018, of 10 October 2018;

3. Remzi Rushiti- Decision Rev. No. 221/2018, of 31 July 2018;

4. Hasan Geci- Decision Rev. No. 65/2018, of 26 March 2018.

Subject matter

4. The subject matter of the Referrals is the constitutional review of the challenged decisions, which allegedly violate the rights of the Applicants guaranteed by Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and Article 15 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

Legal basis

5. The Referrals are based on paragraph 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 9 January 2019, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 10 January 2019, Jahir Bejta in the capacity of the Applicants' representative and in the capacity of the director of the Association "Ngritja e Zërit" submitted to the Court a document which, although expressly does not refer to any specific case in the Court, repeats the allegations and arguments contained in the Applicants' Referrals.

8. On 1 February 2018, the President of the Court in Case KI02/19 appointed Judge Safet Hoxha, as Judge Rapporteur, and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Gresa Caka-Nimani and Bajram Ljatifi.

9. On the same date, in accordance with paragraph 1 of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, the President of the Court ordered the joinder of Referrals KI03/19, KI04/19, KI05/19 with Referral KI02/19.

10. On 19 February 2019, the Court notified the Applicant about the registration and the joinder of the Referrals.

11. On the same date, the Court also notified the Supreme Court about the registration of Referral and their joinder.

12. On 20 June 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

13. Between 27 July 2011 and 14 October 2013, the Applicants individually filed a claim with the Basic Court in Mitrovica, Branch in Skenderaj (hereinafter: the Basic Court) against the Government of the Republic of Serbia for compensation of material and non-material damage which was caused to them during the war between 1998 and 1999.

14. During the period 17 September 2013 - 27 October 2015, the Basic Court, by individual decisions, dismissed the Applicants' claims and declared itself incompetent to decide.

15. The Applicants filed individual appeals against the decisions of the Basic Court with the Court of Appeals, on the grounds of essential violations of the provisions of the contested procedure. The Applicants requested that the decisions of the Basic Court be annulled and the Applicants' claims be declared admissible.

16. Between 28 August 2017 and 5 July 2018, the Court of Appeals rendered separate decisions by rejecting each of the Applicants' appeals and upholding the decisions of the Basic Court.

17. Each of the Applicants, individually, filed a separate request for revision with the Supreme Court, alleging the existence of a violation of the provisions of the contested procedure. They requested that their requests for revision be approved, the decisions of the Court of Appeals and the Basic Court be annulled and their legal case be remanded for reconsideration to the Basic Court. The Applicants alleged that there are other provisions of the Law on Contested

Procedure which regulate the issue of competence in their cases. Among other things, according to them in this case, the provision of Article 28 of the Law on Contested Procedure, which deals with the jurisdiction of the courts in disputes with international element, should have been applied.

18. Between the dates 26 March and 10 October 2018, the Supreme Court rendered separate decisions [see paragraph 3 of this Decision], rejecting the requests for revision of each Applicant as ungrounded. The main arguments of the Supreme Court in each of these decisions, were as follows:

> "*Taking into account* [the provisions of the Law on Contested Procedure] *LCP as well as the fact that with the lawsuit was sued the Republic of Serbia - Government R.S. in Belgrade, [...] in the present case it is about the legal-property dispute in the foreign state, for which the norms of international law apply, and for this dispute the court of the country is not competent to decide, therefore, the Supreme Court of Kosovo assesses that the Basic Court and the Court of Appeals have correctly applied the provisions of Article 18.3 and Article 39 par. 1 and 2 of the LCP, when they were declared incompetent to adjudicate this legal matter and dismissed the* [Applicants'] *claim, as of the general territorial jurisdiction is the court in the territory of which is the seat of the Assembly of the Republic of Serbia, so that, [and] the seat of the Assembly of the Republic of Serbia as a responding party is not in the territory of the courts of the Republic of Kosovo. [...]*
> *The provision of Article 28 LCP, to which the Applicants refer, and which assigns the competence of our courts in the disputes with an international (foreign) element, cannot be applied in the present case, since we are not dealing here either with foreign natural persons or with foreign legal persons, but with a foreign state, with which to the present moment the state of Kosovo, on which territory the damage was caused, has not concluded any international agreement [...] for the competence of domestic courts for these types of disputes [...] The allegation of the revision* [of the Applicants] *that in the present case we are dealing with the territorial jurisdiction chosen under Articles 47, 51 and 61 of the LCP is ungrounded, as according to the assessment of the Supreme Court, these provisions do not relate to the present case [...], the lower instance courts have correctly applied the provision of Article 18.3 of the LCP, considering the other reasons mentioned above".*

Applicant's allegations

19. The Applicants' allegations are identical, and therefore, the Court presents them as identical allegations for all the Applicants of these joined referrals.

20. The Applicants allege that the decisions of the Supreme Court violated their rights guaranteed by Articles 21, 22, [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution, Article 6 (Right to a fair trial) of the ECHR and Article 15 of the UDHR.

21. The Applicants allege that the regular courts "*have incorrectly applied the applicable law referring to the territorial jurisdiction of the Basic Court [...], as the court territorially competent for the adjudication of legal matters is always the court in the territory of which the crime was committed, moral namely material damage! This valid legal definition and position corresponds with the interest of the injured party, the principle of economy in the court and administrative proceedings, and in accordance with the international principle –per loci, the addressing of the indictments based on the place where the crime was committed*".

22. The Applicants, referring to Article 21 paragraph 1 of the Constitution, allege that the regular courts "*have not applied the advanced international human rights standards. One of the standards is to allow the injured party to initiate the issue of compensation for moral and material damage, caused as a result of direct action by the Serbian authorities [...]*".

23. The Applicants, referring to Article 22 of the Constitution, allege that as *"the human rights guaranteed by international conventions, agreements and instruments are a priority in the event of conflict with the laws and other provisions of public authorities"*, accordingly, *"the submission of indictments before the domestic courts is also based on Article 6 of the ECHR and paragraph 15 of the UDHR [...]"*.

24. The Applicants also state that *"The obligation to apply Geneva Conventions of 1994 is also foreseen by the International Humanitarian Law of Kosovo"*. According to the Applicants, the regular courts have violated the constitutional provisions because they have not applied the provisions of the international conventions, as a category of domestic legal order.

25. The Applicants, referring to Article 54 of the Constitution, also state that *"the right to judicial protection of rights, the right to access to justice at national level and the institutional guarantees for the protection of human rights have been denied"*.

26. The Applicants refer to some examples of the international case law whereby, according to them, the victims of the Second World War were allowed *"to submit individual indictments to the domestic courts for compensation of damage caused by Germany"*. In that regard, they specify that in the cases of Greece and Italy, the individuals were given the opportunity to seek compensation for *"the damage caused by Germany during the Second World War in accordance with the international principle 'per loci'."*

27. Finally, the Applicants request the Court to annul the decisions of the regular Courts as well as *"to request the Basic Court in Mitrovica – branch in Skenderaj to reprocess and adjudicate the legal case for compensation of moral and material damage in conformity with applicable law and good court practice [...]."*

28. In addition to all other Applicants, the Applicant Hasan Geci (KI05/19) has also attached a letter requesting that the time-limit be returned to the previous situation pursuant to Article 50 [Return to Previous Situation] of the Law, emphasizing that *"from 1 June 2018 to 3 September, he was staying abroad with his brother in Germany"* and thus could not file the referral within the prescribed time limit of 4 (four) months.

Admissibility of Referrals

29. The Court shall first examine whether the Referrals have met the admissibility requirements established in the Constitution and further specified in the Law and foreseen in the Rules of Procedure.

30. As an initial note, the Court notes that the subject matter of of these joined referrals and the allegations raised in those referrals are similar to a number of other referrals on which the Court has already decided (see, *mutatis mutandis*, cases of the Constitutional Court, KI73/17, KI78/17 and KI85/17, *Istref Rexhepi and 28 others*, Resolution on Inadmissibility of 23 October 2017, cases KI KI97/17, KI99/17, K115/17 and KI121/17 *Mala Mala, Ali Salihu, Nurije Beka and Xhevat Xhinovci*, Resolution on Inadmissibility of 10 January 2018 and Case No. KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18, *Fehmi Hoti and 15*

others, Resolution on Inadmissibility of 19 February 2019, and all cases of "Ngritja e Zërit";, see also the relevant legal provisions cited in those cases).

31. Turning to the circumstances of the present cases, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

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

32. The Court further refers to Article 48 [Accuracy of the Referral], 49 [Deadlines] and 50 [Return to the Previous Situation] 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... ."*

Article 50
[Return to the Previous Situation]

> *If a claimant without his/her fault has not been able to submit the referral within the set deadline, the Constitutional Court, based on such a request, is obliged to return it to previous situation. The claimant should submit the request for returning to previous situation within 15 days from the removal of obstacle and should justify such a request. The return to the previous situation is not permitted if one year or more have passed from the day the deadline set in this Law has expired.*

33. Furthermore, the Court also refers to the Rules of Procedure, namely item (c) of subparagraph (1) and paragraph (2) of Rule 39 [Admissibility Criteria], which stipulate as follows:

> *(1) The Court may consider a referral as admissible if:*
>
> *(...)*
>
> *(c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant,*
>
> *(...)*
>
> *(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."*

Regarding the 3 Applicants [KI02/19, KI03/19 & KI04/19]

34. The Court finds that the three Applicants [not including Referral KI05/19 that will be treated separately] are authorized parties, who challenge an act of a public authority after exhaustion of all legal remedies. The Applicants have also clarified the rights and freedoms they claim to have been violated in accordance with Article 48 of the Law and have submitted the referral in accordance with the deadline set out in Article 49 of the Law 39 (1) (c) of the Rules of Procedure.

35. In addition, in relation to these three referrals, the Court must consider whether the admissibility criterion set out in Rule 39 (2) of the Rules of Procedure is met. In this regard, the Court recalls that the Applicants allege that the regular courts have violated certain rights protected by the Constitution, the ECHR and the UDHR, with particular emphasis on the right to fair and impartial trial and the right to protection of judicial rights.

36. In this regard, the Court notes that the Applicants allege that the regular courts erroneously interpreted the law in force when referring to the territorial jurisdiction of the Basic Court. They further allege that the court in which territory the damage is caused is the court competent to adjudicate their cases.

37. The Court considers that the Applicants' allegations essentially relate to the interpretation by the regular courts of the relevant legal

provisions governing their territorial jurisdiction, namely the competence to deal with the claims of the Applicants.

38. The Court reiterates its position that the fair and complete determination of factual situation, as well as the relevant legal interpretations, in principle fall within the jurisdiction of the regular courts. The role of the Constitutional Court is to ensure compliance with the standards and rights guaranteed by the Constitution, namely, it cannot act as a "fourth instance court". (See *mutatis mutandis,* Judgment of the European Court of Human Rights (hereinafter: the ECtHR) of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, paragraph 28; see also *mutatis mutandis*, regarding the "fourth instance" doctrine, the Constitutional Court cases KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012, paragraph 33; as well as the joined cases KI73/17, KI78/17 and KI85/17 Applicants *Istref Rexhepi and 28 others*, Resolution on Inadmissibility of 27 November 2017, paragraphs 46 and 47).

39. In the present case, the Court notes that the Supreme Court has considered the Applicants' allegations regarding the interpretation made by the Court of Appeals and the Basic Court of the relevant legal provisions relating to the competence to adjudicate in the Applicants' cases.

40. The Supreme Court, during the examination of the Applicants' allegations, reasoned that the Basic Court and the Court of Appeals have correctly applied the provisions of the Law on Contested Procedure when they found that they had no jurisdiction to adjudicate in these court cases. Therefore, the Supreme Court rejected the Applicants' allegations, reasoning that the general territorial jurisdiction is in the court in the territory of which is the seat of the Assembly of the Republic of Serbia which is not in the territory of the courts of Kosovo.

41. Thus, in some of its decisions (see, for example, Decision in case Rev. No. 305/2018), the Supreme Court, *inter alia*, reasoned that:

> *"[...] in accordance with the provision of Article 28.2 of the LCP, when it comes to disputes with a foreign element, the court of the country is competent only if this international competence derives expressly from an international agreement or by law itself [...] Article 39.1 of the LCP, foresees that "in the adjudication of disputes against Kosovo [...] the general territorial jurisdiction is vested in the court within whose territory is the headquarters of its assembly. While in paragraph 2 it is foreseen "in the*

adjudication of disputes against other legal persons, the general territorial jurisdiction is vested in the court within whose territory their headquarters is registered.' Thus, also with the provision of Article 54.1 of the Law on the Resolution of the Collision of Law with the provisions of other states provides that in the legal-property disputes the jurisdiction of the domestic court exists if the property of the respondent or the thing sought by lawsuit is located in our country".

42. The Supreme Court further specified that in the case of the Applicants "*we are dealing with a foreign state, with which to the present moment the state of Kosovo in the territory of which the damage was caused has not concluded any international agreements for the jurisdiction of the local courts for these types of disputes".*

43. The Court considers that the findings of the Basic Court, the Court of Appeals and of the Supreme Court were reached after a review of all the arguments and interpretations put forward by the Applicants. In this way, the Applicants were given the opportunity to present at all stages of the proceedings the arguments and legal interpretations they consider relevant to their cases.

44. Accordingly, the Court concludes that the proceedings before the regular courts, viewed in their entirety, were fair and that the allegation of arbitrary legal interpretation by the regular courts could not be proved.

45. With regard to the Applicants' allegations as to "*their right to judicial protection and access to justice*", the Court emphasizes the case law of the ECtHR, on which it is obliged to refer to under Article 53 of the Constitution. The Court notes that the ECtHR has in some cases noted procedural barriers imposed by the principle of sovereign state immunity - as one of the fundamental principles of international public law - in relation to judicial proceedings that may be conducted against a state in the domestic courts of another state. (See the joined cases of the Constitutional Court, KI96/18, KI97/18,KI98/18, KI99/18,KI100/18,KI101/18, KI102/18,KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18,KI117/18, KI119/18 and KI125/18, Applicant *Fehmi Hoti and 15 others*, Resolution on Inadmissibility of 30 January 2019, paragraphs 58 and 59, see also *mutatis mutandis* the ECHR cases cited in the aforementioned case of the Constitutional Court, *Jones and Others v. the United Kingdom*, 34356/06 and 40528/06, Judgment of 14 January 2014 and *Al-Adsani v. United Kingdom*, Application 35763/97 Judgment of 21 November 2001).

46. Moreover, in the case of *Al-Adsani v. the United Kingdom*, the ECtHR reasoned as follows: "*The right of access to court may be subject to limitations, unless the essence of the very right is impaired. Such limitations must pursue a legitimate aim and be proportionate. The recognition of sovereign state immunity in civil proceedings follows the legitimate aim of respecting the international law [...]. As far as proportionality is concerned, the Convention should, as far as possible, be interpreted in accordance with other rules of international law, including those relating to the immunity of States. Thus, the measures taken by the state which reflect the general rules of international law on the immunity of States cannot, in principle, be regarded as a disproportionate limitation of the right of access to the court*". Such an attitude, as far as concerns the tension between the principle of sovereign immunity of states and the right to access to justice (court), was emphasized by the International Court of Justice (see, for example, case: *Germany v. Italy; Greece as an intervening party*, Judgment of 3 February 2012).

47. In the light of the foregoing arguments, the Court considers that it is important to emphasize the fact that the regular courts of Kosovo did not deal with, namely, did not adjudicate regarding the Applicants' right to seek compensation of damage, but only with respect to the territorial jurisdiction of the courts of Kosovo to conduct proceedings against another state.

48. While referring to the Applicants' allegations about the application of the Geneva Convention in their judicial cases, the Court notes that the Applicants have only referred to this Convention but did not provide any further arguments regarding this allegation. (See, for the ultimate authority in this regard, the joined cases of the Constitutional Court, KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18,KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18, cited above, paragraph 45).

49. The Court emphasizes its general view that the mere fact that the Applicants do not agree with the outcome of the decisions of the Supreme Court, or of other regular courts, as well as mentioning of articles of the Constitution or in international instruments, are not sufficient to build a reasoned allegation of constitutional violations. When such violations of the Constitution are alleged, the Applicants must provide a reasoned allegations and convincing arguments. (See the case of the Constitutional Court, KI136/14, Resolution on

Inadmissibility of 10 February 2015, *Abdullah Bajqinca*, paragraph 33).

50. The Court also notes that the submitted facts and the allegations of the Applicants are almost identical to some earlier Referrals, for which the Court has decided that they are inadmissible, as manifestly ill-founded on constitutional basis. (For the latest authority in this regard, see the joined cases of the Constitutional Court, KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18, cited above, cases KI73/17, KI78/17 and KI85/17, cases KI97/17, KI99/17, K115/17 and KI121/17). All these referrals raised almost identical allegations with the referrals addressed in this decision and, as in those cases, even in these joined cases, the Court considers that they are to be declared as ungrounded on constitutional basis.

51. In sum, the Court considers that the Applicants' Referrals do not prove that the proceedings before the regular courts have caused a violation of their rights guaranteed by the Constitution, the ECHR or the UDHR.

Regarding the Applicant Hasan Geci [KI05/19]

52. With respect to this Referral, the Court finds that the Applicant is an authorized party that challenges an act of a public authority and has exhausted all legal remedies. However, before examining other admissibility requirements, the Court must examine the fulfillment of the requirement of filing the referral within a period of four (4) months, as provided for in Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure.

53. In this regard, the Court recalls that the Applicant challenges the constitutionality of Decision [Rev. No. 65/2018] of the Supreme Court of 26 March 2018, while he filed the Referral KI05/19 to the Court on 9 January 2019, thus, after a period of four (four) months.

54. With regard to the delay in submitting the Referral, the Court recalls that the Applicant requests a return to the previous situation in accordance with Article 50 of the Law, on the grounds that "*from 1 June 2018 until 3 September he was staying abroad with his brother in Germany*".

55. In support of his arguments for lack of physical presence in Kosovo during the aforementioned period, the Applicant also presented the possibility of verification through 2 (two) witnesses.

56. In the present case, the Court considers that the Applicant did not provide any evidence to prove that due to the objective circumstances beyond his control he failed to submit the Referral within the 4 (four) month legal deadline. Furthermore, the Applicant did not provide evidence that indicates that the Referral was filed within 15 (fifteen) days from avoiding the obstacle that would justify the request for return to the previous situation, as required by Article 50 of the Law.

57. Therefore, the Court finds that the Applicant did not substantiate his request for return to the previous situation, pursuant to Article 50 of the Law and, therefore, his Referral should be rejected.

58. The Court recalls that the purpose of the 4 (four) months legal deadline under Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedures, is to promote legal certainty by ensuring that cases raising constitutional matters are dealt within a reasonable time and that past decisions are not continually open to constitutional review. (See, ECtHR case, *O'Loughlin and Others v. United Kingdom*, Application No. 23274/04, Decision of 25 August 2005; see also, the case of the Constitutional Court KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility of 17 March 2014, paragraph 24).

59. Based on the foregoing, it follows that the Referral [KI05/19] of the Applicant Hasan Geci was filed out of the legal time limit provided by Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure and as such is inadmissible.

60. In conclusion, the Court finds that:

(i) with regard to 3 Applicants [KI02/19, KI03/19 and KI04/19], their referrals are manifestly ill-founded on constitutional basis and are to be declared inadmissible in accordance with Article 48 of the Law and Rule 39 (2) of the Rules of Procedure;

(ii) with regard to the Applicant Hasan Geci [KI05/19], his referral was submitted out of the legal deadline provided by Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure and as such is inadmissible.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Articles 48 and 49 of the Law and Rules 39 (1) (c) and 39 (2) of the Rules of Procedure, on 20 June 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

KI111/18, Applicants: Dragomir Vlasačević and others, constitutional review of Decision AC-I-17-0519-0001/0003 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo of 15 March 2018

KI 111/18, Resolution on Inadmissibility of 20 June 2019, published on 30 July 2019

Keywords: individual referral, privatization process, special chamber of the supreme court, manifestly ill-founded referral

The Applicants alleged that the proceedings conducted before the Special Chamber of the Supreme Court violated their right to fair and impartial trial because some of their complaints - according to them - were not reviewed at all.
After examination of the complete case file, the Court found that the Applicants did not prove that their complaints were reviewed by the Special Chamber of the Supreme Court or that because of the "volume of the case" the latter were "mixed" and consequently were not reviewed.
The Court concluded that the Applicants' Referral is inadmissible as manifestly ill-founded on constitutional basis as provided by Article 113.7 of the Constitution, foreseen by Article 48 of the Law and further specified by Rule 39 (2) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI111/18

Applicant

Dragomir Vlasačević and others

Constitutional review of Decision AC-I-17-0519-0001/0003 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo of 15 March 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Dragomir Vlasačević, Liljana Ivič, Slobodanka Savić, Slađana Paunović, Nataša Maksimović, Tihomir Bojković, Zlatica Nedeljković, Milorad Đokić, Desanka Nikolić, Slavica Janković, (hereinafter: the Applicants), represented by Žarko Gajič, a lawyer from Graçanica.

Challenged decision

2. The Applicants challenge the constitutionality of Decision AC-I-17-0519-0001/0003 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo of 15 March 2018.

3. The abovementioned decision was served on the Applicants' representative on 5 April 2018.

Subject matter

4. The subject matter is the constitutional review of the challenged Decision, allegedly violated the Applicants' rights guaranteed by Articles 24 [Equality Before the Law], 32 [Right to Legal Remedies], 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo in conjunction with Articles 6.1 (Right to a fair trial) and 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: the ECHR).

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).

6. On 31 May 2018, the Court adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (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 Constitutional Court

7. On 3 August 2018, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 16 August 2018, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Safet Hoxha.

9. On 19 September 2018, the Court notified the Applicant about the registration of the Referral and a copy of the Referral was sent to the Special Chamber of the Supreme Court.

10. On 12 March 2019, the Court requested the Special Chamber of the Supreme Court to submit the complete case file.

11. On 15 March 2019, the Special Chamber of the Supreme Court submitted the case file but Judgment No. SCEL-11-0070-C0001/C15 of the Specialized Panel of the Special Chamber of the Supreme Court, of 31 March 2015, together with the appeals against this judgment was lacking.

12. On 20 March 2019, the Court again requested the Special Chamber of the Supreme Court to submit Judgment No. SCEL-11-0070-C0001/C15 of the Specialized Panel of the Special Chamber of the Supreme Court, of 31 March 2015, together with the appeals against this judgment.

13. On 22 March 2019, the Special Chamber of the Supreme Court submitted Judgment No. SCEL-11-0070-C0001/C15 of the Specialized Panel of the Special Chamber of the Supreme Cour, of 31 March 2015, together with the appeals against this judgment.

14. On 5 April 2019, the Court requested the Applicants' representative to submit all the appeals filed against Judgment No. SCEL-11-0070-C0001/C15 of the Specialized Panel of the Special Chamber of the Supreme Court of 31 March 2015.

15. On 5 April 2019, the Court notified the Privatization Agency of Kosovo about the registration of the Referral and also requested it to submit all the appeals filed against Judgment No. SCEL-11-0070-C0001/C15 of the Specialized Panel of the Special Chamber of the Supreme Court of 31 March 2015.

16. On 12 April 2019, the Privatization Agency of Kosovo submitted documents to the Court, but noted that the documents in question did not relate to the Applicants.

17. On 23 April 2019, the Applicants' representative brought documents that were previously available to the Court.

18. On 20 June 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

19. From the documents contained in the Referral, it results that the Applicants were the employees of the SOE "Gërmia" in Prishtina.

20. On 5 July 2007, the liquidation process of the SOE "Gërmia" started. In this regard, in all written documents sent to the employees, it was noted that 5 July 2007 will be considered as the last working day in SOE "Germia".

21. On 20 May 2008, the SOE "Gërmia" was privatized.

22. On 15, 16 and 17 December 2011, the final list of employees who had acquired the right to participate in 20% of the proceeds from the privatization of the SOE "Gërmia" on 15, 16 and 17 December 2011 was published. The deadline for submission of complaints against the final list at the Special Chamber of the Supreme Court was scheduled on 7 January 2012.

23. The privatization was carried out pursuant to UNMIK Regulation No. 2003/13, Article 10.4 stipulates that workers considered elligible to participate in 20% of the profit of privatization of socially-owned enterprises must prove: (i) they are registered employees of the respective socially-owned enterprise at the time of privatization; and (ii) have been on the payroll of the Socially-owned Enterprise for not less than three (3) years.

24. The Applicants were not on the final list of employees who had realized the right to participate in 20% of the proceeds from the privatization of the SOE "Germia".

25. On an unspecified date, the Applicants filed complaints with the Specialized Panel of the Special Chamber against the final list of employees who realized the right to participate in 20% of the proceeds from the privatization of the SOE "Gërmia".

26. On 31 March 2015, the Specialized Panel of the Special Chamber (Judgment SCEL-11-0070-C0001/C0115) rejected as ungrounded the Applicants' complaints to be included in the final list of employees elligible to 20 % of profits from the privatization of the SOE "Gërmia".

    (i) For Applicant Dragomir Vlasačević (C-0044/4), the Specialized Panel of the Special Chamber found that he did not

provide any “basic evidence” to prove the employment relationship with the SOE "Gërmia" at least until 1999;

(ii) For Applicant Liljana Ivić, (C-0044/5), the Specialized Panel of the Special Chamber found that she did not prove to have worked in the SOE “Gërmia” for at least three years;

(iii) The Applicant Slobodanka Savić, (C-0044/7), the Specialized Panel of the Special Chamber found that he did not meet the requirements set out in Article 10.4 of UNMIK Regulation No. 2003/13;

(iv) For Applicant Slađana Paunović, (C-0044/8), the Specialized Panel of the Special Chamber found that from 1996 until 1998 she worked in the SOE “Gërmia” but on 8 December 1998 he established new employment relationship in another enterprise and that he does not meet the requirements set out in Article 10.4 of UNMIK Regulation No. 2003/13;

(v) For Applicant Nataša Maksimović, (C-0044/13), the Specialized Panel of the Special Chamber considered that the submitted documents referred to another person and not to the Applicant and found that she did not submit any evidence of employment relationship in the SOE “Gërmia”.

(vi) For Applicant Tihomir Bojković (C-0044/16), the Specialized Panel of the Special Chamber found that there was no evidence regarding the Applicant's general data and that he did not meet the requirements set out in Section 10.4 of the UNMIK Regulation No. 2003/13;

(vii) The Applicant Zlatica Nedeljković, (C-0044/17), the Specialized Panel of the Special Chamber considered that the submitted documents referred to another person and not to the Applicant and that she did not meet the requirements set out in Article 10.4 of UNMIK Regulation No. 2003/13;

(viii) For Applicant Milorad Djokic (C-0044/32) the Specialized Panel of the Special Chamber found that there was no evidence of termination of the employment relationship and that he did not meet the requirements set out in Article 10.4 of UNMIK Regulation No. 2003/13;

(ix) For Applicant Desanka Nikolić, who complained on behalf of her deceased husband S.N., (C-0044/68), the Specialized

Panel of the Special Chamber assessed that she/he has not filed any evidence of employment relationship with the SOE "Gërmia" and that she does not meet the requirements foreseen by Article 10.4 of UNMIK Regulation No. 2003/13;

(x) For Applicant Slavica Janković (C-0084), the Specialized Panel of the Special Chamber found that her complaint was filed out of legal time limit.

27. The Specialized Panel of the Special Chamber pursuant to Article 10.6 of the Law on the Special Chamber provided the legal advice reminding them that they may file a written complaint within twenty (21) days from the day of receipt of the written decision.

28. On 8 April 2015, the abovementioned judgment was served on the representative of all Applicants, whereas on the Applicant Slavica Janković it was submitted on 5 May 2015.

29. The Applicants allege that they filed a complaint with the Appellate Panel of the Special Chamber and attached the appeal of 27 April 2015 and confirmation of the receipt of the complaint by the Post of Kosovo, which was dated 21 April 2015.

30. On 27 July 2017, the Appellate Panel of the Special Chamber (Judgment AC-I-15-0062-A0033) rendered the decision on all the complaints that had been filed with the abovementioned judgment of the Specialized Panel of the Special Chamber. The Appellate Panel of the Special Chamber did not decide at all on the Applicants. The issue of non-decision by the Appellate Panel of the Special Chamber on the Applicants' complaint constitutes the substance of their Referral to the Court and will be elaborated in the following paragraphs.

31. On 29 August 2017, the Applicants' representative filed a complaint with the Appellate Panel of the Special Chamber against the abovementioned judgment, stating that through the post office in Prishtina on 21 April 2015 in the same envelope were put two different complaints with additional documentation. He added that because of the volume of the case and probably because of a technical error, the Applicants' complaints remained without being considered by the final Judgment of the Appellate Panel AC-I-15-0062-A0033 of 27 July 2017. For this reason, according to the Applicant's representative, it was decided on a group of five (5) complainants (the Applicants), while for eleven other complainants (the Applicants) the Special Chamber did not decide at all. As evidence, the Applicant's representative

provided: (i) Judgment AC-I-15-0062-A0033 of the Appellate Panel of Special Chamber of 27 July 2017; (ii) a copy of the receipt received from the post office No. 027570 of 21 April 2015 issued in Prishtina. Finally, the Applicants' representative requested that a decision on merits be taken and that they be included in the list of employees entitled to 20% of the privatization of the SOE "Gërmia" in Prishtina.

32. On 15 March 2018, the Appellate Panel of the Special Chamber (Decision AC-I-17-0519-0001/0003) rejected the appeal of the Applicants' representative as inadmissible. The Appellate Panel of the Special Chamber reasoned: *"... the Appellate Panel established that the challenged Judgment sent to the complainant's representative A0001 on 4 April 2015, namely 5 October 2015, while the appeals filed with the SCSC of 29 August 2017, clearly are out of legal deadline. Therefore, pursuant to Article 10 (6) of the Law on the Special Chamber, the complainants' complaints are dismissed as inadmissible, and the challenged judgment is upheld".*

Relevant legal provisions

UNMIK/REG/2003/13, 9 May 2003 on the Transformation of the Right of Use to Socially Owned Immovable Property

> *10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-Owned Enterprise at the time of privatisation and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.*
>
> *10.6 Upon application by an aggrieved individual or aggrieved individuals, a complaint regarding the list of eligible employees as determined by the Agency and the distribution of funds from the escrow account provided for in subsection 10.5 shall be subject to review by the Special Chamber, pursuant to section 4.1 (g) of Regulation 2002/13.*

Applicant's allegations

33. The Applicants allege violations of Articles 31 [Right to Fair and Impartial Trial], 24 [Equality Before the Law], 32 [Right to Legal

Remedies] and 54 [Judicial Protection of Rights] of the Constitution in relation to Article 6.1 (Right to a fair trial), Article 13 (Right to an effective remedy) and Article 1 of Protocol No. 1 (Protection of property) of the European Convention on Human Rights (hereinafter: the ECHR).

34. The Applicants essentially allege: *"...in the same envelope are put two different complaints with additional documentation [...] that because of the volume of the case and probably due to a technical error the complaint to the Applicant remained not assessed by the final Judgment of the Appellate Panel AC-I-15-0062-A0033 of 27 July 2017".*

35. The Applicants allege: "*Such a reasoning, legally, is inconsistent and contrary to the reasons for taking the judgment. Namely, the court, during the proceedings, on the occasion of rendering the final judgment AC-I-15-0062/A0033 of 27.07.2017, completely ignored the fact that the appeal in the Judgment of the first instance SCEL-11-0070-C44 of 31.03.2015, was filed in due time in accordance with the provisions of Article 10 of the Law on the Special Chamber, within 21 days from the day of receipt, and thereby denied the right of the parties guaranteed by Article 24 of the Constitution of Kosovo, which guarantees equality before the Law as well as Article 32 of the Constitution, which guarantees the right to legal remedy before the Law as well as Article 54 of the Constitution in conjunction with Article 6.1, which guarantees the right to a fair trial and Article 13 of the European Convention on Human Rights, which guarantees the right to an effective remedy, which in this case is not guaranteed, given that the complaint has not been considered".*

36. The Applicants allege: "*The authorized representative indicates to the court that in dealing with the request for finding and decision on the appeal, as the appeal filed, the court has created legal uncertainty, considering that the abovementioned decisions conclude that the complaint does not exist at all as presented sometimes and by which have violated all the principles of the Law, the Constitution and the European Convention which guarantees the protection of human rights. Also, upon receipt of this decision, the Applicants were denied the right to 20% of the privatization, given that this right belongs to the concept of property and the authorized representative is of the opinion that the Applicants have the right to payment of this part, taking into account that in the case of other Applicants after the final decision AC-I-15-0062-A0033 of 27.07.2017, the factual situation in the procedure and the facts provided are almost identical, so the*

authorized representative is of the opinion that there has been a violation of the rights of peaceful enjoyment of the property guaranteed by Protocol 1 to the European Convention on Human Rights".

Admissibility of the Referral

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

38. 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".*
>
> *[...]*

39. The Court refers to Article 47 [Individual Requests] of the Law, which provides:

[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".*

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

41. As to the fulfillment of these requirements, the Court finds that the Applicants are an authorized party, who challenge an act of a public authority, namely Decision [AC-I-17-0519-0001/0003] of 15 March 2018 of the Appellate Panel of the Special Chamber, after exhausting all legal remedies provided by law. The Applicants have also clarified the rights and freedoms they claim to have been violated in accordance with the criteria of Article 48 of the Law and have submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

42. In addition, the Court examines whether the Applicants have met the admissibility requirements set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure sets out the criteria on the basis of which the Court may consider the Referral, including the criterion that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) states that:

> *"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".*

43. In this regard, the Court notes that the Applicants allege violations of Articles 31 [Right to Fair and Impartial Trial], 24 [Equality before the Law], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 6.1 (Right to a fair trial), Article 13 (Right to an effective remedy) and Article 1 of Protocol No. 1 (Protection of property) of the ECHR.

44. The Applicants specifically allege: "*... in the same envelope are put two different complaints with additional documentation [...] that due to*

the volume of the case and certainly due to a technical error, the appeal for the Applicants has remained without being assessed by the final Judgment AC-I-15-0062-A0033 of the Appellate Panel of 27 July 2017".

45. The Court notes that the Applicants in essence allege that due to their voluminous matter, the appeal addressed to the Appellate Panel of the Special Chamber "was likely to be lost" in the case file and thus remained untried. The Applicant considers that due to non-decision on his complaint, there has been a violation of Article 32 [Right to Legal Remedies], in conjunction with Article 13 (Right to an effective remedy) of the ECHR.

46. While violations of other Articles 24 and 54 of the Constitution and Articles 6.1 and 1 of Protocol No. 1 of the ECHR justifies as a result of the violation of Article 32 [Right to Legal Remedies], in conjunction with Article 13 (Right to an effective remedy) of the ECHR. Therefore, the Court will enter the assessment of the constitutionality of the Applicant's substantive allegations.

47. The Court notes that, in the present case, the burden of proof falls on the Applicants. From the submitted documents, the Applicants failed to prove that non adjudication of their appeals by the Appellate Panel of the Special Chamber, if any, could be charged to the latter.

48. The Court notes that it has completed the examination of the full file of the Special Chamber of the Supreme Court and that in the full file of the case a complaint has not been registered, which the Applicant's representative claims to have filed against Judgment No. SCEL-11-0070-C0001/C15 of the Specialized Panel of the Special Chamber of the Supreme Court, of 31 March 2015.

49. The Court also notes that the appeal against the judgment in question was not registered either with the Privatization Agency of Kosovo, which was a responding party to the dispute, and which, according to the documentation submitted by the Applicants' representative, was also addressed to them.

50. Furthermore, the Court notes that there is a discrepancy between the allegation of the Applicants' representative and the factual situation based on the documents filed with the Referral No. KI111/18. The Applicants' representative alleges that on 21 April 2015 he filed an appeal against Judgment No. SCEL-11-0070-C0001/C15 of 31 March 2015, while from the submitted documents it results that the appeal

against the judgment in question is dated 27 April 2015. While the acknowledgment of receipt, which the Applicant submitted to the Court, was dated 21 April 2015.

51. The Court finds that the Applicant did not prove that the complaint for which the Applicants' representative claims to have been filed in the "same envelope" together with the other appeal to the Special Chamber of the Supreme Court or because of the "volume of the case" the latter is "mixed" and failed to assess the alleged appeal.

52. The Court initially notes that the case law of the ECtHR states that the fairness of a proceeding is assessed looking at the proceeding as a whole (See the ECtHR Judgment of 6 December 1988, *Barbera, Messeque and Jabardo v. Spain*, paragraph 68). Accordingly, in assessing the Applicant's allegations, the Court will also adhere to this principle (See, also cases of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38; and KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018, paragraph 31).

53. In the present case, assessing the proceedings in its entirety, the Court notes that the Specialized Panel of the Special Chamber (Judgment of 31 March 2015) found that the Applicants had not met the legal requirements to be considered as employees entitled to 20% of the proceeds from the privatization of the SOE "Germia". On one hand, the issue of a technical error allegedly led to a failure to adjudicate the appeal by the Appellate Panel of the Special Chamber (Judgment AC-I-1S-0062-A0033 27 July 2017) was not proven by the Applicants, whereas the Appellate Panel of the Special Chamber found that the Applicants' complaints are out of time, on the other hand.

54. In addition, the Court notes that the Applicants had the benefit of the conduct of the proceedings based on adversarial principle; that they were able to adduce the arguments and evidence they considered relevant to their case at the various stages of those proceedings; they were given the opportunity to challenge effectively the arguments and evidence presented by the responding party; and that all the arguments, viewed objectively, relevant for the resolution of his case were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in entirety, were fair. (See, *inter alia*, case of the Court No. KI118/17, Applicant *Sani Kervan and Others*, Resolution on Inadmissibility of 16 February 2018, paragraph 35; see also *mutatis*

mutandis, *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, para29).

55. The Court reiterates that Article 31 of the Constitution in conjunction with Article 6 of the ECHR, do not guarantee anyone a favorable outcome in the course of a judicial proceeding nor provide for the Court 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 (*Ibidem*, case No. KI118/17, see also case no. KI142/15, Applicant *Habib Makiqi,* Resolution on Inadmissibility of 1 November 2016, paragraph 43).

56. In this respect, in order to avoid misunderstandings on the part of applicants, it should be borne in mind that the "fairness" required by Article 31 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 also the case of the Court No. KI42/16 Applicant: *Valdet Sutaj*, Resolution on Inadmissibility of 7 November, para. 41 and other references therein).

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

58. The Court further notes that the Applicants are not satisfied with the outcome of the proceedings of the regular courts. However, the dissatisfaction of the Applicant with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim for the violation of the constitutional right to fair and impartial trial (see, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; and see also, case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 42).

59. As a result, the Court considers that the Applicant has not substantiated the allegations that the relevant proceedings were in any way unfair or arbitrary, and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR. (see, *mutatis mutandis, Shub v. Lithuania,* No. 17064/06, ECtHR, Decision of 30 June 2009).

60. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 47 and 48 of the Law and in accordance with Rule 39 (2) and 59 (2) of the Rules of Procedure, on 20 June 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KI18/19,Applicant: Non-Governmental Organization"Association for Culture, Education and Schooling AKEA". Constitutional review of Decision KSHA-OJQ/4-2018, of the Ministry of Public Administration, of 25 September 2018

KI18/19, Resolution on inadmissibility of 20 June 2019, published on 30 July 2019.

Keywords*: Individual referral, request for interim measure, Resolution on inadmissibility, premature referral*

The applicant was registered in Kosovo on 9 December 2004, based on the applicable UNMIK Regulation in the time of UNMIK Administration (No. 1999/22), while on 11 December 2009, the Organization made an pre-registration at the Ministry of Public Administration (MPA) of the Republic of Kosovo, in accordance with the new Law no. 03/L-134 on Freedom of Association in Non-Governmental Organizations.
The applicant freely conducted its activities till the 17 September 2014, when MPA rendered a decision on temporary suspension of their activities, along with the reasoning *„The competent security authority filed a request for suspension of activities of the NGO "Association for Culture, Education and Schooling (AKEA)"*
During the period from 2014 till 2018, the MPA rendered 4 decisions in which the suspension of activities of the applicant was prolonged.
The applicant challenged every decision of MPA on suspension of the activities by appealing to the Commission for NGO appeals review, however, all appeals of the applicant were rejected.
The applicant also initiated two procedures (administrative and court procedures) in relation to the annulment of the MPA decisions.
The first administrative procedure of 18 November 2014, in relation to the annulment of the first MPA decision of 17 September 2014, resulted in 3 Court decision in two court instances, which lead case related to Judgment [A.br.2369/2018] of the Basic Court, in the retrial to be found once again before the MPA.
The Basic Court concluded, inert alia, in its Judgment that there are deficiencies in the MPA decision and that they "*interfere with the assessment of the legality of the challenged decision, and in this direction, the court obliged the respondent authority (MPA) to act in the repeated procedure in accordance with the remarks given in the judgment and to amend the abovementioned deficiencies, and to render a fair decision based on the law".*

The applicant initiated the second Court procedure before the Basic Court on 1 November 2018, in which the applicant asked a suspension of the execution of the MPA decision of 25 September 2018, until the MPA, upon the Judgment of the Basic Court, render a new decision. This procedure is currently before the Appellate Court.

The applicant stated before the Constitutional Court that the decisions of MPA violates his rights and freedoms guaranteed with paragraph 2 of Article 24 [Equality Before the Law], Article 44 [Freedom of Association], paragraph 3 of Article 46 [Protection of property] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo, and with Article 11 (Freedom of assembly and association), Article 14 (Prohibition of discrimination), and also of Article 1 Protocol 1 (Protection of Property) of the European Convention on Human Rights.

The Applicant specifically stated that "*he did not have effective legal remedies available for him to protect his constitutional rights, and accordingly he requested the Constitutional Court to accept the referral and, in the content of the case, to assess whether the previous MPA procedures and procedures of regular courts violated his rights and freedoms guaranteed by the Constitution and ECHR".*

In order to respond to the applicants' request whether, in this specific case, he had to fulfill the required formal conditions for the exhaustion of all legal remedies, or he could be exempted from this obligation, the Court observed the case-law of the ECtHR, as well as the case-law of the Court, where the basic principles and principles of exhaustion of legal remedies are established.

In this regard, the Court took into account the "*concept of exhaustion of legal remedies",* which was established by the case-law of ECtHR, where the Court concluded that it should first of all determine whether the applicant had in the specific case available legal remedies prescribed by law and if he used such remedies, would he be able to protect his constitutional rights, as well as the rights envisaged by the ECHR, before submitting his referral to the Constitutional Court.

Subsequently, the Court dealt with the issue of the effectiveness of remedies in the specific case that the applicant had, in accordance with the law at its disposal, and in that regard, the Court recused to the ECtHR test which involves analyzing the following questions:

1. *was the remedy in the case of the applicant prescribed by the applicable law*
2. *was the legal remedy available to the applicant*
3. *was the legal remedy effective in practice*
4. *were there any obstacles and special conditions in the use of the legal remedy*

Based on the test that the Court analyzed in detail in its decision on the inadmissibility of the referral, it found that: a) that the applicant had at his disposal during the entire proceedings a legal remedy provided by law, b) it was at accessible any time, c) which, in accordance with the applicable law, envisages its efficiency and effectiveness in practice, and d) the use of the legal remedy provided for by the law is not conditioned by any particular circumstances or obstacles.

Having considered all of the foregoing, the Court found that the proceedings initiated by the Applicant are still in the decision-making stage, and concluded that the Applicant's referral submitted before the Constitutional Court is premature.

The Court specifically stated the fact that "*giving priority to judicial protection of rights before ordinary courts and other competent bodies is a very important aspect of the protection of human rights that the Constitutional Court always takes into account. In this regard, the Court specifically stated that all decisions of state bodies, including the administrative decisions of the MPA on suspending the activities of the applicant are subject to judicial control*".

At the end, the Court concluded the Applicant still had not exhausted all legal remedies prescribed in Article 113 paragraph 7 of the Constitution, Article 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure, and subsequently the request for interim measure is rejected pursuant to Article 27.1 of the Law and in accordance to Rule 57. (4) (a) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI18/19

Applicant

Non-governmental Organization "Association for Culture, Education and Schooling AKEA"

Constitutional review of Decision KSHA-OJQ/4-2018 of the Ministry of Public Administration of 25 September 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the NGO "Association for Culture, Education and Schooling AKEA" (hereinafter: „NGO AKEA") (hereinafter: the Applicant). The Applicant, under the authorization of the President of the „NGO AKEA", is represented before the Court by lawyers, Arianit Koci and Nora H. Veliu from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Decision KSHA-OJQ/4-2018, of the Ministry of Public Administration (hereinafter: the MPA), of 25 September 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly violates the rights and freedoms guaranteed by paragraph 2 of Article 24 [Equality Before the Law], Article 44 [Freedom of Association], paragraph 3 of Article 46 [Protection of Property] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 11 (Freedom of assembly and association), Article 14 (Prohibition of discrimination), as well as Article 1 of Protocol No. 1 (Protection of Property) of the European Convention on Human Rights (hereinafter: the ECHR).

4. The Applicant also requests the Court to impose interim measure, stating that *"the irreparable damage will be caused if the interim measure is not granted and that the imposition of the interim measure is in the public interest"*.

Legal basis

5. The Referral is based on Article 21.4 [General Principles] and 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 Rules 32 [Filing of Referrals and Replies] and 56 [Request for Interim Measures] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 1 February 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 6 February 2019, the President of the Court appointed Judge Selvete Gerxhaliu-Krasniqi, as Judge Rapporteur, and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzie Istrefi-Peci and Nexhmi Rexhepi.

8. On 22 February 2019, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the MPA.

9. On 12 April 2019, the Court notified the Basic Court and the Court of Appeals about the registration of the Referral.

10. On 17 April 2019, the Applicant submitted a report to the Court with the recommendations of the Ombudsperson Institution.

11. On 20 June 2019, the Review Panel considered the Report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

12. On 9 December 2004, the Applicant ("NGO AKEA") was registered based on the applicable law at the time of the UNMIK Administration (No. 1999/22) in Kosovo. Based on the statute of the "NGO AKEA", the Court notes that it is registered to carry out the following activities:

> *"Promoting and preserving the cultural values of the citizens of Kosovo;*
> *Preservation and cultivation of human values based on humanity and mutual solidarity of citizens;*
> *Raising educational level of citizens in general and young generations in particular;*
> *Strengthening tolerance and understanding among citizens;*
> *Raising awareness of citizens about negative phenomena and their restraint;*
> *Engaging young people in cultural and educational activities;*
> *Building peace, tolerance and understanding among young people;*
> *Raising the voice against the endangering of civil values;*
> *Raising voice in protection against endangering the dignity of personality, family and society;*
> *Building and raising a healthy person, family and society;*
> *Working to help NGO development and promoting mutual cooperation among NGOs registered in Kosovo;*
> *Supporting development of democracy and civil society and any other activity that is in the function of the general good."*

13. On 11 December 2009, the Applicant ("NGO AKEA") completed again the registration with the Ministry of Public Administration of the Republic of Kosovo, pursuant to the new Law No. 03/L-134 on Freedom of Association in Non-Governmental Organizations, of 25 March 2009.

14. Based on the case file, it follows that the Applicant "NGO AKEA" performed its activities until 17 September 2014.

First decision of the MPA regarding the suspension of the activity of the Applicant

15. On 17 September 2014, the MPA rendered its first decision (Pos. on No. 06/207/2014), which suspends the activity of the "NGO AKEA".

16. In the reasoning of its decision, the MPA, *inter alia*, stated:

> *„The competent authority for security filed a request for suspension of the activities of the NGO "Association for Culture, Education and Schooling (AKEA)" with reg. number 5110087 - 1, registered on 09.12.2004, request under protocol no. 300 of 15.09.2014.*
>
> *Request for suspension of activities of the NGO "Association for Culture, Education and Schooling - (AKEA)" under registration number 511087 - 1 registered on 09.12.2004 is based on the information of the relevant security institutions that there is a reasonable doubt that the activity of the NGO "Association for Culture Education and Schooling (AKEA) does not coincide with the legal and constitutional order of the Republic of Kosovo and with international law, consequently, also violated the legal norms of the statute on the basis of which it is registered.*
>
> *The decision to suspend the activity of this organization is valid until another decision is rendered".*

17. The Court notes that the Applicant, in order to annul the first decision on suspension of the performance of the most important activities of the MPA (Pos. No. 06/207/2014), initiated several proceedings before the competent institution of the MPA and the regular courts.

18. In this regard, for the purpose of easier chronological following of factual situation, the Court will further present the facts in relation to all the actions separately, which the Applicant has taken to annul the MPA decisions on suspension of the activity.

Proceedings initiated by the Applicant before the MPA commission for reviewing the NGO complaints regarding the annulment of the first decision of MPA (Pos. No. 06/207/2014) of 17 September 2014

19. On 24 September 2014, the Applicant filed a complaint with the Commission for reviewing the NGO complaints, against the decision (Pos. No. 06/207/2014), of 17 September 2014.

20. On 23 October 2014, Commission for reviewing the NGO complaints rendered the decision [No. 2/14], which rejected the Applicant's complaint as ungrounded. The reasoning of the decision, *inter alia*, reads:

> *„By Decision, Pos. No. 06/270/2014 of the Department for NGOs was approved the request of the competent security authority No. 300 of 15.09.2014 on suspension of activities of the NGO "Association for Culture, Education and Schooling - AKEA."*
>
> *After consideration of the complaint and other case files, the Commission for reviewing the NGO complaints ... rendered the decision on suspension of activities of the NGO "Association for Culture, Education and Schooling – AKEA."*

First court proceedings initiated by the Applicant regarding the annulment of the first decision of the MPA (Pos. No. 06/207/2014) of 17 September 2014

21. On 18 November 2014, the Applicant filed a claim with the Basic Court against the MPA Decision (Pos. No. 06/270/2014), of 17 October 2014, and decision of the Commission for Reviewing the NGO Complaints (No. 02/2014) of 23 October 2014.

Second decision of the MPA regarding the suspension of the Applicant's activity

22. On 23 October 2015, the MPA rendered second decision (Pos. No. 06/342/2015) which reads: *"deciding upon the request of the competent security authority for NGOs, a decision extending the suspension of the work of the "NGO AKEA" is rendered until another decision is made."*

Proceedings initiated by the Applicant before the MPA commission for reviewing NGO complaints regarding the annulment of the second decision of the MPA (Pos. No. 06/342/2015) of 23 October 2015

23. On 24 November 2015, the Applicant filed a complaint with the Commission for reviewing the NGO complaints, against the second decision of the MPA [Pos. No. 06/342/2015].

24. On 16 December 2015, the MPA Commission for reviewing the NGO complaints rendered the decision (No. KSHA-OJQ/5 -2015), rejecting, as ungrounded, the Applicant's complaint.

Third decision of the MPA in connection with the suspension of the Applicant's activity

25. On 8 November 2016, the MPA renderd the third decision [Pos. No. 06/470/2015], which extended the suspension of the Applicant's activity. The reasoning of the decision of the MPA, *inter alia*, states:

> *„Request for suspension of activities of the NGO "Association for Culture Education and Schooling (AKEA), registration no. 5110087 - 1 registered on 09.12.2004, is based on the information of the competent security institutions that there is a reasonable suspicion that the activity of the NGO "Association for Culture Education and Schooling" does not coincide with the legal and constitutional order of the Republic of Kosovo and the international law, and consequently, violated the legal norms of the statute on the basis of which is registered".*

Proceedings initiated by the commission for reviewing NGO complaints regarding the annulment of the third decision of the MPA (Pos. No. 06/470/2015), of 8 November 2016

26. On 24 November 2016, the Applicant filed an appeal with the commission for reviewing NGO complaints against the decision of the MPA [Pos. No. 06/470/2015], which states *„Nowhere in the law or in the Constitution, the right to suspend the activities of NGOs is emphasized, but only its prohibition by the competent court (Article 44.3 of the Constitution and Article 20, paragraph 1.4 LFANO). There is no mention of the competence of the state authority to suspend organizational activities, moreover, it violates the basic human right guaranteed by Article 44.1 participation in organizational activities. Accordingly, the decisions are based on unconstitutional acts and they are unconstitutional".*

27. Based on the factual situation, the Court notes that the judicial proceedings initiated by the Applicant regarding the annulment of the second and third decisions of the MPA are finalized by the decisions of the MPA Commission for reviewing the NGO complaints.

Decisions of the regular courts upon the Applicant's first statement of claim of 18 November 2014

28. The Court will proceed in the report, with the factual situation regarding the court proceedings initiated by the Applicant before the regular courts concerning the annulment of the first decision of the MPA of 17 September 2014.

29. On 9 November 2017, the Basic Court rendered Judgment [A. No. 2345/2014] which approved the Applicant's statement of claim and annulled the MPA decision [No. 0/2014] of 23 October 2014, and remanded the case for reconsideration to the MPA. The reasoning of the judgment states:

> *„The challenged decision is legally unclear and contradictory with itself and with its reasoning. In its reasoning, the reasons for the decisive facts that led to the adoption of the challenged decision were not given. In the reasoning of the decision, a general and abstract formulation was provided indicating that the activity of the NGO "AKEA" was suspended with the justification that on the basis of the data of the case, it was noted that the organization AKEA performed activities contrary to the legal order and international law. However, the second instance body did not specify what activities were performed contrary to the legal and constitutional order, and whether it considered and assessed all alleged violations during the course of the activity and whether it was conducted in accordance with the legal provisions, assessing the evidence in which it has established decisive facts".*

30. On 18 January 2018, the Applicant filed appeal with the Court of Appeals against the judgment of the Basic Court of 9 November 2017, stating that the Basic Court did not render the decision on merits, did not enter the analysis of Article 18 of the Administrative Instruction on whether the institute of suspension of NGOs exists. The first instance court was to declare the challenged decisions void-absolutely invalid, unlawful and not based on law, because Law on NGOs 04/L-57 on the freedom of association in non-governmental organizations recognizes only the establishment and closure of a non-governmental organization, and not the suspension.

Fourth decision of the MPA regarding the suspension of the Applicant's activities

31. On 10 August 2018, the MPA rendered the fourth decision [Pos. No. 06-108/2018], which extended the suspension of the Applicant's activity. The reasoning of the decision reads:

„According to the competent security authority, on 8 August, 2018, on the suspension of the activities of the NGO "Association for Culture, Education and Schooling – AKEA" under the reg. no. 5110087 - 1 registered on 19.12.2004, the NGO/MPA Department decided to suspend the activity of the abovementioned organization. The request is based on the information of the competent institutions that this NGO is carrying out activities that are contrary to its goal and field of operation and that it is in conflict with the interests of the security of the Republic of Kosovo".

The continuation of court proceedings before the Court of Appeals in relation to the first Applicant's statement of claim of 18 November 2014

32. On 13 September 2018, the Court of Appeals rendered judgment [AA. No. 76/18], by which the Applicant's appeal was approved as grounded, and annulled the judgment of the Basic Court of 9 November 2017, while the case was remanded for retrial. The judgment of the Court of Appeals states:

„The enacting clause of the judgment must be clear, comprehensible and complete because it is part of the judgment from which it should be clearly seen how the competent court decided on the issue that was the subject of the process. It is understood from the enacting clause of the challenged judgment that the statement of claim is approved, but it cannot be understood why the first instance court wrote the authorized representatives of the claimant in the enacting clause of the judgment, complained of, because it is clearly understandable that the claimant in the present case the NGO "Association for Culture, Education and Schooling (AKEA) with its seat in Prishtina, whereas the enacting clause of the judgment implies that the court put as claimants also the claimant's representative. Thus, for the time being, this court cannot accept as fair the statement that is presented in the enacting clause of the judgment, complained of, since it has flaws due to which it cannot be implemented and is legally vague and unstable."

Proceedings initiated by the Applicant before the MPA commission for reviewing NGO complaints regarding the annulment of the fourth decision of the MPA (Pos. No. 06-108/2018) of 10 August 2018

33. On 18 September 2018, the Applicant filed an appeal with the Commission for reviewing the NGO complaints, against the MPA decision, of 10 August 2018.

34. On 19 September 2018, the Applicant submitted to the Ombudsperson Institution "*Request for opening the case of NGO „AKEA"* against the Ministry of Public Administration"

35. On 25 September 2018, the Commission for reviewing the NGO complaints, rendered the decision [No. 4-2018] which rejected the Applicant's appeal as unfounded. The reasoning of the decision reads:

> *"After presentation of evidence in accordance with Article 23 of the Law No. 04/L-57 on Freedom of Association in Non-Governmental Organizations and Article 1 of Regulation No. 02/2012 of MPA on establishment and functioning of the Commission for* reviewing the NGO complaints*, the Commission decided to reject the appeal*".

Second court proceedings initiated by the Applicant for annulment of the fourth decision of the MPA (Pos. No. 06-108/2018), of 10 August 2018

36. On 1 November 2018, the Applicant filed a request with the Basic Court to postpone the execution of the decision of the MPA (Pos. No. 06-108/2018), of 10 August 2018, until the Basic Court renders the judgment on merits according the instructions given by the Court of Appeals given in the judgment of 13 September 2018.

Continuation of the court proceedings in relation to the Applicant's first statement of claim of 18 November 2014

37. On 9 December 2018, the Basic Court, acting in accordance with the judgment of the Court of Appeals of 13 September 2018, rendered Judgment [A. No. 2369/2018], which approved the claim of the Applicant, annulled Decision [No. 02/2014] of 23 October 2014, and remanded the case for retrial to the MPA. The judgment of the Basic Court, among others, states:

> *"In retrial, taking as basis the data from the Court of Appeals, the Court rectified the enacting clause of the court decision in order to make the decision clear and enforceable, and in the reasoning of this decision the court gave its findings regarding the allegations of the litigants.*

The court, based on the reasoning of the challenged decision, finds that the respondent did not consider the claimant's allegations that all the activities of the claimant were in compliance with the conditions of registration and in accordance with the legal norms of its status. In its decision, the respondent did not specify what activities the claimant did in contravention of the constitutional and legal order. The Court finds that the decision of the respondent contains essential violations of the provisions of Article 84, paragraph 2 of the Law 02/L-028, on the Administrative Procedure which provides that the administrative act should, inter alia, contain a summary of factual findings based on evidence submitted during the administrative proceeding or facts provided by the administration, determining the legal basis on which the act is based.

The abovementioned violations are such as to hinder the assessment of the legality of the challenged decision, and in that regard, the court obliges the respondent authority to act in the repeated proceedings in accordance with the remarks given in this judgment and subsequently rectify the abovementioned flaws, to render a fair decision based on the law".

Decisions of the regular courts regarding the second court proceedings initiated by the Applicant on 1 November 2018

38. On 10 December 2018, the Basic Court rendered the Decision [A. No. 2859/18], upon a request made by the applicant on 1 November 2018. The decision of the Basic Court reads*: "a supplement to the claim/proposal for postponing the execution of the decision is returned to the Applicant, for accurately indicating what decision is requested to be annulled, because in this proceeding the court considers the legality of only the final decision by the administrative procedure".*

39. On 19 December 2018, the Applicant submitted specified statement of claim-proposal to the basic Court, in which it requested the delay in the enforcement of the decision of the Commission for NGO complaints [No. 4-2018], of 25 September 2018.

40. On 4 January 2019, the Basic Court rendered decision [A. No. 2859/18], rejecting the Applicant's request for postponement of the execution of the decision of the Commission for the NGO complaints [No. 4-2018], of 25 September, 2018. The reasoning of the decision of the Basic Court reads:

"After considering the claimant's proposal to postpone the execution of the challenged decision, the Court finds that it did not present any fact based on any evidence capable of making its allegations credible, on how the execution of the challenged decision by the claim, is detrimental to it, the damage is difficult to repair and that the delay is not contrary to the public interest, this legal requirement should be proved by the claimant, so that the court can then decide on the postponement of the execution of the decision".

41. On 30 January 2019, the Applicant filed an appeal with the Court of Appeals against the decision of the Basic Court [A. No. 2859/18], of 4 January 2019, in which, *inter alia* states "*that the execution of the challenged decision of the Commission for the NGO Complaints no. 4-2018 of 25 September 2018, will cause to the organization the irreparable damage, because, for the past 4 years, it was forbidden to operate. Similarly, TEB Bank, on the basis of the MIA request, requested the Organization to withdraw all funds from this bank account with the threat of closing the account, without having to wait for the final decision of the competent court".*

Proceedings before the non-judicial institution initiated by the Applicant on 1 February 2019

42. On 1 February 2019, the Applicant filed a request to the Ombudsperson Institution for the assessment of the constitutionality of the MPA decision of 25 September 2018, as well as of Article 18 of the Administrative Instruction GRK No. 02/2014 on the registration and functioning of non-governmental organizations, citing "*that in the period from 2014 onwards, the Ministry of Public Administration by its controversial decisions violated the constitutional rights and freedoms specified in the request, inter alia, the freedom of association under Article 44 of the Constitution, equality before the law under Article 24 (2) of the Constitution and protection of property referred to in Article 46 (3) of the Constitution".*

43. On 1 April 2019, the Ombudsperson issued a Report with recommendations concerning the Applicant's appeal. In the report, the Ombudsperson found *"that to the entity which activity is suspended is violated the right to fair and impartial trial because of the delay of the case, established by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights (ECHR), the right to an effective remedy foreseen by Article 54 of the Constitution of the Republic Kosovo, as well as Article 13 of the ECHR".*

44. In addition, the Ombudsperson in his Report with recommendations, recommended the Government of the Republic of Kosovo *"To modify Administrative Instruction No. 02/2014 on Registration and Functioning of Non-governmental Organizations, adopted at the 195th session of the Government of Kosovo, by Decision No. 01/195 of 3.9.2014, namely deletion of Article 18"*.

Applicant's allegations

45. The Applicant alleges that the arbitrary, unlawful and unconstitutional decisions of the MPA administrative body of 2014 continue, and more specifically the MPA fourth decision [MPA Ref. KSHA-OJQ/4-2018] of 25 September 2018 violate the freedom of association under Article 44 of the Constitution in conjunction with Article 11 of the ECHR.

46. The Applicant further alleges that the organization in the period from 2014 does not perform any of its activities because of the abovementioned decisions of the administrative body of the MPA, the activities of the organization are temporarily suspended for a period of one (1) year, on the grounds that they, according the request the competent security authority, these activities are contrary to the aim and scope of the organization's work and that, as such, they are contrary to the security interests of the Republic of Kosovo, by which Administrative Authority of the MPA violated Article 55 paragraph 1 of the Constitution, according to which, the rights and freedoms guaranteed by the Constitution can only be limited by law.

47. The Court notes that the Applicant, in order to justify his allegations of alleged violation of Article 44 and 55 of the Constitution and Article 11 of the ECHR, listed a number of decisions of the European Court of Human Rights (hereinafter: the ECtHR), including the judgment of the ECtHR *United Communist Party and Others v. Turkey*, application 133/1996/752/951, decision of 30 January 1998, and *Zhechev v. Bulgaria* application no. 57045/00, decision of 21 June 2007.

48. Furthermore, the Applicant alleges that the arbitrary, unlawful and unconstitutional decisions of the administrative body of the MPA of 2014 and onwards, and in particular the fourth MPA decision (MPA decision Ref. KSHA-OJQ/4-2018) of 25 September 2018 violate Article 24 paragraph 2 of the Constitution in conjunction with Article 14 of the ECHR.

49. Similarly, the Applicant claims that the challenged decision violates the right to peaceful enjoyment of property, guaranteed by Article 46.3

of the Constitution in conjunction with Article 1 of the Protocol 1. of the ECHR.

50. The Applicant in this section also refers to a number of ECtHR judgments, in order to build its allegations of violation of Article 24, paragraph 2 of the Constitution in conjunction with Article 14 of the ECHR, as well as violation of Article 46.3 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR.

51. The Applicant further states that he exhausted all legal remedies available in connection with the first MPA decision of 23 October 2014, which for the first time suspended the activity of the organization. However, on 20 November 2014, on the date when it filed the claim against the MPA, until 1 February 2019, the Basic Court in Prishtina has not yet rendered the judgment on merits regarding the legality of the MPA decision of 2014.

52. In this regard, the Applicant requests the Constitutional Court to consider the matter specified in this referral similar to its case-law in relation to cases: KI06/10; KI 11/09; KI 99/14 and KI 100/14 and in accordance with Article 54 of the Constitution, Article 13 of the ECHR and Article 2 of Protocol 4 to the ECHR.

Applicant's allegations regarding the request for imposition of interim measure

53. The Applicant requests the Court to impose an interim measure because it considers that "*it showed a "prima facie" case on the admissibility of the referral*".

54. The Applicant considers it would suffer unrecoverable damage if the interim measure is not granted, in this regard, the Applicant states:

> *„In the circumstances of the present case, the administrative body of the MPA by challenged decisions on the suspension of the activity of the organization in the period from 2014 until the present day, although the decisions were of a temporary nature, with each decision having the legal effect of the suspension of the activity of the organization in the period of only one (1) year, since such decisions have been constantly renewed for five (5) years in a row, they have produced a long-term and continuous effect that has led to the complete freezing of the activities of the organization, which is practically the same as its factual "extinguishing".*

55. The Applicant also considers that the interim measure is in the public interest, and in this context, the Applicant claims: *„...that the imposition of the interim measure in relation to the further application of Article 18 of the Administrative Instruction GRK No. 02/2014 on registration and functioning of non-governmental organizations and consequent imposition of interim measure in relation to execution of the decision of the Ministry of Public Administration Ref. KSHA-OJQ/4-2018 of 25.09.2018 is in the public interest of all civil society organizations, and not only in the personal interest of the Applicant".*

56. The Court, having in mind all the allegations of the Applicant, finds that it in fact requires the Court to find a violation of its rights and freedoms guaranteed by Article 24 of the Constitution and Article 14 of the ECHR, since it does not have equal treatment by law, a violation of Article 44 of the Constitution and Article 11 of the ECHR, because the MPA decisions suspended its right to perform its activities, violation of the right to legal remedy under Article 13 of the ECHR, as the legal remedies it used in the proceedings led it to the decision on suspension, thereby violating the rights to property guaranteed by Article 46 of the Constitution of Article 1 of Protocol 1 to the ECHR.

Admissibility of the Referral

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

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

Article 21 [General Principles]

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

Article 113 [Jurisdiction and Authorized Parties]

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

(...)

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

59. At the outset, the Court notes that in accordance with Article 21.4 of the Constitution, the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms applicable both to individuals and to legal persons (case of the Constitutional Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph).

60. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law and the Rules of Procedure. In this regard, the Court refers to Article 48 [Accuracy of the Referral], which stipulates:

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."

61. As regards the fulfillment of this requirement, the Court notes that the Applicant has clearly emphasized the rights guaranteed by the Constitution and the ECHR, which were allegedly violated, as well as the specific act of the public authority which it challenges in accordance with Article 48 of the Law.

62. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (1) (b) of the Rules of Procedure, which stipulates:

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

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted."

63. Having regard to the Applicant's allegations, the chronology of the activities it carried out, as well as the very substance of the referral, the Court found that it submitted the Referral to the Constitutional Court despite the fact that both proceedings (administrative and judicial), which it initiated in order to protect its constitutional rights and

freedoms, it is still at the decision-making stage before the competent institutions and courts.

64. The Court also notes that the Applicant justified its action by the allegation *„that there is no effective legal remedies available to it to protect its constitutional rights“,* and accordingly requests the Constitutional Court to approve the referral and to enter the substance of the case, and to assess whether the previous proceedings of the MPA and of the regular courts have violated its rights and freedoms guaranteed by paragraph 2 of Article 24 [Equality Before the Law], Article 44 [Freedom of Association], paragraph 3 of Article 46 [Protection of Property] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, as well as Article 11 (Freedom of assembly and association), Article 14 (Prohibition of discrimination), as well as Article 1 of Protocol No. 1 (Protection of property) of the ECHR.

65. Taking into account the abovementioned constitutional provisions, the provisions of the Law and the rules of the Rules of Procedure, the Court should first of all examine whether the present Referral of the Applicant fulfills the admissibility requirements for the exhaustion of legal remedies.

66. In this regard, in order to answer the question whether the Applicant in the present case must meet the required formal requirements for the exhaustion of all legal remedies, or may be exempted from this obligation, the Court should consider the case law of the ECtHR and its case law, which established the basic principles and principles of exhaustion of legal remedies.

Concept of exhaustion of legal remedies

67. The Court notes that the concept of exhaustion or the obligation to exhaust legal remedies derives from and is based on the case law of the ECtHR, according to which “the purpose of the exhaustion of legal remedies is to provide regular courts with the opportunity to prevent or correct alleged violations of the Constitution. In the context of the ECtHR, this obligation is based on the assumption that an internal legal order provides an effective legal remedy for the protection of constitutional rights and rights under the ECHR, this is an important aspect of the subsidiary nature of the ECHR (see ECtHR judgment *Burden v. the United Kingdom*, Application No. 13378/05, of 29 April 2008, paragraph 42, onwards).

68. The Court also recalls that, in its previous case law, "*except for certain grounded and justified exceptions*", it adhered to those principles, and noted that the principle of subsidiarity requires the Applicants to exhaust all legal remedies, in the present case, all procedural possibilities in the regular proceedings in order to prevent violation of constitutional rights or to correct violations of constitutional rights and freedoms, if any (see, Resolution on Inadmissibility in case KI139/12 *Besnik Asllani*, constitutional review of the Judgment of the Supreme Court, paragraph 45, Resolution on Inadmissibility KI24/16, Applicant *Avdi Haziri constitutional review of the decision of the Supreme Court of Kosovo*).

69. The Court also adds that the case law of the ECtHR has also set exceptions to the application of the principle when an individual may be exempted from the obligation to exhaust regular legal remedies. In case *Akdivar v. Turkey* (application 21893/93, decision of 16 September 1996, para. 65-66), the ECtHR found that Applicants must exhaust only domestic legal remedies which are available, sufficient and effective. Likewise, the ECtHR concluded in Judgment *Van Ostervijk v. Belgium* that, in accordance with the general principles of international law, there may be special circumstances in which the Applicant is exempted from the obligation to exhaust previously all domestic legal remedies. (see judgment of the ECtHR *Van Ostervijk v. Belgium* of 6 November 1980, Series A No. 40, pp. 18 and 19, paragraphs 36 to 40).

70. The Court recalls that in its case law, the ECtHR pointed out that it falls to the Applicant to prove and show that the domestic legal remedy available to him was in fact exhausted or that the legal remedy was for some reasons inadequate and ineffective, or in particular, that there existed special circumstances why the Applicant in this case was not obliged to fulfill that requirement (see ECtHR judgment *Akdivar v. Turkey*, pp. 1211, para. 68).

71. The Court also wishes to point out that it had also in its long-standing practice the requests in which it concluded that the applicants in the "*given circumstances did everything*" regarding the exhaustion of legal remedies, and that the obligation of the exhaustion was fulfilled or the cases in which the applicants were "absolved" of the obligation of exhaustion of legal remedies, taking into account the specific nature of the case as well as the substance of the applicants' referral (see KI 56/09, *Fadil Hoxha and 59 others* vs. *the Municipal Assembly of Prizren*, judgment in case No. KI06/10 *Valon Bislimi v. the Ministry of Internal Affairs*, Kosovo Judicial Council and the Ministry of

Justice, Judgments in cases KI99/14 and KI100/14, Applicants *Shyqyri Syla and Laura Pula*).

72. In the light of the above, it follows that, first of all, the Court should determine whether the Applicant had, in the present case, available legal remedies prescribed by law, and through its use, it could protect its constitutional rights as required by the ECHR, before submitting his referral to the Constitutional Court.

The concept of the effectiveness of remedies in a present case

73. The Court notes from the Applicant's allegations that the Applicant considers that there is no purpose to pursue further judicial proceedings since they have not so far resulted in such a way as to enable him to find out the reasons for suspension of its activities, namely to obtain decisions on the merits of the claim.

74. In this regard, the Court further notes that the Applicant considers that there are no effective legal remedies available to it in order to protect its constitutional rights, which can be concluded also on the basis of the decisions of the regular courts. Accordingly, it requests the Constitutional Court to approve the referral and enter the substance of the case, and to assess whether the previous proceedings of the MPA and regular courts violated its rights and freedoms guaranteed by paragraph 2 of Article 24 [Equality Before the Law], Article 44 [Freedom of Association], paragraph 3 of Article 46 [Protection of Property] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, and Article 11 (Freedom of assembly and association), Article 14 (Prohibition of discrimination), as well as Article 1 of Protocol No. 1 (Protection of Property) of the ECHR.

75. In this regard, the Court recalls Article 32 [Right to Legal Remedies] of the Constitution, which in the relevant part reads:

> *"Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law."*

76. The Court also recalls Article 13 (Right to an effective remedy) of the ECHR, which reads in the relevant part:

> *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a*

national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

77. Having regard to the Applicant's allegations, the Court notes that the Applicant bases the rule of exhaustion of legal remedies on the assumption that there are no effective legal remedies available in relation to the alleged violation of its constitutional rights as well as the rights under the ECHR in further proceedings before the regular courts.

78. The Court recalls that, as far as the issue of legal remedies is concerned, the ECtHR has particularly underlined the fact that it falls to the state to provide legal remedies and to ensure all the necessary conditions for their application (see ECtHR Judgment *Vernillo v. France* of 20 February 1991, Series A, No. 198, pp. 11 and 12, para. 27).

79. In this regard, the Court, taking into account the case-law of the ECtHR, finds that by dealing with the issue of exhaustion of legal remedies established that, **a)** the existence of legal remedies must be prescribed by law, and they must be sufficiently certain, not only in theory, but also in practice, **b)** when determining whether a particular legal remedy meets the availability and effectiveness criteria, the specific circumstances of each individual case must also be taken into account; **c)** the Court must in real terms take into account not only the formal legal remedies available at the internal legal system, but must take into account the general legal and political context in which these legal remedies function, **d)** whether there existed some obstacles to the use of the legal remedy (see, the ECtHR Judgment *Akdivar and Others v. Turkey*, para. 68 -69, as well as the ECtHR Judgment *Khashiyev and Akayeva v. Russia*, para. 116-17).

80. In that regard, the Court, having regard to the principles and case law of the ECtHR, should in particular establish a) whether the remedy in the Applicant's case was prescribed by the applicable law, b) whether the legal remedy was available to the Applicant, c) whether this legal remedy was effective in practice, and d) whether there existed some obstacles and special circumstances for its use.

a) whether legal remedy in the Applicant's case was prescribed by the applicable law

81. As regards the first principle, the Court recalls that the Applicant is only required to exhaust all internal legal remedies prescribed by law, which are theoretically and practically available to them at the relevant time, which means that these legal remedies are available and capable

of providing legal redress in relation to the lawsuit and that they provide reasonable prospects for success (see ECtHR Judgment *Sejdović v. Italy*, Application No. 56581/00, of 1 March 2006, para. 46).

82. The Court notes that in the previous court proceedings the Applicant used the legal remedies available to him in accordance with the applicable law, which enabled him to obtain three decisions in two court instances that were in his favor.

83. Likewise, the Court notes that on 9 December 2018, the Basic Court rendered a new judgment in the repeated proceedings, by which, if the Applicant was not satisfied, he can use again the legal remedy before the Court of Appeals in the form of an appeal.

84. In this regard, the Court recalls Article 195 (Decisions of the second instance court over complaint) of Law No. 03/L-006 on Contested Procedure, which in the relevant part reads:

Article 195

"1. The complaint court in the college session or based on the case evaluation done directly in front of it can:
a) disregard the complaint that arrives after the deadline, it's incomplete or illega;
b) an disregard the decision and return the case for re-trial in the court of the first instance;;
d) reject the complaint as an un-based one and verify the decision reached;
e) change the decision of the first instance.
The court of the second instance is not linked to the proposal submitted in the complaint."

85. Moreover, the Court notes that Article 211 (Revision) of the same law reads in the relevant part:

"211.1 Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought.
[...]
211.4 Excluding, when dealt with the charge claim from the paragraph 2 and 3 of this article, the revision is always permitted."

86. Therefore, according to the applicable law, the Court finds that in the case of the Applicant, there are not only one but two legal remedies prescribed by the applicable law, and that both are both theoretically and practically available at the relevant time, by which he can challenge both court decisions and the MPA decisions. The Court also notes that the use of these legal remedies depends exclusively on the Applicant's will.

b) whether the legal remedy was available to the Applicant

87. As regards the principle of availability of a legal remedy, the Court, taking into account the Applicant's action, notes that in the previous part of the proceedings, both before the competent authorities of the MPA and the regular courts, the Applicant used the legal remedies provided by law.

88. In addition, the Court from the actions taken by the Applicant noted that, in fact, and in further proceedings, he used all available legal remedies prescribed by law, which leads to the conclusion that they were at all times available to it.

89. In the same way, the Court does not find that, in the present case, there were, or, in the meantime, arose some specific circumstances which in some way had influence on the further availability of the legal remedies that the Applicant could use in further proceedings.

c) whether the legal remedy was effective in practice

90. The Court recalls that the Applicant specifically cites the fact that the legal remedies prescribed by law are not effective in practice. However, the Court also notes that, in addition to these appealing allegations, he continues to use them, by which he puts into question its allegations of their inefficiency in practice.

91. However, and beside that, the Court analyzing the effectiveness of legal remedies in practice, notes that this issue was an issue with two time intervals, and they are the effectiveness of legal remedies that the Applicant has already used before the MPA and the regular courts, and the effectiveness of legal remedies that the Applicant may use in further court proceedings challenging the decisions of MPA or the regular courts.

92. As regards the effectiveness of legal remedies that the Applicant used in the present part of the proceedings, the Court finds that, by their very essence and results in the present part of the proceedings, they

were effective, perhaps not in a way and to the extent the Applicant was expecting, because the effectiveness of legal remedy is not determined on the basis of whether the Applicant succeeded in achieving his goals by his use in the way he wanted, but whether he had the possibility that in the legal remedy he used he could present his arguments to be considered by the competent authorities (see ECtHR judgment *Soering v. the United Kingdom* Series A No. 161, of 7 July 1989, paragraph 120).

93. Furthermore, as regards the question of the effectiveness of legal remedies which the Applicant can use in further proceedings, the Court *can only recall* that from the time when the Applicant used legal remedies for the last time to date, there has been no change in the general legal and social circumstances, which would further influence the effectiveness of legal remedies prescribed by law.

94. The effectiveness of the Applicants' legal remedies so far only justified the "principle of effectiveness in practice", as it can be seen based on the results of the previous court proceedings, thus removing any suspicion that the legal remedies provided by law are ineffective in further judicial proceedings.

95. Moreover, taking into account the legal guidelines of Article 195 of the Law on Contested Procedure, the Court finds that, upon the appeal, the Court of Appeals may also:

b) "to annul the challenged judgment and to remand the matter for retrial to the first-instance court; and it already did this once, and the Court of Appeals can also:

c) to modify the first instance judgment".

d) whether there existed some obstacles and special circumstances in the use of legal remedy

96. The Court, making connection between the proceedings and the actions taken by the Applicant in the previous part of the proceedings, with the legal remedies he used, finds that the Applicant took all actions by his will, and not the will of the third party on which proceedings (actions or inactions) it would depend the effectiveness of legal remedy itself, and that such a situation would cause direct obstacles in the procedure of using these legal remedies.

97. Moreover, the Court cannot fail to notice that the law which is applicable and which provides for the legal remedies that the

Applicant may use in the further proceedings does not establish or require any special requirements, which it must fulfill as a precondition to use them, except those requirements that determine the time limits for their use.

98. Based on the foregoing, the Court is of the opinion that, in the Applicant's case, there have been no judicial barriers in the present part of the proceedings, and there are no obstacles even in the further court proceedings that would influence or limit the use of the legal remedy prescribed by law to the detriment of the Applicant.

Procedure before a non-judicial institution

99. The Court notes that on 19 September 2018, the Applicant filed an appeal with the Ombudsperson Institution and that the Ombudsperson, acting upon the request, conducted an investigation into the Applicant's allegations, and that on 1 April 2019, it delivered a report with recommendations in which he found *"the right to fair and impartial trial is violated to the entity, which activity has been suspended, due to the delay in the resolution of the case, as established by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights (ECHR), the right to an effective remedy established by Article 54 of the Constitution Republic of Kosovo, as well as Article 13 of the ECHR."*

100. As regards the recommendations, the Ombudsperson recommended in its report to the Government of the Republic of Kosovo *"To amend Administrative Instruction No. 02/2014 on Registration and Functioning of Non-governmental organizations, adopted at the 195th session of the Government of Kosovo, by Decision No. 01/195 of 3.9.2014, or delete Article 18. "*

101. With regard to the Ombudsperson's report with recommendations, the Court emphasizes in particular the fact that the ECtHR in its practice pointed out that the appeal to the Ombudsperson is not in principle a legal remedy to be exhausted under Article 35 of the ECHR (see the ECtHR Judgment *Egmez v. Cyprus*, application para.21 of December 2001, paragraphs 66-73. see, *mutatis mutandis, Montion v. France*, application No. 11192/84, Commission decision of 14 May 1987, Decisions and Reports (DR) 52, para. 227), due to the fact that the Ombudsperson does not have the authority to order any measures or to impose any sanctions except for a recommendation to the competent institutions.

Findings of the Court

102. The Court noted that, based on the analysis of the factual situation, it follows that the Applicant is leading two proceedings, one of which is an administrative and the other court proceedings.

103. ***Administrative procedure,*** which is currently before the MPA, stems from the first court proceedings initiated by the Applicant regarding the first MPA decision (Pos. No. 06/207/2014) of 17 September 2014. The course of the first court proceedings resulted in 3 court decisions in two court instances, which led to the situation that the case upon the judgment [A. No. 2369/2018], of the Basic Court in the repeated proceedings is currently again before the MPA. The Basic Court in the judgment [A. No. 2369/2018] held *"that the respondent MPA did not consider at all the appealing allegations of the claimant and that all the activities of the claimant were in accordance with the requirements of registration and in accordance with the legal norms of its status. In its decision, the respondent did not specify what activities the claimant performed in contravention of the constitutional and legal order. The Court notes that the respondent's decision contains essential violations of the provisions of Article 84, paragraph 2 of the Law 02/L-028, on the Administrative Procedure, which provide that the administrative act should, inter alia, contain a summary of factual findings based on evidence submitted during administrative proceedings or facts provided by the administration, determining the legal basis on which the act is based".*

104. Moreover, the Basic Court concluded that precisely these flaws in the MPA decisions "*interfere with the assessment of the legality of the challenged decision and, in that direction, the court obliges the responding authority to act in the repeated proceedings in accordance with the remarks given in this judgment and subsequently rectify the abovementioned flaws, to render fair decision based on the law".*

105. ***Court proceedings***, which the Applicant initiated before the Basic Court on 1 November 2018, with a request to stop the execution of the MPA decision of 25 September 2018, is currently in the Court of Appeals upon the appeal filed by the Applicant against the decision of the Basic Court of 4 January 2019.

106. The Court, having regard to its findings, concludes that both proceedings, (administrative and court), initiated by the Applicant, are interconnected and that they are still in the decision-making

process. However, the Court also notes that this is about separate proceedings that have their own specificity and complexity.

107. Based on the above, the Court cannot fail to notice that the regular courts in the previous part of the proceedings, have not remained inactive when faced with the allegations in the Applicant's claims. The Court also recalls Article 54 [Judicial Protection of Rights] of the Constitution, which provides that "*Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated*".

108. It follows from this that giving priority to judicial protection of rights before the regular courts and other competent authorities, is a very important aspect of the protection of human rights, which the Constitutional Court always takes into consideration. The Court specifically wishes to indicate that all decisions of the state authorities, including the administrative decisions of the MPA on suspending the activities of the Applicant, are subject to judicial review.

109. Based on the foregoing, the Court finds that the proceedings initiated by the Applicant are still at the decision-making stage, from which it can be concluded that the Applicant's Referral before the Constitutional Court is premature.

110. In this regard, the Court emphasizes that the principle of subsidiarity requires that the Applicant exhausts all procedural possibilities before the regular proceedings, administrative or judicial proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a right guaranteed by the Constitution (see: ECtHR judgment *Sejdović v. Italy*, application No. 56581/00, of 1 March 2006, paragraph 46, see: case *Demë Kurbogaj and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 18-19).

111. Therefore, the Court finds that the Applicant has not yet exhausted all legal remedies foreseen by Article 113, paragraph 7 of the Constitution, Article 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure

112. The Court has just concluded that the Applicant has not exhausted all legal remedies, and therefore, it will not deal with the other allegations of the Applicant in connection with alleged violations of other Articles of the Constitution and the ECHR.

Request for interim measure

113. The Court recalls that the Applicant also requests the Court to impose interim measure, stating *"the irreparable damage will be caused if the interim measure is not granted and that the imposition of the interim measure is in the public interest"*.

114. The Court has just concluded that the Applicant's Referral is to be declared inadmissible on constitutional basis.

115. Therefore, in accordance with Article 27.1 of the Law and in accordance with Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for interim measure should be rejected, because it cannot be a subject of review as the Referral was declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 47 of the Law and Rules 39. 1 (b) and 57 (1) of the Rules of Procedure, in the session held on 20 June 2019, 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;

V. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI 154/17 and KI05/18 Applicants: Basri Deva, Afërdita Deva and Limited Liability Company "BARBAS", Constitutional review of Decision AC. no. 3917/17 of the Court of Appeals of Kosovo, of 25 October 2017

KI154/17 and KI05/18, resolution on inadmissibility, of 22 July 2019, published on 21 August 2019

Keywords*: legal person, individual referral, constitutional review of the challenged decision of the Court of Appeals, manifestly ill-founded.*

In the circumstances of the present case, the Applicants and Raifeisen Bank had entered into a Loan Agreement in the amount of 100.000 EUR. As a result of a failure of the debtor to fulfill its obligations, the Creditor had requested the initiation of the enforcement procedure for the remaining value of the loan, namely 78,709.68 EUR. The Municipal Court allowed the enforcement and the case was transferred to the Private Enforcement Agent. The latter, through relevant conclusions, had set public auctions for the sale of immovable property set forth in the Agreement in the amount of 151,600.00 EUR. As per case file, the immovable property was sold to RBK at the public auction of 21 July 2017, at one third (1/3) of the determined value of the immovable property, namely 50,535.00 EUR. As a result, the Private Enforcement Agent had issued the Order for the sale of the immovable property. The debtors, namely the Applicants, had challenged this Order in the Court of Appeals, which by Decision [Ac. no. 3917/2017] of 25 October 2017, rejected the debtors' appeal as ungrounded. In the Court, the Applicants challenge the latter, alleging, in substance, that "*the enforcement procedure was unconstitutional and unlawful*".

The Applicants' allegations, including those according to which (i) the public sale was executed based on a law which was not applicable in the time the enforcement procedures were initiated, namely the Law on Amending and Supplementing the Law on Enforcement Procedure, resulting thus to a different and more disadvantageous outcome for the Applicants than if the Law on Enforcement Proceedings had been implemented; (ii) the Private Enforcement Agent refused to appoint an expert to determine the amount owed to the creditor, namely Raifeisen Bank; (iii) the Agreement was in violation of the Law on Obligational Relationships; and (iv) the Law on Enforcement Procedure is in contradiction with the Constitution and the European Convention on Human Rights, were examined by the Court while applying the case law of the European Court of Human Rights.

The Court concluded that the allegations of the applicants related to the (i) manifestly erroneous application and interpretation of the Law, are manifestly ill-founded on constitutional basis and therefore, unacceptable based on the paragraphs 1 and 7 Article 113 of the Constitution and

paragraph (2) of Rule 39 of the Rules of Procedure; (ii) the refusal to appoint the expert and lack of the reasoning for that refusal, as manifestly ill-founded on constitutional basis and therefore, unacceptable based on the paragraphs 1 and 7 of Article 113 of the Constitution and paragraph (2) of Rule 39 of the Rules of Procedure of the Constitutional Court; (iii) unlawfulness of the Agreement, as unacceptable as the result of the non-exhaustion of legal remedies in substantive terms in accordance with paragraphs 1 and 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure of the Constitutional Court, and (iv) non-compliance of the LEP with the Constitution, as unacceptable, as they were not filed by an authorized party in accordance to the subparagraph (1) of paragraph 2 of Article 113 of the Constitution, Article 47 of the Law and item (a) of paragraph (1) of Rule 39 of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

cases no. KI154/17 and KI05/18

Applicant

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

Constitutional review of Decision AC. No. 3917/17 of the Court of Appeals of Kosovo, of 25 October 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. Referral KI154/17 was submitted by Basri Deva and Afërdita Deva from the Municipality of Gjakova (hereinafter: the first Applicant).

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

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

Challenged decision

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

Subject matter

5. The subject matter is the constitutional review of the challenged decision of the Court of Appeals, which allegedly violates the Applicants' rights and fundamental freedoms guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR), as well Articles 46 [Protection of Property], and 54 [Judicial Protection of Rights] of the Constitution.

Legal basis

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

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

Proceedings before the Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of facts

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

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

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

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

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

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

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

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

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

31. On 22 July 2016, the Private Enforcement Agent issued the Conclusion on the first public sale of the immovable property and scheduled the latter on 22 August 2016. At the request of the creditor, namely the RBK, the first public sale was postponed and the same was scheduled to 9 September 2016. The first public sale was not realized.

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

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

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

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

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

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

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

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

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

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

Applicant's allegations

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

43. With respect to the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants allege that in their case the wrong law was applied. According to the allegation, the provisions of Law 05/L-118 On Amending and Supplementing the

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

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

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

46. The Applicants also ultimately allege that the LEP is in violation of Articles 22, 31, 46 and 54 of the Constitution and Article 6 and Article 1 (Protection of Property) of Protocol no. 1 of the ECHR. The Applicants in this context specifically state that the relevant law is unconstitutional because the latter (i) enables the debtor's immovable property to be sold at a public auction in 1/3 of the determined value; and (ii) it does not allow the use of an extraordinary legal remedy.

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

Relevant legal provisions

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

Article 234 The sale price of a real estate

1. In the first session of the auction, real estates cannot be sold with the price that is lower than eighty percent (80%) of the determined value. The starting offers for the first session that is lower than eighty percent (80%) of the determined value will not be reviewed. 2. Without agreement of persons who have a pre-purchase right in the enforcement procedure to settle their credits before creditor, the real estates in the auction session cannot be sold at the price that cannot even partly cover the amount of a proposer's enforcement's credit. 3. In case that the real estates cannot be sold in the first session, the enforcement body will determined the second session in the timeframe of thirty (30) days. 4. The enforcement body will assign the second session in the timeframe of thirty (30) days even when three (3) convenient purchasers did not pay the bill in the first session within the foreseen deadline.

5. In the second session the real estates cannot be sold at the price that is a lower than half of the assigned value with the selling conclusion. The starting offer in the second session cannot be lower than half of the determined value.

6. In case that the real estate is not sold even in the second session, the enforcement body will determine the third session in the timeframe of fifteen (15) to thirty (30) days. In this session the real estates cannot be sold at a price lower than one third of the determined price of the real estate.

7. In case there are persons with the right of pre-purchase or contractual right, than the person who according to the law has right of settlement with priority of his credit from selling price, shall acquire the right of pre-purchase of the real estates at the price reached in the third session.

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

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

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

Assessment of admissibility of the Referral

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

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

Article 21
[General Principles]

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

Article 113

[Jurisdiction and Authorized Parties]

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

[...]

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

50. The Court further refers to the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

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

Rule 39
Admissibility Criteria

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

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

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,

(...)

(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim.

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

53. In this regard, the Court initially recalls that the debtors, namely the Applicants and the creditor namely the RBK, had concluded the Loan Agreement in the amount of 100,000 euro. As a result of non-fulfillment of obligations by the debtor, the creditor requested the initiation of the enforcement procedure for the remaining loan amount, namely 78,709.68 euro. The Municipal Court allowed the enforcement and the case was transferred to the Private Enforcement Agent. The latter, through relevant conclusions, assigned public auctions for the sale of the immovable property as defined by the Agreement in the amount of 151,600.00 euro. According to the case file, the immovable property was sold to the RBK in the second public auction, in the amount of 1/3 of the determined value of the immovable property, namely 50,535.00 euro. As a result, the Private Enforcement Agent issued the Order for the Sale of Immovable Property. The debtors, namely the Applicants, challenged this Order in the Court of Appeals, which by the Decision [Ac. No. 3917/2017] rejected as ungrounded the debtors' complaint. Before the Court, the Applicants challenge the latter, essentially claiming that "*the enforcement procedure was unconstitutional and unlawful*".

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

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

56. In this respect, the Court initially notes that the case law of the ECtHR states that the fairness of a proceeding is assessed looking at the proceeding as a whole (See ECHR Judgment of 6 December 1988, *Barbera, Messeque and Jabardo v. Spain*, paragraph 68). Consequently, in assessing the Applicant's allegations, the Court will also adhere to this principle (See, in this regard, cases of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38; and case KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018, paragraph 31).

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

(i) As to the application of the erroneous law

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

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

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

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

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

63. The Court, however, also notes that the case-law of the ECtHR also provides for the circumstances under which exceptions from this position can be made. The ECtHR reiterated that while it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of legislation, the role of the Court is to verify whether the effects of such interpretation are compatible with the ECHR. (See

the ECtHR cases, *Miragall Escolano and Others v. Spain*, Judgment of 25 May 2000, paragraphs 33-39).

64. Therefore, even though the role of the Court is limited in terms of assessing the interpretation of law, it must ensure and take measures where it observes that a court has "*applied the law manifestly erroneously"* in a particular case or so as to reach "*arbitrary conclusions"* or "*manifestly unreasoned"*. (See the ECtHR cases *Anheuser-Busch Inc. v. Portugal,* Judgment of 11 January 2007, paragraph 83; *Kuznetsov and Others v. Russia*, Judgment of 11 January 2007, paragraphs 70-74 and 84; *Păduraru v. Romania*, Judgment of 1 December 2005, paragraph 98; *Sovtransavto Holding v. Ukraine*, Judgment of 25 July 2002, paragraphs 79, 97 and 98;, *Beyeler v. Italy*, Judgment of 5 January 2005, paragraph 108; see also cases of the Court KI06/17, Applicant *L. G. and five others*, cited above, paragraph 40; and KI122/16, cited above, paragraph 59).

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

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

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

68. More specifically, Article 234 of the LEP, through Article 22 of the Law on Amending and Supplementing it, by reducing the threshold for the sale price in public auctions as it follows (i) in the first auction, according to the first, the immovable property cannot be sold at a price

that is lower than 80 (eighty) percent of the determined value; whereas according to the second, the immovable property cannot be sold at a price that is lower than 50 (fifty) percent of the determined value; (ii) in the second auction, according to the first one, the immovable property cannot be sold for a price that is lower than half (1/2) of the value determined by the conclusion on the sale; whereas according to the second, the immovable property cannot be sold at a lower price than one-third (1/3) of the determined value. While in the third auction, according to the first, the immovable property cannot be sold at a lower price than one third (1/3) of the set value of the immovable property, whereas according to the second, the third auction is not held but with a proposal of the creditor, the office of the enforcement agent decides that the immovable property shall be handed over to the creditor by transferring to his ownership.

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

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

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

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

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

> *"In the auction for the second public sale held on 10.10.2016, as it was ascertained that there was no interested in purchasing the immovable property, the auction was declared failed, the auction for the third public sale was scheduled for 11.11.2016, but the same auction was not held since the creditor through e-mail dated 07.11.2016 requested that this auction be postponed for 2 months, namely until 07.01.2017 in order to clarify the issue of the*

mortgage related to the parcel no. 3085/3, the same auction for the same issue, at the request of the creditor was postponed two times until 20.03.2017 as well as until 04.06.2017.

According to e-mail of 19.06.2017 by the creditor, after reviewing the parcel in question, which is a mortgage in this case and after the meetings with the debtors, who so far failed to reach any agreement on the payment of the debt, at the request of the creditor, the Enforcement Agent issued a conclusion on 20.06.2017 and assigned the auction for second public sale on 21.07.2017.

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

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

"*The private enforcement agent assigned the first and the second public auction for the sale of the immovable property where no bidder appeared, in the third public auction dated 21.07.2017, the sole and most favorable bidder was declared the creditor Raiffeisen Bank*".

"Considering that in the present case we are dealing with a proposal for execution, based on the enforcement document, the first instance court allowed the enforcement on the basis of the Decision on the registration of the mortgage In. No. 330/2004 dated 23.07.2017, of the Municipal Court in Gjakova, as well as the loan agreement No. 6278 dated 23.07.2004, based on Article

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

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

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

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

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

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

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

the Private Enforcement Agent, the Applicants' request was addressed and rejected.

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

> *"From the submissions of the debtors submitted to this enforcement office on 23.08.2016, it is required that an expert in this matter be appointed to determine the amount of the debt as well as the determination of the value of the mortgaged property.*
>
> *In the public sale session held on 09.09.2016, the creditor's authorized representative opposed in entirety the debtor's proposals, as the creditor as a financial institution has sufficient staff to calculate the amount of the claim as well as the allegations that the value of the immovable property has changed and is not sufficient basis for the assignment of the expert of evaluation, since the value of the immovable property is determined by the agreement between the parties on the occasion of granting the loan, therefore it opposes all the claims of the debtors from this submission, because they are intended for the delay of the case, therefore he requests the Enforcement Agent to proceed with the holding of the second auction, at the time the auction for the second sale was scheduled for 10.10.2016".*

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

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

and sold the immovable property of the debtors in conformity with the provisions of the LEP".

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

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

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

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

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

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

88. Therefore, based on the foregoing and taking into account the allegation raised by the Applicants and the facts presented by them, the Court relying also on the standards established in its case law in similar cases and the case law of the ECtHR, finds that the Applicants did not prove and did not sufficiently substantiate their allegation of a violation of their rights and freedoms as to the reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

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

(iii) As to the unlawful Agreement

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

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

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

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

paragraph 90 and the references therein; see also the case of the Court KI119/17, cited above, of X, paragraph 72).

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

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

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

(i) Regarding unconstitutional law

97. Finally, and with respect to the fourth allegation of the Applicants, namely the allegation that the LEP is in contradiction with the Constitution, the Court recalls subparagraph 1 of paragraph 2 of Article 113 of the Constitution, according to which the Constitution has

established the authorized parties that may challenge the constitutionality of a law, the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and the Ombudsperson. The Constitution does not define individuals, as is the case in the circumstances of the present case, as parties authorized to challenge the constitutionality of a law. Such a possibility is determined only under the circumstances and under the conditions laid down in paragraph 8 of Article 113 of the Constitution, and the relevant legal provisions and the Rules of Procedure.

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

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

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

101. Therefore and finally, the Court finds that the allegations of the Applicants with respect to (i) the manifestly erroneous application and interpretation of the law are manifestly ill-founded on constitutional basis and therefore, inadmissible in accordance with paragraphs 1 and 7 of Article 113 of the Constitution and paragraph 2 of Rule 39 of the Rules of Procedure; (ii) the refusal to appoint an expert and the lack of reasoning for this refusal, as manifestly ill-founded on constitutional basis and therefore inadmissible in accordance with paragraphs 1 and 7 of Article 113 of the Constitution and paragraph 2 of Rule 39 of the Rules of Procedure; (iii) the unlawfulness of the Agreement as inadmissible as a result of the non-exhaustion of legal remedies in substantive aspect, in accordance with paragraphs 1 and 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law, and item (b) of paragraph 1 of Rule 39 of the Rules of Procedure; and (iv) non-

compliance of the LEP with the Constitution as inadmissible because the latter were not raised by an authorized party in accordance with subparagraph 1 of paragraph 2 of Article 113 of the Constitution, Article 47 of the Law and item (a) of paragraph 1 of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

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

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

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

KI 133/17, Applicant: Ali Gashi, Constitutional review of Decision Rev. no. 96/2017 of the Supreme Court, of 1 June 2017

KI 133/17, Decision adopted on 29 July 2019, published on 29 August 2019.

Keywords: *individual referral, public authorities, religious communities, access to Court, proportionality principle, ratione materiae, civil right, serious and real dispute, inadmissible referral.*

The Applicant worked as Chief Imam in the Islamic Community Council in Peja and he was retired on 27 August 2009. Based on decisions of the Islamic Community Council of Kosovo, he received the pension from the Islamic Community Council of Kosovo until 30 December 2011, the day when the ICC in Peja stopped with the payment for the Applicant. The Applicant challenged this decision of the ICC in Peja, firstly before the structures of the Islamic Community of Kosovo, and later, through the regular courts. The Basic Court and the Court of Appeals had granted, namely confirmed the allegation of the Applicant. However, these Judgments were annulled by the Supreme Court by its Decision [Rev. no. 96/2017] of 1 June 2017, where the Court concluded that the courts in Republic of Kosovo have no jurisdiction, pursuant to the paragraph 2 Article 39 of the Constitution and paragraph 2 Article 5, and paragraph 2 Article 7 of the UNMIK Regulation on Freedom of Religion, to decide over the litigation procedure between the Applicant and the Islamic Community Council in Peja. This Judgment of the Supreme Court was challenged by the Applicant before the Court, stating that the Judgment, *inter alia,* was rendered in violation of his right of access to court which is guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human.

When considering the Applicant's allegations, the Court first pointed out the general principles of consolidated case law of the European Court of Human Rights concerning the right of access to court explaining: (i) the legal nature and the scope of the right of access to the court; (ii) conditions which have to be fulfilled in order to claim the right of access to the court; and (iii) limitations, under certain circumstances, on the right of access to the court.

Based on the practice of ECHR, in the circumstances of this particular case, the Court found that the Applicant does not have *"the civil right"*, because his right to *"pension-material assistance"*, was regulated by the internal rules and decisions of the Islamic Community of Kosovo, and was not based on the applicable laws in the Republic of Kosovo. The Court also assessed whether the restriction on right of access to a court had a "*reasonable proportionality correlation between the used means and the purpose to be achieved*".

The Court further emphasized that in accordance with Article 39 of the Constitution, *inter alia,* (i) religious communities have autonomy; and (ii) are free to independently regulate their internal organization. However, the Court also stated that this autonomy and organizational independence of religious communities does not necessarily result in a restriction of the right of access to a court guaranteed by Article 31 of the Constitution in conjunction to Article 6 of the ECHR in relation to individuals serving in religious communities. The Court emphasized that the applicability of Article 31 of the Constitution in conjunction with Article 6 ECHR, should be evaluated based on the circumstances of every case in order to determine whether there is a *"civil right"* and whether there is a *"dispute"*, circumstances these that guarantee the right of access to court also to all individuals serving in Religious Communities.

However, in the circumstance of this particular case, the Court concluded that there was no *"civil right"* established by civil laws in the Republic of Kosovo, and as a result, Article 31 of the Constitution in conjunction with Article 6 ECHR is not applicable. Hence, the Referral of the applicant in not *ratione materiae* in accordance with the Constitution and pursuant to item b paragraph 3 Rule 39 of the Rules of Procedure, has to be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI133/17

Applicant

Ali Gashi

Constitutional review of Decision Rev. No. 96/2017 of the Supreme Court of Kosovo of 1 June 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of**:**

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

Applicant

1. The Referral was submitted by Ali Gashi from the village Vërmica, Municipality of Malisheva, represented by Xhevdet Krasniqi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Decision [Rev. No. 96/2017] of 1 June 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [CA. No. 902/2014] of 7 February 2017 of the Court of Appeals and Judgment [C. No. 432/13] of 24 January 2014 of the Basic Court in Peja (hereinafter: the Basic Court).

3. The challenged decision was served on the Applicant on 20 July 2017.

Subject matter

4. The subject matter is the constitutional review of the abovementioned Decision of the Supreme Court in conjunction with Judgment [CA. No. 902/2014] of 7 February 2017 of the Court of Appeals and Judgment [C. No. 432/13] of 24 January 2014 of the Basic Court.

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on 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).

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

Proceedings before the Court

7. On 14 November 2017, the Applicant submitted the Referral to the Court.

8. On 16 November 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Ivan Čukalović and Bekim Sejdiu.

9. On 29 November 2017, the Court notified the Applicant about the registration of the Referral and requested him to submit the evidence (acknowledgment of receipt) indicating the date of receipt of the challenged Decision, and based on Article 21 (Representation) of the Law and Rule 32 of the Rules of Procedure, requested him to submit to the Court the power of attorney in the proceedings before the Court. On the same date, a copy of the Referral was sent to the Supreme Court and the Basic Court.

10. On 12 December 2017, the Basic Court submitted additional documents and the acknowledgment of receipt indicating the date of receipt of the challenged Decision by the Applicant.

11. On 13 December 2017, the Applicant submitted the requested documents to the Court.

12. On 24 January 2018, a copy of the Referral was sent to the Presidency of the Islamic Community of Kosovo (hereinafter: PICK) and the Islamic Community Council in Peja (hereinafter: ICC in Peja) for eventual comments regarding the Referral No. KI133/17.
13. On 30 January 2018, the ICC in Peja submitted the relevant comments to the Court.

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

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

16. On 7 May 2019, as the mandate as judges of the Court of four abovementioned judges was over, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision KSH. KI133/17, on the replacement of the members of the Review Panel Altay Suroy and Ivan Čukalović and the Review Panel was reappointed composed of judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Bajram Ljatifi.

17. On 29 July 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

18. According to the case file, it follows that the Applicant worked as a chief imam in ICC in Peja.

19. On 26 November 2002, the PICK by Notification [No. 469/02] informed all authorities of the Islamic Community of Kosovo that in the absence of a law on pensions in the Republic of Kosovo and until its adoption, the employees of the Islamic Community who meet the retirement requirements, will be compensated in the name of the pension at 60% of the amount of the salary.

20. On 27 August 2009, the Applicant's employment relationship with the ICK in Peja was terminated due to reaching retirement age and the PICK, by Decision [No. 396/09] recognized the Applicant's right to a '*pension - financial assistance*' in the amount of 60% of monthly personal income, namely 300 euro per month.

21. On 30 December 2011, the ICC in Peja by Decision [No. 226/11] annulled the aforementioned Decision and as of 1 January 2012, finally terminated the *'pension-financial assistance'* to the Applicant. The ICC in Peja, *inter alia*, justified its decision with limited budgetary opportunities.

Regarding procedures within the structures of the Islamic Community of Kosovo

22. On an unspecified date, the Applicant filed a complaint with the ICC in Peja regarding its Decision to terminate the relevant compensation.

23. On 21 March 2012 and 22 January 2013, the PICK addressed the ICC in Peja (i) stating that Decision [No. 226/11] of 30 December 2011 is in contradiction with the Decision [No. 396/06] of the PICK; and (ii) requested the latter to annul Decision [No. 226/11] of 30 December 2011.

24. On 8 May 2013, the ICC in Peja rejected the Applicant's appeal.

With regard to court proceedings

25. In 2013, the Applicant filed a claim against ICC in Peja with the Basic Court.

26. On 24 January 2014, the Basic Court, by Judgment [C. No. 432/13] approved the Applicant's claim as grounded by (i) reasoning that there is a civil-legal relationship between the claimant, namely the Applicant and the respondent, namely the ICC in Peja, pursuant to paragraph 1 of Article 262 of the Law on Obligation Relationships of 30 March 1978 (hereinafter: the LOR); and (ii) obliged the ICC in Peja to compensate the Applicant in the name of debt for unpaid pensions the amount of 7,200 euro and the costs of the proceedings.

27. On 19 February 2014, the ICC in Peja filed an appeal against the abovementioned Judgment of the Basic Court with the Court of Appeals, on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of

factual situation and erroneous application of substantive law, and proposed that the abovementioned Judgment should be annulled and the case be remanded for retrial.

28. Meanwhile, on 6 May 2014, the Assembly of the Republic of Kosovo adopted Law No. 04/L-131 on Pension Schemes Financed by the State (hereinafter: the Law on Pensions), whereas on 2 December 2014, the PICK notified Decision [No. 1068/14], approved on 4 September 2014, which repealed its Decision on pensions, with effect from 1 January 2015.

29. On 7 February 2017, the Court of Appeals by Judgment [CA. No. 902/2014] rejected the appeal of the ICC in Peja as ungrounded and upheld the Judgment of the Basic Court.

30. On an unspecified date, the Applicant submitted a proposal for enforcement based on the abovementioned Judgment of the Court of Appeals. Private Enforcement Agent by the Enforcement Order [P. No. 53/2017] allowed the enforcement. According to the case file, this Order was enforced.

31. On 14 March 2017, the ICC in Peja filed a request for revision against the judgments of the Court of Appeals and the Basic Court, with the Supreme Court, on the grounds of violation of the provisions of contested procedure and erroneous application of the substantive law. The claimant, namely the Applicant, filed a response to the revision.

32. On 1 June 2017, the Supreme Court by Decision [Rev. No. 96/2017] approved as grounded the revision of the ICC in Peja, annulled the Judgments of the lower instance courts and dismissed the Applicant's statement of claim as inadmissible. The Supreme Court reasoned, *inter alia*, that the lower instance courts do not have jurisdiction to consider the litigation between the Applicant and the ICC in Peja. The Supreme Court based its finding on the lack of jurisdiction of the courts on paragraph 2 of Article 5 (Religious Neutrality) and paragraph 2 of Article 7 (Self-Determination and Self-Regulation) of UNMIK Regulation No. 02/31 on Freedom of Religion hereinafter: UNMIK Regulation) and paragraph 2 of Article 39 [Religious Denominations] of the Constitution.

Comments submitted by ICC in Peja

33. The authorized representative of the ICC in Peja stated before the Court that the Decision of the Supreme Court is fair because (i) the independence of Religious Denominations, including internal

organization, is guaranteed by paragraph 2 of Article 5 and paragraph 2 of Article 7 of UNMIK Regulation and paragraph 2 of Article 39 of the Constitution; and (ii) the courts have no jurisdiction to adjudicate matters pertaining to the organization, administration, and independence of Religious Denominations. In support of these arguments, the ICC in Peja referred to the Court's Resolution on Inadmissibility of 28 January 2016 in the case KI63/15, with Applicant *Bedri Haxhi Halili*.

Applicant's allegations

34. The Applicant alleges that the Decision [Rev. No. 96/2017] of 1 June 2017 of the Supreme Court, violated his fundamental rights and freedoms guaranteed by Articles 3 [Equality Before the Law], 8 [Secular State], 24 [Equality Before the Law], 31 [E Right to Fair and Impartial Trial], 32 [Right to legal Remedies], 46 [Protection of Property] and 54 [Judicial Protection of Rights] of the Constitution. The Applicant also alleges that this Decision violated Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR) and Article 10 of the Universal Declaration of Human Rights (hereinafter: the Universal Declaration).

35. As to the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant alleges a violation of his right to access to court; whereas relation to the allegations of violation of Articles 32 and 54 of the Constitution, the Applicant alleges violations of the legal remedy and judicial protection of rights. In support of his allegations, the Applicant refers to the cases of the Court KI04/12, Applicant *Esat Kelmendi*, Judgment of 24 July 2012 (hereinafter: case KI04/12) and KI89/13, Applicant *Arbresha Januzi*, Judgment 15 May 2014 (hereinafter: case KI89/13).

36. Finally, the Applicant requests the Court to declare his Referral admissible and to declare invalid the Decision [Rev. No. 96/2017] of the Supreme Court of 1 June 2017, remanding the case for retrial.

Admissibility of the Referral

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

38. 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".

39. The Court further refers to the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

40. As to the fulfillment of these criteria, the Court considers that the Applicant is an authorized party and challenges an act of a public authority, namely Decision [Rev. No. 96/2017] of 1 June 2017 of the Supreme Court, having exhausted all legal remedies provided by law. The Applicant also clarified the fundamental rights and freedoms which have allegedly been violated in accordance with Article 48 of the

Law and submitted the Referral in accordance with the deadlines set forth in Article 49 of the Law.

41. The Court also notes in this respect that the Applicant's Referral has met the criteria set out in items (a), (b) and (c) of paragraph 1 of Rule 39 [Admissibility Criteria] of the Rules of Procedure.

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

43. In this context, the Court recalls that the essence of the Applicant's allegations relates to his constitutional right to a court, namely the right of access to the court. This right is guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. But this right, and as will be elaborated below, is not absolute and it is subject to certain limitations. Taking into account that in the circumstances of the present case, the Applicant's dispute relates to a Religious Confession which autonomy is guaranteed by the Constitution, the Court must first consider whether, in the circumstances of the present case, Article 31 of the Constitution in conjunction with Article 6 of the ECHR is applicable.

44. In order to determine this applicability, the Court will further (i) elaborate on the general principles deriving from the case law of the European Court of Human Rights (hereinafter: the ECtHR) with regard to the right to a court, in harmony with which based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret fundamental rights and freedoms; and then (ii) apply these principles to the circumstances of the present case.

(i) General principles regarding "the right to a court"

45. The right of access to court for the purposes of Article 6 of the ECHR is defined in case *Golder v. the United Kingdom*. (See ECtHR case, *Golder v. the United Kingdom*, Judgment of 21 February 1975, paragraphs 28-36). Referring to the principle of the rule of law and the avoidance of arbitrary power, the ECtHR found that the "*right of access to court*" is an essential aspect of the procedural guarantees enshrined in Article 6 of the ECHR. (On the general principles of right to a court, see also ECHR Guide of 31 December 2018 to Article 6 of the ECHR, Right to Fair and Impartial Trial, Civil Aspects, Part II, Right to a court and also, *inter alia*, the case of the ECtHR, *Zubac v. Croatia*, Judgment of 5 April 2018, paragraph 76). Moreover,

according to the ECtHR, this right provides everyone with the right to address respective issue related to "*civil rights and obligations*" before a court. (See ECtHR case, *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 84 and references therein.).

46. The Court in this regard notes that the right to a court, as an integral part of the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, provides that all litigants should have an effective judicial remedy enabling them to assert their civil rights. (See Cases of the ECHR, *Běleš and Others v. the Czech Republic*, Judgment of 12 November 2002, paragraph 49; and *Naït-Liman v. Switzerland*, Judgment of 15 March 2018, paragraph 112).

47. Therefore, based on the case law of the ECtHR, everyone has the right to file a *'lawsuit'* related to their respective *"civil rights and obligations"* with a court. Article 31 of the Constitution in conjunction with Article 6 of the ECHR embodies the "*right to a court*", that is, "*the right of access to a court*", which implies the right to institute proceedings before the courts in civil matters. (See ECtHR case *Golder v. the United Kingdom*, cited above, paragraph 36). Therefore, anyone who considers that there has been unlawful interference with the exercise of his/her civil rights and claims to have been denied the opportunity to challenge such a claim before a court may refer to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, invoking the relevant right of access to a court.

48. More specifically, according to the ECtHR case law, there must first be "*a civil right*" and second, a "*dispute*" as to the legality of an interference that affects the very existence or scope of "*a civil right*" protected. The definition of both of these concepts should be substantial and informal. (See, *inter alia*, the cases of ECtHR *Le Compte, Van Leuvenand De Meyere v. Belgium*, Judgment of 23 June 1981, paragraph 45; *Moreira de Azevedo v. Portugal*, Judgment of 23 October 1990, paragraph 66; *Gorou v. Greece* (no. 2), Judgment of 20 March 2009, paragraph 29; and *Boulois v. Luxembourg*, Judgment of 3 April 2012, paragraph 92). The "*dispute*", however, based on the ECtHR case law, must be (i) "*genuine and serious*" (see, in this context, the ECtHR cases *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, paragraph 81 and *Cipolletta v. Italy*, Judgment of 11 January 2018, paragraph 31); and (ii) the outcome of the proceedings before the courts must be "*decisive*" for the civil right in question. (See, in this context, the case of the ECtHR, *Ulyanov v. Ukraine*, Judgment of 5 October 2010). According to the ECtHR case

law, the "*tenuous links*" or "*remote consequences*" between the civil right in question and the outcome of these proceedings are not sufficient to fall within the scope of Article 6 of the ECHR. (See, in this context, ECHR cases, *Lovrić v. Croatia*, Judgment of 4 April 2017, paragraph 51 and *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 71 and references therein).

49. In such cases, when it is found that there is a "*civil right*" and a "*dispute*", Article 31 of the Constitution in conjunction with Article 6 of the ECHR guarantee to the affected individual the right "*to have the question determined by a tribunal*". (See ECtHR case, *Z and Others v. the United Kingdom*, Judgment of 10 May 2001, paragraph 92). A court's refusal to consider the parties' claims as to the compatibility of a procedure with the basic procedural guarantees of fair and impartial trial, limits their access to the court. (See the case of ECHR *Al Dulimi and Montana Management Inc. v. Switzerland*, Judgment of 21 June 2016, paragraph 131).

50. Moreover, according to the ECtHR case law, the ECHR does not aim at guaranteeing the rights that are "*theoretical and false*", but the rights that are "*practical and effective*". (See, for more on "*practical and effective*" rights, ECtHR Guide of 31 December 2018 to Article 6 of the ECHR, The Right to Fair and Impartial Trial, Civil Aspects, Part II. Right to Court, A. Right and Access to Court, 1. A practical and effective right; and the ECHR cases *Kutić v. Croatia*, cited above, paragraph 25 and the references cited therein; and *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 86 and references therein).

51. Therefore and importantly, within the meaning of these rights, Article 31 of the Constitution in conjunction with Article 6 of the ECHR, guarantee not only the right to institute proceedings but also the right to obtain a determination of the dispute by a court. (See ECHR cases, *Kutić v. Croatia*, Judgment of 1 March 2002, paragraphs 25-32; *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 86 and references therein; *Ać imović v. Croatia*, Judgment of 9 October 2003, paragraph 41; and *Beneficio Cappella Paolini v. San Marino*, Judgment of 13 July 2004, paragraph 29).

52. The abovementioned principles, however, do not imply that the right to court and the right of access to court are absolute rights. They may be subject to limitations, which are clearly defined by the ECtHR case law. (See ECHR Guide of 31 December 2018, Article 6 of the ECHR, Right to Fair and Impartial Trial, Civil Aspects, and specifically with

respect to limitations on the right to court, Part II. Right to Court, A. Right and Access to Court 2. Limitations). However, these limitations cannot go so far as to restrict the individual's access so as to impair the very essence of the right. (See, in this context, ECtHR case, *Baka v. Hungary*, Judgment of 23 June 2016, paragraph 120; and *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 89 and references therein). Whenever access to the court is limited by the relevant law or respective case law, the Court examines whether the limitations touches on the essence of the law and, in particular, whether that limitation has pursued a "*legitimate aim*" and whether there is "*a reasonable relationship of proportionality between the means employed and the aim sought to be achieved*". (See ECHR cases, *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, paragraph 57; *Lupeni Greek Catholic Parish v. Romania*, cited above, paragraph 89; *Naït-Liman v. Switzerland*, cited above, paragraph 115; *Fayed v. the United Kingdom*, Judgment of 21 September 1990, paragraph 65; and *Marković and Others v. Italy*, Judgment of 14 December 2006, paragraph 99).

(ii) Application of these general principles to the circumstances of the present case

53. In the light of the foregoing, and in so far as relevant to the circumstances of the present case, the Court notes that the right to a court is, in principle, guaranteed in respect of "*disputes*" concerning a "*civil right*".

54. In this context, the Court notes that there are two essential issues to determine the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The former relates to "*civil right*" and the latter to the existence of a "*dispute*". Consequently, in the circumstances of the present case, the Court will first consider whether the latter involve in itself a "*civil right*".

55. The Court, in this respect, first recalls that the Applicant was retired on 27 August 2009. Based on the decisions of the PICK, namely (i) Notice [no. 469/02] of 26 November 2002; and (ii) Decision [no. 396/09] of 27 August 2009, he had benefited from the pension of the Islamic Community of Kosovo until 30 December 2011, the date on which the ICC in Peja by Decision [no. 226/11] terminated the Applicant's income. The latter challenged this decision of the ICC in Peja, initially within the structures of the Islamic Community of Kosovo. In this regard, the Court notes that the PICK requested the ICC in Peja to annul the Decision of 30 December 2011, a request

which was not respected by the ICC in Peja. As a result, the Applicant addressed the regular courts. The Basic Court and the Court of Appeals approved, namely upheld, the Applicant's claim. These Judgments, however, were annulled by the Supreme Court by the Decision [Rev. No. 96/2017] of 1 June 2017, which held that pursuant to paragraph 2 of Article 39 of the Constitution and paragraph 2 of Article 5 and paragraph 2 of Article 7 of UNMIK Regulation, the courts in the Republic of Kosovo do not have jurisdiction to examine the litigation between the Applicant and the ICC in Peja. The Applicant challenges this Decision to the Court, alleging that it limits his right of access to court.

56. In this respect, the Court first notes that, in the circumstances of the present case, the Applicant's right to pension derives from the internal rules and decisions of the Islamic Community of Kosovo. According to the case file, it follows that the latter's decision to enable its members to retire was made in the absence of and not based on the Law on Pensions, which was approved by the Assembly of the Republic of Kosovo on 6 May 2014. Specifically , the Court recalls that the Applicant's right to a pension of the Islamic Community of Kosovo derives first from Notice [No. 469/02] of 26 November 2002 of the PICK, and subsequently from Decision [No. 396/09] of the latter, through which the Applicant was granted the right to *'pensions and financial assistance*'. According to the case file, following the adoption of the Law on Pensions, on 4 September 2014 the PICK annulled its Decision on pensions for its members.

57. Therefore, the Applicant's "*right*" to pension and his dispute with the ICC in Peja was based and governed by the internal rules of the Islamic Community of Kosovo, which organizational independence is protected and guaranteed. by the Constitution, while it was neither grounded nor regulated by the applicable laws of the Republic of Kosovo.

58. The Court further notes that, despite the finding of the Basic Court and the Court of Appeals, the Supreme Court, by its Decision, which approved the respondent's revision, namely of the ICC in Peja as admissible, reasoned that the Applicant's right , in the circumstances of the present case, derives from his employment relationship regulated through the internal rules of the Islamic Community of Kosovo, which organizational matters, according to the Supreme Court's reasoning, do not fall within the scope of the regular courts, and consequently the latter do not have the competence to resolve the respective disputes. Specifically, in this regard, the Supreme Court emphasized:

> "*The Supreme Court assesses that the revision of the respondent of the Islamic Community Council in Peja is inadmissible due to the fact that the regular courts do not have jurisdiction to decide upon the statement of claim of the claimant regarding the realization of monthly salaries in the name of the old age pension at the respondent. The statement of claim of the claimant is related to the realization of the right deriving from the employment relationship at the Islamic Community of Kosovo, defined by the Constitution of the Islamic Community of Kosovo based on the Decision of the presidency of this Community. The internal organization of religious communities is not under the jurisdiction of regular courts, religious communities are separated from public authorities and regulate and administer independently their internal organization. Consequently, the statement of claim of the claimant is protected by the Islamic Community of Kosovo and by the Constitution of the Islamic Community*".

59. However, despite (i) the fact that the "*right*" of the Applicant, in the circumstances of the present case, is not based on the applicable law of the Republic of Kosovo, it derives from the internal regulation of a Religious Confession; and (ii) the reasoning of the Supreme Court, the Court, in determining whether the Applicant's "*right*", in the circumstances of the present case, is a "*civil right*", will refer to the ECtHR case law. The latter, has examined a number of cases related to religious denominations, but in the case of *Karoly Nagy v. Hungary* (Judgment of 14 September 2017), it considered a case very similar to the circumstances of the present case. It should be noted that the Hungarian Constitution, which case was examined in this context by the ECtHR, also specifically stipulates the autonomy and independence of the Church and its separation from the State. (See the provisions of the Hungarian Constitution relevant to the circumstances of the case in Part II of the ECtHR Judgment in *Karoly Nagy v. Hungary*, cited above*).*

60. In the present case, the Applicant alleged a violation of his rights of access to a court guaranteed by the ECHR, challenging the decisions of the Hungarian courts which refused to deal with his case on the merits, considering that, his right to compensation was not determined by state laws, but by the rules of the Hungarian Reformed Church, where he worked as a pastor.

61. More specifically, the Applicant's dispute with the relevant Church had arisen as a result of a disciplinary procedure initiated by the latter

which had initially resulted in the suspension of the Applicant by reducing his income by 50%, and subsequently on his removal from office. (For the factual circumstances of the present case, see the relevant ECtHR case *Karoly Nagy v. Hungary*, cited above, paragraphs 8 to 24). The internal organs of the respective Church rejected his complaints. The Hungarian regular courts also rejected his request, pointing out that his income was determined by the internal rules of the relevant Hungarian Church, and did not meet the criteria for being considered contractual relationship based on the relevant civil law, and consequently , the regular courts had no jurisdiction to settle the respective dispute.

62. The case was further examined by the Hungarian Constitutional Court. The latter, by its Decision No. 32/2003, examined the interconnection of the right of access to court and individuals in service in religious denominations. The Hungarian Constitutional Court stated that these individuals have the right to access to court in all disputes related to rights deriving from the state laws. The relevant court further stated that the courts are obliged to determine all cases, in the context of such circumstances, if a right allegedly infringed is regulated by state law. It is important to note that the Hungarian Constitutional Court held that (i) the principle of separation of the Church from the State cannot result in an infringement of the right of individuals of access to the court; however (ii) the right to a court guarantees these individuals only the resolution of disputes which are based on state legislation; and (iii) that in resolving these disputes, the courts, namely the State, must also respect the autonomy of the Church. (See the reasoning of Hungarian Constitutional Court in paragraph 29 of the ECtHR case *Karoly Nagy v. Hungary*, cited above).

63. The issue was finally considered by the ECtHR. Its Grand Chamber confirmed the Hungarian courts' decisions, declaring the Applicant's allegations regarding the right of access to court as incompatible *ratione materiae* with the ECHR. The ECtHR noted, *inter alia*, that the service, compensation and benefits of the Applicant were determined by act of appointment based on the internal rules of the Church; and that consequently the Applicant's right to the disputed compensation did not derive from the applicable civil law of the Hungarian State. (See ECtHR reasoning in paragraphs 64-77 in *Karoly Nagy v. Hungary*, cited above). As a result, the ECtHR found that in the circumstances of the case there was no "*civil right*", and therefore the guarantees of Article 6 of the ECHR were not applicable and consequently the applicant's applicaiton was declared

incompatible *ratione materiae* with the ECHR. (See ECtHR case *Karoly Nagy v. Hungary*, cited above, paragraph 78).

64. The Court notes that, as in the aforementioned case of the ECtHR, the Applicant's right to pension determined by the PICK Decision derives and is determined by the internal rules of the Islamic Community of Kosovo and is not based on the civil laws of the Republic of Kosovo. In such circumstances, the Court must find that, in the circumstances of the present case, a "*civil right*" is not involved and which, together with the existence of a "*dispute*", would guarantee also the Applicant's right of access to court, and more specifically the right to resolution of this "dispute" by a court as one of the procedural guarantees set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Court also states that a fact that such an agreement or right deriving from the internal rules of a Religious Confession may be similar to a contractual agreement deriving from civil law, not necessarily results in the finding that in the circumstances of a case there is a "*civil right*", the existence of which, would not limit the right of access to court.

65. The Court, however, should also recall and emphasize that the limitation of the fundamental rights and freedoms, namely of the right to a court in the circumstances of a particular case must be prescribed by law and cannot restrict the relevant right to that extent, as to impair its essence and that any restrictions, in order to be compatible with the procedural guarantees enshrined in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, must (i) pursue a "*legitimate aim*"; and (ii) have a "*reasonable relationship of proportionality between the means employed and the aim sought to be achieved*". These criteria are also embodied in Article 55 [Limitation on Fundamental Rights and Freedoms] of the Constitution.

66. The Court considers that in the circumstances of the present case, such a limitation has a "*legitimate aim*" and entails "*proportionality between the means employed and the aim pursued.*"

67. In this regard, the Court notes that based on Article 39 of the Constitution, *inter alia* (i) Religious denominations have autonomy; and (ii) are free to regulate independently their internal organization. This autonomy and organizational independence does not necessarily result in a limitation of the right of access to court guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR with regard to individuals serving in Religious Denominations. The constitutional right of access to court is also guaranteed to individuals serving in Religious Denominations, as any other citizen, provided

that the subject matter of the dispute derives and is regulated by applicable state law, which, as discussed above, is not the case in the circumstances of the present case.

68. Given that the public authorities in the Republic of Kosovo are separate from Religious Denominations, they cannot be used to enforce internal rules and decisions of Religious Denominations. Moreover, the principle of the separation of Religious Denominations from public authorities prevents the latter from interfering in the internal affairs of the former.

69. That being said, and notwithstanding the reasoning of the Supreme Court, which establishes not only the lack of jurisdiction of the regular courts to resolve the Applicant's case, but also the jurisdiction of the regular courts to resolve all disputes relating to internal matters of Religious Denominations, the Court reiterates that (i) the principle of the autonomy of Religious Denominations and their internal organizational independence may not result in a violation of the right of individuals of access to court guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR; (ii) the courts must assess the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in the circumstances of each case to determine whether there is a "*civil right*" and a "*dispute*"; the relevant "*civil right*" shall be based on the applicable civil laws of the Republic of Kosovo; and (iv) that in resolving these disputes, the courts must also respect the autonomy of the relevant Religious Confession, as defined by the Constitution.

70. The Court at the end also recalls the fact that the Applicant in support of his arguments refers to two cases of the Court, namely KI04/12 and KI89/13. However, apart from the fact that the Applicant has mentioned and cited these decisions, he did not elaborate its factual, and legal connection, with the circumstances of the present case. The Court emphasizes that the reasoning of other court decisions must be interpreted in the context and in light of the factual circumstances in which they were rendered. (See, in this context, Judgment in Case KI 48/18 of 4 February 2019, with Applicants Arban *Abrashi and the Democratic League of Kosovo (LDK),* paragraph 275; and case KI 119/17, Applicant *Gentian Rexhepi,* Resolution on Inadmissibility, of 3 May 2019, paragraph 80). Furthermore, the Court notes that none of the cases referred by the Applicant corresponds to the circumstances of his case nor do they relate to Religious Denominations.

71. Therefore, the Court notes that in the circumstances of the present case, there is no "*civil right*" established by the civil laws of the Republic of Kosovo and, as a result, Article 31 of the Constitution in conjunction with Article 6 of the ECHR, are not applicable. Therefore, the Court must find that the Applicant's Referral is incompatible *ratione materiae* with the Constitution and, in accordance with item (b) of paragraph 3 of Rule 39 of the Rules of Procedure, is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 47 of the Law, and Rules 39 (3) and 59 (2) of the Rules of Procedure, on 29 July 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

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

KI108/18 – Constitutional review of Decision No. 64/04 of the Civil Registration Agency of 13 June 2018s

KI108/18, Applicant: Blerta Morina

Resolution on Inadmissibility of 5 September 2019, published on 1 October 2019

Keywords*: Individual referral, premature referral, right for a private life, rights of transgender persons*

The Referral was submitted by Blerta Morina. Without prejudice to the merits of the case, the Court, in accordance with the case law of the European Court of Human Rights in respect of transgender persons, referred to the Applicant as a male, thereby respecting his self-identification with that gender.

The subject matter was the constitutional review of the Decision of the Civil Registration Agency which rejected the Applicant's request for legal change of the name from "Blerta" to "Blert" and legal change of gender from female gender "F" to male gender "M". The Applicant alleged that the Civil Registration Agency violated his fundamental rights and freedoms guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 36 [Right to Privacy] of the Constitution in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights. In addition, the Applicant's main procedural requirement before the Constitutional Court was that he be exempted of the obligation to exhaust the legal remedy provided by law, namely the claim for administrative conflict, in the circumstances of his case.

In assessing the admissibility of the Referral, the Court initially articulated (i) the general principles of the European Court of Human Rights and of the Constitutional Court with regard to the exhaustion of legal remedies (see paragraphs 148-159 of the Resolution); and, subsequently, the latter (ii) applied in the circumstances of the present case (see paragraphs 160-191 of the Resolution). The application of the principles in question and application of the tests established by the European Court of Human Rights and internalized by the Constitutional Court led the latter to the decision that the Applicant's request to be exempted of the obligation to exhaust the legal remedy provided by law, must be rejected and, consequently, Referral KI108/18 is to be declared inadmissible as premature.

In examining the Applicant's allegations concerning the lack of an effective legal remedy in the circumstances of his case and taking into account the

Applicant's "*special circumstances*", the Court specifically considered whether the claim for administrative conflict is effective and sufficiently certain not only in theory but also in practice. As elaborated in this Resolution, in determining the effectiveness and sufficient certainty of a legal remedy in practice, based on the case law of the European Court of Human Rights, the case law relevant to the circumstances of the case under consideration is of special importance. In this regard, the Constitutional Court took into account that the Basic Court, before which the Applicant's claim for administrative conflict was pending, already had the relevant case law, through which, in similar circumstances, approved the request of another transgender person for legal change of name and legal change of gender from "F" to "M". The decision of the Basic Court was also confirmed by the Court of Appeals. The regular courts invoked the Constitution, the European Convention on Human Rights and the case law of the European Court of Human Rights and ordered the relevant authorities to make the corrections in the civil registration books.

In the light of these circumstances, the Court found that the claim for administrative conflict is "*effective*" and "*sufficiently certain in theory and in practice*", and that, based on the case law of the regular courts, this legal remedy "*is capable of providing redress*" regarding the Applicant's allegations of violation of his fundamental rights and freedoms guaranteed by the Constitution, as well as to "*provide a reasonable prospect of success*".

In such cases where the effectiveness of a legal remedy, beyond theory, is also confirmed in practice through the relevant case law, the Court, based on the principle of subsidiarity, cannot deprive the regular courts of their constitutional competence to decide on the Applicants' allegations of potential violations of articles of the Constitution and of the European Convention on Human Rights. It would be in full contradiction with the subsidiary spirit of the constitutional control mechanism if the Court would declare a legal remedy ineffective, when in fact the latter has proven its effectiveness in practice. Respecting the principle of subsidiarity requires precisely allowing the necessary path and space to the lower instance courts to carry out their duty of direct application of the Constitution and the European Convention on Human Rights. If they fail in this task, the Constitutional Court may be set in motion by the respective parties in accordance with its jurisdiction.

At the end of its Resolution, the Court also stated that declaring the Referral KI108/18 as premature in itself means that the Applicant is guaranteed by the Constitution and the relevant provisions of the Law and the Rules of Procedure of the Court, the opportunity to address it again with a request for constitutional review of the decisions of public authorities, whether of their actions or failure to act, which he may claim to be in breach of rights or

fundamental freedoms guaranteed by the Constitution, European Convention on Rights Human Rights or other international instruments guaranteed by the Constitution.

In conclusion, the Court held that the Applicant did not meet the admissibility requirement of exhaustion of legal remedies established in paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

Finally, the Court also addressed the Applicant's request for compensation of non-pecuniary damage in the amount of € 5,000.00 due to violation of his fundamental rights and freedoms guaranteed by the Constitution and the European Convention on Human Rights. This Applicant's request was rejected by the Court on the grounds that Referral KI108/18 was declared inadmissible on procedural basis as well as the fact that the Court has no power to award "*just satisfaction*" or "*compensation*" as the European Court of Human Rights has such a right in accordance with Article 41 of the European Convention on Human Rights and Rule 60 of its Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI108/18

Applicant

Blerta Morina

Request for constitutional review of Decision No. 64/04 of the Civil Registration Agency of 13 June 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Blerta Morina, represented by the lawyer Rina Kika (hereinafter: the Applicant.

2. By respecting his self-identification with the male gender, the Court will refer to the Applicant in the same gender (see the case of the European Court of Human Rights regarding the practice of respecting the self-identification of the person *X. v. the Former Yugoslav Republic of Macedonia*, now North Macedonia, Judgment of 17 January 2019, paragraph 1).

Challenged decision

3. The Applicant challenges Decision [No. 64/14] of 13 June 2018 of the Commission for the Review of Appeals against Decisions of the Civil

Registry Offices, which functions as part of the Civil Registration Agency at the Ministry of Internal Affairs of the Government of the Republic of Kosovo (hereinafter: the Civil Registration Agency).

Subject matter

4. The subject matter is the constitutional review of the challenged Decision, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 36 [Right to Privacy] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights (hereinafter: the ECHR).

5. The Applicant also requests to be exempted from the obligation to exhaust the legal remedy provided by law, an obligation established by paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, paragraph 2 of Article 47 [Individual Requests] of the Law and item (b) of paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure.

Legal basis

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

Proceedings before the Constitutional Court

7. On 30 July 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 16 August 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

9. On 26 September 2018, the Ombudsperson submitted to the Court, on his own initiative, a request to appear as *Amicus Curiae* ("*Friend of the Court*") regarding case KI108/18. Along with his request, the Ombudsperson submitted a written submission, namely a Legal

Opinion, in capacity of the *Amicus Curiae*, regarding the case in question.

10. On 27 September 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Civil Registration Agency.

11. On 9 October 2018, based on paragraph (1) of Rule 55 [*Amicus Curiae*] of the Rules of Procedure, the Judge Rapporteur consulted the Review Panel with regard to the approval of the Ombudsperson's request to appear as *Amicus Curiae* in case KI108/18.

12. On 11 October 2018, the Judge Rapporteur, after consulting the Review Panel, approved the Ombudsperson's request to appear as *Amicus Curiae*, thereby accepting the Legal Opinion submitted by the Ombudsperson as an integral part of the file in case KI108/18. On the same date, the Judge Rapporteur, pursuant to paragraph (2) of Rule 55 of the Rules of Procedure, notified all the judges of the Court about the decision to allow the participation of the Ombudsperson in the capacity of *Amicus Curiae* in the case KI108/18.

13. On 16 October 2018, the Court notified the Ombudsperson that his request to appear as *Amicus Curiae* was considered by the Court and approved based on the aforementioned Rules of Procedure. In this regard, it was confirmed to the Ombudsperson that the Legal Opinion submitted to the Court is already an integral part of the case file KI108/18.

14. On the same date, the Court notified the Applicant and the Civil Registration Agency about the request of the Ombudsperson to appear as *Amicus Curiae* in case KI108/18. The Court also notified them about the decision to allow the participation of the Ombudsperson as *Amicus Curiae* and sent a copy of the Legal Opinion submitted by the Ombudsperson.

15. On the same date, the Court notified and addressed the Kosovo Judicial Council (hereinafter: the KJC) (i) about the registration of the Referral and sent a copy of the Referral; (ii) regarding the request of the Ombudsperson to appear as *Amicus Curiae* in case KI108/18, on the decision to allow the participation of the Ombudsperson as *Amicus Curiae* and sent a copy of the Legal Opinion submitted by the Ombudsperson; and (iii) with the request that by 31 October 2018, to submit relevant comments regarding the Applicant's allegations and the support of such allegations by the Ombudsperson, namely that in the circumstances of the present case, the claim for administrative

conflict does not constitute an effective legal remedy. The Court addressed the KJC with four specific questions regarding the assessment of the "*effectiveness*" of the legal remedy, as established on the case-law of the European Court of Human Rights (hereinafter: the ECtHR), as follows:

> *(i) Do you consider that the claim for initiation of the administrative conflict as a legal remedy meets the standards of being "sufficiently certain, not only in theory, but also in practice", in the circumstances of the present case; (ii) Do you consider that a claim for administrative conflict as a legal remedy meets the standards necessary to be considered "available" to the Applicant, "accessible" to him and "effective" regarding the allegations raised in Referral KI108/18. Examples of case-law in this regard would be helpful; (iii) Do you consider that the claim for initiation of the administrative conflict as a legal remedy provides the respective "prospective of redress" and "the reasonable chance of success" as to the Applicant's allegations raised in the Referral KI108/18. Examples of case law in this regard would be helpful; and (iv) Do you consider that there are "special circumstances" in the case of the Applicant that would potentially meet the criteria for exempting the Applicant from the obligation to exhaust legal remedies".*

16. Within the prescribed time-limit, the Court did not receive any reply or comment from the KJC.

17. On 2 November 2018, the Judge Rapporteur, upon consultation with the Review Panel and after notifying all Judges of the Court, sent several questions to the Venice Commission Forum regarding case KI108/18, as follows:

> *(i) What is the practice in your Court to review the admissibility of cases, in which the applicants have not exhausted all available legal remedies according to the legislation in force, but claim that the same are not effective in the circumstances of their case?; (ii) Has your Court ever, due to "specific/special circumstances" of an Applicant or his/her arguments for "irreparable damage", exempted her/him from the need to exhaust all legal remedies prior to filling a constitutional complaint (or a similar complaint) with your Court? If yes, links to the respective decisions, preferably in English, would be appreciated; and (iii) Has your Court ever reviewed the merits of a case on transgender rights? If yes, could you please provide*

us with a link to a copy of such decision, in English preferably" ?

18. Between 2 and 23 November 2018, the Court received a total of 16 (sixteen) replies/comments regarding the Court's request for additional information on the case-law. One reply was received from the ECtHR itself, respectively its Research Department and other responses were received from some constitutional/supreme court members of the Venice Commission Forum, namely Germany, Bulgaria, the Czech Republic, Hungary, Latvia, Mexico, Portugal, Slovakia, Sweden, Liechtenstein, Finland, the Netherlands, Estonia, Croatia and Northern Macedonia. The replies received from the Venice Commission Forum are reflected in paragraphs 105-138 of this Resolution on Inadmissibility.

19. On 8 November 2018, the Court sent a repeated request for comments to the KJC reminding them that their replies/comments regarding the procedural aspect of the exhaustion of legal remedies are useful to address the Applicant's allegations supported by the Ombudsperson's Legal Opinion. In this regard, the Court granted the KJC an additional seven (7) days to submit their replies and comments on the questions posed by the Court, listed above.

20. On 20 November 2018, the KJC submitted its responses and comments to the Court. The responses and comments received from the KJC are reflected in paragraphs 84-88 of this Resolution on Inadmissibility.

21. On the same date, the Applicant requested the Court to notify him *"as soon as possible about the status of the proceedings"* in case KI108/18.

22. On 29 November 2018, the Court notified the Applicant about the status of the proceedings in case KI108/18, informing him about the procedural steps which had been taken up to that date. Through the same letter, the Court also notified the Applicant about its questions addressed to the KJC and the replies that the latter submitted to the Court, thus sending him a copy of the Court's letter sent to the KJC and the KJC response submitted to the Court. In that case, the Court invited the Applicant to submit his comments on the comments submitted by the KJC. Finally, the Court also requested the Applicant to notify the Court, within seven (7) days of receipt of the letter, about two additional issues, by answering the following questions: (i) *Have you filed any request for expedited procedure or an equivalent request with the Basic Court in Prishtina? If so, please submit a copy*

of the relevant document and any other document, additional information or reply that you consider as relevant in this regard; and (ii) Has the Basic Court in Prishtina taken any steps so far?

23. On 10 December 2018, the Applicant submitted a reply in respect of the two abovementioned questions of the Court and submitted comments regarding the comments submitted by the KJC on 20 November 2018. The additional replies and comments received from the Applicant are reflected in paragraphs 89- 93 of this Resolution on Inadmissibility.

24. On 12 December 2018, the Court sent to the KJC, for its information, a copy of the additional comments received from the Applicant as additional comments to the KJC replies and comments submitted to the Court.

25. On 23 March 2019, the Applicant, on his own initiative, notified the Court that the Department for Administrative Matters of the Basic Court in Prishtina (hereinafter: the Basic Court) from the moment that his claim for administrative conflict was filed on 24 July 2018, until the moment of the last reporting to the Court, has not yet received *"any summon, invitation, or other request"* in connection with the initiated claim. The Applicant stated that, as a consequence, on 22 March 2019 he sent his second request for "*expedition of the proceedings*" in relation to his claim and sent to the Court a copy of his request for expedition of procedure addressed to the Basic Court. Finally, the Applicant requested the Court to notify him about the stage of proceedings in which the Referral KI108/18 is being considered.

26. On 28 March 2019, the Court sent a letter to the Basic Court notifying it about the registration of the Referral and requesting that it notifies the Court, no later than 9 April 2019, regarding the stage of proceedings at which is the consideration of the claim for administrative conflict filed by the Applicant on 24 July 2018.

27. On 12 April 2019, the Basic Court responded to the Court, notifying the latter as follows: *"Referring to your request, we inform you that the case A. No. 1822/2018 of 24.06.2018 according to the claim of the claimant, Blerta Morina, no procedural action has been taken by this court despite the fact that the court is aware of the urgency of the matter to be addressed. This is due to the large number of cases awaiting to be dealt with according to priority of receipt to the court".*

28. On the same date, the Court notified the Applicant that Referral KI108/18 is still under consideration, and informed him about the further procedural steps which had been taken up to that date.

29. On 16 April 2019, 5 June 2019 and 4 July 2019, the Applicant notified the Court that on the same dates he submitted his third, fourth and fifth request for expedition of proceedings before the Basic Court.

30. On 21 August 2019, the media reports highlight the fact that the Basic Court, before which the Applicant's claim for administrative conflict is pending, on 27 December 2018 rendered a decision on merits in a case similar to the case under consideration before this Court. The latter, from the same media reports, found out that the Court of Appeals, on 2 August 2019, fully upheld the decision of the Basic Court, which ordered the administrative authorities of the Municipality of Prizren to change to the person "Y" [the exact identity will not be disclosed by the Court, *ex officio*, based on paragraph (6) of Rule 32 of the Rules of Procedure] the name at his request and the gender marker from "F" (Female) to "M" (Male); the details of this case are reflected in paragraph 167 of the Resolution on Inadmissibility.

31. On 5 September 2019, the Court considered the preliminary report of the Judge Rapporteur and, unanimously, made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts of case KI108/18

32. The Applicant was born in Gjakova. At the time of the submission of the present Referral to the Court, in the civil registry books of the Republic of Kosovo, the Applicant is registered with the name "Blerta Morina" and with the female gender marker, namely "F".

33. According to the case file, it appears that the Applicant has always had a tendency to identify himself with the male gender rather than with the female gender, as assigned at birth. As an adult, he claims to live and appear as a *"man in all areas of life: at work, in the city, while spending time with family, at home, while spending time with friends and in all other situations and circumstances of daily life."* He also claims that the name and gender listed in his identification documents do not match with the name with which he is presented and with the gender with which he is identified. Such fact, according to the allegation, compels him *"to go through difficult and discriminatory experiences in his daily life"*.

34. On 27 December 2017, according to the case file, the Applicant was visited by a psychologist and a psychotherapist for the purposes of discussing the issue of hormonal treatment for physical "*transition*" from female to male. (For the definition of "*transition*" (see, *inter alia,* the publication referred by the Applicant of the World Professional Association for Transgender Health, "*Standards of Care for the Health of Transexual, Transgender, and Gender Nonconforming People*"). The Applicant received a positive recommendation from the medical expert he had visited. In January 2018, the Applicant conducted another medical visit to a clinic in North Macedonia, where he began hormonal treatment related to the transition.

35. On 4 April 2018, the Applicant filed a Referral with the Office of Civil Status, Department for General Administrative Matters in the Municipality of Gjakova (hereinafter: the Office of Civil Status). The Applicant's request contained two components. The first component concerned the Applicant's specific request to change his personal name from "Blerta" to "Blert"; while the second component of the request concerned the Applicant's specific request to change the gender marker from "F to "M". The Applicant requested the Civil Registry Office to have his personal name and gender marker changed according to his proposal in all identification documents so that "*the name and gender marker are in harmony with his gender identity*". In his request, the Applicant explained that he, since childhood, had tendencies to dress as a male and identify with the male gender rather than the female gender assigned at birth. The Applicant reasoned his request to change his name and gender marker, stating that he felt discriminated against and excluded from society because of the inconsistency of his gender identity with the gender marker in his identification documents. He stated that the name "Blerta" impedes his integration in the society because it does not enable him to live freely and in accordance with his gender identity, namely the male gender. As a result, he argued that changing the name constituted an essential condition for his integration into society. Concerning his request for the gender marker, he argued that the gender assigned to a person at birth is not the primary determinant since there is importance to be put also on the personal perception of the gender or the gender which the person considers to be his or her own. Therefore, according to him, the requirement to change the gender marker is grounded since the gender determination in the documents should be adjusted to the gender with which the person is identified. In support of his arguments, the Applicant cited and referred to the following acts/practices applicable in the legal order of the Republic of Kosovo:

36. Articles 22 [Direct Applicability of International Agreements and Instruments] and 53 [Interpretation of Human Rights Provisions] of the Constitution; (ii) Article 8 of the ECHR; (iii) Articles 3, 6 and 12 of the Universal Declaration of Human Rights (hereinafter: the UDHR); (iv) Article 17 of the Covenant on Civil and Political Rights (hereinafter: CCPR); (v) ECtHR cases: *B. v. France* (Judgment of 25 March 1992) and *Christine Goodwin v. United Kingdom* (Judgment of 11 July 2002); (vi) Articles 12 [Modes for changing personal names] and 17 [Procedure for alteration of personal names based on a request] of Law No. 02/L-118 on Personal Name (hereinafter: Law on Personal Name); (vii) paragraph 1.8 of Article 6 [Reasons for the personal name change] of Administrative Instruction no. 19/2015 on the Conditions and Procedures for Personal Name Change and Correction (hereinafter: Administrative Instruction on Personal Name); (viii) paragraph 1.9 of Article 3 [Definitions] of Law No. 05-L-020 on Gender Equality (hereinafter: the Law on Gender Equality); (ix) Article 1 [Purpose] of Law No. 05/L-021 on Protection from Discrimination (hereinafter: Law on Protection from Discrimination); and (x) The Legal Opinion of the Ombudsperson, in the capacity of Friend of the Court (*Amicus Curiae*) for the Basic Court in Prishtina regarding the state of homophobia and transphobia in Kosovo of 2 May 2017 (hereinafter: the Legal Opinion of the Ombudsperson) regarding the state of homophobia and transphobia in Kosovo).

37. On 26 April 2018, the Civil Registry Office by Decision [No. 02-201-02-8319] rejected the Applicant's request in respect of both the aforementioned components. In the reasoning of its Decision, the Civil Registry Office stated that the Applicant did not meet the criteria set out in the Administrative Instruction on Personal Name. According to the Civil Registry Office, the reasonableness provided by the Applicant does not stand and fails to meet the purpose of sub-paragraph 1 of paragraph 6 of Article 6 of this Administrative Instruction on Personal Name as the name "Blerta" does not impede the integration of the person in society in the Republic of Kosovo. The Civil Status Office did not reason the rejection of the request for the change of gender marker.

38. On 29 May 2018, the Applicant filed an appeal against the Decision [No. 02-201-02-8319] of 26 April 2018 of the Office of Civil Status before the Civil Registration Agency. In the appeal, the Applicant requested the Civil Registration Agency to annul the challenged Decision of the Civil Status Office because, allegedly, the same is "*unlawful and discriminatory*." In this regard, the Applicant stated three reasons. Firstly, according to the Applicant, this Decision was rendered in the absence of an authorization prescribed by law and

consequently had no legal basis. Secondly, according to the Applicant, this Decision was rendered in contradiction with the legal provisions governing the form or mandatory elements of an administrative act because, *inter alia*, the Office of Civil Status failed to provide reasoning in accordance with Article 48 (Reasoning of a written administrative act) of the Law No. 05/L-031 on General Administrative Procedure (hereinafter: LAP). Thirdly, according to the Applicant, this Decision was unlawful because it was contrary to the Constitution, the ECHR and the case-law of the ECtHR, the UDHR, the CVPR, the Law on Gender Equality and the Law on Protection from Discrimination.

39. On 13 June 2018, the Civil Registration Agency by Decision [No. 64/04] rejected the Applicant's appeal as ungrounded. The Civil Registration Agency considered that the Decision of the Civil Status Office was rendered in accordance with (i) Article 12 of the Law on Personal Name and Administrative Instruction on Personal Name; and (ii) Article 11 (Components stemming from natural events) and Article 32 (Basic birth documents) of the Law on Civil Status.

40. As regards the first component, namely the Applicant's complaint regarding the non-approval of the change of the personal name from "Blerta" to "Blert", the Civil Registration Agency stated that the reason given by the Applicant for the change of the personal name does not stand because it *"provided no evidence, document, other note or photograph, archive document showing that personal name Blerta Morina is preventing the person from her integrating in the society"*.

41. With regard to the second component, namely the Applicant's complaint regarding the non-approval of his request for the change of the gender marker, the Civil Registry Agency stated that the Applicant's request was not grounded, *"because by law it is meant that the verification of gender and eventually the change or correction of this component of the civil status is done only with a medical report or decision"*. Furthermore, the Civil Registration Agency stated that *"a person must make eventual changes to the constituents of the civil status which are facts deriving from a natural event, including the gender of the person as a natural fact, must be regulated by a medical report, then the medical report produces legal consequences in constituents of the civil status"*. The Civil Registration Agency concluded its reasoning by pointing out that the Applicant did not provide convincing evidence *"that he is entitled to change the personal name [...] and gender as a natural fact"*.

42. On 24 July 2018, the Applicant filed a claim for administrative conflict against the Decision [No. 64/04] of the Civil Registration Agency of 13 June 2018, with the Basic Court.

43. On 30 July 2018, the Applicant filed his present Referral with the Court.

44. On 4 December 2018, 22 March 2019, 16 April 2019, 5 June 2019 and 4 July 2019, the Applicant filed the first, second, third, fourth and fifth request for expedition of proceedings regarding the claim for administrative conflict filed with the Basic Court.

45. To date, according to the Applicant's allegation and from the case file and the information submitted to the Court, it results that the Basic Court has not taken any procedural step towards reviewing the Applicant's claim for administrative conflict.

Applicant's allegations

46. The Applicant alleged that Decision [No. 64/04] of 13 June 2018 of the Civil Registration Agency violated his fundamental rights and freedoms guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 36 [Right to Privacy] of the Constitution in conjunction with Article 8 (Right to respect for private and family life) of the ECHR. In his allegations raised before the Court, the Applicant initially (i) seeks that his Referral be declared admissible and, consequently submits his arguments with respect to the request for exemption from the exhaustion of legal remedies provided by law; he further submits his allegations of alleged violations of the abovementioned articles as a result of the challenged Decision of the Civil Registration Agency, namely (ii) the change of the name from "Blerta" to "Blert" and (iii) the change of the gender marker from "F" to "M"; and finally, he also submits (iv) his arguments concerning the claim for compensation for non-pecuniary damage caused by the Republic of Kosovo in the event of the violation of his rights and fundamental freedoms. In the following, the Court will present the Applicant's allegations focusing on these four categories of issues.

(i) With regard to the exhaustion of legal remedies

47. As to the admissibility of the Referral, the Applicant focused his argument on the procedural requirement of exhaustion of all legal remedies before submitting a Referral to the Court, considering that in his opinion, all other admissibility requirements have been met.

48. In this regard, the Applicant referred to the case-law of the ECtHR and the Court itself, noting that the latter, in many cases, clarified the importance of the obligation to exhaust legal remedies and the fact that this obligation subsumes the principle of subsidiarity, which implies that the state authorities and the courts should initially be able to prevent or remedy constitutional violations. At the same time, the Applicant stated that, in the legal system of the Republic of Kosovo, the obligation to exhaust legal remedies is based on the assumption that the legal order provides effective remedies to address the violation of fundamental rights and freedoms established in the Constitution. In the present case, the Applicant alleges that *"the available legal remedies are ineffective for addressing the respective violations"* and consequently requests that, based on the practice of the ECtHR and of the Court, be exempted from the fulfillment of this obligation laid down in paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

49. In this context, the Applicant states that the parties are only required to exhaust "*accessible*" and "*sufficient*" legal remedies and that the existence of such remedies must be "*certain in practice and not only in theory*". Otherwise, such remedies shall be deemed "*inadequate and ineffective*". Moreover, according to the ECtHR case-law, the existence of "*special circumstances*" may exempt the Applicants from the obligation to exhaust legal remedies. In support of these arguments, the Applicant refers to the case-law of the ECtHR in cases *Selmouni v. France* (Judgment of 28 July 1999, paragraph 75 and references therein) and *Van Oosterwijck v. Belgium* (Judgment of 6 November 1980, paragraph 36 and references therein).

50. The Applicant specifically alleges that in the circumstances of his case: (i) the legal remedy has actually been used; (ii) the legal remedy is inadequate and "*ineffective*"; and (iii) there are "*special circumstances*" for his exemption from the obligation to exhaust all legal remedies provided by law.

51. As regards the first (i) and second (ii) arguments, the Applicant states that he used the available legal remedies. He states that he has exhausted all legal remedies in administrative proceedings by filing appeal against the decision of the Civil Status Office and challenging the latter before the Civil Registration Agency, which upheld the decision of the former. The Applicant states that he also initiated the claim for administrative conflict with the Basic Court. However, and despite the fact that his claim is pending before the Basic Court, according to the Applicant, the Court should exempt the Applicant

from the obligation to exhaust these legal remedies because the latter are allegedly inadequate and "*ineffective*", because "*the available legal remedies provide only theoretical and not practical certainty in the Applicant's case".*

52. In addition, the Applicant states that without prejudice to the decision of the Basic Court or the Court of Appeals, "*the lengthy period of time for reviewing and resolving an administrative case in the Applicant's case renders the legal remedy inadequate and ineffective, precisely because of the particular circumstances of the present case*". Therefore, the Applicant asserts that the filing of claim for administrative conflict and subsequently a potential appeal to the Court of Appeals "*does not constitute an effective legal remedy as it does not address the violation of rights of the Applicant within a reasonable time as guaranteed by the Constitution and the ECHR*".

53. In arguing that the legal remedies available are "*ineffective*" in the circumstances of the present case, the Applicant first refers to the General Annual Report of the KJC of 2017, according to which in the Basic Court, where the claim was filed, there were 5,304 pending cases in total. During 2017, a total of 2,268 administrative cases were resolved, while according to the KJC quarterly report for 2018, it has been concluded that there are a total of 5,297 unresolved cases. The estimated time of resolving administrative cases in 2017, according to these data, for one case is estimated to be approximately 853 days in the first instance. Further, the calculations of the Court of Appeals show that it takes 412 days to resolve a second-instance case. Therefore, according to the allegation, it takes on average three (3) years and four (4) months to resolve an administrative case pending before the Basic Court and the Court of Appeals. In this regard, the Applicant states that the European Commission in its Progress Report on Kosovo published in April 2018 assessed that the large number of administrative cases pending before the Basic Court "*is unlikely to be reduced in the future*".

54. The Applicant also alleges that there is a real possibility that the Basic Court will not decide the case on merits, but only remand it to the administrative proceedings before the administrative authorities that have already decided, which makes the length of the proceedings at least twice longer. In highlighting this problem, the Applicant also refers to the findings of the Ombudsperson in his Report No. 425/2015 of 22 August 2016 regarding the lack of effective legal remedies addressed to the Ministry of Labor and Social Welfare and the Basic Court. The Ombudsperson, according to the Applicant, in this report found that in the administrative disputes the courts did not enter in

the assessment of the merits of the case but only held procedural violations and consequently the latter were remanded for reconsideration to the authority which has initially made the decision, whilst that administrative body decides again in the same way. Among other things, according to the allegation, the Ombudsperson, in this Report, also "*found that there has been a violation of human rights by the claims filed by the complainants, because the legal remedies were ineffective and did not secure the exercise of the right to which the complainants were entitled*".

55. Regarding the length of the proceedings, the Applicant states that the ECtHR and the Court have already stated that the length of the proceedings itself "*does not render the legal remedy ineffective and that the reasonableness of the length of the proceedings should be assessed in the circumstances of the case*", namely, according to the Applicant, based on the "*complexity of the case*"; "*conduct of the relevant authorities*" and the "*case under consideration*" for the Applicant in that dispute.

56. As to the "*complexity of the case*", the Applicant alleges that the present case relates only to a party seeking his right to change the name and gender marker and all relevant evidence has been attached to the claim. The Applicant's requests do not pose great legal complexities. Gender identity is a protected legal category under Article 1 of the Law on Protection from Discrimination and paragraph 1.9 of Article 3 of the Law on Gender Equality and "*falls within the framework of the state positive obligations to protect the right to privacy under Article 36, Article 22, Article 53 of the Constitution*". The ECtHR case-law in a number of cases specifies the state's positive obligation to legally recognize the gender identity with which the person is identified and offers a broad practice of "*what can be considered a violation of the right to privacy in the context of legal recognition of gender identity and what cannot be considered as such*". According to the Applicant, the fact that this is the first case presented by a transgender person seeking to have his gender identity legally recognized and his name changed so as to coincide with his gender identity, should not be considered a characteristic that makes the case complicated. In support of his allegations the Applicant refers to the cases of the ECtHR: *B. v. France*, cited above; *Christine Goodwin v. United Kingdom*, cited above; and *A.P. Garcon and Nicot v. France* (Judgment of 6 April 2017).

57. With regard to the "*conduct of the Applicant and of the relevant authorities*", the Applicant states that he filed a claim within the legal time limit and there is no circumstance or evidence to consider that

the Applicant's conduct affected or would have affected the delay of the proceedings. The Applicant considers the change of the name and of the gender marker "*essential for his personal and social development, and for such reason he is ready to use all legal remedies until the legal recognition of his gender identity*".

58. Whereas, as regards the "*conduct of the authorities*", the Applicant states that in this context the duration of addressing administrative cases at the Basic Court and the risk that in most cases claims are not decided on merits, but it is decided that the matter is remanded to the administrative authorities for retrial, and the latter, according to the Applicant and referring to the relevant reports of the Ombudsperson, in most cases decide as in the first case. Accordingly, the Applicant states that "*the responsibility for delay rests with the relevant authorities*".

59. Finally, with regard to the "*issue under consideration*" for the Applicant, he emphasizes that the changes suffered by the "*transition process*" through hormone therapy are increasingly visible in the physical aspect. The issue of changing the name and gender marker "*is essential for the Applicant*." Failure to deal with the case in a timely manner "*would cause a violation of his rights, as the status of name and gender by which the Applicant is identified and presented mismatch with the name and gender marker appearing in his identification documents would continue and the Court will not be able to hear his case within a reasonable time"*.

60. In this respect, the Applicant states that the ECtHR in a number of cases considered the "*case under consideration for the Applicant*" as "*a special circumstance*" for assessing the violation of the right to a trial within a reasonable time, guaranteed by Article 6 of the ECHR. Such a criterion, the Applicant emphasizes, has also been used by the ECtHR in civil status cases, such as the cases of the ECtHR: *Bock v. Germany* (Judgment of 21 February 1989); *Laino v. Italy* (Judgment of 18 February 1999) and *Mikulić v. Croatia* (Judgment of 7 February 2002). The ECtHR held that "*the cases concerning the civil status of the Applicants require special care for their examination within a reasonable time*", finding that there has been a violation of the right to a trial within a reasonable time in all three aforementioned cases.

61. Finally, and with regard to the Applicant's third argument (iii), namely the existence of "*special circumstances*" in the circumstances of the present case, the Applicant refers to the cases of ECtHR *Van Ooserwijck v. Belgium* (Judgment of 6 November 1980 and the relevant references therein) and *Selmouni v. France* (Judgment of 28

July 1999 and the relevant references therein) according to which, according to the Applicant, the existence of "*special circumstances*" may exempt the Applicant from the obligation of exhaustion of legal remedies which he has at his disposal. The ECtHR also stated, according to the Applicant, that the application of the exhaustion rule should also include the context. In relation to the latter, the Applicant emphasizes as a *"special circumstance"* in his case the "*inconsistency of his appearance and behavior with the gender presented in the identification documents*" and the "*legal and political context*" related to the community which he represents.

62. With regard to the former, *"special circumstance"* the Applicant first states that the designation of the female and not of the male marker, and at the same time the name "Blerta" and not "Blert" in his identification documents constitute "*obstacles which do not allow him the enjoyment of the right to private life and put him in situations that violate his human dignity*".

63. In this regard, he reiterates that in January 2018, he started the process of physical transition, and as a result of the hormonal treatment, he "*has already begun to experience distinct physical changes while losing female characteristics*". Furthermore, considering that the Republic of Kosovo lacks care and other medical services for transgender persons, the Applicant is treated in North Macedonia, and conducts medical visit every four (4) months. As a result, he has to cross the border and be subject to the checking of identification documents, whilst the difference in his physical appearance is even greater, and he is constantly subject to violations of his constitutionally guaranteed rights against discrimination and protection of privacy, in particular. Degrading treatment at border crossings, according to the Applicant, is also ongoing as a result of his participation in international conferences, taking into account that he is also the director of the non-governmental organization "CEL", which deals with advocacy, protection and improvement of the life of the LGBT *("Lesbian, Gay, Bisexual and Transgender")* community.

64. With regard to the latter, *"special circumstance"* namely the "*legal and political context*", the Applicant states that "*one should take into account the fact that the transgender community is a highly marginalized and prejudiced category in the Kosovo society"*. This fact, according to the Applicant is "*a known fact*" and as such was confirmed by the Ombudsperson in the *Amicus Curiae* sent to the Basic Court regarding the state of homophobia and transphobia in Kosovo as well as in the Annual Report for 2017.

65. To illustrate this context, the Applicant states that it is important to mention two of the most important events in the history of the LGBTI *("Lesbian, Gay, Bisexual, Transgender and Intersex")* community in Kosovo, namely the attack on the Kosovo 2.0 newspaper in 2012 and the organization of the Pride Parade in 2017 [Clarification: the Applicant in some cases refers to the LGBT acronym and in some cases to the LGBTI acronym]. The Applicant states that these events reveal "*the homophobia and transphobia of Kosovar society*". Despite some positive developments, it is clear, according to the Applicant, that "*the state authorities do not use applicable laws to properly address violations and cases involving the LGBTI community*".

66. Finally, the Applicant states that "*the acceptance for the constitutional review of the Decision of the CRA* [Civil Registration Agency] *by the Constitutional Court is necessary and important to reflect positive social change in the legal context of the treatment of the LGBT community by the local institutions in Kosovo*". By accepting the constitutional review of the challenged Decision, the Court, according to the allegation, "*would establish a much-needed standard in Kosovo for the protection of the rights and freedoms of the LGBTI community in Kosovo*". According to the allegation, "*the legal and political context in relation to the protection of the LGBTI community in Kosovo must also be considered in favor of the Applicant's request to be exempted from the obligation to exhaust all legal remedies".*

(ii) As to the merits, namely the Applicant's request to change his name from "Blerta" to "Blert"

67. The Applicant alleges that Decision [No. 64/04] of the Civil Registration Agency was rendered in violation of his fundamental rights and freedoms guaranteed by Articles 23, 24 and 36 of the Constitution in conjunction with Article 8 of the ECHR.

68. In this context, the Applicant states that the rejection to change his name violated his right to privacy, which, according to the ECtHR's case-law, includes also the gender identity. The Applicant states that elements such as gender identification, name, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of the ECHR. Furthermore, the Applicant continues stating that the ECtHR held that "*the notion of personal autonomy is an important principle that defines the interpretation of guarantees under Article 8 of the ECHR and that, since the very essence of the ECHR rests on respect for human dignity and freedom, the right of transgender persons to personal development, physical and moral security is protected by the Convention*". In support of this allegation, the Applicant refers to

the cases of ECtHR *B. v. France*, cited above; *Christine Goodwin v. United Kingdom*, cited above; and *A.P. Garcon and Nicot v. France*, cited above. Therefore, in this respect, the Applicant also alleges that the aforementioned Decision was also rendered in violation of his rights guaranteed by Article 23 of the Constitution.

69. The Applicant also alleges that Decision [No. 64/04] of the Civil Registration Agency was rendered in violation of Article 24 of the Constitution and is consequently discriminatory. In support of this allegation, the Applicant bases on the reasoning of the Civil Registration Agency, according to which, "*giving the justification that a person wishes to change his/her name because of his or her gender identity does not constitute sufficient reason for Kosovo citizens to use their right to change their name*". According to the Applicant, this reasoning excludes the Applicant, on the basis of gender identity, from enjoying the rights guaranteed to all other citizens. By not treating gender identity as a protected constitutional and legal category, the challenged Decision, in addition to violating Article 24 of the Constitution, allegedly also violates the Law on Protection from Discrimination and the Law on Gender Equality.

70. In addition, according to the Applicant, the challenged Decision was rendered also in violation of the LAP, the Law on Personal Name and the Administrative Instruction on the Change of Personal Name. In this regard, the Applicant submits to the Court two categories of arguments (i) "*lack of reasonableness*" and (ii) "*lack of additional documents*".

71. As to the former category, the challenged Decision rejected the Applicant's request to change his name based on the "*lack of reasonableness*" of this request. According to the Applicant, the "*lack of reasonableness*" is not a legal basis upon which a request to change a name can be rejected.

72. More specifically, according to the Applicant, Article 12 of the Law on Personal Name guarantees that the personal name can be changed at the request of a person, and the procedure for changing the name also sets out the relevant restrictions provided for in Article 18 of the Law on Personal Name. The latter does not define "*lack of reasonableness*" as one of the legal grounds based on which a request may be rejected. Therefore, according to the Applicant, "*lack of reasonableness*" does not constitute a legal basis on which a request can be rejected. The same case is with the Administrative Instruction on Personal Name and with the Application Form itself available to the parties when filing requests for changing of the name. The documentation required

through the latter is limited to the criteria of Article 18 of the Law on Change of Personal Name.

73. Moreover, the relevant Application Form specifies the reasons given in a declarative manner, in the concrete case because the personal name "*impedes the person's integration into society*", but does not require the presentation of narrative explanations. However, despite the fact that the narrative explanations are not required by the Law on Change of Name, Administrative Instruction on Personal Name, nor the relevant Application Form, and despite the findings of the Civil Registration Agency, the Applicant also filed his request in the narrative form where he explained that he is a transgender person and presented the reasons as to why his name "*impedes the integration of the person into society*".

74. In this respect, the Applicant states that beyond the fact that the "*lack of reasonableness*" used by the Civil Registration Agency in rejecting his request no longer coincides with the factual situation because the Applicant submitted the relevant reasons when submitting the request, namely "*lack of reasonableness*", is inconsistent with and has no legal basis on the Law on Personal Name, and consequently, is inconsistent with the LAP. This is because based on Article 52 (Unlawfulness of an administrative act) in conjunction with Article 4 (The principle of legality), an administrative act is unlawful if issued in the absence of an authorization based on a law.

75. As to the second category, namely, "*lack of additional documents*", the Applicant states that part of the Decision of the Civil Registration Agency stating that "*the Applicant has not provided evidence, photographs and other documents that would prove that the name hinders the integration of the person into society*", is in violation of the Law on Change of Personal Name and Administrative Instruction on Personal Name. Moreover, according to the Applicant, even if this were to be the case, the Civil Registration Agency acted in violation of the relevant provisions of the LAP, without requiring the Applicant the same before issuing its Decision. This is because, according to the Applicant, Article 11 (Principle of Information and Active Assistance) of the LAP obliges the Civil Registration Agency to assist the parties in protecting and exercising their legal rights and interests in the conduct of administrative proceedings, including clarifications on "*the essential legal requirements as well as the procedures and formalities provided for the issuance of an administrative act or the realization of a required real act, including the documents and statements to be submitted*". This request is also embodied in paragraph 4 of Article 73 (Form and content of request), of the LAP on

the basis of which, "*The public authority shall try to understand what is required in the submitted request and, if necessary, contact the applicant for further clarification or supplementation*", which the Civil Registration Agency has failed to do. In the same regard, the Applicant also alleges a violation of Article 131 (Procedure for examination of the complaint by the competent public authority) and Article 132 (Procedure for examination of the complaint by the superior authority) of the LAP.

(iii) As to the merits, namely, the Applicant's request to change the gender marker from "F" to "M"

76. The Applicant states that the Civil Registry Agency rejected the request to change the gender marker as ungrounded because he did not submit a medical report which would prove the gender change as a constitutive element of civil status. This decision was issued by the Civil Registration Agency pursuant to Article 11 (Components stemming from natural events) and Article 32 (Basic Birth Documents) of the Law on Civil Status. According to the Applicant, the conditioning of recognition of gender identity by a medical report which identifies gender differences is contrary to Article 36 of the Constitution in conjunction with Article 8 of the ECHR, Article 23 of the Constitution in conjunction with Article 3 of the ECHR and Article 53 of the Constitution, on the basis of which the fundamental rights and freedoms are to be interpreted in the light of the ECtHR case law.

77. The Applicant elaborated the case-law of the latter by referring to certain specific ECtHR decisions, namely the case *A.P. Garcon and Nicot v. France* (cited above) and *Van Kück v. Germany* (Judgment of 12 June 2003). In these cases, the Applicant points out, the ECtHR found that not all transgender persons wish, and not all may be subjected to medical treatment or surgery and requests that such interventions be made to legally recognize gender identity, are not considered compliant practices "*with the respect for human freedom and dignity that are at the same time one of the main principles of the ECHR"*. Therefore, the Applicant argues that the ECtHR case-law "*noted that the conditioning of legal recognition of gender identity even within the right to inviolability of physical integrity*", which implies also non-imposition of medical treatment. Therefore, the conditioning of the recognition of gender identity of transgender persons with sterilizing surgery or medical treatment, or surgical intervention or medical treatment that is likely to cause sterilization "*prevents a person from enjoying his or her right to gender identity and personal development which is a fundamental aspect of the right to respect for private life*".

78. In the context of the medical report which would confirm the change of gender by the Applicant, the latter also refers to the Law on Gender Equality, on the basis of which the gender identity "*covers the gender-related identity, appearance or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth*". According to the Applicant, the Law on Gender Equality is binding on the Civil Registry Agency in dealing with his request for change of gender because (i) *lex specialis derogat legi gjenerali*, and consequently the Law on Gender Equality as *lex specialis* regulates in particular the issue of gender, and thus has priority over other general laws; and (ii) *lex posterior derogat legi priori*, and consequently as a law adopted in 2015 versus the Law on Civil Status adopted in 2011, should have priority in the interpretation of his fundamental rights and freedoms.

79. The Applicant in the context of the Law on Gender Equality also invokes and alleges a violation of paragraph 1.3 of Article 3 (Definitions) which defines the definition of male gender as "*any person that considers itself as such, regardless of age or marital status*". In this regard, the Applicant argues that this definition does not include the determination of the gender that the person had at birth, but rather the "*subjective perception of gender or gender which the person considers to be his own*".

80. In this regard, the Applicant concludes his allegation by stating that the main basis on which the Civil Registration Agency relies that the Applicant has not provided a medical report evidencing gender differences is a conditioning of the legal recognition of the Applicant's gender identity and as such it is unconstitutional conditioning which is inconsistent with the aforementioned case-law of the ECtHR, a practice which constitutes the main source of interpretation of fundamental rights and freedoms under Article 53 of the Constitution.

(iv) With regard to the Applicant's claim for compensation of non-pecuniary damage

81. The Applicant seeks compensation for non-pecuniary damage on account of "*violation of his/her freedoms and personality rights, pursuant to Article 183, paragraph 1 of Law No. 04/077 on Obligational Relationships*". He states that the non-recognition of the Applicant's gender identity through a decision rejecting to change his name and gender marker "*caused psychological distress and suffering to the Applicant whilst making him feel excluded and rejected from the society and the state to which he belongs*". Such

refusal puts the Applicant in a situation that repeatedly violates his right to privacy, *inter alia*, whenever he is required to show an identification document.

82. The Applicant states that the right to compensation falls under Article 41 (Just Satisfaction) of the ECHR, which determines compensation in the event that the Court finds that there has been a violation of fundamental rights and freedoms. In many cases of violation of the right to privacy, the Applicant states that the ECtHR has decided that the party is entitled to the right to compensation for non-pecuniary damage. For example, in cases *Akdivar and Others v. Turkey* (Judgment of 16 September 1996) and *B. v. France* (cited above), the ECtHR awarded the parties the right for non-pecuniary compensation after finding that their privacy was violated by the Turkish state, namely the French state. For the latter, the ECtHR awarded an amount of 100,000.00 French francs because the gender identity of the Applicant had not been recognized.

83. The Applicant further claims that in the case *Dolenec v. Croatia* (Judgment of 26 November 2009), the ECtHR reiterated that mental health is an essential part of private life and relates to the aspect of the person's moral integrity. Maintaining mental stability in this context is a necessary precondition for respecting the right to privacy. In this regard, the Applicant stated that he continues to experience psychological distress and pressure due to the non-recognition of his gender identity by the state. Accordingly, he asserts that the state must compensate for the non-pecuniary damage caused due to violation of the right to privacy and the right to a dignified life, pursuant to paragraph 1 of Article 13 of the Law 04/L-077 on Obligational Relationships (hereinafter: LOR). In the name of this compensation, the Applicant requests to be compensated in the amount of EUR 5,000.00.

The Applicant's final request addressed to the Court

84. The Applicant requests the Court to:

(i) declare the Referral admissible for review; (ii) to hold that there has been a violation of the right to privacy, as established in Article 36 of the Constitution in conjunction with Article 8 of the ECHR; (iii) to hold that there has been a violation of dignity, as provided for in Article 23 of the Constitution; (iv) to hold that there has been a violation of the right to equal protection against discrimination as provided for in Article 24 of the Constitution; (v) to order the Civil Registration Agency to approve as grounded the request to change the

name from "Blerta" to "Blert" and the gender marker from "F" to "M" in the central registry of civil status; and (vi) to order the Civil Registration Agency to compensate the Applicant for non-pecuniary damage in the amount of € 5,000.00 as well as the costs of the proceedings and those of the lawyer.

KJC responses and comments

85. The Court addressed the KJC with a request to comment on the four specific questions listed in the part of the proceedings before the Court (see paragraphs 15, 19 and 20 of this Resolution on Inadmissibility). The Court communicated to the KJC that the specific issues raised by Referral KI108/18 were based on the case-law of the ECtHR in respect of the exhaustion of legal remedies as a procedural precondition to address the merits of a Referral. The Court addressed the KJC with such a request twice. The first time, on 16 October 2018, and considering that the KJC had not responded to the Court's questions, the Court addressed the KJC with the same questions for the second time on 8 November 2018. On this occasion, the KJC submitted its responses and comments to the Court.

86. In respect of the Court's first question as to whether the claim for administrative conflict can be regarded as a legal remedy that meets the standards of being a legal remedy "*sufficiently certain, not only in theory but also in practice*" in the circumstances of the present case, the KJC expressed the view that "*the claim as a regular legal remedy for initiating administrative conflict meets all standards to be sufficiently certain in the present case and other cases given that the courts are independent, apolitical, impartial and ensure equal access to all*". In addition, the KJC cited paragraph 4 of Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution: "*In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation*". [Clarification note: KJC mentions paragraph 5 of Article 55 of the Constitution but in the text it cited verbatim paragraph 4 of Article 55 of the Constitution]. The KJC did not provide any case-law examples, as requested by the Court.

87. In respect of the Court's second question as to whether a claim for administrative conflict can be regarded as a legal remedy that meets

the standards necessary to be considered "*available*" to the Applicant, "*accessible*" to him and "*effective*" in relation to the allegations raised, the KJC stated that: "*the claim for the initiation of an administrative conflict as a legal remedy meets the standards necessary to be considered as a legal remedy available to the Applicant, as the courts enable and provide equal access to all and always strive to be as effective and efficient as possible in resolving cases despite facing a large number of pending cases that are accumulated due to a series of factors* as [are] *the remaining cases from previous years, new cases received at work, insufficient number of judges, etc*". The KJC did not submit any case-law examples, as requested by the Court.

88. In respect of the Court's third question as to whether a claim for administrative conflict can be regarded as a legal remedy providing the relevant "*possibility of correction"* and "*reasonable prospect of success*" in relation to the allegations raised, the KJC stated that: "*only the court's decision can substantiate this, as the KJC is a body mandated to administer only the judiciary, but has no competence to interfere with the work of judges, who under the Constitution and laws are independent in deciding cases before the courts*". The KJC did not provide any case-law examples, as requested by the Court.

89. In respect of the fourth question of the Court as to whether it can be considered that there exist "*special circumstances*" in the Applicant's case that would potentially meet the criteria for the Applicant's exemption from the obligation to exhaust legal remedies, the KJC stated that: "*we consider that it is within the Constitutional Court's mandate to decide whether there are special "circumstances" in the Applicant's case KI108/18 that would potentially meet the criteria for exempting the Applicant from the obligation to exhaust legal remedies."*

Applicant's additional comments to KJC comments and Applicant's replies to additional questions of the Court

90. The Court notified the Applicant about the responses received by the KJC and offered him the opportunity to submit his comments on them.

91. As to the KJC's response regarding the Court's first question as to whether a claim for administrative conflict can be regarded as a legal remedy that meets the standards of being a "*sufficiently certain remedy, not only in theory, but also in practice*", in the circumstances of the present case, the Applicant stated that the KJC responded by saying that the required standards were met and justified this with the

argument that "*the courts are independent, apolitical, impartial and provide equal access to all*". However, according to the Applicant, those arguments of the KJC are not directly related to the certainty of the legal remedy and have nothing to do with ensuring a fair trial within a reasonable time as one of the main grounds that renders "*the administrative conflict ineffective*". Further, the Applicant stated that the KJC reference to paragraph 4 of Article 55 of the Constitution, which speaks about the limitations of human rights by public institutions, is "*entirely irrelevant to the question raised by the Constitutional Court"*. The Applicant considered that the KJC did not address the standard for which it was asked by the Court, but merely stated that the administrative conflict "*meets all sufficient standards to be sufficiently certain in the present case and in other cases"*. According to the allegation, this finding of the KJC is a statement that *"is not based on any fact or concrete evidence"*.

92. With regard to the reply of the KJC to the Court's second question as to whether a claim for administrative conflict can be regarded as a legal remedy that meets the standards necessary to be considered "*available*" to the Applicant, "*accessible*" to him and *"effective"* in relation to the allegations raised, the Applicant stated that the KJC provided ungrounded and contradictory findings which do not stand. In this regard, the Applicant states that the provision of equal access, according to the allegation of the KJC, does not make the legal remedy "*available, accessible and effective*" in relation to the allegations in case KI108/18. The contradiction of the KJC is that "*on one hand it considers that the administrative conflict meets the standards necessary to be considered as an available and effective legal remedy, while on the other hand it lists the reasons which impede the resolution of cases within a reasonable time, such as: the large number of pending cases due to the accumulation of cases from previous years, new cases received at work, insufficient number of judges, etc*". In terms of length of proceedings, the Applicant states that in the nine-month period of 2018, it is shown that the number of pending cases in the Basic Court has increased by 16.2% since the end of 2017, and now the estimated time for resolving a case in administrative proceedings in the first instance is 1,521 days or on average four (4) years and one (1) month.

93. The Court also requested the Applicant to answer two specific questions of the Court as to whether any request to expedite the proceedings before the Basic Court had been filed and whether the latter had taken any steps so far to proceed the claim, initiated by the Applicant on 22 July 2018.

94. As to the former, the Applicant notified the Court that a request for expedition was submitted on 4 December 2018 where it was requested that due to the "*special circumstances*" of the case, the latter should be given priority. In this respect, it was also stated that no summon or invitation was received from the Basic Court. As to the second, the Applicant informed the Court that the Basic Court "*has not taken any steps so far and we have not yet received any summon, invitation or other request from the trial judge.*"

Amicus Curiae of the Ombudsperson

95. In the Legal Opinion submitted to the Court, the Ombudsperson stated that the main purpose of this intervention was to argue and provide a legal analysis regarding case KI108/18. Throughout the text of the Legal Opinion, the Ombudsperson stated that he would refer to the Applicant as Mr. Blert Morina, namely as a male applicant, because this is the gender with which he is identified, and will therefore use this reference without prejudice to the Court's decision regarding this Referral.

96. The purpose of this Legal Opinion, according to the case file, is to support the request for exemption from the exhaustion of legal remedies because, according to the Ombudsperson, "*the circumstances of the case render the awaiting of the processing of the claim by the Basic Court in Prishtina/Department for Administrative Matters, ineffective and inadequate remedy*".

97. In this regard, the Ombudsperson states that according to the ECtHR case-law, the Applicants should exhaust available "*effective*" legal remedies "*before the case can be referred to the Constitutional Court, but they must guarantee effectiveness and efficiency*". This rule, according to the ECtHR, should be applied with a degree of flexibility and without excessive formalism, since the exhaustion rule is neither absolute nor should it be applied automatically, "*but it is very important to take into account the particular circumstances of each individual case*". Citing the case of the ECtHR in *Akdivar and Others v. Turkey* (cited above), the Ombudsperson emphasized that the general legal context should be taken into account in the present case, as well as the personal circumstances of the Applicant.

98. According to the Ombudsperson, the Applicant's request to be exempted from his obligation to exhaust all legal remedies based on the lack of an effective legal remedy in his case is also based on the KJC General Annual Report - where the statistics show 5,304 pending cases and the fact that the average time taken to conclude an

administrative case pending before the Basic Court and the Court of Appeals is three (3) years and four (4) months. Such a prolonged delay, according to the Ombudsperson, cannot be qualified as an effective legal remedy in the context of Referral KI108/18.

99. The Ombudsperson also stated that the Court's case-law confirms such a finding in cases KI99/14 and KI100/14 (Applicants *Shyqyri Syla and Laura Pula*, Judgment of the Constitutional Court of 3 July 2014) where it was held that: "*even if there are legal remedies, in the Applicant's case they are not proved to be efficient. Moreover, taking into consideration the specificity of the election procedure for the position of Chief State Prosecutor and the necessity this to be done in a timely fashion, the Court is of the opinion that there is no legal remedy to be exhausted.*" In support of this argument, the Ombudsperson also referred to two other cases before this Court, namely case KI11/09 (Applicant *Tomë Krasniqi*, Decision to strike out the referral of 17 May 2011) and KI06/10 (Applicant *Valon Bislimi*, Judgment of 30 October 2010).

100. With regard to this case-law, the Ombudsperson is of the opinion that the Applicant's case is similar in two relevant respects. Firstly, as in the case of the election of the Chief Prosecutor, in the case of the Applicant, even if there are legal remedies, in his case they have not proved to be effective. On the contrary, based on statistics, the Ombudsperson states, "*not only have the legal remedies not proven to be effective, but also the legal remedies have proved positively inefficient"*. Secondly, in the case of the election of the Chief Prosecutor, the Court emphasized the "*necessity*" that the election procedure be done in a timely fashion and because of that urgency it was decided that there were no legal remedies for exhaustion. According to the Ombudsperson, the case of the Applicant is an urgent case and therefore it is necessary that the case be resolved "*in a timely fashion and as soon as possible*".

101. Furthermore, the Ombudsperson states that although the Applicant has not undergone surgery, he is nevertheless shown to be "*experiencing the same feelings of vulnerability, humiliation and anxiety created when the domestic law situation falls in conflict with an important aspect of personal identity"*. The evidence provided by the Applicant on situations requiring the showing of identification documents and the inconsistencies as well as the traumatic situations of crossing the border crossings make the Ombudsperson find that: "*The non-compliance of the legal status of Mr. Morina, with his personal gender identity, has an extremely severe impact on a number of frequent situations in his daily life"*. In such circumstances,

the Ombudsperson considers that asking the Applicant to wait *"three years and four months*" is unreasonable, considering the real possibility that the Basic Court will not decide on the merits at all, but only remand the case for reconsideration.

102. The Ombudsperson also referred to his Report with recommendations issued on case A. No. 72/2015 regarding the lack of effective legal remedies of 17 October 2016, which *inter alia*, found that in administrative disputes the regular courts have not reviewed the merits of the case in the respective proceedings, but only found procedural violations and decided to remand the cases to the administrative body that initially rendered the decision and subsequently the case was decided in the same way again. In such cases, the Ombudsperson found that "*there has been a violation* of *human rights as the claim filed by the complainants in the capacity of an effective legal remedy were ineffective and did not ensure the exercise of their right under the law".*

103. With regard to the merits of the Referral, the Ombudsperson emphasizes the obligation laid down in Article 53 of the Constitution, according to which human rights and fundamental freedoms must be interpreted in accordance with the ECtHR's case-law. In this regard, it was emphasized that the interpretation of the ECHR by the ECtHR has created a space for the application of the prohibition of discrimination based on sexual orientation and gender identity. It is a particular obligation of a state to protect human rights through its own legal system, thus ensuring that rights can be effectively enjoyed.

104. In this regard, the Ombudsperson states that the Court should take into account the case of *Christine Goodwin v. the United Kingdom* (cited above), in which the ECtHR stated that: "*It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity [...] The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, [...] be regarded as a minor inconvenience arising from a formality [...].* On the contrary, there is a conflict between social reality and the law that places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation, and anxiety (*ibid, emphasis added*)".

105. Finally, the Ombudsperson concluded by stating that the Applicant had provided sufficient evidence in support of his request to be exempted from the obligation to exhaust all legal remedies due to the

fact that "*the circumstances of the case make the awaiting of proceedings in respect of the claim before the Basic Court an ineffective and inadequate remedy*". The Ombudsperson noted that the Court's case-law indicates that in some cases it had "*flexible access and found that the Applicants had no effective legal remedy and therefore allowed the use of this jurisdiction without exhausting legal remedies*".

Responses received from the Venice Commission Forum

106. As reflected in the proceedings before the Court, the latter addressed some specific questions to the Venice Commission Forum. The Court received a total of 16 responses, the content of which will be presented below.

107. As a preliminary note, the Court clarifies that the Venice Commission Forum is a forum which enables member courts of the Venice Commission to ask other member courts for specific information on their case-law. Therefore, the Venice Commission Forum should not be understood as an official opinion offered by the Venice Commission as such, since the procedure for seeking such an opinion differs from the informal procedure that characterizes the Forum. The latter serves as an incubator of information which enables courts to research on each other's case-law, with a view of benefiting from mutual experience in similar cases. In this regard, it is self-evident that the responses received are not binding on any court seeking additional information from the other courts. The only answers which are binding on the Court are those relating to decisions taken by the ECtHR, given that under Article 53 of the Constitution, all fundamental rights and freedoms must be interpreted in accordance with the decisions of the ECtHR.

Contribution submitted by the European Court on Human Rights

108. In its responses addressed to this Court, the ECtHR Department of Research and Library, under the supervision of the Juristconsult, submitted a document titled as "*a contribution to the case-law*", which emphasized the most important cases decided by the ECtHR in the area of transgender rights. As a note of attention, the following was also stated: "*This document was prepared by the Research and Library Division, under the guidance of the Juristconsult. It does not oblige the Court* [the ECtHR]".

109. As regards the recognition of the new gender identity, the ECtHR emphasized the case of *Christine Goodwin v. the United Kingdom*

(cited above, paragraphs 90, 91 and 103) where it was held, *inter alia*, that "*the lack of legal recognition of her changed gender*" constituted a violation of Article 8 of the ECHR; whereas the inability of a transsexual person to marry was considered a violation of Article 12 (Right to marry) of the ECHR. The ECtHR, for a similar line of reasoning, also recommended that the following cases be considered: (i) *I.* v. *the United Kingdom* (Judgment of the ECtHR Grand Chamber of 11 July 2002, paras 69-73); (ii) *Grant v. the United Kingdom* (ECtHR Judgment of 23 May 2006, paras. 40-43) in which the ECtHR ruled that the denial of legal recognition of gender identity change and the denial of age-based pension applicable to other women, constituted a violation of Article 8 of the ECHR; (iii) *L. v. Lithuania* (ECtHR Judgment of 11 September 2007, paragraph 59), where it was found that there had been a violation of Article 8 of the ECHR due to the authorities' failure to submit implementing legislation to enable transexual persons to have gender reassignment surgery and change gender in official identification documents; and (iv) *Y.Y. v. Turkey* (ECHR Judgment of 10 March 2015, paras 118-122), where it was found a violation of Article 8 of the ECHR considering that the gender reassignment surgery had to prove that the person could no longer procreate, which in itself was considered an excessive demand.

110. Concerning the change of the name in official identification documents, the ECtHR highlighted several relevant cases in this regard. Initially, the ECtHR referred to the case *S.V. v. Italy* (ECHR Judgment of 11 October 2018, paragraphs 70-75), where the Italian state was considered not to have fulfilled the positive obligations provided for by the ECHR, as the Applicant's inability in that case to change the name ("*forname*") for a period of two and a half years, on the grounds that the gender transition process was not completed through a gender change surgery, resulted in a violation of the Applicant's right to respect the private life guaranteed by Article 8 of the ECHR. The ECHR further referred, *inter alia*, to the cases of *Schlumpf v. Switzerland* (Judgment of 8 January 2009, paragraph 57), reiterating that the determination of the need to take measures for gender change is not a matter for a judicial review; *and B. v. France* (cited above, paragraph 63), which stated that failure to recognize in law the sexual identity of a transgender person after surgery constitutes a violation of Article 8 of the ECHR.

111. The ECtHR also referred to the case *Kück v. Germany* (cited above, paragraphs 56) in which it specifically stated that:

"Gender identity is one of the most intimate areas of a person's private life. The burden placed on a person in such a situation to

prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate.
Given the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment. [This was said in citing case *Christine Goodwin v. the United Kingdom,* cited above*]. […]*
In the absence of any exhaustive scientific findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain, […] the approach taken by the Court of Appeal in examining the question whether the applicant had deliberately caused her condition appears inappropriate.
The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate… No fair balance was struck between the interests of the private insurance company on the one side and the interests of the individual on the other".

Contribution submitted by the Constitutional Court of Croatia

112. With regard to the exhaustion of legal remedies, the Constitutional Court of Croatia held that, in principle, the Applicants should exhaust all legal remedies. However, it emphasized that there are two possibilities which constitute an exception to this rule and if such exceptions are applicable, the Applicants can directly address the Constitutional Court of Croatia with a constitutional complaint. The first exception relates to cases where a regular court has not decided the case within a reasonable time. In such cases, the Applicants may refer a case directly to the Constitutional Court of Croatia. The second exception concerns cases where the challenged decision seriously violates the constitutional rights and it is quite clear that serious and irreparable harm will be caused if no case is initiated before the Constitutional Court of Croatia. In this respect, the latter brought before the Court's attention few cases where the above mentioned types of exemptions had been applicable. (See cases of the Constitutional Court of Croatia, U-IIIN-1005/2004 of 8 July 2004; U-IIIB-4366/2005 of 5 May 2006 and U-IIIB-1373/2009 of 7 July 2009; U-IIIB-369/2016 of 15 December 2015).

113. Regarding transgender rights, the Constitutional Court of Croatia confirmed that its case-law through which it has ruled twice on such cases and even, in one case, it decided before the Applicant had

exhausted all legal remedies. (See cases of the Constitutional Court of Croatia, U-IIIB-3173/2012 of 18 March 2014 and U-III-361/2014 of 21 November 2017). In one specific case, the Applicant was born as a male and was registered as such in the civil registration books. After undergoing a gender change from "F" to "M" through surgery, she was able to have a decision that recognized the name and gender change based on the medical documentation she had submitted. Having succeeded in changing the name and gender, the Applicant in question succeeded in establishing, even legally, a new identity in the identity documents, including the new certificate of citizenship that reflected the changes made. Her further attempt to reflect the same changes on her diploma obtained from the University of Zagreb had been unsuccessful and, as a result, she appeared before the Constitutional Court of Croatia. The latter held that the extremely formalistic approach of the University of Zagreb which had rejected her request for modification of her diploma records was not an acceptable act and had, consequently, violated the Applicant's right to private life in relation to the right to fair and impartial trial.

114. Regarding the name change, it was also stated that in Croatia every person has the right to change his name, without giving any reason why he/she wishes to change it. When such a law had been examined before the Constitutional Court of Croatia, in terms of incidental control, it was stated that: "*it is clear that the current legal basis provides a high level of protection for the privacy and private life of all persons, who have changed their gender and personal name or changed their name before changing their gender.*"

Contribution submitted by the Constitutional Court of the Czech Republic

115. In principle, all requests submitted before the exhaustion of legal remedies are rejected as inadmissible, the Constitutional Court of the Czech Republic stated. However, there is one exception to this general rule which states that the Constitutional Court of the Czech Republic will not reject as inadmissible the request even if all legal remedies have not been exhausted, if the significance of the constitutional complaint goes substantially beyond the personal interests of the Applicant who filed that case.

116. In the case-law there can be noted several sets of arguments which have been raised based on this exception. The first set of arguments includes those that emphasize that the legal remedies were not effective, but such arguments can only be accepted if there is an inefficiency that results from a systematic problem and in such cases, the Court's decision would have a general impact. The second set of

arguments concerns cases where public authorities have used an unconstitutional law or used a law that has already been repealed. In such cases it is unreasonable to reject a request for non-exhaustion of legal remedies.

117. As to whether their case law recognizes a case similar to that of this Court, the Constitutional Court of the Czech Republic stated that they had examined a very similar case. The Applicant in that case was a person who referred to himself as gender neutral and had requested that the identification documents reflect this. The relevant ministry informed her that neither changing her personal identification number nor initiating such a procedure without submitting a medical report proving completion of gender reassignment was permitted. The Constitutional Court of the Czech Republic did not consider the merits of that request as it held that all legal remedies had not been exhausted and that the appeal did not go beyond the Applicant's respective personal interest in applying the above exemption to exhaustion of all legal remedies. Later, the Applicant reached the Supreme Administrative Court of the Czech Republic and the case is still pending before that court.

Contribution submitted by the Federal Constitutional Court of Germany

118. The Federal Constitutional Court of Germany stated that a constitutional complaint is an extraordinary legal remedy which is subject to the principle of subsidiarity, according to which, the constitutional complaints can generally be submitted only after all legal remedies have been exhausted. The rationale behind this rule is that it is for the regular courts to resolve all the factual and legal issues of a case.

119. However, since recourse to a regular court may not always be possible, two exceptions to the principle of subsidiarity are recognized and they are provided by law. The first exception is that the constitutional complaint is of "*general importance*" and the second exception that the recourse to other courts would cause "*inevitable and severe disadvantage*". The Federal Constitutional Court interprets both exceptions in a strict manner.

120. More specifically as to the first exception, the Federal Constitutional Court used this exception when a case raises fundamental questions of constitutional law and consequently, its decision on that constitutional complaint would give clarity to a large number of similar cases. It has not been considered sufficient that a case has not yet been resolved by a court. As strict restrictions are applied in this

respect, the Federal Constitutional Court has rarely ruled that it is not necessary to exhaust the legal remedies under this exception.

121. As to the second exception, the Federal Constitutional Court has rarely used this exception and in its case-law clarified that "*the inevitable and severe disadvantage*" implies a particular and grave interference with a fundamental right, which is irreparable in the sense that even a successful legal remedy could not put right such interference. (See the cases referred to by the Federal Constitutional Court itself as cited by the latter in the responses submitted to this Court: "*cf. BVerfG, Order of the Second Chamber of the First Senate of 17 January 2013 - 1 BvR 1578/12 -; cf. BVerfGE 19, 268 <273>).; cf. BVerfGE 75, 78 <106>; 87, 1 <43>; 101, 239 <270>; BVerfG, Judgment of first Senate of 24 April 1991 – 1 BvR 1341/90; cf. BVerfG, Order of Third Chamber of the First Senate of 28 December 2004, - 1 BvR 2790/04 -, paragraphs 17 and 185, with references ib BVerfGE 38, 105 <110>, BVerfGE 9, 3 <7 and 8>).*").

122. Regarding the argument that the exhaustion of legal remedies may be ineffective or the procedure may take a long time, the procedural law of Germany establishes other legal remedies to oppose the prolongation of a procedure. For example, a preliminary letter may be filed with the courts if there is a fear that the case will not be completed within a reasonable time and, if prolonged, the applicants may seek monetary compensation under the applicable law.

123. As to the Court's third question on the merits of the Referral, the Federal Constitutional Court stated that it has already adjudicated on a considerable number of cases concerning transgender rights. (See the cases referred to by the Federal Constitutional Court itself as cited by the latter in the answers submitted to this Court: "*Order of the First Senate of 11 October 1978 - 1 BvR 16/72 - cf. Decisions of the Federal Constitutional Court, BVerfGE 49, 286; Order of the First Senate of 16 March 1982, - 1 BvR 938/81; cf. BVerfGE 60, 123; Order of the First Senate of 26 January 1993 - 1 BvL 38/92 - cf. BVerfGE 88, 87 ; Order of the Second Chamber of the First Senate of 15 August 1996 - 2 BvR 1833/95 ; Order of the First Senate of 6 December 2005 - 1 BvL 3/03 cf. BVerfGE 115, 1); Order of First Senate of 18 July 2006 - 1 BvL 1/04 -, - 1 BvL 12/04 - cf. BVerfGE 116, 243); Order of First Senate of 27 May 2008 - 1 BvL 10/05 - cf. BVerfGE 121, 175; Order of First Senate of 11 January 2011 - 1 BvR 3295/07 cf. BVerfGE 128, 109); Order First Senate Second Chamber of 17 October 2017 - 1 BvR 747/17 -; Order of the First Senate Second Chamber of 6 December 2016 - 1 BvQ 45/16 - ".).*

124. In one of those decisions, the Federal Constitutional Court had ruled that the refusal of the state authorities to change/correct the gender data in the birth certificate in cases where a transgender person changed gender through surgery was declared unconstitutional. On that occasion, the Federal Constitutional Court held that such refusal was incompatible with Article 1 of Germany's Basic Law which protects human dignity and the way people perceive themselves as individuals. Human dignity was consequently interpreted to imply an individual's right to free personal development and of personality, including the determination of the civil status of the gender with which that individual is identified.

Contribution submitted by the Supreme Court of Mexico

125. The Supreme Court of Mexico explained the so-called "*amparo*" adjudication procedure, according to which unconstitutional and unlawful acts of the executive, legislative and judicial branches can be challenged. The basic principle is that an "*amparo*" procedure can only be initiated after all the legal remedies provided by the applicable law have been exhausted; however, there are some exceptions to this general rule. A total of 10 exceptions were enumerated with the relevant sub-exceptions which are applicable in the Mexican legal system and the main reason was that the challenged act should cause irreparable damage.

126. As regards the transgender rights, the Mexican Supreme Court held that there was one such case with facts as follows. A transgender person, born as a male but identified with the female gender, had undergone a gender reassignment surgery and then sought to correct her birth certificate to reflect the changes made. She had also requested that information on her gender change be kept confidential and that the fact that she is a transgender person be not disclosed. Her case was decided by a judge who had granted her request for a birth certificate correction but who ordered new information to be added as "additions", namely as "corrections" to the original birth certificate. The Applicant considered such conduct to violate her rights to equality before the law, non-discrimination, privacy, human dignity and health. The Mexican Supreme Court, following her appeal, ruled that the judge's decision was unconstitutional and, on that occasion, ordered that the changes be made to the original certificate and that the changes not be made public except in court proceedings and in the police, if necessary. The reasoning used by the Supreme Court was as follows: "*Every individual lives a gender-relevant identity. They develop personality based on it, so that psychosocial sex should take precedence over morphological sex. Consequently, sex change*

imposed by a person is part of their right to free personality development and is in contravention of the fundamental rights to keep a person in the sex that they do not feel is theirs".

Contribution submitted by the Supreme Court of the Netherlands

127. With regard to the exhaustion of legal remedies, the Supreme Court of the Netherlands stated that overcoming the stages of appeal and sending a case directly to it is known by the term *"sprongcassatie"* or in the literal translation "*jump cassation*" and such a step is possible only if all the interested parties in a case agree, but such cases are more of a contractual nature and do not coincide with the circumstances of the case explained by the Court. Consequently, it was pointed out that their practice does not recognize any similar case where, due to the Applicant's particular circumstances, the latter was exempted from the obligation to exhaust the legal remedies provided by law.

128. As regards the right to gender change, it was stated that the Netherlands Civil Code explicitly provides for this possibility and that is why the Supreme Court of the Netherlands did not have a case to declare on this issue. It was further stated that it was not possible until recently in the identification documents (birth certificate/passport) to state that a person does not have a defined gender, any indication that the person is intersex or that gender cannot be determined and therefore, in 2007, the Supreme Court of the Netherlands ruled that this was not foreseen by the applicable law. Also, in that case, the Supreme Court of the Netherlands stated that while, on one hand, Article 8 of the ECHR imposes upon the Contracting States a positive obligation to provide mechanisms for changing the indication of a person's gender; on the other hand, the Contracting States have a margin of appreciation in this respect and, using such a margin, the Supreme Court in 2007 ruled that, up to that point, there was no basis to accept the conviction of an individual that he does not belong to any gender. However, in a later case in 2018, the Limburg District Court decided that the attitudes of society have changed, so that the requirement that a person have no indication of gender should be approved. In practice, the passport of such person would read: "*gender cannot be determined*" and the current legal provision is designed for cases where gender cannot be determined at birth, which is not the case at hand. The Assembly is in the process of discussing whether the law should be amended to accommodate persons who do not identify with either gender. In this respect it was emphasized that the Netherlands court did not admit that there is a "*third gender"* but stated that it was possible for the identification documents to state that "*gender cannot be determined."*

Contribution submitted by the Constitutional Court of Hungary

129. With regard to the exhaustion of legal remedies, the Constitutional Court of Hungary held that the Applicants can only appear before it when all legal remedies have been exhausted or when no remedy is available. It was further stated that there is an exception whereby the Applicants can apply directly to the Constitutional Court of Hungary if a legal provision is applied in violation of the Fundamental Law of Hungary or when a legal provision becomes ineffective and the rights are directly infringed, without a court decision. The other exception is when there is no procedure that provides a legal remedy designed to correct the violation of the respective rights.

130. As to whether they have had similar cases, the Constitutional Court of Hungary stated that they had a very similar case to the case pending before the Court. The case in question is not translated into English, but its summary is submitted to the case database of the Venice Commission.

131. The case concerned a refugee who was also transgender and had applied for asylum in Hungary. He requested that his identification documents be written as male since he did not identify with the female gender that figured in his documents. The Hungarian authorities had initially rejected the request, citing that these rights belong only to Hungarian nationals and not to asylum seekers. However, at the end of the litigation process, the Applicant's constitutional complaint was also accepted by the Constitutional Court of Hungary, which decided that the right claimed by the Applicant, although a refugee and asylum seeker, was a universal right. In this respect, it was found that he had been discriminated against on the basis of national origin as the right to a name derives from the right to human dignity and as such this right is inviolable. The Constitutional Court of Hungary considered the right of transgender persons to change the name as a fundamental right based on the right of the person to personal integrity and equal human dignity.

Contribution submitted by the Constitutional Court of Latvia

132. The Constitutional Court of Latvia stated that there was only one exception to the general rule that all legal remedies should be exhausted before a constitutional complaint is filed. Such exemption relates to cases where the constitutional complaint is of general interest or if the general remedies would not be in a position to avoid substantial damage that would be caused to the Applicant. The

concept of "*substantial damage*" is interpreted to mean a negative and irreversible consequence for the constitutional complainant. The latter bears the burden of proof to prove such a thing.

133. The case-law of the Constitutional Court of Latvia shows the self-restraint used in respect of this exception, although as such it is possible. In this respect, there is only one case where this exception was used. In that case it was considered that the general remedies did not have the capacity to avoid the substantial damage to the Applicant (see the case of the Constitutional Court of Latvia, no. 2003-19-0103 of 14 January 2004), in which no broad reasoning was given on this point but it was emphasized that the case itself shows that the rights and freedoms of the Applicant cannot be protected by the general remedies to which he had access and that substantial damage would be irreversible.

Other contributions sent to the Court

134. The State Court of the Principality of Liechtenstein held that the Applicants should exhaust all possible remedies of appeal and that no exception was ever made to this rule. However, as far as transgender rights are concerned, it has been confirmed that there have been no such cases.

135. The Supreme Court of Finland stated that they did not deal with a case similar as described by the Court and that in Finland all courts have an obligation to give precedence to the Constitution in cases where a law is incompatible with the Constitution. However, as far as transgender rights are concerned, it has been confirmed that there have been no such cases.

136. The Constitutional Court of North Macedonia noted the differences in jurisdiction that exist in the constitutional adjudication as to the exhaustion of legal remedies. In this respect, it was emphasized that individuals have the right to appear directly to the Constitutional Court of North Macedonia in cases where it is alleged that a public authority has violated an individual right; however, according to the stipulation, this provision causes problems in practice as such jurisdiction places it in the position to serve as a court of first instance. Concerning "*special circumstances*", it was stated that no similar case was filed but that, in their view, all cases related to the protection of human rights and freedoms were regarded as "*special*" cases, which must be dealt with a particular diligence.

137. The Constitutional Court of Bulgaria stated that in Bulgaria there is no legal possibility to submit an individual request which could be considered equivalent to the Referral before this Court. Concerning transgender rights, it was confirmed that there have been no such cases.

138. The Supreme Court of Estonia stated that there was only one case in which it was concluded that there was no effective legal remedy to address the applicant's allegations of a violation of fundamental rights and freedoms. However, noting the jurisdictional differences between this Court and that of Estonia, it was emphasized that individuals in Estonia cannot submit constitutional requests directly without exhausting all legal remedies. Regarding cases that have to do with transgender rights, it was stated that there were no such cases.

139. The Constitutional Court of Portugal stated that there had been no case of transgender rights and that there had been no case where, for special reasons or for special circumstances, an Applicant was exempted from the obligation to exhaust legal remedies.

Admissibility of the Referral

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

141. In this respect, the Court, by applying Article 113 of the Constitution, the relevant provisions of the Law as to the procedure in the case set out in paragraph 7 of Article 113 of the Constitution; Rule 39 [Admissibility Criteria] and Rule 76 [Request pursuant to Article 113.7 of the Constitution and Rule 46, 47, 48, 49 and 50 of the Rules of Procedure] initially shall examine whether: (i) the Referral was submitted by the authorized party; (ii) an act of public authority is challenged; and if (iii) all legal remedies have been exhausted. Depending on the fulfillment of these initial criteria, the Court will decide that it is necessary to continue with examining other admissibility requirements.

Regarding the authorized party and the act of public authority

142. 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."

143. The Court also refers to Article 47 [Individual Requests] of the Law, which establishes: "*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".*

144. The Court also refers to item (a) of paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure which stipulates: "*(1) The Court may consider a referral as admissible if: (a) the referral is filed by an authorized party".*

145. The Court also refers to paragraph (2) of Rule 76 of the Rules of Procedure which, *inter alia*, foresees: *"(2) A referral under this Rule must accurately clarify [...] what concrete act of public authority is subject to challenge."*

146. As regards the fulfillment of these criteria, the Court finds that the Referral is (i) filed by an authorized party, namely the Applicant, in the capacity of an individual seeking protection of his fundamental rights and freedoms guaranteed by the Constitution and the ECHR, as set out in the abovementioned provisions of the Constitution, the Law and the Rules of Procedure; and (ii) challenged an act of a public authority in the Republic of Kosovo, namely Decision [No. 64/04] of 13 June 2018 of the Civil Registration Agency.

147. Accordingly, the Court concludes that the Applicant is an authorized party; and that he challenges an act of a public authority.

Regarding the exhaustion of legal remedies

148. With regard to exhaustion of legal remedies , the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above; paragraph 2 of Article 47 of the Law; and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure, which establish:

Article 47
[Individual Requests]

"[...]

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

Rule 39
[Admissibility Criteria]

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

[...]

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted."

149. In view of the Applicant's request to be exempted from the obligation to exhaust the "*claim for administrative conflict*" as a legal remedy established by law in the circumstances of the present case, the Court will in the following (i) set out the general principles of the ECtHR and of the Court as to the exhaustion of legal remedies; and subsequently it shall (ii) apply the latter in the circumstances of the present case.

(i) General principles of the ECtHR and of the Court as to the exhaustion of legal remedies

150. The Court notes that paragraph 7 of Article 113 of the Constitution establishes the obligation to exhaust "*all legal remedies provided by law*". This constitutional obligation is also set out in Article 47 of the Law requiring that "*all legal remedies*" be exhausted and, further, in item (b) of paragraph (1) of Rule 39 of the Rules of Procedure, with particular emphasis on the obligation to exhaust in advance all "*effective*" remedies provided by law.

151. The criteria for assessing whether the obligation to exhaust all "*effective*" legal remedies is fulfilled are well defined in the ECtHR's case-law, in accordance with which, under Article 53 of the Constitution, the Court is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

152. In this regard, the Court notes that the concept of exhaustion and/or obligation to exhaust legal remedies derives from and is based on the "*generally recognized rules of international law*" (see, *inter alia*,

Switzerland v. United States of America, Judgment of 21 March 1959 of the International Court of Justice). The same applies to the ECtHR, which under Article 35 (Admissibility criteria) of the ECHR: *"The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law [...]"*.

153. The purpose and rationale behind the requirement to exhaust the legal remedies or the exhaustion rule, is to afford the relevant authorities, primarily the regular courts, the opportunity to prevent or put right the alleged violations of the Constitution. It is based on the presumption, reflected in Article 32 of the Constitution and 13 of the ECHR that the Kosovo legal order provides an effective remedy for the protection of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery. (See in this regard, the ECtHR cases *Selmouni v. France*, cited above, paragraph 74; *Kudła v. Poland,* Judgment of 26 October 2000, paragraph 152*;* and among others, see also the cases of the Court: KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility of 8 December 2016, paragraph 61; KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility of 7 August 2017, paragraph 35; KI41/09, Applicant *AAB-RIINVEST University L.L.C*, Resolution on Inadmissibility of 3 February 2010, paragraph 16; and, KI94/14, Applicant *Sadat Ademi*, Resolution on Inadmissibility of 17 December 2014, paragraph 24).

154. The Court has consistently adhered to the principle of subsidiarity, maintaining that all applicants are required to exhausts all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. The Court has further maintained that applicants are liable to have their respective cases declared inadmissible by the Court, when failing to avail themselves of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. (see, among others, cases of the Court, KI139/12, Applicant *Besnik Asllani*, Decision on the Request for Interim Measures and the Resolution on Inadmissibility of 25 February 2013, paragraph 45; KI07/09, Applicants *Demë Kurbogaj dhe Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 18-19: KI89/15, Applicant *Fatmir Koçi*, Resolution on Inadmissibility of 22 March 2016, paragraph 35; KI24/16, Applicant *Avdi Haziri*, Resolution on Inadmissibility of 16 November 2016, paragraph 39; and, KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility of 7 August 2017, paragraphs 35-37).

155. The exemption from the obligation to exhaust legal remedies at the level of the ECtHR is only made exceptionally and only in specific cases when analyzing this admissibility criterion in the light of the factual, legal and practical circumstances of a particular case. Even at the level of this Court, based on the ECtHR case law, but also in harmony with the practice of the Constitutional Courts of the Venice Commission member states, the exemption from the obligation to exhaust legal remedies can only be granted exceptionally. (see cases of the Court in which such an exception was applied: Kl56/09, Applicant *Fadil Hoxha and 59 others*, Judgment of 22 December 2010, paragraphs 44-55; Kl06/10, Applicant *Valon Bislimi*, Judgment of 30 October 2010, paragraphs 50-56 and paragraph 60; KI41/12, Applicants *Gëzim and Makfire Kastrati*, Judgment of 25 January 2013; paragraphs 64-74; Kl99/14 and KI100/14, cited above, paragraphs 47-50; KI55/17 , Applicant *Tonka Berisha*, Judgment of 5 July 2017, paragraphs 53-58; and KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 68-73).

156. The fact that the exemption from the exhaustion of legal remedies provided by law, although possible, is made only exceptionally, is also confirmed by the responses submitted to the Court through the Venice Commission Forum, without prejudice to differences in the Constitutions and the respective applicable laws of these states.

157. The exceptions, namely exemption from the obligation to exhaust legal remedies, are set out in the ECtHR case-law, which states that the exhaustion rule must be applied with a "*degree of flexibility and without excessive formalism*", having regard to the context of the protection of human rights and fundamental freedoms (regarding the concept of "*flexibility and lack of excessive formalism"*, see the ECtHR's Practical Guide on Admissibility Criteria of 30 April 2019, I. Procedural Grounds for Inadmissibility, A. Non-Exhaustion of Remedies, 2. Application of this rule, A. Flexibility, page 22 and, *inter alia*, the case of the ECtHR *Ringeisen v. Austria*, Judgment of 16 July 1971, paragraph 89). In principle, based on the ECtHR practice, the obligation to exhaust legal remedies is limited to the use of those remedies, (i) the existence of which is "*sufficiently certain not only in theory but also in practice*", and consequently the latter, should be "*capable of providing redress"* in respect of the applicant's allegations and "*provide a reasonable prospects of success*"; and (ii) which are "*available, accessible and effective*", the characteristics which must be sufficiently consolidated in the case law of the relevant legal system. (see ECtHR cases: *Selmouni v. France*, cited above, paragraphs 71-81; *Akdivar and Others v. Turkey*, cited above, see Section B. on exhaustion of domestic legal remedies, paragraphs 55-77;

Demopolous and Others v. Turkey, Judgment of 1 March 2010, Sections: A. Submissions before the Court on exhaustion of domestic legal remedies and B. Exhaustion of domestic legal remedies, paragraphs 50-129; *Öcalan v. Turkey*, Judgment 12 May 2005, paragraphs 63-72; and *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraphs 155-162).

158. In both of the abovementioned categories, the case-law is of particular importance. Consequently, arguments about the "*effectiveness*" or lack of "*effectiveness*" of the legal remedy must also be supported by the case law, or namely its absence (see, in this context, the ECtHR case: *Kornakovs v. Latvia*, Judgment of 15 June 2006, paragraphs 83-85). The importance of the case law is also evidenced in the case of the ECtHR, *Vinčić and others v. Serbia*, in which the appeal to the Constitutional Court of Serbia was not considered effective, since that court had not yet heard cases related to the relevant violations of human rights and until that court had issued and published such decisions on the merits. (see *Vinčić and Others v. Serbia*, Judgment of 1 December 2009, paragraph 51). Thus, although in theory there was a possibility for the Applicants to refer to the Constitutional Court of Serbia, at the ECtHR level, in the absence of case law, such a legal remedy was considered ineffective until it was proved otherwise. At a later stage and only after concrete evidence on the effectiveness of the legal remedy in practice, the ECtHR had accepted the arguments presented for the created effectiveness of the legal remedy and had consequently changed its approach by accepting and requesting that the exhaustion of such legal remedy must take place before an application is filed before the ECtHR.

159. However, and beyond these possibilities of exception, in all cases and in the light of the ECtHR case-law, the Applicant must prove that he/she *"did everything that could reasonably be expected of [her] him to exhaust domestic remedies*". (see ECtHR case, *D.H. and Others v. the Czech Republic*, Judgment of 13 November 2007 paragraph 116 and the references therein). The ECtHR emphasizes that it is in the Applicant's interests to apply to the appropriate court to give it the opportunity to develop existing rights through its power of interpretation. (see among others, the ECtHR case: *Ciupercescu v. Romania*, Judgment of 15 June 2010, paragraph 169). This stand except for cases where an Applicant may demonstrate, by providing relevant case-law or other appropriate evidence that a legal remedy available to him, which he has not used would fail. (see ECtHR cases: *Kleyn and Others v. the Netherlands*, cited above, paragraph 156 and references therein, and *Selmouni v. France*, cited above, paragraphs 74-77). In this respect, it is important to note that a "*mere suspicion*"

of an Applicant about the ineffectiveness of a legal remedy does not serve as a reason to exempt an Applicant from the obligation to exhaust legal remedies. (see, *inter alia*, ECtHR cases; *Milošević v. the Netherlands*, Decison of 19 March 2002, last paragraph of page 6; and *MPP Golub v. Ukraine*, Judgment of 18 October 2005, last paragraph of Section C on the Assessment of the Court).

160. The Court also notes that a flexible assessment of the necessary characteristics of the legal remedy must be made taking into account the circumstances of each individual case. In this regard, the ECtHR has also adopted the concept of "*special circumstances*", through which it assesses, if there is any particular ground which exempts the Applicant from the obligation to exhaust the legal remedy. In making this assessment, the ECtHR also takes into account (i) the overall legal and political context; and (ii) the "*special circumstances*" of an Applicant. (for the concept of *"special circumstances"*, among others, see ECtHR cases: *Van Oosterijck v. Belgium*, cited above, paragraphs 36-40, and the relevant references therein; *Selmouni v. France*, cited above, paragraphs 71-81 and the relevant references therein; *Öcalan v. Turkey*, cited above, paragraph 67; and *Akdivar and Others v. Turkey*, cited above, paragraphs 67-68 and references therein. Further, for general legal and political considerations, *inter alia*, see *Akdivar and Others v. Turkey*, cited above, paragraphs 68-69 and references therein; and *Selmouni v. France*, cited above, paragraph 77). In cases where it results that an Applicant's obligation to use a legal remedy may be unreasonable in practice and would present a disproportionate obstacle to effectively exercising his right, the ECtHR exempts the Applicant from the obligation to exhaust legal remedies (see, *inter alia*, ECtHR cases: *Veriter v. France*, Judgment of 15 December 1997, paragraph 27; *Gaglione and Others v. Italy*, Judgment of 21 December 2010, paragraph 22; and *M.S. v. Croatia* (*no. 2*).), Judgment of 19 February 2015, paragraphs 123-125).

161. Finally, the Court notes that, having regard to the principle of flexible assessment of the exhaustion of legal remedies and the adaptation of this assessment to the "*special circumstances*" of each case separately, the ECtHR has developed the test of "*burden of proof*", a process clearly defined in its case-law. According to the latter, in the context of the ECtHR, the burden of proof is shared between the Applicant and the relevant Government claiming non-exhaustion. (For a more detailed discussion on the distribution of the burden of proof, *inter alia*, see ECtHR cases: *Selmouni v. France*, cited above, paragraph 76 and references therein; and *Akdivar and Others v. Turkey*, cited above, paragraph 68 and references therein). In principle, following the allegations of the respective Applicant of lack of the legal remedy,

the responding party, namely the relevant state in the context of the ECtHR, bears the burden of proof that there is a legal remedy that has not been used and which is "*effective*" and that the Applicant will have to prove the opposite, namely that the referred remedy was used or that it was not "*effective*" in the circumstances of the respective case. As noted above, reliance on the relevant case-law is relevant in both cases.

(ii) Applying the abovementioned principles and the assessment of the Court regarding the exhaustion of legal remedies to the circumstances of the present case

162. Based on the foregoing principles, the Court will consider the Referral and the Applicant's arguments to be exempted from the obligation to exhaust legal remedies, provided by law. In this context, the Court initially recalls that the Applicant filed a claim for administrative conflict with the Basic Court on 24 July 2018. However, only one week later, namely on 30 July 2018, the Applicant also addressed the Court, requesting to be exempted from the exhaustion of this legal remedy, alleging that the latter is not "*effective*" and "*sufficiently certain in theory and in practice"*.

163. The Applicant argues these alleged characteristics of the legal remedy, based on (i) his "*special circumstances*", including the legal and political context of the community he represents; and (ii) the length of the proceedings before the regular courts. These allegations of the Applicant are also supported by the Ombudsperson. Whereas, as explained above, the KJC has provided a reply to these allegations and the relevant questions of the Court.

164. The Court recalls that in a reply regarding the Applicant's allegations and the questions of the Court, the KJC, *inter alia*, stated that the relevant legal remedy "*meets all standards to be sufficiently certain in the present case and in other cases given that the courts are independent, apolitical, impartial and ensure equal access to all"*. Further, the KJC in the context of the Applicant's right to a legal remedy being "*sufficiently certain not only in theory but also in practice*", as noted above, referred to paragraph 4 of Article 55 of the Constitution. Whereas regarding the "*availability", "accessibility" and "effectiveness"* of the legal remedy that "*the claim for the initiation of an administrative conflict as a legal remedy meets the standards necessary to be considered as a legal remedy available to the Applicant, as the courts enable and provide equal access to all and always strive to be as effective and efficient as possible in resolving cases despite facing a large number of pending cases that are*

accumulated due to a series of factors such [are] *the remaining cases from previous years, new cases received at work, insufficient number of judges, etc*" The KJC did not submit any examples of case law, as requested by the Court based on the case law of the ECtHR. The Applicant challenged the KJC arguments, noting, *inter alia*, that the latter only made a finding that the administrative conflict "*meets all sufficient standards to be sufficiently certain in the present case and in other cases*", but which finding, "*is not based on any concrete facts or data*".

165. In this respect, the Court initially notes that while the KJC stated that the relevant legal remedy is sufficiently certain in theory and practice, in support of its arguments, it refers to paragraph 4 of Article 55 of the Constitution in relation to the limitations of human rights and freedoms. While such an argument is unclear, the Court also notes that the KJC does not provide any additional reasoning, further elaboration or evidence that would prove the effectiveness of this legal remedy in the circumstances of the present case. Moreover, it has not substantiated its assertions by any relevant case law, which according to the case law of the ECtHR is necessary for the practical determination of sufficient certainty and the effectiveness of the legal remedy.

166. In this context, and based on the Applicant's allegations and the relevant comments of the Ombudsperson and the KJC, the Court will first address the allegations concerning the lack of effectiveness and insufficiency of the legal remedy in theory and practice, as a result of the Applicant's "*special circumstances*".

167. The Court notes that the Applicant's allegations concerning the ineffectiveness of the legal remedy relate to the nature of the alleged violation of the right to private life and the legal and political context of the community represented by the Applicant as one of the most marginalized communities in the Republic of Kosovo, also according to the arguments of the Ombudsperson. The Court also notes that at the time and circumstances of the submission of the Referral, namely the relevant allegations by the Applicant before the Court, no case-law existed to prove that a claim for administrative conflict could be effective and sufficiently certain not only in theory but also in practice for the Applicant's "*special circumstances*".

168. The Court further notes that although there was a pending appeal before the Basic Court against the Civil Registration Agency and which rejected the request of a person "Y" to change the name and gender marker from "M" to "F" until 9 October 2018 and 20 November 2018,

the dates on which the Ombudsperson submitted Legal Opinion and the KJC submitted its comments to the Court, based on the case file, the regular courts had no case law regarding the change of name and gender marker of the transgender persons.

169. The first case in this regard, results to have been decided by the Basic Court on 27 December 2018, and upheld by the Court of Appeals on 2 August 2019. The Court notes that this case law regarding the rights of transsexual/ transgender persons to change their name and gender marker, changes the context of the Applicant's allegations and their assessment by the Court, because the latter also proves that the claim for administrative conflict, in the circumstances of the present case, besides being effective, is also sufficiently certain not only in theory, but also in practice.

170. The Court in this context notes that the case decided by Judgment [A. No. 2196/2017] of the Basic Court of 28 December 2018 and upheld by the Court of Appeals by Judgment [PA. No. 244/2109] of 2 August 2019, includes a person "Y" who was born female and had a name that clearly belonged to the female gender. At a later stage, the person "Y" underwent gender reassignment surgery from female to male. Such interventions ended successfully. As a result, in 2017, the person "Y" filed a request with the Civil Status Office in the Municipality of Prizren for legal change of personal name and gender marker. The Civil Status Office rejected his request. The Civil Registration Agency, acting upon the complaint of the person "Y", also rejected his request. Person "Y" initiated court proceedings against the Civil Registration Agency thus filing a claim for administrative conflict with the Basic Court, before the same Basic Court where the Applicant's claim for administrative conflict is still pending. The Basic Court approved the claim of the person "Y" as grounded. On that occasion, it ordered the General Directorate of the Municipality of Prizren to (i) correct the personal name of the person "Y" upon his request; and (ii) change the gender marker of person "Y" from female "F" to male "M" gender. The Civil Registration Agency filed appeal against the decision of the Basic Court with the Court of Appeals. The latter rejected that appeal and upheld the decision of the Basic Court in its entirety. Proceedings before the regular courts in this case had lasted on average of one (1) year and eight (8) months from the time of filing the respective claim until the decision of the Basic Court was upheld by the Court of Appeals.

171. In this context, the Court initially notes that the abovementioned case reflects circumstances very similar to the circumstances of the present case, in at least the following two aspects: (i) a request to change the

name and gender marker from "F" to "M" in the civil registry books addressed initially to the Civil Status Office; and (ii) a request rejected by the Civil Status Office in the respective municipalities upheld by the Civil Registration Agency.

172. In the case already resolved by the regular courts, namely the case of the person "Y", the Court notes that his claim filed on 27 December 2017 with the Basic Court against the decision of the Civil Registration Agency and which upheld the decision of the relevant Civil Status Office for rejecting the request to change the name and gender marker of the person "Y" was resolved in favor of the latter, by Judgment [A. No. 2196/2017] of 28 December 2018 of the Basic Court and upheld by the Court of Appeals by Judgment [PA. No. 244/2109] of 2 August 2019. The respective courts ordered, namely confirmed that (i) the correction of the personal name of the person "Y" be made based on his request; and (ii) change the gender of person "Y" from female "F" to male "M".

173. The Court also notes that the regular courts, in rendering the aforementioned Judgments, also refer to the previous practice of changing the personal name as well as changing the gender marker from "M" to "F" by the relevant municipal offices in the Municipality of Suhareka. More specifically, based on the relevant documents, it results that on 18 April 2012, the Municipality of Suhareka, through the relevant Decision allowed the transgender person "Z" [exact identity will not be disclosed by the Court, *ex officio*, based on paragraph (6) of Rule 32 of the Rules of Procedure], the change of personal name and change of gender marker from "M" to "F", based on his preference and requirement.

174. The Court furthermore notes that the abovementioned decisions of the regular courts are not subject to review before this Court, and consequently it is not assessing their compliance with the Constitution. However, for the purposes of assessing the exhaustion of the legal remedy in the circumstances of the present case, and the effectiveness and sufficient certainty of the claim for administrative conflict in "*theory and practice*", the Court notes that the regular courts, throughout their respective decision-making and in applying the relevant legal remedy in practice referred to (i) the Constitution, namely Articles 21, 24 and 36; (ii) the case law of the ECtHR, specifically *Goodwin v. the United Kingdom* (cited above), based on Article 53 of the Constitution; (iii) in the ECHR, namely Article 8 thereof; and (iv) the legal regulation set out in the LAP, the Law on Personal Name in conjunction with the Administrative Instruction on

Personal Name, the Law on Civil Status and the Law on Gender Equality.

175. In this regard, the Court notes, that the claim for administrative conflict is established in Law No. 03/L-202 on Administrative Conflicts, and the Court has consistently maintained that the latter constitutes an "*effective*" legal remedy not only in theory but also in practice. Beyond the limited and stated exceptions in the part of General Principles, the Court has consistently rejected the Referrals as inadmissible precisely on the ground of non-exhaustion of this legal remedy. (See, *inter alia*, case KI131/17, Applicant *Uran Halimi*, Resolution on Inadmissibility of 10 October 2018, paragraphs 48-49). In the circumstances of the present case, it is its effectiveness and sufficient certainty "*in practice*" which is disputed, taking into account the Applicant's "*special circumstances*".

176. The Court, based on the case law of the ECtHR, reiterates the importance of the case law in assessing the effectiveness and sufficient certainty of a legal remedy in practice. With respect to the latter, and following information received from the Court on 21 August 2019, when it was reported that the Basic Court and the Court of Appeals decided on a case similar to the present case, namely the case of the person "Y", the Court cannot fail to notice and note the fact that there is already a case law in the Republic of Kosovo, although not consolidated but nonetheless important, in respect of the fundamental rights and freedoms of transsexual and transgender persons seeking to change their personal names and gender markers.

177. As noted above, the Judgment [A. No. 2196/2017] of the Basic Court of 28 December 2018 and upheld by the Court of Appeals by Judgment [PA. No. 244/2019] of 2 August 2019, in similar personal circumstances, and in similar legal and political contexts, ordered the relevant public authorities to correct the personal name and gender of the relevant transgender person in the civil registration books. The Court notes and points out that, unlike the circumstances of the present case, the person "Y" had previously undergone a gender reassignment surgery. However, the Court also notes that this fact was not decisive in the assessment of the Basic Court by Judgment [A. No. 2196/2017] of 28 December 2018, and which specifically reasoned, *inter alia*, that based on the Constitution, the ECtHR case law and the Law on Gender Equality, the surgical interventions are not determinants of legal recognition of gender identity.

178. Therefore, and in the light of those circumstances, the Court must find that the claim for administrative conflict is "*effective*" and "*sufficiently*

certain [also] in practice", and that, based on the relevant case law, it is "*capable of providing redress"* regarding the Applicant's allegations of a violation of his rights and freedoms guaranteed by the Constitution and "*provides a reasonable prospects of success"*.

179. In such cases where, based on the relevant case law, a regular legal remedy is "*effective*" and "*sufficiently certain in theory and in practice*" and accordingly is "*capable of providing redress"* regarding the Applicant's allegations and "*provides a reasonable prospects of success"*, the Court, based on the principle of subsidiarity, cannot deprive the regular courts of their constitutional competence to decide on the Applicants' allegations of possible violations of the articles of the Constitution and of the ECHR. As noted above, it is precisely the purpose and rationale of the obligation to exhaust legal remedies to provide the regular courts with the opportunity to prevent or put right the alleged violations of the Constitution.

180. It would be in full contradiction with the subsidiary spirit of the constitutional control mechanism if the Court would declare a legal remedy ineffective when in fact it has proved its effectiveness in practice, as the case of person "Y" cited above shows. Respecting the principle of subsidiarity requires precisely allowing the necessary way and space for the lower instance courts to carry out their duty of direct application of the Constitution and the ECHR.

181. However, the principle of subsidiarity in no way prevents the respective Applicants from addressing the Court, seeking the constitutional review of (i) acts of public authorities after they have exhausted the legal remedies provided by law as set out in paragraph 7 of Article 113 of the Constitution and the relevant provisions of the Law and the Rules of Procedure; and (ii) the absence of a decision within a reasonable time or the alleged delayed court proceedings in violation of the guarantees of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. In this context, the Court recalls that the case law of the ECtHR and not only, but also the case law of the respective courts of the member states of the Venice Commission, enables the relevant applicants to be exempted from the obligation to exhaust the legal remedies.

182. In this context, the ECtHR has sufficient case law, however, the Court will refer to the latest ECtHR case regarding the transgender rights, *X v. North Macedonia*. The Court notes that in this case, the ECtHR rejected the allegations of North Macedonia that the case was premature before the ECtHR because the case was still being dealt with by the courts in North Macedonia. (See the arguments of the

Government and the respective Applicant with regard to the exhaustion of legal remedies in paragraphs 40 and 41 of case *X v. North Macedonia*, cited above). The ECtHR rejected these arguments and accepted the Applicant's case for review on merits, despite the non-exhaustion of legal remedies, reasoning that the delay of the judicial proceedings could constitute grounds for exempting the respective Applicants from the obligation to exhaust legal remedies, and that in the relevant circumstances, the Applicant's case was pending before the Macedonian authorities and courts for seven (7) years and with no indication of when it could be completed. According to the ECtHR, the prolongation of the proceedings in relation to the Applicant's circumstances and the fact that he was subject to a highly prejudicial situation with regard to his right to a private life enabled the Applicant's exemption from the obligation to exhaust legal remedies (see respective reasoning of the ECtHR, in paragraphs 43-46 of case *X v. North Macedonia*, cited above).

183. In this regard, the Court also recalls that before the Court, the Applicant alleges that he should be exempted from the obligation to exhaust legal remedies due to the "*possibility*" of prolongation of the court proceedings in the circumstances of his case. The Court recalls that a considerable part of the Applicant's allegations are based on the KJC reports to argue that the resolution of his case before the regular courts would result in lengthy court proceedings and on average three (3) to four (4) years, at the risk that his case is not decided at all on merits by the regular courts but remanded to the original administrative authorities for review. These allegations of the Applicant are also supported by the Ombudsperson's Legal Opinion.

184. However, in this respect as well, the Court must clarify that the Applicant before the Court does not seek to be exempted from the exhaustion of legal remedies and constitutional review of the already lengthy court proceedings, contrary to the guarantees embodied in Article 31 of the Constitution, in conjunction with Article 6 of the ECHR. On the contrary, the Applicant's allegations concerning the length of the regular court proceedings relate to the "*possibility*" of their prolongation in the future.

185. More specifically, the Court reiterates that the Applicant's Referral was submitted to the Court on 30 July 2018, only 6 days after the submission of the claim to the Basic Court on 24 July 2018. Consequently, the Applicant does not allege that the proceedings before the Basic Court already consist in prolongation of the proceedings and violation of his right to a court decision within a reasonable time as guaranteed by the Constitution and the ECHR.

Similarly, the criteria referred to by the Applicant set out in the ECtHR case law and which are related to the "*complexity of the case*"; "*conduct of the relevant authorities*" and "*the case under consideration*", relate to the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and serve for the constitutional review of a proceeding which allegedly is already prolonged court proceeding. The latter (i) cannot be applied for a period of 6 days from the date of filing the claim with the Basic Court and submission of the Referral to the Court; and (ii) based on the ECtHR case law, do not serve as criteria for assessing the "*possibility*" of prolonging a proceeding in the future.

186. Such allegations, in the circumstances of the present case, are regarded by the Court as "*mere suspicions*" of the "*ineffectiveness*" of the claim for administrative conflict as a legal remedy and therefore, as such, based on the ECtHR case law, cannot serve as a reason to exempt the Applicant from the obligation to exhaust a legal remedy. Moreover, from recent information received by the Court, it follows that, despite the Applicant's allegations, the same Basic Court in a similar case had taken approximately one year to decide on the merits; meanwhile, the Court of Appeals approximately eight (8) months to decide in the second instance and to confirm the decision of the Basic Court.

187. The Court notes that from the moment the Applicant filed the relevant claim with the Basic Court, namely on 24 July 2018, he has submitted five more requests for speeding up, namely urgencies before the respective Court, on 16 October 2018, 22 March 2019, 16 April 2019, 5 June 2019 and 4 July 2019, and based on the case file, it does not follow that the Applicant has received any reply from the Basic Court. In addition, in the replies submitted to the Court, the Basic Court confirmed the Applicant's allegation that no procedural steps had been taken to address the Applicant's allegations of a violation of Articles 23, 24 and 36 of the Constitution in conjunction with Article 8 of the ECHR. More precisely, and as stated above, the Basic Court, in reply to the Court's question at what stage of the proceedings the Applicant's request is being dealt with, stated that: *"[...] no procedural action was taken even though the [Basic] Court is aware of the urgency of the case to be addressed*".

188. However, and as noted above, the issue before the Court is not the constitutional review of the proceedings before the Basic Court, but the constitutional review of the challenged Decision of the Civil Registration Agency. In order to assess the latter, the Court will have to approve the Applicant's request for exemption from the obligation

to exhaust legal remedies, finding that the claim for administrative conflict in the circumstances of the present case and taking into account the "*special circumstances*" of the Applicant, (i) is not effective; and (ii) is not sufficiently certain in theory and practice.

189. As elaborated above, such finding by the Court, in circumstances where the claim for administrative conflict was proved to be effective and sufficiently certain, not only in theory, but also in practice, in the case of the person "Y" decided by the same Basic Court by Judgment [A. No. 2196/2017] of 28 December 2018 and in circumstances similar to those of the Applicant, it would be contrary to the principle of subsidiarity, the principle enshrined in paragraph 7 of Article 113 of the Constitution and the consolidated case law of the Court itself and the ECtHR.

190. The Court has already established in its case law that if the proceedings are pending before the regular courts, then the Applicants' Referral is considered premature. (See, in this context, the cases of the Court, KI23/10, Applicant *Jovica Gadzic*, Resolution on Inadmissibility, of 19 September 2013; KI32/11, Applicant *Lulzim Ramaj*, Resolution on Inadmissibility, of 20 April 2012; KI113/12, Applicant *Haki Gjocaj*, Resolution on Inadmissibility of 25 January 2013, paragraph 34; KI114/12, Applicant *Kastriot Hasi*, Resolution on Inadmissibility, of 3 April 2013, paragraph 33; KI07/13, Applicant Ibish *Kastrati*, Resolution on Inadmissibility of 5 July 2013, paragraphs 28-29; KI58/13, Applicant *Sadik Bislimi*, Resolution on Inadmissibility, of 25 November 2013, paragraph 31; and KI102/16, Applicant *Shefqet Berisha*, Resolution on Inadmissibility, of 2 March 2017, paragraph 39).

191. Therefore, in the circumstances of the present case, based on the principle of subsidiarity, the Court is required to declare the Applicant's Referral inadmissible because it is premature, thereby providing the opportunity and priority to the regular courts to address the issues raised in his referral.

192. To declare this Referral as premature in itself implies that the Applicant is guaranteed by the Constitution, the Law and the Rules of Procedure the opportunity to address again this Court with a request for constitutional review of the decisions of public authorities, whether of their acts or failure to act, which he may claim to have been rendered in violation of a right or fundamental freedom guaranteed by the Constitution, the ECHR or other international instruments.

193. In conclusion, the Court finds that the Applicant has not fulfilled the admissibility criterion of exhaustion of legal remedies established in paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

Applicant's request for compensation of non-pecuniary damage

194. The Applicant, requested the Court to award him compensation for non-pecuniary damage in the amount of € 5,000.00 due to a violation of his fundamental rights and freedoms guaranteed by the Constitution and the ECHR. The Applicant bases his claim for compensation for non-pecuniary damage on Article 41 (Just satisfaction) of the ECHR and the case-law of the ECtHR, namely in cases *Akdivar and Others v. Turkey* (cited above), *B. v. France* (cited above) and *Dolenec v. Croatia* (Judgment of 26 February 2010).

195. The Court notes and finds that Article 41 of the ECHR, which is a part of Section II [European Court of Human Rights] of the ECHR cannot serve as a basis for seeking "*just satisfaction*" or compensation for non-pecuniary damage before the Constitutional Court, as this Article refers to the competences of the ECtHR and not to the competencies of the domestic courts which are part of the protection mechanism guaranteed by the ECHR. The contracting parties are obliged to guarantee the rights and freedoms guaranteed by Section I [Rights and Freedoms] of the ECHR. In this respect, the Court is aware of the fact that the ECHR awards "*just satisfaction*" or compensation for non-pecuniary damage, but does so on the basis of its specific competences described in Article 41 of the ECHR and Rule 60 of its Rules of Procedure.

196. Despite the fact that the ECtHR has specific authorization to award "*just satisfaction*", this Court in the absence of such authorization, is bound and conditioned to act only on the basis of the legal and procedural regulative governing its work. None of the documents governing the scope and proceedings before this Court and the actions that the latter may take, provide an equivalent authorization to award "*just satisfaction*" in the manner in which such competence is clearly ascribed to the ECtHR with abovementioned provisions.

197. The foregoing does not imply that individuals have no right to seek compensation from public authorities in the event of finding violation of their rights and freedoms under the laws applicable in the Republic of Kosovo. On the contrary, the ECtHR itself states that in order for a right to be repaired to the fullest extent possible, the Applicants must

be compensated at the appropriate amount and in accordance with the right which has been infringed upon. (See, for example, one of the ECtHR cases in this regard: *Gavriliță v. Moldova*, Judgment of 22 July 2014).

198. Therefore, the Applicant's request is to be rejected due to the fact that his Referral was declared inadmissible and due to the fact that the Court does not have authorization to award "*just satisfaction*" or "*compensation*". *(See, mutatis mutandis,* the Court's case KI177/14, Applicant Miodrag Jankovic, Resolution on inadmissibility, of July 2015, paragraph 44).

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 59 (b) of the Rules of Procedure, in the session held on xx September 2019, unanimously/by majority:

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the parties;

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

IV. TO DECLARE that this Decision is effective immediately.

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

KI91/18 - Constitutional review of Judgment ARJ. UZV. No. 1/2018 of the Supreme Court of the Republic of Kosovo of 25 January 2018

KI91/18, Applicants: Njazi Gashi, Lirije Sadikaj, Nazife Hajdini-Ahmetaj and Adriana Rexhepi

Resolution on Inadmissibility of 10 September 2019

Keywords: *Individual referral, Independent Oversight Board, employment relationship, manifestly ill-founded*

The Referral was submitted by four Applicants who jointly challenged the constitutionality of the aforementioned Judgment of the Supreme Court.

The Applicants applied in a job vacancy announced by the Ministry of Health for "Health Inspector". They were selected as successful candidates by the Recruitment Commission of the Ministry of Health and consequently had signed relevant appointments and commenced their employment relationship with the Ministry of Health. The unsuccessful candidates in that vacancy initially filed a complaint with the Ministry of Health; and then with the Independent Oversight Board ["IOBCSK"]. The latter upheld their complaints and annulled the entire job vacancy in question and the selection of the Applicants as the winning candidates. Against the decisions of the IOBCSK, the Applicants initiated an administrative conflict on which the regular courts decided on the claim. The Basic Court rejected their claim as ungrounded; The Court of Appeals also rejected their appeal as ungrounded; and, finally, the Supreme Court also rejected their request for extraordinary review as ungrounded. In other words, the regular courts considered that the Applicants' acts of appointment were not lawful and that the IOBCSK decided correctly when it annulled the results of the said vacancy. Before the Constitutional Court, the Applicants challenged the decision of the regular courts, alleging that their rights and freedoms guaranteed by Articles 31, 49 and 55 of the Constitution and Article 6 of the ECHR were violated.

After considering the Applicants' allegations, the Court concluded that:

(i) the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR with regard to the reasoning of the court decisions are manifestly ill-founded on constitutional basis and as such are to be rejected as inadmissible in accordance with Article 113.7 of the Constitution and Rule 39 (2) of the Rules of Procedure;

(ii) the allegations of a violation of Article 49 of the Constitution regarding the right to work and exercise profession are manifestly ill-founded on constitutional basis and as such are to be rejected as inadmissible in accordance with Article 113.7 of the Constitution; and Rule 39 (2) of the Rules of Procedure; and

(iii) the allegations of a violation of Article 55 of the Constitution in respect of the limitation of human rights and freedoms are not adequately clarified and as such are to be rejected in accordance with Article 48 of the Law in conjunction with Rule 39 (1) (d) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

case No. KI91/18

Applicant

Njazi Gashi, Lirije Sadikaj, Nazife Hajdini-Ahmetaj and Adriana Rexhepi

Constitutional review of Judgment ARJ. UZV. No. 1/2018 of the Supreme Court of the Republic of Kosovo of 25 January 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of**:**

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

Applicants

1. The Referral was submitted by Njazi Gashi, Lirije Sadikaj, Nazife Hajdini-Ahmetaj and Adriana Rexhepi residing in Prishtina (hereinafter: the Applicants), who are represented by Njazi Gashi, namely one of the Applicants.

Challenged decision

2. The Applicants challenge the Judgment [ARJ. UZV. No. 1/2018] of 25 January 2018 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with the Judgment [A.A. No. 244/2017] of 20 October 2017 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and the Judgment [A. No. 1144/14] of 9 March 2017 of the Basic Court in Prishtina - Department for Administrative Matters (hereinafter: the Basic Court).

3. The Applicants were served with the challenged Judgment of the Supreme Court on 9 March 2018.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violates their rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial], 49 [Right to Work and Exercise Profession] and 55 [Limitations on Fundamental Rights and Freedoms] 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 for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

6. On 9 July 2018, the Applicants jointly submitted their Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 10 July 2018, the Applicants submitted a power of attorney to the Court authorizing Njazi Gashi - one of the Applicants - to represent all the Applicants in the proceedings before the Court.

8. On 16 August 2018, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Gresa Caka-Nimani and Bajram Latifi.

9. On 12 October 2018, the Court notified the Applicants about the registration of the Referral and requested them to submit copies of the acknowledgments of receipt to prove the date of receipt of the challenged Judgment of the Supreme Court.

10. On the same date, the Court sent a copy of the Referral to the Supreme Court and the Independent Oversight Board for the Kosovo Civil Service (hereinafter: the IOB).

11. On the same date, the Court also notified the Ministry of Health about the registration of the Referral, in the capacity of an interested party, providing it the opportunity to submit comments regarding Referral KI91/18 within 15 (fifteen) days of receipt of the notification of the Court.

12. On 18 October 2018, the Applicants submitted to the Court the requested acknowledgment of receipt proving that the Applicants' representative was served with the challenged Judgment of the Supreme Court on 9 March 2018.

13. On 30 October 2018, the Ministry of Health submitted its comments to the Court.

14. On 7 November 2018, the Court notified the Applicants about the receipt of comments from the Ministry of Health and sent them a copy.

15. On 28 June 2019, the Court requested the Basic Court to submit to the Court a copy of the entire case file relating to the Applicants.

16. On 1 July 2019, the Basic Court submitted a copy of the requested case file to the Court.

17. On 10 September 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

Introduction

18. The Applicants applied in a job vacancy announced by the Ministry of Health for "Health Inspector". They were selected as successful candidates by the Recruitment Commission of the Ministry of Health and consequently had signed relevant appointments and commenced their employment relationship with the Ministry of Health. The unsuccessful candidates in that vacancy initially filed a complaint with the Ministry of Health; and then, with the IOB. The latter upheld their complaints and annulled the entire job vacancy in question and the selection of the Applicants as the winning candidates. Against the

decisions of the IOB, the Applicants initiated an administrative conflict on which the regular courts decided on the claim. The Basic Court rejected their claim as ungrounded; The Court of Appeals also rejected their appeal as ungrounded; and, more recently, the Supreme Court also rejected their request for extraordinary review as ungrounded. It follows from all this introductory summary of the facts that the regular courts considered that the Applicants' acts of appointments were not lawful and that the IOB decided correctly when it annulled the results of the vacancy in question. Before the Constitutional Court, the Applicants challenge the decision of the regular courts, alleging that their rights and freedoms guaranteed by Articles 31, 49 and 55 of the Constitution and Article 6 of the ECHR have been violated.

Recruitment and appeal procedures conducted within the Ministry of Health and before the IOB

19. On 12 September 2013, the Ministry of Health announced a job vacancy for 5 (five) vacant job positions entitled: "Health Inspector".

20. On 14 November 2013, the Recruitment Commission of the Ministry of Health, established for the purpose of this vacancy, presented the Final Recommendation Report which was approved by the Secretary General of the Ministry of Health. After completing all the recruitment procedures, the Ministry of Health, namely the Head of Personnel, through a Notice [without number] announced the final list of the winners of this vacancy, where all four applicants were selected as successful candidates of the vacancy in question. The Notice issued by the Ministry of Health cited legal advice according to which: *"Dissatisfied parties may file a complaint within 30 days [...]"* with the Dispute Resolution and Appeals Commission at the Ministry of Health (hereinafter: DRA Commission).

21. Between 15 November 2013 and 19 November 2013, several unsuccessful candidates in the vacancy in question, namely, F.V.H., N.K.D., and T.J.M., filed their appeals with the DRA Commission.

22. On 18 December 2013, the DRA Commission, by Decision [No. 05-6834/2] rejected the appeals of the aforementioned candidates as ungrounded and upheld the assessment of the Recruitment Commission of the Ministry of Health - according to which the Applicants were selected as the winners of the vacancy in question.

23. Between 19 December 2013 and 30 December 2013, the Applicants and the Ministry of Health, in the capacity of employees and

employers, signed act-appointments for the establishment of the employment relationship in the capacity of "Health Inspector". In all the act appointments for all the Applicants as the date of the commencement of employment relationship was 5 January 2014, while the duration and type of appointment was an "indefinite" contract.

24. As of 5 January 2014, the Applicants have started their work as "Health Inspectors".

25. Between 16 January 2014 and 14 February 2014, the unsuccessful candidates in the vacancy in question [F.V.H.; N.K.D.; and T.J.M.] filed appeals against the Decision of the DRA Commission with the IOB. They opposed the selection of the Applicants as winners and requested the annulment of the vacancy in question.

26. Between 28 February 2014 and 10 March 2014, the IOB, acting on the basis of the appeals of unsuccessful candidates for the position of "Health Inspector", rendered Decisions [No. A/02/10/2014; A/02/11/2014; A/02/42/2014] by which annulled all recruitment procedure for "Health Inspector". The reasons on which the IOB decisions were based consisted, *inter alia*, of: (i)*" the extension of the vacancy for the position of Health Inspector is in contradiction with Regulation no. 02/2010 on Recruitment Procedures in the Kosovo Civil Service"; (ii) "On the occasion of the second recruitment announcement by the Ministry of Health for the position of Health Inspector (5 positions) the terms of the vacancy have been changed, which is in contradiction with Regulation No. 02/2010 on Recruitment Procedures in the Kosovo Civil Service";* (iii) The reasoning of the Decisions of the DRA Commission did not meet the necessary criteria as set out in paragraph 3 of Article 86 of Law No. 02/L-28 on Administrative Procedure (hereinafter: LAP); (iv) *"the compilation of the written test by the Selection Committee was not done in accordance with Regulation No. 02/2010 on Civil Service Recruitment Procedures"*. At the end of these decisions it was stated that the dissatisfied party may initiate an administrative conflict within 30 days, but that the initiation of the same procedure does not prevent the execution of the IOB decisions. The latter obliged the Secretary General of the MEST to implement the decisions of the IOB within 15 days of receipt the decisions and to keep the IOB informed about the action taken to implement these decisions.

27. On 22 April 2014, the Ministry of Health, by Decision [No. 112/IV/2014] annulled the recruitment procedures for "Health Inspector" positions in accordance with the abovementioned IOB

Decisions. On that occasion, the Ministry of Health revoked the act appointments for the nominees in this vacancy, namely the Applicants and did this, as stated in the Decision of the Ministry of Health, "*in execution of the decisions*" of the IOB.

28. On 29 April 2014, namely following the revocation of their act-appointments by the Ministry of Health, the Applicants addressed the latter with a request for annulment of the abovementioned Decision revoking their act-appointments for "Health Inspectors". It follows from the case file that the Ministry of Health did not respond to this request of the Applicants.

29. On 5 June 2014, after the Ministry of Health did not reply, all the Applicants individually filed an appeal with the IOB requesting the annulment of the Decision [No. 112/IV/2014] of the Ministry of Health of 22 April 2014 on the revocation of their acts of appointment.

30. Between 16 June 2014 and 20 June 2014, the IOB rendered Decisions [Nos. A/02/237/2014; A/02/238/2014; A/02/240/2014; and A/02/239/2014] by which it rejected, separately, all Applicants' appeals as ungrounded. In the reasoning of the IOB decisions of all the Applicants, it was stated, *inter alia*, that: *"[...] The Ministry of Health, although aware that the recruitment procedure was challenged by appeal by the competing candidates* [F.V.H., N.K.D., and T.J.M.] *dissatisfied with the selection of the winning candidates, when establishing the employment relationship did not respect Article 80. paragraph 3 of Law No. 03/L-149 on the Civil Service of the Republic of Kosovo, where it is clearly stated that: "All effects of administrative actions appealed and brought for review to the competent disputes and grievances management bodies are suspended till final decision"* Also, in the decisions of the IOB, for all Applicants, it was stated that *"[...] essential violations of the legal provisions by the employment authority* [Ministry of Health] *[...] have produced legal consequences, so as a consequence was the revocation of the act of appointment [...] which was unlawfully concluded".* In the end it was emphasized that against these decisions of the IOB, the dissatisfied party may initiate an administrative conflict.

Proceedings in the regular courts following the initiation of an administrative conclict by the Applicants against the decisions of the IOB

31. On 10 July 2014, the Applicants filed a claim for administrative conflict against the decisions of the IOB with the Basic Court in Prishtina, the Department for Administrative Matters (hereinafter:

the Basic Court), requesting the reinstatement to their working places and compensation of salary.

32. On 9 March 2017, the Basic Court, by Judgment [A. No. 1144/14] rejected as ungrounded the statement of claim of the Applicants filed against the IOB decisions revoking the act-appointments for "Health Inspectors". In that case, the Basic Court reasoned that the IOB correctly established the factual situation when rejecting their complaints as ungrounded due to the fact that *"the claimants* [Applicants] *did not have legal basis, namely the vacancy of 12 September 2013 was annulled, based on which the employment relationship with the Ministry of Health was established, and on this basis, according to the assessment of the Basic Court, the employment authority –the Ministry of Health, has correctly decided when it annulled the act-appointments of the claimants* [Applicants]*, thereby implementing the decisions of the respondent* [the IOB]*."*

33. On 28 April 2017, the Applicants filed their appeals against the Judgment of the Basic Court with the Court of Appeals of Kosovo on the grounds of erroneous application of the substantive law, with the proposal that the Judgment of the Basic Court be modified and their statement of claim be approved as grounded or the latter be quashed and the case be remanded to the first instance court for retrial.

34. On 20 October 2017, the Court of Appeals, by Judgment [A.A. No. 244/2017] rejected the Applicants' appeal as ungrounded and upheld the abovementioned Judgment of the Basic Court. Among other things, the Court of Appeals reasoned its decision by stating that:*"[…] the responding authority* [the IOB] *based on administered evidence, has fully established the decisive facts on a legal basis, by rejecting the claimants' appeals and upholding the decision of the Ministry of Health* [on annulment the act-appointments], *because when establishing the employment relationship of the claimants* [the Applicants], *the Ministry as an employing body did not respect Article 80 paragraph 3 of the Law on Civil Service, which stipulates that all effects of administrative actions appealed and brought for review to the competent disputes and grievances management bodies are suspended till final decision"*. The Court of Appeals also stated that the first instance court decided in a fair and legal manner on the rejection of the Applicants' appeals *"[…] because with the annulment of the vacancy of the responding body - the Ministry of Health by the Board* [the IOB], *the legal basis on which the claimants have established employment relationship with the Ministry of Health has been invalidated by the Board* [the IOB]*; therefore, the employing authority has correctly decided on the annulment of the act*

appointments of the claimants, in implementing the decisions of the respondent regarding the annulment of the recruitment procedure […].”

35. On 7 December 2017, the Applicants filed a request for extraordinary review with the Supreme Court, proposing that the judgments of the two lower courts be modified and the Applicants’ statement of claim be approved as entirely grounded.

36. On 25 January 2018, the Supreme Court, by Judgment [ARJ. UZVP. No. 1/2018] rejected the Applicants’ request for extraordinary review as ungrounded.

Applicant’s allegations

37. The Applicants allege that the challenged Judgment of the Supreme Court violated their rights guaranteed by Articles 31, 49 and 55 of the Constitution and Article 6 of the ECHR. Thus, the Applicants allege a violation of their right to (i) “fair and impartial trial”; (ii) “the right to work and exercise profession”; and (iii) “the limitations on fundamental rights and freedoms”.

38. First, as to the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants allege that the administrative acts give contradictory reasons regarding the annulment and revocation of the act appointments, which, in their view, is contrary to paragraph 1 of Article 86 [Modalities of rationale] of the LAP which was in force at the time of issuing the decisions providing that: *“Rationale shall be clearly formulated and shall include an explanation of legal and factual basis of the act.”* Further, the Applicants also cite paragraph 3 of Article 86 of the same Law which provides that: *“Rationale with unclear, contradictory or inaccurate data is equal to lack of rationale”*.

39. In this regard, the Applicants point out, as we deal with the contradictory reasoning of the challenged decisions, in particular the reasoning of the Court of Appeals and of the Supreme Court, *“it is still remains unclear to the claimants* [the Applicants] *what is the reason for the cancellation of the vacancy and the revocation of their act appointments”*. They further pose the question whether *“The reasons mentioned in the IOBCSK* [the IOB] decisions *no. A/02/11/2014, A/02/2014 and A/02/10/2014 on which the decision of the MoH* [Ministry of Health] *on annulment of the vacancy and the act of appointment was based or are the reasons given by the judgment of*

the Court of the Appeals and Supreme Court and the decision of the IOBCSK [the IOB] *as a second instance to the claimants' appeal."*

40. In relation to the allegations of the obligation of the reasoning of the court decisions, the Applicants also note that *"The Supreme Court did not respond to any of the claimants'* [Applicants'] *allegations, but only by a paragraph, which states that the claimants' allegations were without influence in deciding otherwise […]."* As a result, the Applicants allege that they have remained *"without clarification on what legal basis their employment relationship with the Ministry of Health was terminated, where as stated above, the decisions of the administrative body and the decisions of the courts have different reasoning and contradict each other. Eventual violations that the administrative body might have committed in a recruitment procedure, where the employees had no influence on them, should not sanction the employees, leading to termination of their employment relationship without any right."*

41. Second, with regard to the right to work and exercise profession Article 49 of the Constitution, the Applicants claim that although they have started their work as a "Health Inspectors" since 5 January 2014, when they have accepted their acts appointments and performed their duties without any remark, the employment relationship was subsequently "*terminated in an unilateral manner*". This termination, allegedly, confirmed by the challenged Judgment of the Supreme Court has resulted in a violation of Article 49 of the Constitution as the termination of employment relationship was done unilaterally and without a notice.

42. Further, in this respect, the Applicants emphasize that the Supreme Court, by the challenged Judgment, committed erroneous application of substantive law as it based its decision on paragraph 3 of Article 80 of the Law on Civil Service, which states that *"All effects of administrative actions appealed and brought for review to the competent disputes and grievances management bodies are suspended till final decision."* – whereas, according to the Applicants, the Supreme Court *"does not reason what is the legal basis for termination of employment in this regard."* It is the Law on Civil Service that expressly provides for cases where the employment relationship of a civil servant may be terminated and in the present case none of those circumstances has been fulfilled.

43. Third, as regards Article 55 of the Constitution which regulates the issue of limitation of human rights and freedoms, the Applicants do

not clarify any allegation but merely allege that the Article in question has been violated.

44. Finally, the Applicants request the Court to render a Judgment which:

(i) Declares the Referral admissible;
(ii) Holds that there has been a violation of Article 31 [Right to Fair and Impartial Trial], Article 49 [Right to Work and Exercise Profession], Article 55 [Limitations on Fundamental Rights and Freedoms], Article 53 [Interpretation of Human Rights Provisions] of the Constitution of Kosovo;
(iii) Holds that there has been a violation of Article 6 (Right to a fair trial) of the European Convention on Human Rights;
(iv) Declares invalid the Judgment [ARJ. UZVP. No. 1/2018] of the Supreme Court; Judgment [A.A. No. 244/2017] of the Court of Appeals and Judgment [A. No. 1144/14] of the Basic Court in Prishtina.

Comments of the Ministry of Health

45. The Ministry of Health, in the capacity of an interested party, submitted its comments to the Court following the opportunity given to it by the latter.

46. The Ministry of Health stated that following the completion of the recruitment procedures for the five vacant job positions for the "Health Inspector", the final list of successful candidates was announced, including all four applicants. Subsequently, the appeals of some candidates dissatisfied with the result of the vacancy were approved and as a result the entire recruitment procedure announced on 12 September 2013 was canceled. Along with it, all the decisions stemming from that procedure were also annulled.

47. The Ministry of Health further states that it has implemented the IOB decisions and on 18 April 2014 rendered the Decision [No. 112/IV/2014], by which it canceled the recruitment procedure announced on 12 September 2013 and revoked the act-appointments for the nominees from this vacancy including the Applicants. The Ministry of Health states that it has done so as the decision of the IOB *"are final decisions and the latter must be executed within 15 days by the responsible person […]"*.

48. Finally, the Ministry of Health states that the Basic Court rejected the Applicants' statement of claims and that, in the absence of the

Judgment [ARJ. UZVP. No. 1/2018] of 25 January 2018 of the Supreme Court it *"could not comment on the Judgment in question"*.

Admissibility of the Referral

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

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

51. The Court further refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

> Article 47
> [Individual Requests]
>
> *1. "Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority".*
>
> 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".*

52. As to the fulfillment of these criteria, the Court finds that the Applicants are authorized parties challenging an act of a public authority, namely Judgment [ARJ. UZV. No. 1/2018] of the Supreme Court of 25 January 2018, after the exhaustion of all legal remedies. With regard to their rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and Article 49 of the Constitution, the Court considers that the Applicants have clarified their allegations to those rights and freedoms which they claim to have been violated by the court decisions in accordance with the requirements of Article 48 of the Law. They also submitted the Referral in accordance with the time limit set forth in Article 49 of the Law.

53. As to the Applicants' allegation of a violation of Article 55 of the Constitution which regulates the issue of limitation of fundamental human rights and freedoms, the Court notes that the Applicants have not submitted any argument as to how this constitutional provision was violated by public authorities. They simply referred to this article and requested the Court to find a violation of this article.

54. In this regard, the Court recalls that the mere citation of an Article of the Constitution cannot be regarded as fulfillment of the legal obligation under Article 48 of the Law in conjunction with item (d) of paragraph (1) of Rule 39 of the Rules of Procedure, where it is required from the Applicants to clarify "*accurately and adequately* [...] *the allegations of a violation of constitutional rights or provisions*". Therefore, and in line with the case law of this Court, the latter will not further deal with the Applicants' allegation of a violation of Article 55 of the Constitution as the Applicants have not accurately clarified their allegation of a violation of this constitutional provision. (See, in this regard, the Resolution on Inadmissibility of the Constitutional Court in case KI02/18, Applicant *the Government of the Republic of Kosovo [Ministry of Environment and Spatial Planning],* paragraphs 40-41).

55. Further, with regard to the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and those of a violation of Article 49 of the Constitution, the Court must also examine whether the Applicants have fulfilled other admissibility requirements, laid down in Rule 39 (2) of the Rules of Procedure, which provides:

> *"(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."*

56. With regard to these proceedings before the regular courts, the Applicants essentially complain that in their case:

> (i) The Supreme Court and that of the Court of Appeals have violated their right guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR as to the obligation to reason the court decisions, by failing to provide sufficient reasoning and which has, allegedly, resulted in remaining unclear the fact why the vacancy in question was canceled; and
> (ii) the regular courts have violated the right guaranteed by Article 49 of the Constitution by allowing the unilateral termination of the employment relationship established between them and the Ministry of Health through relevant acts of appointments.

As to alleged violation of Article 31 of the Constitution and Article 6 of the ECHR as to the reasoning of the court decisions

57. In this regard, the Court recalls the Applicants' allegations of a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR, where they mainly emphasize that the Supreme Court and the Court of Appeals did not sufficiently reason their decisions and consequently they still do not know the reason for the cancellation of the vacancy in question. This allegedly violated their right to a reasoned court decision. They also point out that the Supreme Court did not clarify the legal basis for termination of employment relationship.

58. In light of these allegations, the Court notes that the Court of Appeals rejected their appeal against the Judgment of the Basic Court and subsequently the Supreme Court rejected the request for extraordinary review submitted against the Judgment of the Court of Appeals. According to this Court, both regular courts, namely the Supreme Court and the Court of Appeals, have fulfilled their constitutional and legal obligations to provide sufficient legal reasoning as required by Article 31 of the Constitution and Article 6 of the ECHR and in consistent with the case law of the European Court of Human Rights (hereinafter: the ECtHR) and the case law of this Court itself. Both these regular courts, which reasoning is challenged by the Applicants on the grounds if insufficiency, clearly responded as to why they have upheld the IOB decisions on annulment of the vacancy in question. Therefore, this Court also considers that the

Applicants' allegation that it is not still clear to them *"why the vacancy was canceled"* is ungrounded.

59. More specifically, the Court notes that the Court of Appeals, with regard to the reason for the cancellation of the vacancy, stated that *"[...] the cancellation of the vacancy of the responding body - the Ministry of Health by the Board* [the IOB] *has invalidated the legal basis on which the claimants have established employment relationship with the Ministry of Health, therefore, the employment body has correctly decided to annul the act of appointments of the claimants in accordance with the decisions of the respondent regarding the annulment of the act of appointments of the claimants in implementation of the decisions of the respondent regarding the cancellation of the recruitment procedure [...]."*

60. The Supreme Court further reasoned the confirmation of the Judgment of the Court of Appeals and consequently upheld it in entirety by giving reasons for both the application of the substantive law and the lawfulness of the cancellation of the vacancy and the Applicants' act-appointments. The relevant reasoning of the Supreme Court in this regard reads as follows:

> *"The legal position of the Court of Appeal in general is approved also by this Court, because the challenged Judgment does not contain essential violations as claimed by the claimant in the request.*
>
> *Article 80.3 of Law No. 03/L-149 on the Civil Service of Kosovo provides that all effects of administrative actions appealed and brought for review to the competent disputes and grievances management bodies are suspended till final decision. It has been established that the claimants'* [the Applicants] *acts of appointment for the position of 'Health Inspector' were revoked by the Ministry of Health, due to the annulment of the Vacancy [...] and violations of the Regulation No. 02/2010 on the recruitment procedures in the civil service, therefore, according to the court's assessment, the Ministry of Health has acted correctly by implementing the decisions of the respondent [the IOB] [...].*
>
> *In this regard, this Court has found that the lower instance courts have correctly decided when they rejected as ungrounded the appeal of the claimants* [the Applicants] *regarding the annulment of the decision of the respondent MoH [...] as the administrative body during the repeated procedure has revoked the acts of*

appointment, which according to the ascertainment of the IOB […] have been unlawfully established, in violation of Article 36 of the Regulation No.02/2010 and Article 80.2 of the Law No.03/L-149 on Civil Service".

61. Finally, the Supreme Court also stated that the challenged Judgment of the Court of Appeals *"is clear and comprehensible, contains sufficient reasons and decisive facts to render lawful decisions"* and the Court of Appeals, according to the Supreme Court, applied *"correctly the substantive law"* and that *"the law was not violated to the detriment of the claimants* [the Applicants]".

62. In this regard, the Court recalls that in rejecting an appeal, or as in the present case, rejecting a request for extraordinary review, the Supreme Court may, in principle, merely approve the reasons for rendering the decision of the lower instance court, in this case the Court of Appeals (see ECtHR cases, *García Ruiz v. Spain*, cited above, paragraph 26; *Helle v. Finland*, application No. 20772/92, Judgment of 19 December 1997, Reports 1997-VIII, paragraphs 59-60).

63. Similarly to the same line of reasoning, the Court also recalls that cases where a court of third instance or appellate court confirms decisions taken by the lower courts - its obligation to justify decision-making differs from cases where a court changes lower court decision making. In the present case, the Supreme Court did not change the decision of the Court of Appeals or that of the Basic Court – which rejected the Applicants' claim for administrative conflict - but only upheld their legality, as, according to the Supreme Court the factual situation was determined in a correct manner and the decision making in the Court of Appeals and the Basic Court was in accordance with the substantive and procedural law as to the cancellation of a vacancy under the rules of the civil service in the Republic of Kosovo. Thus, the Supreme Court has fully confirmed that the cancellation of the vacancy in question was made in full compliance with the applicable legislation and that in the case of rejecting the Applicants' appeals, the IOB had correctly decided when it annulled the vacancy and when it approved the Decision. of the Ministry of Health on revocation of the Applicants' acts of appointment.

64. In this respect, the Court considers that, even though the Supreme Court may not have responded at every issue raised by the Applicants in their request for extraordinary review, it has addressed the Applicants' substantive arguments as to the application of substantive law and potential violations as alleged by the Applicants (see *mutatis mutandis,* the ECtHR cases: *Van de Hurk v. the Netherlands*, cited

above, paragraph 61; *Buzescu v. Romania*, cited above, paragraph 63; and *Pronina v. Ukraine*, Application No. 63566/00, Judgment of 18 July 2006, paragraph 25). In doing so, the Supreme Court has fulfilled its constitutional obligation to provide a reasoned court decision, in accordance with the requirements of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and the case law of the ECtHR and this Court itself.

65. In the light of this, the Court further considers that the Applicants did not substantiate that the proceedings before the Supreme Court or the Court of Appeals were unfair or arbitrary, or that their fundamental rights and freedoms protected by the Constitution were violated, as a result of erroneous interpretation of the substantive or procedural law. The Court reiterates its general position that, in principle, the interpretation of the law, both substantive and procedural, is a primary duty of the regular courts and as such is a matter of legality. (See, case KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility of 8 August 2016, paragraph 44; and also see joined cases KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants *Arben Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku and Sami Lushtaku*, Resolution on Inadmissibility of 15 November 2016, paragraph 62).

66. The Applicants' dissatisfaction with the outcome of the proceedings before the regular courts, and before the administrative authorities, namely the Court of Appeals and the Supreme Court, and even before the Ministry of Health and the IOB, cannot of itself raise an arguable claim of violation of the right to fair and impartial trial (See, *mutatis mutandis*, ECtHR case, *Mezotur - Tiszazugi Tarsulat v. Hungary*, Decision of 26 July 2005, paragraph 21,; and see also case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 42).

67. As a result, the Court considers that the Applicants have not substantiated their allegations that the relevant proceedings for annulment of the vacancy in question were in any way unfair or arbitrary and that the challenged decision of the Supreme Court violated the rights and freedoms guaranteed by the Constitution and the ECHR. (see, *mutatis mutandis*, *Shub v. Lithuania,* no. 17064/06, ECtHR, Decision of 30 June 2009).

68. The Court also considers that the Applicants' allegations raise issues of legality, as they relate to the application of legal provisions and to the assessment of the evidence on the basis of which the Applicants should continue their work as "Health Inspectors" and not to revoke

their appointments - as they claim "*in an unilateral manner"* by the Ministry of Health. The Court recalls that such allegations fall within the scope of the legality and do not fall under the jurisdiction of the Court and, therefore, cannot in principle be examined by the Court.

69. As it is known from the case law of this Court, it is not the duty of the latter to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law that has led the regular courts to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "*fourth instance*", which would be to disregard the limits imposed on its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of the procedural and substantive law (see, case *García Ruiz v. Spain*, ECtHR Judgment of 21 January 1999, paragraph 28; and see the case KI70/11, Applicants: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011).

70. Therefore, the Referral is manifestly ill-founded on constitutional basis as to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and is to be declared inadmissible as set out in Article 113.7 of the Constitution and further specified in Rule 39 (2) of the Rules of Procedure.

Regarding the alleged violation of Article 49 of the Constitution

71. In this regard, the Court recalls the Applicants' allegations of a violation of Article 49 [Right to Work and Exercise Profession] of the Constitution where they mainly point out that the unilateral termination of the employment contract and the revocation of their act-appointments by the Ministry of Health has resulted in a violation of their right to "work and exercise profession".

72. The Court emphasizes in the context of this specific right, Article 49 of the Constitution provides a standard definition that specifies the guarantees and rights to work, the employment opportunities and the provision of equal conditions without discrimination, as well as the right to choose freely the working place and exercise profession, without forced obligations. These rights are regulated by applicable laws in a specific manner. (see, *inter alia*, cases of the Court KI46/15, Applicant *Zejna Qosaj,* Resolution on Inadmissibility of 20 October 2015, paragraph 26; and KI70/17, Applicant *Rrahim Ramadan*i, Resolution on Inadmissibility, of 8 May 2018, paragraph 48; and

KI140/17, Applicant *Merita Dervishi,* Resolution on Inadmissibility of 28 May 2019, paragraphs 65-68).

73. The Court notes that the Applicants' allegation of a violation of the right to work must be understood in the light of the abovementioned interpretation. The Court also notes that the Applicants' allegations in the present case, do not relate to the denial of the right to work and exercise profession, within the meaning of Article 49 of the Constitution.

74. The Court considers that the challenged Judgment of the Supreme Court does not in any way prevent the Applicants from working or exercising a profession. As such, there is nothing in the Applicants' allegations that would justify a conclusion that their constitutional rights, guaranteed by Article 49 have been violated. (See, *inter alia*, the cases of the Court KI136/14, Applicant: *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 34, and case KI42/17, Applicant: *Kushtrim Ibraj*, Resolution on Inadmissibility of 5 December 2017, paragraph 53; and KI140/17, Applicant *Merita Dervishi,* cited above, paragraph 68).

75. The Court notes that the Judgment of the Court of Appeals states that the cancellation of the vacancy for the position of "Health Inspector" has invalidated the legal basis on which the Applicants have established employment relationship with the Ministry of Health and, consequently, the basis of establishing their employment relationship was dismissed. The Court also notes that the Supreme Court, as cited above, has addressed the grounds on which the Applicants' allegations were rejected when it was concluded that the correct application of substantive law by the regular courts was committed, and that the law was not violated to the detriment of the Applicants.

76. Therefore, based on the foregoing and the allegations raised by the Applicants and the facts presented by them, the Court, relying also on the standards established in its case law in similar cases and the case law of the ECtHR, does not find that the Applicants' fundamental rights and freedoms have been violated by the Judgment of the Supreme Court which they challenge before the Court, nor by other decisions of the regular courts.

77. As a result, the Referral is manifestly ill-founded on constitutional basis also with regard to Article 49 of the Constitution, and is to be declared inadmissible as established in Article 113.7 of the Constitution and further specified in Rule 39 (2) of the Rules of Procedure.

78. **Conclusion**

79. The Court finally concludes that:

(i) The Applicants' allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR with regard to the reasoning of the court decisions are manifestly ill-founded on constitutional basis and as such are to be rejected as inadmissible in accordance with Article 113.7 of the Constitution and Rule 39 (2) of the Rules of Procedure;

(ii) The Applicants' allegations of a violation of Article 49 of the Constitution regarding the right to work and exercise profession are manifestly ill-founded on constitutional basis and as such are to be rejected as inadmissible in accordance with Article 113.7 of the Constitution; and Rule 39 (2) of the Rules of Procedure;

(iii) The Applicants' allegations of a violation of Article 55 of the Constitution in respect of the limitation of human rights and freedoms are not adequately clarified and as such are to be rejected in accordance with Article 48 of the Law in conjunction with Rule 39 (1) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Article 20 of the Law, and Rules 39 (1) (d) and 39 (2) of the Rules of Procedure, on 10 September 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Safet Hoxha Arta Rama-Hajrizi

KI96/19 Applicant: Đeljalj Kazagić, Constitutional review of Decision Pzd. No. 820/2019 of the Supreme Court of the Republic of Kosovo, of 5 February 2019

KI96/19 Resolution on Inadmissibility, approved on 8 October 2019, published on 31 October 2019

Keywords*: individual referral, criminal procedure, right to fair trial, ratione materiae, inadmissible referral*

The Applicant alleged that the regular courts, by rejecting his requests for reopening of the criminal proceedings, violated Article 31 [Right to Fair and Impartial Trial] of the Constitution, claiming that he was prevented from participating in the session of the Court of Appeals.

The Court after assessing the case as a whole, concluded that Article 31 of the Constitution, in the light of the interpretation of Article 6 of the Convention does not apply to proceedings for the reopening of a criminal case, because a person whose sentence has become final and who applies for his case to be reopened, during this proceeding is not charged with a criminal offence within the meaning of Article 6 of the Convention. For this reason, the Court considered that the Applicant's allegations pertaining to the rejection by the regular courts of his request for reopening of the criminal proceedings as such are incompatible *ratione materiae* with the Constitution, because Article 31 of the Constitution, in conjunction with Article 6 of the Convention do not apply. Therefore, the Court concludes that the Applicant's Referral, in accordance with Rule 39 (3) (b) of the Rules of Procedure, is inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI96/19

Applicant

Đeljalj Kazagić

Constitutional review of Decision PZD.no.820/2019 of the Supreme Court of the Republic of Kosovo, of 5 February 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 Đeljalj Kazagić (hereinafter: the Applicant), residing in Mitrovica, currently serving a sentence of imprisonment.

Challenged decision

2. The Applicant challenges the constitutionality of the Decision PZD.nr.820 / 2019 of Supreme Court of 5 February 2019 (hereinafter: the challenged decision), which was served on him on 5 September 2018.

Subject matter

3. The subject matter of this Referral is the constitutional review of the challenged decision, whereby the Applicant alleges to have been

violated his rights guaranteed by Article 30 [Rights of the Accused] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

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 the Law on the Constitutional Court of the Republic of Kosovo, no.03/L-121 (hereinafter: the Law), and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 12 June 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 17 June 2019, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi(members).

7. On 5 July 2019, the Court notified the Applicant about the registration of the Referral and sent a copy of this Referral to the Supreme Court, in accordance with the law.

8. On 8 October 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. The Applicant is submitting a Referral to the Court for the fourth time.

Facts in relation to the first Referral, KI82/16

10. On 24 May 2016, the Applicant submitted to the Court the Referral KI82/16, whereby he requested the constitutional review of the Decision Pml.no.13/ 2016 of the Supreme Court of 13 November 2016, which as alleged by him violated his rights guaranteed by Articles 24[Equality before the Law], 27 [Prohibition of Torture, Cruel, Inhuman or Degrading Treatment], 29[Right to Liberty and Security],

31 [Right to Fair and Impartial Trial], and 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution.

11. By the decisions of the regular courts which the Applicant was challenging, the Applicant was sentenced to an aggregate sentence of imprisonment in length of 11 (eleven) years.

12. On 1 March 2017, the Court rendered a Ruling on Inadmissibility, declaring the Applicant's Referral manifestly ill-founded on constitutional grounds, as he had not substantiated his allegations of violations of fundamental human rights and freedoms guaranteed by the Constitution.

Facts in relation to the second Referral, KI50/18

13. On 30 March 2018, the Applicant submitted the Referral KI50 / 2018, challenging the constitutionality of Decision Pml. no. 110/2017 of the Supreme Court of 13 November 2017, alleging that the regular courts, by rejecting his requests for review of criminal proceedings, violated Article 30 [Rights of the Accused], paragraph 3 of the Constitution, *"because of denial of the right to ensure his defence and the opportunity to challenge the statements of witnesses and the evidence charging him"*, and Article 31 [Right to Fair and Impartial Trial], paragraphs 1 and 2 of the Constitution, by alleging that *"he was prevented to take part in the session of the trial panel of the Court of Appeals"*.

14. On 16 January 2019, the Court issued the Resolution on Inadmissibility, after having found that the Applicant's allegations relating to the refusal of regular courts of his request for review of criminal proceedings were not *ratione materiae* compatible with the Constitution, given that Article 31 of the Constitution in conjunction with Article 6 of the Convention do not apply in such cases.

Facts in relation to the third Referral, KI186/18

15. On 30 March 2018, the Applicant submitted the Referral KI186/2018, challenging the constitutionality of Decision Pml. no. 168/201 of the Supreme Court of 3 August 2018, alleging that the regular courts, by rejecting his requests for review of criminal proceedings, violated Article 31 [Right to Fair and Impartial Trial] of the Constitution, on the ground that he was prevented to attend the trial session of the Court of Appeals.

16. On 8 May 2019, after having considered the circumstances of the case, the Court rendered a Ruling on Inadmissibility, finding that Article 6 of the Convention does not apply to proceedings for the review of a criminal case. For this reason, the Court considered that the Applicant's allegations concerning the refusal of regular courts of his request for review of criminal proceedings, as such, were not *ratione materiae* compatible with the Constitution. Consequently, the Court concluded that the Applicant's Referral pursuant to Rule 39 (3) (b) of the Rules of Procedure is inadmissible.

Facts in relation to the third Referral, KI96/19

17. On 12 February 2015, the Basic Court in Mitrovica, by Judgment P.no. 42/14, found the Applicant guilty of committing several offences and sentenced him to an aggregate sentence of imprisonment in length of1 4 (fourteen) years.

18. On 7 April 2015, the Applicant submitted an appeal to the Court of Appeals in Prishtina against the Judgment P.no. 42/14 of the Basic Court of Mitrovica of 12 February 2015, on the grounds of essential violations of criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and length of imprisonment sentence.

19. On 7 September 2015, the Court of Appeals in Prishtina, by Judgment PAKR. no. 220/15, partially approved the Applicant's appeal regarding the decision on punishment, by amending the sentence of imprisonment from 14 (fourteen) years to 11 (eleven) years of imprisonment. In other parts the Judgment of the Basic Court in Mitrovica remained unchanged.

20. On 27 July 2018, the Applicant submitted a request for extraordinary mitigation of punishment to the Supreme Court against the above Judgments, by alleging mitigating circumstances which were not considered by the regular courts during the main trial.

21. On 5 February 2019, the Supreme Court, by Decision Pzd.nr.8 / 2019, rejected as unfounded the Applicant's request for extraordinary mitigation of punishment, on the ground that he had applied for extraordinary mitigation of sentence without any concrete proposal and that the legal conditions for the approval of the request in question had not been met in accordance with the provision of Article 431 para.6 of the CPCK.

Applicant's allegations

22. The Applicant alleges that the Supreme Court, by the challenged Decision, violated his rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the Convention, because it failed to take into account the mitigating facts and circumstances to mitigate the punishment.

23. Further, the Applicant alleges that, *"The Supreme Court of Kosovo, by its Decision Pzd.nr.8 / 2019 of 05.02.2019 ..., has violated my "human rights and freedoms" guaranteed by the Constitution of the Republic of Kosovo in a very cruel, inhuman, unprecedented and brutal manner..."*

24. Furthermore, the Applicant alleges that*, "as seen in the Decision of Supreme Court, no single circumstance was respected on the ground that in the request are not described-pointed out circumstances which did not exist at the time when the judgment was rendered, or about which the court did not know, whilst it has omitted the crucial part of the legal provision even though they existed, they would have led to a more lenient sentence, and thus rejected the entire request as unfounded".*

25. Finally, the Applicant requests from the Court to "*1. Annul the Decision Pzd. no. 8/2019 of the Supreme Court of Kosovo of 05.02.2019 whereby my request for extraordinary mitigation of punishment was rejected, and remand it to the Supreme Court of Kosovo for reconsideration and adjudication because of the violations of the constitutional provisions of the Republic of Kosovo described in detail, as well as of the European Convention on Human Rights " Right to a fair trial", or: 2. To amend the final Judgment of the Court of Appeals: PAKR no. 07.09.2015 whereby I was found guilty of four (4) criminal offences, so that at least symbolically , based on the circumstances set forth in the request for extraordinary mitigation of punishment, reduces the aggregate sentence of imprisonment for at least one (1) year, in respect of any criminal offence, and imposes a new aggregate sentence of imprisonment for all four offences for which I have been found guilty, in a total length of ten (10) years. [...]. "*

Admissibility of the Referral

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

27. 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".*
>
> *[...]."*

28. In addition, the Court also examines whether the Applicant has fulfilled the admissibility requirements as further specified by Article 47[Individual Requests] , 48 [Accuracy of the Referral] and 49 [Deadlines], which provide:

> 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..."

29. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party; he has exhausted all the legal remedies provided by the law; he has specified the act of the public authority which he is challenging at the Court and the constitutional rights which he claims to have been violated, as well as he has submitted the Referral in timely manner.

30. However, the Court also takes into account the admissibility criteria set out in the Rules and in the present case it refers to sub-rule 39 (3) (b) of the Rules of Procedure, which provides:

"(3) The Court may also consider a referral as inadmissible if any of the following conditions are present:

[...]
(b) the Referral is incompatible ratione materiae with the Constitution;

[...]."

31. In this case, the Court will not consider the Applicant's allegations which were the subject of the Court's review in Resolutions KI82 / 16, KI50 / 18 and KI86 / 18. The court in the present case will assess the constitutionality of the challenged Decision Pzd.nr.8 / 2019 of the Supreme Court of 5 February 2019, whereby the said court decided on the Applicant's request for extraordinary mitigation of punishment.

32. The Court recalls that the Applicant complains and alleges that the challenged Decision violates his rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the Convention, for the reason that the Supreme Court did not consider the mitigating circumstances under which the Applicant would have been enabled to have his punishment mitigated.

33. In this context, the Court notes that in relation to the Applicant's request for "extraordinary mitigation of punishment" the Supreme Court considered only the procedural aspects, namely the admissibility of the Referral, without affecting the substance of the Judgment PAKR. No. 220/15 of the Court of Appeals of 7 September 2015, whereby the Applicant's punishment was reduced from 14 (fourteen) years to 11 (eleven) years of imprisonment.

34. Before considering the present Referral, the Court recalls that, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights"*.

35. In this regard, the Court, referring to the case law of the European Court of Human Rights, recalls that Article 6 of the Convention does not apply to proceedings for the review of a case if a person whose conviction has become final and who requests a review of his case and he or she has not been "accused of any criminal offence" within the meaning of Article 6 of the Convention in the course of the proceedings (see ECtHR cases *Franz Fischer v. Austria*, appeal no. 27569/02, decision , of May 6, 2003).

36. In the present case, the Applicant's request for extraordinary mitigation of the punishment filed with the Supreme Court, in facts, seeks the reopening of the proceedings concluded by a final decision, as to the decision on punishment. However, as it can be noted from the above reasoning of the Supreme Court, the said court rejected the request for extraordinary mitigation of the punishment as unfounded, as it concluded that the request did not meet the legal requirements for reopening or amending the decision of final form, with respect to the decision on punishment.

37. In this context, the Court recalls that, in all cases where the review or reopening of proceedings completed by final decisions (civil, criminal, enforcement) was requested through extraordinary remedies, and the regular courts dealt only with the admissibility criteria of the requests and not the merits of the case, in accordance with the ECtHR jurisprudence, the Court has ascertained that Article 31 of the Constitution in conjunction Article 6 of the ECHR are not applicable (See, the cases of the Constitutional Court KI159/15, *Sabri Ferati*, Resolution on Inadmissibility of 13 June 2016, KI80/15, KI81/15 and KI82/15, *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, and KI07/17, PashkMirashi, Resolution on Inadmissibility of 29 May 2017).

38. Therefore, also the request for extraordinary mitigation of the punishment, same as the requests for review and repetition of the completed proceedings falls in the category of requests that are incompatible *ratione materiae* with the Constitution, because of the non-applicability of Article 31 of the Constitution, when the said article is interpreted in the light of Article 6 of the Convention.

39. Furthermore, the extraordinary legal remedies seeking the extraordinary mitigation of punishment do not usually involve the determination of "civil rights and obligations" or the grounds of "any criminal charge" and therefore, Article 6 does not apply to them (see, inter alia, *X v. Austria*, number 7761/77, Decision of Commission of 8 May 1978, DR 14, P.171, *Zawadzki v. Poland* (decision) No 34158/96 of 6 July 1999, *Hurter v. Switzerland* (decision), number 48111/07, of 15 May 2012; *Dybeku v. Albania* (decision), number 557/12, paragraph 30 of 11 March 2014).

40. In this regard, the Court reiterates that the compatibility *ratione materiae* of a Referral with the Constitution derives from the Court's substantive jurisdiction. The rights, called upon by the Applicant, must be protected by the Constitution, in order for a constitutional complaint to be compatible *ratione materiae* with the Constitution (See: the Constitutional Court, Case KI07/17, Applicant *Pashk Mirashi*, Resolution on Inadmissibility of 29 May 2017, paragraph 66).

41. To sum up, the Court considers that the Applicant did not meet the admissibility criteria established by the Constitution and further specified and provided for by the Law and the Rules of Procedure.

42. Consequently, the Court concludes that the Applicant's Referral is not *ratione materiae* compatible with the Constitution, and as such, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (3) (b) and 56 (2) of the Rules of Procedure, on 8 October 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi.

KI78/19 Applicant: Miodrag Pavic, constitutional review of Judgment Pml. no. 270/2018 of the Supreme Court of 18 December 2018

KI78 / 19, Resolution on Inadmissibility of 8 October 2019, published on 1 November 2019

Keywords: *individual referral, constitutional review of the challenged judgment of the Supreme Court, manifestly ill-founded*

The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law on the Constitutional Court of the Republic of Kosovo no. 03 / L-121 and Rule 32 of the Rules of Procedure of the Constitutional Court.
The Applicant submitted the Referral to the Court for the second time, in the first Referral the Applicant alleged that the Court of Appeals modified the decision of the first instance without notifying him. The Applicant alleged a violation of the right to fair trial protected by Articles 31 and 54 of the Constitution and Article 6 of the ECHR, as the Applicant, as a defendant, was not informed about the hearing of the Court of Appeals and thereby he was denied his right to present his arguments. This Referral was registered under case number KI 104/16.
In case KI 104/16, the Court concluded that by failing to summon the Applicant to be present at the hearing of the Court of Appeals in which his guilt was established, the Applicant was denied the opportunity to defend himself against the charges made against him. Consequently, the Court finds that the Applicant's right to fair trial has been violated and, accordingly, orders the Supreme Court and the Court of Appeals to review the decisions in accordance with the Court's recommendation.
Acting pursuant to the decision of the Constitutional Court KI104/16, the Supreme Court by Judgment PML. no. 110/2016 repeated the procedure in respect of the Applicant's request for protection of legality, approved the Applicant's request for protection of legality and annulled the Judgment [PA-II. no. 6/2015] of the Supreme Court of 1 December 2015 and Judgment [PAKR. no. 222/2015] of the Court of Appeals of 15 July 2015 and remanded the case to the Court of Appeals for reconsideration, by ordering the Court of Appeals to summon the Applicant to attend the hearing in the repeated proceedings.
Acting pursuant to the decision of the Supreme Court, the Court of Appeals repeated the procedure and held a hearing of the trial panel to consider the Prosecution's appeal. The Applicant and his defense counsel were duly summoned at the hearing of the trial panel in accordance with the recommendation of the Supreme Court. On the same date, the Court of Appeals rendered its judgment [PAKR. no. 521/2017], whereby it approved the Prosecution's appeal and modified the judgment [K. no. 82-2013] of the

Basic Court of 29 January 2015. The Court of Appeals found the Applicant guilty and sentenced him to one year of imprisonment.

In this case, the Applicant alleges before the court that the Judgment KI104/16 of Constitutional Court has not been enforced, that the second instance court was obliged to schedule a hearing and to inform the parties to the proceedings and that the regular courts violated the procedural and substantive law.

The Court notes that the Supreme Court and that of the Court of Appeals have eliminated the aforementioned procedural violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR, and has thereby respected the Judgment KI104/16 of the Constitutional Court of the Republic of Kosovo, therefore the Court concludes that the Applicant's allegations concerning the disregard of the Constitutional Court's judgment are manifestly ill-founded on constitutional grounds and must be declared inadmissible.

The Court also notes that the Applicant's allegations that the Court of Appeals in its repeated proceedings, rendered its decision without summoning the Applicant and his defense counsel are manifestly ill-founded on constitutional grounds and therefore they should be declared inadmissible.

In summary, the Court concludes that as regards the Applicant's allegations they are not substantiated at all by the Applicant and that the Applicant does not explain which decisive facts contain contradictions, he merely concludes that there has been an erroneous application of procedural and substantive law.

Accordingly, the Court finds that the Applicants' Referral is manifestly ill-founded on constitutional grounds, and must therefore be declared inadmissible in its entirety, pursuant to Rule 39 (2) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI78/19

Applicant

Miodrag Pavić

Constitutional review of Judgment Pml. br. 270/2018 of the Supreme Court, of 18 December 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The referral was submitted by Miodrag Pavić from the village of Koretishte, Municipality of Novo Berdë (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment Pml. no. 270/2018 of the Supreme Court of 18 December 2018, and in connection with the judgment of PA-II. no. 6/2015 of the Supreme Court of 7 May 2018 and the Judgment PAKR. no. 521/2017 of the Court of Appeals of 12 December 2017.

3. The challenged judgment was served on the Applicant on 25 January 2019.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged decision, which as alleged by the Applicant has violated his rights guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on Article 113.7 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo No. 03 / L-121 (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 20 May 2019 the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 23 May 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu(presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

8. On 17 June 2019 the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court. On the same day, the Court requested from the Basic Court in Prizren to enclose a copy of the acknowledgment of the receipt of the challenged Judgment (Pml. No. 270/2018 of the Supreme Court of 18 December 2018) by the Applicant.

9. On 24 June 2019, the Basic Court in Prizren submitted to the Court a proof of service of the challenged judgment on the Applicant, bearing the delivery date 25 January 2019.

10. On 8 October 2019, after having reviewed the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. The Applicant is submitting a Referral to the Court for the second time.

Summary of facts in respect of the first Referral KI104/16

12. On 9 November 2012, the Basic Prosecutor's Office in Prizren filed an indictment against the Applicant on the grounds of suspicion that he had committed the offence of accepting bribe.

13. On 29 January 2015, the Basic Court rendered its judgment [K. no. 82-2013], whereby it acquitted the Applicant of the charge due to lack of evidence.

14. The Prosecution filed an appeal with the Court of Appeals because of essential violation of the provisions of the criminal procedure, violation of the Criminal Code and erroneous and incomplete determination of the factual situation, with the proposal that the Court of Appeals quashes the judgment of the Basic Court and remand the case for retrial. The Applicant filed a response to the Prosecution's appeal within the time-limit.

15. On 15 July 2015, the Court of Appeals held a hearing to consider the Prosecution's appeal. Based on the Applicant's allegations and the case file, it results that pursuant to Article 390 of the Criminal Procedure Code of Kosovo (hereinafter: the CPCK), the Applicant was not informed of the session of the Court of Appeals.

16. During the hearing of 15 July 2015, the Court of Appeals rendered its judgment [PAKR. no. 222/2015], whereby it upheld the Prosecution's appeal and modified the Judgment [K. no. 82-2013] of the Basic Court. The Court of Appeals found the Applicant guilty and sentenced him to imprisonment in length of one year.

17. The Applicant submitted an appeal to the Supreme Court against the judgment of the Court of Appeals [PAKR. no. 222/2015] alleging, *inter alia*, that the Court of Appeals held a session at which he was found guilty without having informed him in advance of the session, and thus rendered a decision in violation of the CPCK.

18. On 1 December 2015, the Supreme Court rendered the judgment [PA-II. no. 6/2015], whereby it dismissed the Applicant's appeal as unfounded.

19. The Applicant acting within the legal deadline submitted a request for the protection of legality against the Judgment of the Court of Appeals [PAKR. no. 222/2015] and the Judgment of the Supreme Court [PA-II. no. 6/2015].

20. On 16 May 2016, the Supreme Court rendered the judgment [PML-KZZ no. 110/2016], whereby it rejected the Applicant's request for protection of legality as unfounded.

21. On 9 August 2016, the Applicant submitted a Referral to the Court, claiming that the Court of Appeals modified the first instance decision without informing him. The Applicant alleged the violation of the right to a fair trial protected by Articles 31 and 54 of the Constitution and Article 6 of the ECHR, since the Applicant, as a defendant, was not informed of the session of the Court of Appeals and thus was denied his right to present his arguments. That Referral was registered under number KI 104/16.

22. On 29 May 2017, the Court rendered its judgment, finding that the Supreme Court and Court of Appeals violated the Applicant's right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. The Court declared null and void the Judgment [PML-KZZ. no. 110/2016] of the Supreme Court of 16 May 2016, in connection to Judgment [PA-II. no. 6/2015] of the Supreme Court of 1 December 2015 and Judgment [PAKR. no. 222/2015] of the Court of Appeals of 15 July 2015 and remanded the case to the Supreme Court for reconsideration in accordance with the judgment of the Court.

23. The Court concluded that by not summoning the Applicant to be present at the session of the Court of Appeals at which his guilt had been established, the Applicant was denied the opportunity to defend himself against the charges brought against him. As a consequence, the Court finds that the Applicant's right to a fair trial has been violated and accordingly orders the Supreme Court and Court of Appeals to review the decisions in accordance with the Court's recommendation.

Summary of facts in respect of the present Referral KI78/19

24. On 9 October 2017, acting in accordance with the Judgment of Constitutional Court KI104 / 16, the Supreme Court by Judgment PML. no. 110/2016 repeated the procedure concerning the Applicant's request for protection of legality, by upholding the Applicant's request for protection of legality and quashing the

Judgment [PA-II. no. 6/2015] of the Supreme Court of 1 December 2015 and Judgment [PAKR. no. 222/2015] of the Court of Appeals of 15 July 2015 and remanded the case to the Court of Appeals for reconsideration, by ordering the Court of Appeals to have the Applicant summoned at the session of the trial panel during the repetition of the proceedings.

25. On 12 December 2017, the Court of Appeals repeated the proceedings and held a panel session to consider the Prosecution's appeal. The person submitting the request and his defence counsel were duly summoned to the session of the panel, pursuant to the recommendation of the Supreme Court. On the same day, the Court of Appeals rendered its judgment [PAKR. no. 521/2017], whereby it upheld the appeal of the Prosecution and modified the Judgment [K. no. 82-2013] of the Basic Court of 29 January 2015. The Court of Appeals found the applicant guilty and sentenced him to imprisonment in length of one year.

26. The Applicant filed an appeal to the Supreme Court against the Judgment of the Court of Appeals [PAKR. no. 521/2017] alleging, *"essential violations of the provisions of criminal procedure, erroneous and incomplete determination of the factual situation, violation of criminal law and decision on criminal sanction".*

27. On 7 May 2018, the Supreme Court rendered the Judgment [PA-II. no. 1/2018], dismissing the Applicant's appeal as ill-founded and upholding the judgment of the Court of Appeals.

28. The Applicant submitted to the Supreme Court a request for protection of legality against the Judgment of the Court of Appeals [PAKR. no. 521/2017] and the Judgment of the Supreme Court [PA-II. no. 6/2015].

29. On 8 December 2018, the Supreme Court rendered the Judgment [PML no. 270/2018], rejecting the Applicant's request for protection of legality as unfounded.

30. The relevant part of the reasoning of the Supreme Court's judgment states*, "It is unfounded to state that the second instance court rendered its judgment without a hearing, since on the basis the case file, namely by looking into the minutes of the public hearing of the Court of Appeals held on 12.12.2017 we may conclude that the defendant and his defence counsel [...] participated in the hearing. The court of second instance properly acted when it modified the first instance judgment regardless of the appeal proposal, by*

approving the ground of appeal on the violation of the criminal law, although no such proposal was made explicitly. […] The allegation of non-compliance with Article 6.3 of the ECHR is unsustainable, since all the rights of the accused have been respected in accordance with the standards set out in the said article, and the accused and his defence counsel have been given the opportunity to be an active part during the entire course of the judicial proceedings, starting from the investigative actions up to legal remedies. Based on the course of the court hearing and the minutes kept, it can be concluded that the accused and his defence counsel had equal opportunities compared to the state prosecutor as regards the examining of the witness's testimony and providing their conclusions on the material evidence".

Applicant's allegations

31. Te Applicant alleges that during the repeated proceedings before the regular courts his rights guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments] and Article 54 [Judicial Protection of Rights] of the Constitution have been violated.

32. The Applicant justifies that during the repeated procedure the Judgment PAKR. no. 521/2017 of the Court of Appeals has been "*fully transcribed from the previous first Judgment PAKR. no. 222/2015 of the Court of Appeals of Kosovo of 15 July 2015, which by the Judgment of the Constitutional Court of 04.08.2017 in Case no. KI104/16 was declared INVALID."*

33. The Applicant further states that, *"the Second Instance Court rendered the judgment in violation of Article 403. 1 of the CPC of the RK, because for modifying the judgment of the first instance court, it was obliged to schedule-hold a court hearing and inform the parties to the proceedings in that respect, in order to properly determine-assess the material facts".*

34. The Applicant also alleges that, "*Pursuant to the provisions of Article 382 para.1.3 of the CPC, the State Prosecutor, proposed that the judgment of acquittal of the first instance court should be annulled in the repeated proceedings, whilst the second instance court acted contrary to the aforementioned proposal of the prosecutor by modifying the challenged judgment, and pronouncing the accused guilty and sentencing him".*

35. The Applicant finally stated that, pursuant to Article. 384 para.1 items 1 and 12 of the CPC. "*The challenged judgments of the Second Instance Court and the Supreme Court contain essential violations of the provisions of the criminal procedure, since the reasons on decisive facts are not presented-shown and there are also considerable contradictions which concern the decisive facts".*

Assessment of the admissibility of Referral

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

37. 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".*

38. In addition, the Court also examined whether the Applicant has fulfilled the admissibility requirements as further specified in the Law. In this respect, the Court first refers to Article 47[Individual Requests] , 48 [Accuracy of the Referral and 49 [Deadlines], which provide:

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 […]."

39. As to the fulfillment of the aforementioned criteria, the Court finds that the Applicant is an authorized party; he has exhausted all the legal remedies provided by the law; he has specified the act of the public authority which he is challenging before the Court and he has also submitted the Referral within the time-limit.

40. In addition, the Court refers to Rule 39 (2) of the [Admissibility Criteria] of the Rules of Procedure, which it provides:

"(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".

41. The Court recalls that the Applicant alleges that his rights protected by Article 22 [Direct Applicability of International Agreements and Instruments] and Article 54 [Judicial Protection of Rights] of the Constitution have been violated by the regular courts, but does not reason them.

42. In the concrete case, the Court notes that the Applicant's allegations essentially amount to i) that the Judgment of Constitutional Court KI104/16 was not enforced, ii) that the second instance court was obliged to schedule-hold a court hearing and inform the parties to the proceedings in that regard, and iii) that the ordinary courts violated the procedural and substantive law because *"there have not been stated-presented the reasons on decisive facts and there are considerable contradictions concerning the decisive facts as well"*.

(i) As regards the allegation that the Judgment of the Constitutional Court KI104/16 was not enforced

43. As regards the first allegation of the Applicant, the Court notes that the appeal claims on violation of rights relate to the manner in which the

Supreme Court and Court of Appeals enforced the Decision of the Constitutional Court no. KI104 /16 of 4 August 2017.

44. Acting pursuant to the recommendation of the Court, the Supreme Court repeated the proceedings concerning the Applicant's request for protection of legality, upheld the Applicant's request for protection of legality, and annulled the Judgment [PA-II. no. 6/2015] of the Supreme Court of 1 December 2015 and Judgment [PAKR. no. 222/2015] of the Court of Appeals of 15 July 2015 and remanded the case to the Court of Appeals for reconsideration, by ordering the Court of Appeals to summon the Applicant at the panel session during the repetition of the procedure (see: the Judgment PML. no. 110/2016 of 9 October 2017).

45. Acting pursuant to the recommendation of the Supreme Court, the Court of Appeals repeated the proceedings and held a panel session to consider the Prosecution's appeal. The person submitting the request and his defence counsel were duly summoned to the session of the panel, in accordance with the recommendation of the Supreme Court. On the same day, the Court of Appeals rendered the judgment, upholding the Prosecution's appeal and modifying the judgment [K. no. 82-2013] of the Basic Court of 29 January 2015. The Court of Appeals found the Applicant guilty and sentenced him to imprisonment of one year (see the Judgment: PAKR. No. 521/2017 of 12 December 2017).

46. The Court notes that the Supreme Court by Judgment PML. no. 110/2016 of 9 October 2017 as well as the Court of Appeals by Judgment of PAKR. no. 521/2017 of 12 December 2017 corrected the violations of Article 31. [Right to Fair and Impartial Trial] of the Constitution and Article 6. [Right to a Fair Trial] of the ECHR, which were established by the Court in the Decision PML-KZZ.no.110/2016 of the Supreme Court of 16 May 2016, when it considered the Applicant's Referral no. KI104/16 of 4 August 2017.

47. The Court finds that, on the recommendation of the Supreme Court, the Court of Appeals held a hearing again on 12 December 2017, to which all parties to the proceedings had previously been duly summoned and which was attended personally by the Applicant and his defence counsel.

48. Accordingly, the Court notes that the Supreme Court and the Court of Appeals eliminated the aforementioned procedural violation of Article 31. [Right to Fair and Impartial Trial] of the Constitution and Article 6. [Right to a fair trial] of the ECHR, and thereby respected

the Judgment of the Constitutional Court of the Republic of Kosovo. KI104 / 16, therefore the Court concludes that the Applicant's allegations of non-compliance with the Constitutional Court's Judgment are manifestly ill-founded on constitutional grounds and must be declared inadmissible on the basis of Rule 39 (2) of the Rules of Procedure.

(ii) As regards the allegation that the court of second instance was obliged to schedule-hold a court hearing and inform the parties to the proceedings in that respect

49. As to the second allegation of the Applicant that the court of second instance was obliged to schedule-hold a court hearing and inform the parties to the proceedings in that respect, the Court notes that the Supreme Court ordered the repetition of the procedure before the Court of Appeals.

50. The Court further notes that on 12 December 2017, the Court of Appeals repeated the proceedings and held a session of the Panel to consider the Prosecution's appeal. The Applicant and his defence counsel were duly summoned to the session of the Panel and were decisive in accordance with the recommendation of the Supreme Court.

51. In addition, in its Judgment (Pml. No. 270/2018), the Supreme Court rejected, as unfounded, the request for the protection of legality and responded in detail precisely to these allegations of the Applicant, as well as to each allegation of the Applicant, by explaining separately;. *"... having looked into the minutes of the public hearing of the Court of Appeals held on 12.12.2017, we may conclude that the defendant and his defence counsel [...] participated in the hearing. The court of second instance has acted properly when modifying the judgment of the first instance regardless of the appeal proposal, by approving the ground of appeal concerning the violation of the criminal law, although no such proposal was made in an explicit manner. [...] the allegation which concerns the non-compliance with Article 6.3 of the ECHR is unsustainable...."*

52. Therefore, the Court concludes that the Applicant's allegations that the Court of Appeals, in a repeated procedure, rendered its decision without summoning the Applicant and his defence counsel were manifestly ill-founded on constitutional grounds and therefore must be declared inadmissible on the basis of Rule 39 (2) of the Rules of Procedure.

(iii) As regards the allegation that the regular courts violated the procedural and substantive law because "there have not been stated- shown the reasons on decisive facts and there are considerable contradictions concerning the decisive facts as well".

53. The Court first notes that as to this allegation of the Applicant it is not substantiated by the Applicant at all and the Applicant does not explain which decisive facts contain contradictions, instead he merely ascertains that there has been an erroneous application of the procedural and substantive law.

54. The Court recalls that it is not the role of the Constitutional Court to determine whether certain types of evidence are admissible, what evidence are to be presented, or to indicate what evidence is admissible and what is not, that is the role of regular courts. The question which the Constitutional Court must answer is whether the proceedings as a whole were fair, including the manner in which evidence was obtained (see also the ECtHR Case *Khan v. United Kingdom* No. 35394/97, paragraph 34-35, judgment of 12 May 2000).

55. Looking at the process as a whole, the Court finds that the Court of Appeals and Supreme Court have thoroughly described their findings by providing numerous reasons in response to the Applicant's allegations (see the ECtHR judgment, *Pekinel v. Turkey*, of 18 March 2008, no. 9939/02, paragraph 55).

56. The Court reiterates that its general position that the mere fact that the applicants do not agree with the outcome of the decisions of the Supreme Court or other regular courts, as well as the mere mentioning of articles of the Constitution or international instruments, is not sufficient to build a substantiated allegation on constitutional violation. When alleging such violations of the Constitution, the applicants must provide substantiated allegations and convincing arguments (see the Case of the Constitutional Court KI136/14, Resolution on Inadmissibility of 10 February 2015, *Abdullah Bajqinca*, paragraph 33).

57. As a summary, the Court considers that the Applicants' referrals do not prove that the proceedings before the regular courts caused violations of their rights guaranteed by the Constitution, i.e. Article 22 [Direct Applicability of International Agreements and Instruments], and 54 [Judicial Protection of Rights] of the Constitution.

58. Therefore, the Court finds that the Applicant's Referral is manifestly ill-founded on constitutional grounds and must be declared inadmissible in its entirety on the basis of Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113, paragraphs 1 and 7 of the Constitution, and Rule 39(2) of the Rules of Procedure, in its session held on 8 October 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with
Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KI73/18 Applicant is N. S. who requested constitutional review of Decision CML. No. 36/2018 of the Supreme Court of 10 April 2018, in conjunction with Decision CN. No. 89/2015 of the Basic Court in Mitrovica of 14 August 2015

KI73/18, Resolution on Inadmissibility, of 8 October 2019, published on 1 November 2019

Keywords: Resolution on inadmissibility, ratione materiae, request for non-disclosure of identity

The Applicant submitted the Referral to the Constitutional Court for the second time.

In the first Referral, the Constitutional Court found that the Applicant had not exhausted all legal remedies, and for this reason, taking into account the Resolution of the Constitutional Court, the Applicant exhausted all legal remedies, and for the second time appeared as a party before the Court.

Upon reviewing the Applicant's second Referral, the Court noted that, although he exhausted all legal remedies, namely he obtained the decision of the Supreme Court, in essence, he challenges the decision of the Basic Court in Mitrovica, which recognized the court decision of a foreign court, more specifically the court in Albania.

The Applicant stated in the Referral that the Basic Court in Mitrovica, by the procedure of recognition of a foreign court decision, violated his rights guaranteed by Articles 24 and 31 of the Constitution and Article 6 of the ECHR.

The Court, having regard to the substance of the appealing allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR, found that the requirement for the application of Article 31 of the Constitution and Article 6 of the ECHR is that civil rights and obligations are established in the present proceedings. Therefore, in this case, the question arises as to whether, during the review by the Basic Court in Mitrovica, the legal requirements for recognizing a foreign court's decision were met, and whether there is any obstacle to recognizing a foreign court's decision, whether the civil rights and obligations were established, and whether, in the proceedings of considering a proposal for recognition of a decision of a foreign court, Articles 31 of the Constitution and Article 6 ECHR are applicable.

After analyzing and applying the principles and standards of the ECtHR, the Court concluded that the Applicant's allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR were *ratione materiae* incompatible with the Constitution, as in the present case there was no dispute in which were established the Applicant's civil rights and freedoms. In essence, the Basic Court in Mitrovica found in accordance with law that the request for recognition of a foreign court decision fulfills all the legal requirements for its recognition, that is, the court only dealt with a procedural issue. Accordingly, the Basic Court rendered a decision by which a final court decision in Albania becomes a final decision and becomes part of the legal system of Kosovo.

The Court rejected the Applicant's allegation of violation of Article 24 of the Constitution as ungrounded, while the Court did not deal with other decisions, because the Applicant did not request this in his Referral.
As to the request for non-disclosure of identity, the Court approved the Applicant's request as grounded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI73/18

Applicant

N. S.

Constitutional review of Decision CML. No. 36/2018 of the Supreme Court of 10 April 2018 in conjunction with Decision CN. No. 89/2015 of the Basic Court in Mitrovica of 14 August 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu, 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 N. S. from Mitrovica (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision CML. No. 36/2018, of the Supreme Court of 10 April 2018, in conjunction with Decision CN. No. 89/2015 of the Basic Court in Mitrovica of 14 August 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights and freedoms guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic

of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

4. The Applicant also requests that his identity be not disclosed to the public.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

6. On 31 May 2018, the Court adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (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 Constitutional Court

7. On 25 May 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

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

9. On 16 August 2018, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel, composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Safet Hoxha.

10. On 27 August 2018, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Supreme Court.

11. On 18 January 2019, the Court requested the Basic Court in Mitrovica to submit all the case files in case KI73/18. The Basic Court in Mitrovica submitted all the requested case files within the deadline.

12. On 8 October 2019, after considering the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. The Court first notes that the Applicant is appearing for the second time as an Applicant before the Constitutional Court.

14. The Court examining the Applicant's Referral notes that there are two sets of the court proceedings in the present case. The first set of proceedings relates to the recognition of a decision of a foreign court (Decision No. 5799 of the District Court in Tirana), while the second set of proceedings concerns the enforcement procedure. Accordingly, the Court will present them separately in this report.

Proceedings concerning recognition of a foreign court decision

15. On 3 December 2012, the District Court in Tirana rendered Decision No. 5799, which dissolved the marriage between the Applicant and his former spouse, who resides in Tirana.

16. On 14 August 2015, the Applicant's ex-wife, through her legal representative, filed a proposal with the Basic Court in Mitrovica seeking the recognition and enforcement of Decision No. 5799, of the District Court in Tirana.

17. On 14 August 2015, the Basic Court in Mitrovica (by Decision CN. No. 89/2015) found that the "*proposal is grounded*", recognized the decision of the District Court in Tirana "*within the meaning of Article 86-101 of the Law on Resolving Conflict of Laws with Regulations of other countries, and on the grounds of reciprocity*"

Proceedings regarding execution of Decision CN. No. 89/2015 of the Basic Court in Mitrovica

18. On 21 August 2015, the Applicant's minor children, represented by their mother (the Applicant's former spouse), filed a proposal with the Basic Court for the execution of the judgment of the District Court in Tirana. In the proposal of execution, they requested the realization of unpaid monetary obligation on the part of the Applicant.

19. On 05 October 2015, the Basic Court rendered Executive Decision P. No. 133/2015, in which it allowed the execution of the judgment of the District Court in Tirana.

20. Within the legal time limit, the Applicant filed appeal with the Court of Appeals against the enforcement decision of the Basic Court P. No. 133/2015 of 5 October 2015, with a proposal that the Court of Appeals modifies the decision of the Basic Court in Mitrovica by rejecting the enforcement proposal and ordering the mother to return the children to Kosovo or hand them over in custody of their father in Kosovo.

21. On 29 November 2016, the Court of Appeals rendered Decision Ac. No. 4970/15, in which it rejected the Applicant's appeal as ungrounded. The decision of the Court of Appeals reads:

> *„The first instance court has correctly established the fact that the decision of the District Court in Tirana No. 5799 of 21.07.2010, which is effective as of 03.12.2012, which dissolved the marriage, based on the executive body ordered the execution, is an executive document, as provided for in Article 22, paragraph 1.5 of the LEP "the judgments, acts, and memoranda on court settlements of foreign courts, as well as the awards of foreign arbitration courts and the settlements reached before such courts in arbitration cases, which have been accepted to enforcement within the territory of the Republic of Kosovo", in the specific case of the District Court in Tirana recognized by the decision of the Basic Court in Mitrovica CN. no. 89/2015 of 14.08.2015. Also, "an executive document is both an executive decision of the court and an enforceable court settlement" and constitutes the legal basis for determining enforcement in accordance with Article 21 if it fulfills the conditions of Article 24 para. 1 and 27 1 of the same law, which states that "Enforcement document shall be eligible for enforcement if it shows the creditor, the debtor, the object, means, amount, and deadline for settling the obligation", which is why there is no violation of legal provisions in permitting enforcement*".

22. On 1 February 2017, the Applicant submitted the Referral to the Constitutional Court, registered by the Court with number KI08/17.

23. In his Referral KI08/17, the Applicant stated that the decision of the Basic Court in Mitrovica violated the rights and freedoms guaranteed by Article 24 [Equality Before the Law] and Article 32 [Right to Legal Remedies] of the Constitution.

24. The Applicant requested the Court "*to declare invalid the foreign court's decision (...) because it approved in violation of the procedure and provision of the law in force*".

25. On 5 September 2017, the Court rendered the resolution on inadmissibility of the Referral in case KI08/07 on the grounds that the Applicant has not exhausted all legal remedies established by the Constitution, further specified by the Law and foreseen in the Rules of Procedure.

26. On 15 December 2017, the Public Prosecutor filed with the Supreme Court a request for protection of legality (KMLC No. 137/2017) against the decision (CN. No. 89/2015) of the Basic Court, on the grounds of erroneous application of substantive law under Article 247 paragraph 1 item a of the LCP, namely, on the grounds of erroneous violation of the provisions of the Law on Contested Procedure, with the proposal to annul the challenged decision and remand the case to the first instance court for reconsideration and retrial.

27. On 10 April 2018, the Supreme Court rendered decision (CML No. 36/2018), rejecting as ungrounded the request for protection of legality of the state prosecutor (KMLC. No. 137/2017), filed against the decision of the Basic Court in Mitrovica (CN. No. 89/2015 of 14 August 2015).

28. The decision of the Supreme Court reads:

> *i) „In this case, the provisions of the Law on the Resolution of the Collision of Laws with the Regulations of Other Countries on certain relationships "Official Gazette of SFRY no. 43 dated 23.07.1982". Article 101 paragraph 3 of this law foresees "Against the ruling on recognition, respectively the execution of the decision the parties may file a complaint within 15 days from the date of the sentencing.*
>
> *In the present case against the decision of the first instance court, no complaint has been filed even though the party has had knowledge of it, as before (Referral of the Constitutional Court dated 01.02 .2017 and the Enforcement Procedure) nor after the regular delivery of the ruling on 07.12.2017.*
>
> *ii) According to the provision of Article 101, paragraph 3, in conjunction with Article 96, paragraph 2 of this law, the decision of the foreign court is recognized –* ***approved by a ruling****. Against this decision the party can only file appeal within the*

meaning of the provision of Article 101 paragraph 3 and 4 of the Law. Therefore, in this case, we have to deal with non-contested issues where it is assessed whether the conditions for recognition of a court decision have been fulfilled.

From the content of the request for protection of legality it is clear that the request for protection of legality has been filed for essential violation of the provisions of the contested procedure established by the provision of Article 182.1 of the LCP, in conjunction with Articles 177 and 206 of the LCP. However, with the provision of Article 247.1 item (a) of the LCP, the possibility of filing a request for protection of legality is limited only to certain violations which may serve as causes."

Applicant's allegations

29. The Applicant alleges that the challenged decision violated his constitutional rights and freedoms guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution, as well as Article 6 (Right to a fair trial) of the ECHR.

30. The Applicant alleges that in recognizing the decision of a foreign court, the Basic Court referred to Articles 86-101 of the Law on Resolving Conflict of Laws with Regulations of Other Countries on the basis of reciprocity. According to the Applicant, Article 92 of the same Law states: "*A foreign court decision shall not be recognized if reciprocity is lacking*".

31. Accordingly, the Applicant adds "*that the Basic Court in Mitrovica neglected the fact that there is no reciprocity agreement for the recognition of decisions in civil cases between the Republic of Albania and the Republic of Kosovo*".

32. The Applicant alleges that "*the recognition of the decision of the Court in Tirana was sought not by him, as a citizen of Kosovo, but by a citizen of Albania. Therefore, the Basic Court in Mitrovica had no basis for recognizing this judgment*".

33. The Applicant states "*that a forged decision of the Basic Court of one foreign country was recognized by the Basic Court by neglecting due process (through the Ministry of Justice). Deliberately, I, as a citizen of Kosovo, was represented by a decision of a Kosovo court as a foreign citizen and foreign citizenship was Kosovo citizenship".*

34. The Applicant further submitted that the Basic Court is not competent to recognize a foreign court decision and that the procedure for recognizing a foreign court's decision was to go through the Ministry of Justice.

35. The Applicant considers that "*this decision should not have been recognized, as it affects me twice before the Kosovo courts and the Albania's courts*".

36. The Applicant requests the Court that the decision (CN. No. 89/2015) of the Basic Court in Mitrovica of 14 August 2015, which recognized the judgment of the District Court in Tirana, as a decision contrary to the laws of Kosovo. The Applicant requests compensation "*for all the legal effects this decision has produced*".

Admissibility of the Referral

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

38. 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.*

39. The Court further examines whether the Applicant has fulfilled the admissibility requirements as provided by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47 [Individual Requests]

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual*

rights and freedoms guaranteed by the Constitution are violated by a public authority.

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... .“

40. As regards the fulfillment of these requirements, the Court finds that the Applicant has filed a claim in the capacity of an authorized party, challenging the act of a public authority, after exhaustion of all legal remedies. The Applicant also emphasized the rights and freedoms he claimed to have been violated in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the time limit prescribed in Article 49 of the Law.

41. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraphs 2 and (3) (b) of the Rules of Procedure, which provides:

“(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim.“

(3) The Court may also consider a referral inadmissible if any of the following conditions are present:
[...]
(b) the Referral is incompatible ratione materiae with the Constitution“.

42. Therefore, the Court notes that the Applicant alleges a violation of Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, since:

a) The Basic Court has no jurisdiction when it comes to the recognition of a foreign court decision due to the lack of

reciprocity between the Republic of Kosovo and the Republic of Albania.

b) The Supreme Court and the Basic Court recognized the forged decision of a foreign court, neglecting regular process through the Ministry of Justice.

c) The Supreme Court, contrary to the fact that it is aware of his place of birth, changes his place of birth from Mitrovica to Tirana.

43. The Court first notes that the Applicant appears for the second time before the Court as the Applicant.

44. More specifically, as regards the first Referral, the Court recalls that on 1 February 2017, the Applicant submitted the Referral and requested the constitutional review of Decision CN. No. 89/2015 of the Basic Court in Mitrovica of 14 August 2015. The Court rejected the Referral on 5 September 2017, by the Resolution on Inadmissibility, for purely procedural reasons, that is, due to the lack of exhaustion of all legal remedies, without considering the very substance and the grounds of the Applicant's allegations.

45. The Court notes that, despite the fact that in the meantime he has received other decisions of the regular courts, which are directly related to the decision he is challenging, in the new Referral KI73/18, he again requests the constitutional review of Decision CN. No. 89/2015 of the Basic Court in Mitrovica of 14 August 2015, which arose as a result of the first court proceeding regarding the recognition of a foreign court's decision.

46. Accordingly, the Court will accept the Applicant's Referral, and accordingly, when considering the new Referral KI73/18, it will not solely limit itself to an assessment of the grounds of the Applicant's allegations, which is "*that Decision CN. No. 89/2015 of the Basic Court of 14 August 2015 violated his rights and freedoms guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution, as well as Article 6 (Right to a fair trial) of the ECHR"*.

47. Having regard to the Applicant's allegations that can be analyzed by reference to the ECtHR case law, the Court recalls the obligation of Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which reads as follows::

„Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights“.

48. Having regard to the very essence of the Applicant's allegations of alleged violations which he relates to a fair trial, the Court finds it necessary, to first answer the question whether the guarantees of Article 31 of the Constitution and Article 6.1 of the ECHR are applicable in the present case.

49. In this respect, the Court recalls that Article 31 (2) of the Constitution in the relevant part reads:

„Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations […].“

50. The Court also recalls Article 6.1 of the ECHR, which stipulates:

„In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.“

51. It follows from the foregoing that the requirement for the application of Article 31 of the Constitution and Article 6 of the ECHR is that civil rights and obligations are determined in the present proceedings. Therefore, in this case the question arises whether, during the review by the Basic Court in Mitrovica, the legal requirements for recognizing the decision of a foreign court were fulfilled, and whether there was any obstacle for recognizing the decision of a foreign court, whether civil rights and obligations and, in the course of considering the proposal for recognition of a decision of a foreign court, Articles 31 of the Constitution and Article 6 of the ECHR are applicable.

Applicability of Article 6 paragraph 1 of the ECHR

52. The Court notes that, in accordance with the ECtHR case law, the applicability of Article 6 of the ECHR under item *civil (rights and obligations*) implies the cumulative presence of the following requirements: **a)** there must be a "*dispute*" over the "*rights*" or "*obligations*" which must have a basis in domestic law (see ECtHR Judgment *Benthem v. the Netherlands*, Application No. 8848/80, 23 October 1985, paragraphs 32–36 and *Roche v. the United Kingdom*,

Application No. 32555/96 of 10 October 2005, paragraphs 116-126); and, **b)** the right or obligation must be "*civil*" in nature (see ECtHR Judgment, *Ringeisen v. Austria*, application 2614/65, of 16 July 1971, paragraph 94).

53. It follows from the foregoing that the Court must first determine whether the court proceedings instituted by the request for recognition of a foreign court judgment are a) "*dispute*" and, b) whether the "*civil rights and obligations"* were decided in the dispute*?*.

Term "dispute"

54. With regard to the term "dispute", the Court notes that the "dispute" is a court proceeding in which a regular court reviews and decided in disputes relating to personal and family relations, the employment relationship (with the employer), as well as the property and other civil-legal relations between natural and civil legal persons, socio-political communities, organizations of associated labor and other social legal entities.

55. The Court also recalls that in order for a judicial proceeding to have a "dispute" nature, it must meet certain criteria, namely, it should contain the action of three entities - the claimant, the respondent and the court. The claimant is a litigating party who requests that the court provides him protection for a "civil right", and the respondent is the one from whom the claimant seeks such a protection. The claimant and the respondent are the parties to the dispute, therefore, the subjects whose right and obligation are concerned. The court is the third subject in the dispute, which examines whether the request for protection is justified and, according to the result of the examination, provides or rejects protection to the claimant. All the actions of the parties and of the court therefore seek one ultimate goal - judgment.

56. The Court further finds that, in accordance with the ECtHR case law, the term "dispute" over "civil rights and obligations" includes all proceedings which result is decisive for the private rights and obligations, even if the proceedings concern a dispute between an individual and a public authority acting independently and whether they fall under the domestic legal system of the respondent state into the sphere of private or public law or are of a mixed nature (see ECtHR judgment *Ringeisen v. Austria*, of 16 July 1971, application No. 2614/65, page 39, paragraph 94; as well as the ECtHR judgment *König v. Germany*, Series A, No. 27, pp. 30 and 32, paragraphs 90 and 94).

57. The Court also recalls several other decisions of the ECtHR, in which it determined the concept and nature of the dispute, that is, what all court proceedings must fulfill in order to satisfy that criterion. In the case of *Ringeisen v. Austria*, of 16 July 1971, the ECtHR found that *"... the expression "dispute against" (des) droits et oblig de caractere civil" [disputes on civil rights and obligations] cover all proceedings the result of which is decisive for [such] rights and obligations "(Series A No. 13, p. 39, paragraph 94). However, "tenuous connection or remote consequences are not enough to bring Article 6 paragraph 1 (Article 6-1) into play –"civil rights and obligations must be an object –or one of the objects-" of the contestation " (the result of the proceedings must be directly decisive for such a right"(*see judgment cited above *Van Leuven and De Meiere, v. Belgium* Series A No 43, p. 21, paragraph 47).

58. The Court also states that in the case *Sporrong and Lonnroth v. Sweden,* the ECtHR, concluded that the "contestation" (dispute) must be authentic and serious (see ECtHR judgment *Sporrong and Lonnroth v. Sweden*, of 23 September 1982, Series A no. 52, p. 30, paragraph 81).

59. In this regard, the Court in the present case should determine whether the proceedings regarding the recognition of the foreign court decision conducted before the Basic Court in Mitrovica have all the characteristics of a court dispute.

Defining the term "dispute" in a present case

60. On the basis of all the case-files, the Court notes that the Applicant's former spouse has now filed a divorce suit for dissolution of marriage before the District Court in Tirana, pursuant to which the District Court was called to decide on the divorce, as well as on the rights and obligations consequently arising from such a community.

61. Accordingly, the District Court conducted the proceedings for dissolution of marriage involving the spouses (the applicant and his ex-wife), and consequently the District Court rendered a decision resolving the issue of the marriage. By the same decision, the Court also determined the scope of rights and obligations of both parties in the proceedings for marriage dissolution.

62. It follows from the case file that Decision No. 5799, of the District Court in Tirana has become final defining all the rights and obligations of both parties involved in the proceedings for marriage dissolution.

63. Further, as regards the court proceedings before the regular courts in the Republic of Kosovo, namely the Basic Court in Mitrovica, the Court first notes that the request for recognition of a foreign court decision (Decision No. 5799 of the District Court in Tirana) was filed by the former Applicant's wife, who, as an interested party, has a legitimate legal interest in recognizing the decision of a foreign court in the Republic of Kosovo, which creates conditions for her and allows her to exercise certain rights defined in a decision of a foreign court.

64. Therefore, in order for her to be able to exercise her rights in full in the manner defined by the court of the foreign country in its decision, those rights must also be recognized by the court of the country in which territory the interested party (in the present case of the ex-wife of the Applicant), she seeks the recognition of that foreign court decision.

65. The Court recalls that such a right derives from the legal provision of Article 101 of the Law on Resolving Conflict of Laws with Regulations of Other Countries, which provides:

> *„... Everyone who has a legal interest is entitled to request the recognition of a foreign court decision relating to the personal status ".*

66. The Court also recalls that in order a decision of a foreign court in the territory of Kosovo would have legal effects, namely, the rights and consequences defined therein, it must be recognized by a competent court in the territory of Kosovo.

67. In this connection, the Court states that the issue of jurisdiction to recognize decisions of foreign courts is governed by Article 11 of Law on Courts No. 03/L-199,

> *Article 11*
> *Subject Matter Jurisdiction of the Basic Court [...]*
>
> *„2. The Basic Courts are competent to give international legal support and to decide for acceptance of decisions of foreign courts."*

68. It also follows the fact that it is within the jurisdiction of the Basic Court, as the competent court, to determine whether a decision of a foreign court meets all the conditions laid down in the law for it to be recognized. In this regard, the Court recalls that the "*Law on Resolving Conflict of Laws with Regulations of Other Countries*"

prescribes all the conditions that the Basic Court must determine before deciding whether a foreign court's decision qualifies as such.

69. The Court, bringing the legal provisions in connection with the present facts of the Referral, finds that before the Basic Court in Mitrovica, as the competent court, there was exclusively a procedural issue related to the recognition of a foreign court's decision raised by an interested party.

70. Thus, in the opinion of this court, the Basic Court in Mitrovica was called upon to answer exclusively the question whether the decision of the foreign court, which recognition is requested by the Applicant's former spouse, meets all formal requirements for its recognition. Accordingly, it can be concluded that there are only two parties to the present court proceedings, namely the Applicant's ex-wife as an interested party seeking recognition of the decision of a foreign court, and the state, that is, the Basic Court in Mitrovica, which, as a competent court, should answer that procedural question.

71. On the basis of the foregoing, it can be concluded that in the present case the Applicant was not a party to the proceedings before the Basic Court in Mitrovica in recognition of the decision of a foreign court, and thus the Basic Court in Mitrovica did not even decide on his civil rights or obligations, which could arise from this court proceeding.

72. The Court, comparing the criteria established by the ECtHR case law (*Ringeisen v. Austria*) with the present case concerning the term "dispute", finds that the specific court proceedings before the Basic Court in Mitrovica were conducted solely between two parties, thus concluding that the absence of a third party in this court proceeding affects the very character of the proceedings, defining it as a court proceeding which, by this criterion and nature, has no element of a "dispute".

73. Likewise, the Court finds that also according to the second ECtHR criterion, the court proceedings before the Basic Court in Mitrovica is not a "dispute", on the ground that the Basic Court was not called upon to decide on any civil rights of a third party (the Applicant), and which is in any way protected by domestic law and, therefore, the Basic Court could not directly decide on it.

74. Similarly, the Basic Court in Mitrovica did not decisively determined the Applicant's civil rights and obligations, but as such, they were already decided in their scope in a divorce lawsuit, namely, the "dispute" brought before the courts of a foreign state, where based on

the case file, it may be concluded that the Applicant was an active participant. Accordingly, the Court finds that the third criterion determining the nature of the dispute in this case is not met.

75. Furthermore, with regard to the criterion established by the ECtHR in case *Sporrong and Lonnroth v. Sweden*, "*that "the contestation" (dispute) must be authentic and serious*", the Court finds that the non-contentious court proceedings before the Basic Court in Mitrovica have elements of authenticity and seriousness, which are reflected in the fact that this decision (CN No. 89/2015 of 14 August 2015 of the Basic Court) realizes the rights and obligations defined in the decision of a foreign court, and that this decision at the same time protects the rights and the implementation of all obligations to the party who has applied for its recognition.

76. The Court recalls, in particular, that it would be an injustice if a party having a final decision as a result of a court proceedings that had the character of a "dispute", which defined all "rights and obligations", could not as such exercise and enjoy them to the extent that they are defined. Especially when bearing in mind that the nature of the dispute was a marriage dissolution proceedings whereby the defined rights directly affect, in addition to the parties to the proceedings (spouses), also the subjects that were indirectly parties to the proceedings (children of the spouses), but are directly affected by the defined rights.

77. Accordingly, the Court particularly wishes to note that from the moment when a domestic court renders a decision recognizing a foreign court's final decision, according to the law, it also becomes a final decision in the legal system of the state which court has recognized it as such.

78. Moreover, the recognition of a foreign court decision is not only a legal obligation of the court having a legal obligation under its jurisdiction to recognize it (provided that all procedural requirements defined by law are met), but it is also a duty of the state under private international law.

79. Based on the foregoing, the Court finds that the non-contentious court proceedings conducted before the Basic Court in Mitrovica regarding the recognition of a foreign court's decision do not constitute a "dispute" within the meaning of Article 31 of the Constitution and Article 6.1 of the ECHR.

The term "civil rights and obligations"

80. The Court recalls that the term "civil rights and obligations" starts from an explanation of the term "civil right". This term refers to the protection of all rights that an individual would enjoy under the applicable national law. On the other hand, the term "civil right" extends well beyond the scope of civil cases in the narrow sense. In the judgment of the ECtHR, *Ringeisen v. Austria*, it was held that any proceedings the outcome of which is "decisive for the determination of a civil right" must comply with the requirements of Art. 6. of the ECHR (see ECtHR judgment *Ringeisen v. Austria*, Application No. 2614/65, of 16 July 1971, Series A, No. 13).

81. Article 6 of the ECHR applies regardless of the status of the parties, and regardless of the nature of the legislation governing the manner in which the dispute will be categorized; what matters is the nature of the right in question, and whether the outcome of the proceedings will directly affect *the rights and obligations* under private law (see ECtHR judgment *Baraona* v. *Portugal*, application 10092/82, of 8 July 1987, paragraphs 38–44).

82. The ECtHR also requests that there is a "dispute" over the content of "civil rights and obligations", at least in the broad sense of the word, as found in the ECtHR judgment *Le Compte, Van Leuven and De Meyere v. Belgium*, where Article 6 of the ECHR would not, in principle, apply to cases of a purely administrative and procedural nature, in which there is no substantive action either on factual or legal issues (see ECtHR judgment *Le Compte, Van Leuven and De Meyere v. Belgium*, application 6878/75 7238/75, of 23 June 1981, paragraph 41).

83. The Court, bringing the aforementioned principles of the ECtHR with the present case, finds that the fact that there was a court proceeding before the Basic Court in Mitrovica is not disputed, but also for this Court is not disputable the fact that the Basic Court in Mitrovica did not decide on the scope of civil rights and freedoms as established in ECtHR case *Le Compte, Van Leuven and De Meyere v. Belgium*.

84. Moreover, the Court finds that as far as the Applicant's civil rights and obligations are concerned, a decisive impact on their scope had the court proceedings conducted before the District Court in Tirana relating to the lawsuit for the dissolution of marriage to which he participated as a party. In this regard, the Court would like to add that during the divorce proceedings the Applicant had the opportunity, to the extent that he was dissatisfied with the way in which his civil rights

and freedoms were treated by the competent courts, to apply to the competent institutions in the Republic of Albania to protect those rights.

85. In the present case, the Court has already concluded that the Applicant has not initiated the "dispute" over the "rights" envisaged by domestic law, within the meaning of Article 6 paragraph 1 of the ECHR, and accordingly, the cumulative conditions for the application of Article 6.1 of the ECHR have not been met, as established by the ECtHR judgment in *Ringeisen v. Austria*. More specifically, the courts did not take any substantive action on factual or legal issues, and accordingly did not decide on the Applicant's "civil rights or obligations, which would result from such a "dispute".

86. Accordingly, the Court finds that, in the present case, the procedure for recognizing a foreign court decision does not in itself constitute a "dispute" about "civil rights or obligations" within the meaning of Article 31 paragraph 2 of the Constitution and Article 6 paragraph 1 of the ECHR , because in the present case it was not a matter of determining the civil rights and obligations required by Article 31.2 of the Constitution and Article 6 paragraph 1 of the ECHR, namely, the merits of the lawsuit were not discussed (e.g. the grounds of the statement of claim or the grounds of the criminal charge, the divorce proceedings or any right or obligation that would have direct consequences for the Applicant), but only a pure procedural issue was reviewed, namely whether *the procedural requirements for recognition of a foreign court's decision were met*.

87. However, the Court also wishes to note that the ECtHR has concluded in its long-standing practice that Article 6 of the ECHR can be applied to proceedings initiated by the Applicants, in which it claimed that there was a failure (negligence) of the courts when have been deciding on his "civil rights" in the court proceedings having the character of a "*dispute*", even in cases where the scope of the right has already been decided. In such cases, it is for the domestic court to examine whether the requirements of Article 6 of the ECHR have been respected in these judicial proceedings.

88. Thus, for example, in the case Golder *(Golder),* the ECtHR considered that the procedural guarantees given in Article 6 of the ECHR relating to fairness, publicity and expediency would be meaningless if there were no protection of the preconditions for enjoying those guarantees, more specifically - access to court. The Court found that this was an inalienable form of the guarantees contained in Article 6 of the ECHR, invoking the rule of law principles and avoiding the discretionary

powers underlying in a bigger part of the Convention (see ECtHR judgment in case Golder *(Golder)* v. *the United Kingdom* of 21 February 1975, Series A No. 18, pp. 13-18, paragraphs 28-36).

89. Furthermore, on Article 6 paragraph 1 of the ECHR *"may... be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6.1 "*
(see ECtHR Judgment in case *Le Compte, Van Leuven and De Meyere v. Belgium* of 23 June 1981, Series A no. 43, paragraph 44).

90. Also, where there is a serious and authentic "dispute" as to the lawfulness of that interference, concerning either the very existence or extent and scope of the impugned "civil right", Article 6 paragraph 1 of the ECHR authorizes an individual "*to decide on a matter of domestic law before a domestic court*" (see ECtHR judgment in case *Sporrong and Lönnroth v. Sweden*, of 23 September 1982, Series A No. 52, paragraph 81; also see judgment in case *Tre Traktörer AB v. Sweden* of 7 July 1989, Series A No. 159, paragraph 40).

91. Likewise, when access to an individual to the court is limited, either by law or factually, when he cannot participate in a "*dispute*" where his "*civil rights*" *are directly decided",* the Court needs to examine whether the limitations touches on the essence of his rights and, in particular, whether that limitation has pursued a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (ECtHR judgment in case *Ashingdane v. the United Kingdom* of 28 May 1985, Series A no. 93, p. 24-25, paragraph 57). If the limitation is compatible with these principles, there will be no violation of Article 6 of the ECHR.

92. However, given that the Applicant before the Constitutional Court did not challenge any of the guarantees provided for in Article 6 of the ECHR, when in the "*dispute*" it was decided on the scope of his "*civil rights*", but he exclusively challenged before the Court the proceedings of the recognition of the final decisions of a foreign court, which, in accordance with its jurisdiction, the Basic Court in Mitrovica has recognized by decision, leads to the conclusion that his allegations cannot qualify for the aforementioned principles and practice of the ECtHR (referred to in paragraphs 86, 87, 88, 89 and 90 of the report), which would make it possible to review whether in a court "*dispute*" when deciding on his "*civil rights*", all his guarantees under Article 6 of the ECHR were respected.

93. Based on all the foregoing and on the basis of the conclusions above, the Court finds that the Applicant's allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR, which, according to him, resulted from the recognition of a foreign court decision, are incompatible *ratione materiae* with the Constitution.

94. The Court also noted that the Applicant alleged a violation of Article 24 [Equality Before the Law] of the Constitution, however, the Court also noted that the Applicant did not by a single word explain or provide any valid argument which would justify "*and substantiate the claim*".

95. Accordingly, the Court rejected the Applicant's allegation of violation of Article 24 of the Constitution as ungrounded, in accordance with Rule 39.2 of the Rules of Procedure.

96. The Court further notes that there are other decisions of the regular courts regarding the enforcement proceedings, but that the Applicant did not request their constitutional review in the referral, and accordingly the Court will not deal with them either.

Request to not disclose identity

97. The Court recalls that the Applicant requested for his identity not to be disclosed to the public, „*due to the reason that my name is irrelevant in reviewing the case, and publicity may indirectly affect my children".*

98. In this respect, the Court refers to Rule 32 (6) of the Rules of Procedure, which provides:

> *"Parties to a referral who do not wish their identity to be disclosed to the public shall so indicate and shall state the reasons justifying such a departure from the rule of public access to information in the proceedings before the Court […]."*

99. The Court also refers to Article 8.1 of the Convention on the Rights of the Child, which foresees:

> *"States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."*

100. The Court considers that in a family case the publicity may, even indirectly, affect the identity, name and family relations of the children.

101. Therefore, pursuant to Article 8 (1) of the Convention on the Rights of the Child and Rule 32 (6) of the Rules of Procedure, the Court approves the Applicant's request for not disclosing his identity to the public.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113. 1 and 7 of the Constitution, Article 20 of the Law and Rules 32.6 and 39 (2) and (3) b of the Rules of Procedure, in the session held 8 October 2019, by majority of votes

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO APPROVE unanimously the request for non-disclosure of identity;

III. TO NOTIFY this Decision to the Parties;

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

V. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Arta Rama-Hajrizi

KI81/19, Applicant: Skender Podrimqaku, Request for constitutional review of Decision AC-I-19-0007 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, of 14 March 2019

KI81/19, Resolution on Inadmissibility adopted on 7 November 2019, published on 9 December 2019

Keywords: *individual referral, manifestly ill-founded, inadmissible referral, interim measure, pre-trial procedure.*

The subject matter was the request for constitutional review of the challenged Decision of the Supreme Court, which allegedly violated the fundamental constitutional rights and freedoms guaranteed by Articles 10 [Economy], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 46 [Protection of Property], 53 [Interpretation of Human Rights Provisions], and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

The Applicant's main allegation filed with the Constitutional Court is the imposition of an interim measure prohibiting the sale of a property for which the Privatization Agency of Kosovo has notified that the tender in the present case has been canceled. The interim measure was requested until the moment when the Special Chamber of the Supreme Court of Kosovo (hereinafter: SCSC) decides on the merits of his claim.

Regarding the abovementioned allegation, the Court noted that as to the applicability of Article 6 of the Convention and Article 31 of the Constitution in the pre-trial proceedings, taking into account that the right included in the "*preliminary proceedings*" is a civil right and that the interim measure is decisive for the civil right in question, the Court found that in the circumstances of the case, based on the ECtHR case law, are met the criteria for the application of the procedural safeguards established in Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.
The Court found that the allegations and arguments raised by the Applicant do not show that the proceedings before the Specialized Panel and the Appellate Panel of the SCSC were unfair or arbitrary, so that the Constitutional Court could be satisfied that the Applicant was denied any procedural guarantees, which would amount to a violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
The Court, dealing with the Applicant's allegations in respect of the violation of Article 46, notes that the Applicant did not specifically reason the violation

of the right to property and does not specifically refer to any of the principles contained in Article 46 of the Constitution, but considers that this right has been violated as a result of a violation of the right to fair and impartial trial (Article 31 of the Constitution).

However, when considering these allegations within Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR, the Court has already concluded that these allegations are manifestly ill-founded. Therefore, the Court considers that in the present case it is not proved that the Applicant has a reasoned claim regarding the violation of the property right under Article 46 of the Constitution.

As to the alleged violation of Article 10, the Court notes that this Article does not fall into the category of Fundamental Rights and Freedoms set forth in Chapter II of the Constitution. Accordingly, the allegation of a violation of this Article must be connected and substantiated with any other right provided for in the Chapter II. Whereas, with regard to the alleged violations of Article 32 of the Constitution, the Court notes that the Applicant only mentioned the violation of this Article of the Constitution in his case, but did not elaborate and substantiate such allegation with arguments.

Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Rule 39 paragraph (2) of the Rules of Procedure.

Finally, in accordance with Article 27.1 of the Law and in accordance with Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for interim measure is rejected, as the latter cannot be the subject of review, as the Referral is declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI81/19

Applicant

Skender Podrimqaku

Constitutional review of Decision AC-I-19-0007 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, of 14 March 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 Skender Podrimqaku residing in the Municipality of Peja, who is represented by Armend Deskaj, a lawyer (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision AC-I-19-0007 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), of 14 March 2019, which was served on him on 19 March 2019.

Subject matter

3. The subject matter is the request for constitutional review of the challenged decision, which according to the Applicant's allegation, violated his rights guaranteed by Articles 10 [Economy], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 46 [Protection of Property], 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 further requests the Constitutional Court of Kosovo (hereinafter: the Court) to impose an interim measure and to "prohibit the sale of Unit No. 50: AC Cooperative - Agricultural Land Sigë 1," (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 Constitutional Court

6. On 22 May 2019, the Applicant submitted the Referral by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 23 May 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Nexhmi Rexhepi (members).

8. On 17 June 2019, the Court notified the Applicant about the registration of the Referral.

9. On 17 June 2019, the Court notified the Appellate Panel of the SCSC about the challenging Decision AC-I-19-0007 and provided a copy of the Referral.

10. On 4 July 2019, the Applicant submitted the supplementation to the Referral to the Court.

11. On 24 September 2019, the Court requested the Applicant's representative to submit the power of attorney to the Constitutional Court.

12. On 4 October 2019, the Applicant sent the power of attorney to the Court by mail service.

13. On 7 November 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommendation to the Court the inadmissibility of the Referral.

Summary of facts

14. On 11 December 2017, the Applicant was notified by the Privatization Agency of Kosovo (hereinafter: PAK) that he was announced the bidder with the highest price in terms of participation in the sale process of a property. This PAK notice clarified that "*under the General Rules of Tender, the highest price offered in any way does not constitute a Decision on the sale of the asset, but the Decision on the approval or refusal of the sale shall be taken by the PAK Board of Directors".*

15. On 27 December 2017, the PAK notified the Applicant about the decision of the PAK Board of Directors regarding the cancellation of the tender for the disputed property. The notice also contained guidance on a legal remedy against the decision on cancellation, namely the initiation of proceedings before the SCSC.

16. On 27 February 2018, the Applicant filed a lawsuit with the SCSC requesting: (i) the annulment of the decision of the PAK Board of Directors regarding the sale of the disputed property; (ii) to establish that the claimant is a purchaser of the disputed property; (iii) to oblige the PAK to conclude the sale proceedings (of the contested property) within 30 days and to cover the costs of the contested procedure. In addition, by the same lawsuit, the Applicant requested the issuance of a Preliminary Injunction (hereinafter: the PI), which would prohibit the PAK from taking action to tender the disputed property until the final decision.

17. On an unspecified date, the PAK submitted its comments to the Specialized Panel of the SCSC, rejecting the proposal to issue the PI as not supported by law, arguing that the decision of the PAK Board was in accordance with Law No. 04/L-034 on the Privatization Agency of Kosovo.

18. On 13 April 2018, the Specialized Panel of the SCSC rendered Decision C-III-18-0038, by which it rejected the Applicant's request for the issuance of the PI. The reasoning of this Decision states, *inter alia*, that the claimant (the Applicant) has not provided credible evidence that he will suffer "*immediate and irreparable financial harm*" if the request for the PI is not approved.

19. On 3 May 2018, the Applicant filed an appeal with the SCSC Appellate Panel against Decision C-III-18-0038, on the grounds of essential violation of the provisions of the procedure, erroneous application of substantive law and erroneous determination of factual situation.

20. On 31 May 2018, the Appellate Panel of the SCSC, by Decision AC-I-18-0271, rejected the Applicant's appeal as ungrounded and upheld Decision C-III-18-0038 of the Specialized Panel of the SCSC of 13 April 2018. In this Decision, the Appellate Panel reasoned that: "*The appellant (the Applicant) only verbally claims that the damage will be immediate and irreparable, but he has no evidence before either the Specialized Panel or the Appellate Panel, which would substantiate the damage caused to him by the decision on annulment this tender. Moreover, to any participant in a tender procedure is clear under Article 17 of the Rules of Tender that only the PAK Board has the final authority to approve a sale"*. Finally, the Appellate Panel emphasized that this Decision does not prejudice the merits of the claim.

21. On 13 July 2018, the Applicant again filed a request for the issuance of the PI, after the PAK had announced the 39th wave of privatization of the sale of the disputed property.

22. On 19 December 2018, the Specialized Panel of the SCSC rendered Decision C-III-18-0038, which rejected the Applicant's request for the issuance of the PI (with the same reasoning as in the Decision of 13 April 2018).

23. On 10 January 2019, the Applicant again filed appeal with the SCSC Appellate Panel against Decision C-III-18-0038 of 19 December 2019, on the grounds of essential violations of the procedural provisions, erroneous application of substantive law and erroneous determination of factual situation.

24. On 14 March 2019, the Appellate Panel of the SCSC, by Decision AC-I-19-0007, rejected the Applicant's appeal as ungrounded and upheld Decision C-III-18-0038 of 19 December 2018 of the Specialized Panel of the SCSC (with the same reasoning as in the Decision of 31 May

2018). The Appellate Panel reiterated that this Decision does not prejudice *'final resolution of the claim'*.

Applicant's allegations

25. The Applicant alleges that the Appellate Panel of the SCSC, by Decision AC-I-19-0007, by rejecting his request for a preliminary injunction, has violated his rights protected by Article 10 [Economy], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 46 [Protection of Property], 53 [Interpretation of Human Rights Provisions], and 54 [Judicial Protection of Rights] of the Constitution.

26. The Applicant states that with the (re) tendering of the disputed property, '*the legal requirements for the issuance of the preliminary injunction (interim measure) have been met*'. Consequently, according to the Applicant, the tendering process could result in the sale of the disputed property, in which case it would cause immediate and irreparable damage. Thus, '*eventual sale of the asset would jeopardize the main request filed with the claim seeking to establish that the respondent's [PAK] decision to cancel the tender was unlawful*'.

27. The Applicant alleges that his request is a property claim and that the right to property is a constitutional category and also a right guaranteed by international conventions on human rights and freedoms. Accordingly, in his view, the rejection of the request for interim measure would lose the meaning of the dispute regarding the statement of claim, which is pending before the Specialized Panel of the SCSC. Therefore, according to the Applicant, the prohibition of sale until the decision on merits is in the legal interest of the claiming party and in the interest of justice in general.

28. The Applicant also alleges that the decision of the PAK Board of Directors to annul the tender for the disputed property is in violation of Article 10 of the Constitution, because it states that Kosovo is designated as a state with free market economy. He alleges that of particular importance is the well-known principle that in the countries where the free market economy is applied, supply and demand are market price regulators, and in this respect, as long as the Applicant had offered the highest price the sale of the contested property should have been approved.

29. Finally, the Applicant requests the Court to "*interpret*" the constitutionality of the challenged Decision AC-I-19-0007, as well as

the decision of the PAK Board of Directors to annul the tender for the disputed property.

30. The Applicant also requests the Court to impose interim measure, requesting that "*until the clarification of the requests, pursuant to Article 27 of the Constitutional Court regarding the interim measures [...] to prohibit the sale of assets no. 39 by Judgment [...]*".

Admissibility of the Referral

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

32. 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".*

33. The Court further refers to the admissibility requirements as provided by Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

34. As to the fulfillment of these criteria, the Court notes that the Applicant has fulfilled the criteria laid down in Article 113 (7) of the Constitution, as he is an authorized party, challenges an act of a public authority, namely Decision AC-I-19-0007 of 14 March 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 also submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

35. However, when assessing the admissibility of the Referral, the Court should also examine whether the Applicant has met the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure establishes the criteria based on which the Court may consider a Referral, including the criterion that the referral is not manifestly ill-founded. Specifically, Rule 39 (2) of the Rules of Procedure stipulates:

"(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."

36. In this respect, the Court recalls once again that the Applicant alleges that his rights protected by Articles 10 [Economy], 31 [Right to Fair and Impartial Trial], 32 [Right to legal Remedies], 46 [Protection of Property], 53 [Interpretation of Human Rights Provisions], 54 [Judicial Protection of Rights] of the Constitution, have been violated.

37. However, in the light of the facts of the present case, the Court considers that the Applicant's allegations relate, in substance, to the:

(i) violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and

(ii) violation of Article 46 of the Constitution.

(i) Applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in "pre-trial proceedings" "

38. The Court notes that in the present case the Applicant's main allegations relate to pre-trial court proceedings, namely the rejection of his request for a PI by two judicial instances within the SCSC.

39. Therefore, the Court will first determine whether Article 6 of the Convention applies to the Applicant's case in conjunction with Article 31 of the Constitution..

40. With regard to the applicability of Article 6 of the Convention and Article 31 of the Constitution to pre-trial proceedings - such as those decided upon the Applicant's request for a PI, the Court notes that such application has been interpreted by the ECtHR through its case law. The Court, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the human rights and fundamental freedoms guaranteed by the Constitution in accordance with the ECtHR case law.

41. Accordingly, the Court will determine the applicability of procedural guarantees of Article 6 of the ECHR, in the circumstances of the present case, based on the case law of the ECtHR (See also Judgment in case No. KI122/17, Applicant, *Česká Exportní Banka A. S.*, Judgment of 30 April 2018, paragraph 124 and KI150/16, Applicant *Mark Frrok Gjokaj*, Judgment of 31 December 2018, paragraph 62).

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

2008, paragraph 28; and *Micallef v. Malta*, No. 17056/06, Judgment of 15 October 2009, paragraph 74).

43. The Court further emphasizes the ECtHR general position that, in principle, the "*preliminary proceedings"*, like those concerned with the granting of an interim measure/injunctive relief - are not considered to determine *"civil rights and obligations"* and therefore, do not usually fall within the ambit of such protection under Article 6 of the ECHR. (See ECtHR cases: *Wiot v. France*, appl. no. 43722/98, Judgment of 7 January 2003; *APIS a.s. v. Slovakia*, appl. no. 39754/98, Decision of 13 January 2000; *Verlagsgruppe NEWS GMBH v. Austria*, appl. no. 62763/00, Decision of 23 October 2003; *Libert v. Belgium*, appl. no. 44734/98, Judgment of 8 July 2004; *Micallef v. Malta,* application no. 17056/06, Judgment of 15 October 2009, paragraph 83, see also cases of the Constitutional Court: KI 122/17*,* Applicant *Ceska Exportni Banka A.S,* Judgment of 30 April 2018, paragraph 126 and KI150/16, Applicant *Mark Frrok Gjokaj*, Judgment of 31 December 2018, paragraph 64).

44. Nevertheless, in certain cases, the ECtHR has applied Article 6 of the ECHR to such "*preliminary proceedings"* when it considered that the injunctive relief measures were determinant for the civil rights of the Applicant. (See, *inter alia*, ECtHR cases *Aerts v. Belgium*, appl. No. 25357/94, Judgment of 30 July 1998; *Boca v. Belgium*, appl. no. 50615/99, Judgment of 15 November 2012; *Micallef v. Malta,* application no. 17056/06, Judgment of 15 October 2009, paragraph 75; see also cases of the Constitutional Court No. KI122/17, Applicant *Ceska Exportni Banka A.S,* Judgment of 30 April 2018, paragraph 127 and KI150/16, Applicant *Mark Frrok Gjokaj*, Judgment of 31 December 2018, paragraph 65).

45. By Judgment *Micallef v. Malta* (of 2009), the ECtHR altered its previous approach regarding non-applicability of procedural safeguards of Article 6 of the ECHR in the "*preliminary proceedings*". In changing this position, the ECtHR argued, *inter alia*, as follows:

> *"The exclusion of interim measures from the ambit of Article 6 has so far been justified by the fact that they do not in principle determine civil rights and obligations. However, in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge's decision on an injunction will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases. It follows that, frequently interim and main proceedings decide the same "civil*

rights or obligations" and have the same resulting long-lasting or permanent effects. (See ECtHR case: Micallef v. Malta, application no. 17056/06, Judgment of 15 October 2009, paragraph 79).

46. Based on this Judgment, the Court notes that, according to the ECtHR case law, not all injunctive reliefs/interim measures determine civil rights or obligations and the applicability of Article 6 of the ECHR to pre-trial proceedings depends on whether certain conditions are meet.

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

48. Secondly, the ECtHR notes that the nature of the interim measure should be scrutinised, as whenever an interim measure/injunction relief can be considered effectively to determine the civil right or obligation at stake -Article 6 will be applicable. (See the case of ECtHR *Micallef v. Malta*, Ibidem, paragraph 85).

(ii) Applying the above-mentioned principles in the present case

49. The Court notes that the content of the alleged right in the present case, namely the request for a PI, relates to the annulment of the decision on sale of the disputed property, through (re) tendering in the privatization process. This is a right of a civil nature under the legislation in force in the Republic of Kosovo.

50. The purpose of the PI, requested by the Applicant, was to secure the Applicant's main allegation concerning the disputed property. The Applicant considers the PI to be a necessary measure for prohibition of the sale of the disputed property, while the courts had not yet decided on the merits of the case (namely the lawsuit filed on 27 February 2018). Moreover, as regards the second requirement, the Court notes that the PI effectively determines the civil right in question.

51. Therefore, taking into account that the right included in the "*preliminary proceedings*" is a civil right and that the PI is decisive for the civil law in question, the Court finds that the circumstances of the case, based on the ECHR case law, meet the criteria for the application of the procedural safeguards embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

52. Accordingly, the Court will assess the respect for the procedural safeguards of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, in the proceedings conducted before the SCSC in relation to the Applicant's request for the PI.

(A) As to the allegation of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

53. The Court notes that the Specialized Panel and the Appellate Panel of the SCSC have decided only on the claimant's (Applicant's) request for PI, while a decision on the merits of the statement of claim has not yet been taken.

54. Consequently, the Court will only examine the Applicant's allegations in respect of the SCSC decisions on the request for the PI.

55. In this regard, the Court notes that the Applicant alleges that the decisions of the SCSC violated his rights guaranteed by Articles 10, 31, 32, 46, 53, and 54 of the Constitution.

56. The Court recalls that the Applicant filed a lawsuit with the SCSC against the decision of the PAK Board of Directors, requesting: (i) the annulment of the decision of the PAK Board of Directors regarding the cancellation of the sale of the disputed property; (ii) certification that the claimant is a purchaser of the disputed property; (iii) to oblige the PAK to conclude the sale proceedings (of the contested property) within 30 days and to cover the costs of the contested procedure; and (iv) to issue Preliminary Injunction (PI), which would prohibit the PAK to take any action to tender the disputed property until a final decision.

57. However, the Court notes that the substance of the Applicant's allegations relates to the right to a fair and impartial trial, in conjunction with the right to property.

58. As to the right to a fair and impartial trial, the Applicant alleges that he was not provided adequate protection during the proceedings

before the SCSC and thus Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated.

59. In this regard, the Court notes that the main reason for the rejection of the Applicant's request for PI before the Specialized Panel of the SCSC was that *"[...the claimant did not provide credible evidence that would justify the issuance of the PI. The claimant did not adduce any evidence of the existence of a risk of harm and furthermore, he did not submit any evidence that would argue that immediate and irreparable harm would be caused if the PI were not issued"*.

60. The Court further notes that the Appellate Panel of the SCSC reasoned as follows: *"The claimant has provided evidence to the SCSC showing that he was declared a temporary winner of the said immovable property. But that does not mean that he bought this immovable property. It is the PAK Board of Directors, which in accordance with its powers under PAK Law No. 03/L-67 in support of the applicable rules decides on the approval or cancellation of a sale* [...] *Therefore, despite the appellant's expectations, especially after the announcement of a higher bid, the cancellation of the tender cannot be regarded as a caused harm, and therefore no compensation may be claimed precisely because of Article 14 of the Rules of Tender which provide for the cancellation of the sale due to unreasonable price"*.

61. The Court considers that the Specialized Panel and the Appellate Panel of the SCSC have given a reasoned response to all of the Applicant's allegations concerning the interpretation and application of the relevant rules of procedural and substantive law.

62. Based on the case file, the Court notes that the reasoning given in the Decision of the Appellate Panel of the SCSC is clear and after having considered all the proceedings, the Court also found that the proceedings before the Specialized Panel and the before the Appellate Panel of the SCSC were not unfair or arbitrary (See ECtHR case: *Shub v. Lithuania*, Application No. 17064/06, Decision of 30 June 2009).

63. In line with its consolidated case-law, the Court reiterates that it is not a function of the Constitutional Court to deal with alleged errors in the application of the relevant laws allegedly committed by the regular courts, if this application has not violated the rights and freedoms protected by the Constitution and the ECHR. It cannot itself assess the law that has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "*fourth instance*", which would be to disregard the limits imposed on its jurisdiction. In fact, that it is the role of the regular

courts to interpret and apply the pertinent rules of both procedural and substantive law (see: *Garcia Ruiz v. Spain,* paragraph 28 of the ECtHR Judgment of 21 January 1999).

64. The Court further reiterates that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, namely before the Specialized Panel and the Appellate Panel of the SCSC, cannot itself make a substantiated claim of violation of the right to a fair and impartial trial, or equality before the law (See, *mutatis mutandis*, case of the Constitutional Court KI91/18, Applicants: *Njazi Gashi, Lirije Sadikaj, Nazife Hajdini-Ahmetaj and Adriana Rexhepi*, Resolution on Inadmissibility, of 30 September 2019, paragraph 66; see also ECtHR case, *Mezotur - Tiszazugi Tarsulat v. Hungary*, Decision of 26 July 2005, paragraph 21).

65. The Court considers that the allegations and arguments raised by the Applicant do not show that the proceedings before the Specialized Panel and the Appellate Panel of the SCSC were unfair or arbitrary, so that the Constitutional Court could be satisfied that the Applicant was denied any procedural guarantees, which would amount to a violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

(B) As to the alleged violation of Article 46 of the Constitution

66. The Court recalls that the Applicant also states that the challenged decision was rendered contrary to the rights guaranteed by Article 46 [Protection of Property] of the Constitution and that the rejection of the request for interim measure would lose the meaning of the dispute regarding the statement of claim pending before the SCSC Specialized Panel. Accordingly, according to the Applicant, the prohibition on the sale of the disputed property until the case is decided on merits is in the legal interest of the claimant, but also in the interest of justice in general.

67. The Court recalls that Article 46 of the Constitution, as well as Article 1 of Protocol no. 1 (Protection of Property) of the ECHR do not guarantee the right to acquire property (See case of the Constitutional Court KI201/18, Applicant *Selami Taraku*, Resolution on Inadmissibility of 1 November 2019, paragraph 39; KI83/18, Applicant *Ivica Milosevic*, Resolution on Inadmissibility of 17 October 2019, paragraph 41; See also ECtHR cases: *Van der Mussele v. Belgium*, ECHR Judgment of 23 November 1983, paragraph 48; and

Slivenko and Others v. Latvia, application no. 73049/01, Judgment of 9 October 2003, paragraph 121).

68. In this context, the Court refers to the interpretations of the ECtHR, where it is noted that Article 1 of Protocol no. 1 (Protection of Property) of the ECHR applies only to a person's existing "possessions" (see *Marckx v. Belgium*, paragraph 50, Judgment of 13 June 1979; *Anheuser-Busch Inc. v. Portugal*, paragraph 64).

69. The Applicant can further claim a violation of Article 46 of the Constitution only insofar as the challenged decisions relate to his "property"; within the meaning of this provision, "property" may be "existing property", including claims under which the applicants may claim "legitimate expectations" that will acquire the effective enjoyment of any property right.

70. In certain circumstances, a "*legitimate expectation"* to acquire a property may also enjoy protection under Article 1 of Protocol No. 1 to the ECHR (*Pressos Company Naviera SA and Others v. Belgium*, Application No. 17849/91, Judgment of 20 November 1995, paragraph 31; *Grazinger and Gratzingerova v. Czech Republic*, Case No. 39794/98, Resolution on Inadmissibility of 10 July 2002, paragraph 73).

71. But, according to the ECtHR case law, no "*legitimate expectation*" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law (regarding property disputes) and where the applicant's submissions are subsequently rejected by the national courts (see: *Kopecký v. Slovakia*, paragraph 50 of the Judgment of the ECtHR, of 28 September 2004).

72. The Court, dealing with the Applicant's allegations in respect of the abovementioned principles, notes that the Applicant has not specifically justified the violation of the right to property and does not specifically refer to any of the principles contained in Article 46 of the Constitution, but considers that this right has been violated as a result of a violation of the right to fair and impartial trial (Article 31 of the Constitution). This is due to the fact that, according to the Applicant, the Specialized Panel and the Appellate Panel of the SCSC have erroneously determined the factual situation and erroneously applied the substantive law and, thus, did not decide on his request for the PI.

73. However, when considering these allegations within Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR, the Court has

already concluded that these allegations are manifestly ill-founded. Therefore, the Court considers that in the present case it is not proved that the Applicant has a reasoned claim regarding the violation of the property right under Article 46 of the Constitution.

74. In conclusion, the Court considers that the Applicant has not provided facts that would indicate that the decisions of the regular courts have in any way violated his rights guaranteed by the Constitution.

75. As to the alleged violation of Article 10, the Court notes that this Article does not fall into the category of Fundamental Rights and Freedoms set forth in Chapter II of the Constitution. Accordingly, the allegation of a violation of this Article must be connected and substantiated with any other right provided for in the chapter II (See *mutatis mutandis* case of the Court: KI108/18, Applicant *Blerta Morina*, Resolution on Inadmissibility of 30 September 2019, paragraphs 195-197).

76. Also, with regard to the alleged violations of Article 32 of the Constitution, the Court notes that the Applicant only mentioned the violation of this Article of the Constitution in his case, but did not elaborate and substantiate such allegation with arguments. The Court reiterates its general position that the mere fact that the applicant does not agree with the outcome of the decisions of the Supreme Court or other regular courts, as well as the mere mentioning of articles of the Constitution, is not sufficient to build a substantiated allegation of constitutional violation. When alleging such violations of the Constitution, the applicants must provide substantiated allegations and convincing arguments (See, *mutatis mutandis*, cases of the Constitutional Court: KI 78/19, Applicant *Miodrag Pavic*, Resolution on Inadmissibility of 1 November 2019, paragraph 56; KI136/14, Applicant *Abdullah Bajqinca*, Resolution on Inadmissibility, of 10 February 2015, paragraph 33).

77. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Rule 39 paragraph (2) of the Rules of Procedure.

Request for interim measure

78. The Court recalls that the Applicant presented as a main allegation the imposition of an interim measure, which would prohibit the sale of the disputed property until the case is decided on merits by the Specialized Panel of the SCSC.

79. The Court has already concluded that the Applicant's Referral must be declared inadmissible, as manifestly ill-founded on constitutional basis.

80. Therefore, in accordance with Rule 27.1 of the Law and Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for interim measure must be rejected, as the latter cannot be the subject of review, as the Referral is declared inadmissible (See in this context the case of the Court: KI19/19 and KI20/19, Applicants *Muhamed Thaqi* dhe *Egzon Keka*, Resolution on Inadmissibility of 26 August 2019, paragraphs 53-55).

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Articles 20, 27 of the Law and Rules 39 (2), 57 (1) and 59 (2) of the Rules of Procedure, unanimously/by majority:

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**
Bekim Sejdiu	Arta Rama-Hajrizi

KI76/19, Applicants A. C., D. C., and F C., The request for constitutional review of Judgment Rev. no. 48/2019 of the Supreme Court, of 27 March 2019

KI76/19, Resolution on Inadmissibility of 7 November 2019, published on 19 December 2019

Keywords: *Resolution on Inadmissibility, civil procedure, request for non-disclosure of Identity, manifestly ill-founded*

The subject matter was the constitutional review of the challenged judgment which allegedly violated the rights and freedoms of the Applicants guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 54 [Judicial Protection of Rights] of the Constitution and Article 6 (Right to a fair trial), as well as Article 41 (Just satisfaction) of the ECHR.
The Applicants also request that their identities be not disclosed to the public, saying *"in the present case we are dealing with a compensation which is directly related to a tragic loss of the Applicants' spouse and father, and therefore they consider this case to be sensitive"*.
Essentially, the Applicants initiated a contested procedure before the Basic Court against the insurance company due to the death of the spouse respectively the father as a result of a traffic accident.
The Applicants considered that there existed also the liability of the other participant in the traffic accident and that, consequently, they were entitled to monetary compensation. During the proceedings, the courts concluded that there was no shared liability for causing the traffic accident and therefore, the Applicants could not realise their right to compensation.
The Applicants appeared before the Court alleging that the regular courts based their decisions upon the wrong legal provisions, and thus violated Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
The Court, having analyzed the Applicants' allegations, the case file and the court decisions, found that the Basic Court, the Court of Appeals and the Supreme Courts in their Judgments have dealt with the applicants' allegations concerning the facts, and on that occasion have concluded that the facts were correctly established by the Basic Court, and that, therefore, also the provision of Article 154 of the Law on Obligations was correctly applied.
In this respect, the Court concludes that there has been no violation of Applicants' rights from Article 31 of the Constitution in conjunction with Article 6 of the ECHR, based on which it results that there has neither been a violation of Article 54 of the Constitution.
As regards the other allegations concerning the Article 41 of the ECHR, the Court concludes that it cannot serve as a basis for seeking "just satisfaction" or compensation for non-material damage before the Constitutional Court

because this Article concerns the jurisdiction of the ECHR, and is not within the jurisdiction of the local courts as an integral part of the ECHR's protection mechanism.

However, as for the request for protection of identity, the Court having taken into consideration the specifics of the procedure in question granted the Applicants' request as founded.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI76/19

Applicants

A.C., D. C. and F. C.

Constitutional review of the Judgment Rev. no. 48/2019 of the Supreme Court, of 27 March 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 A. C., D.C. and F. C. from Ferizaj (hereinafter: the Applicants). The Applicants are represented before the Constitutional Court by Zaim Istrefi, a lawyer from Prishtina.

Challenged decision

2. The Applicants challenge the Judgment Rev. no. 48/2019 of the Supreme Court, of 27 March 2019, in conjunction with the Judgment of the Court of Appeals Ac. no. 3488/2014 of 14 November 2018 and the Judgment of the Basic Court C. no. 1851/08, of 15 April 2014.

Subject matter

3. The subject matter is the constitutional review of the challenged judgments by which as alleged by the Applicants were violated their rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and

Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to fair trial) and Article 41 (Just satisfaction) of the European Convention on Human Rights (hereinafter: ECHR).

4. The Applicants also request that their identities be not publicly disclosed, claiming that *"in the present case we are dealing with a compensation which is directly related to a tragic loss of the Applicants' spouse and father, and therefore they consider this case to be sensitive"*.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03 / L-121 (hereinafter: the Law) and Rule 32.6 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 13 May 2019, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 17 May 2019, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu(presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

8. On 18 June 2019, the Court notified the Applicants' legal representative about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 7 November 2019, after having considered the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 11 December 2007, a traffic accident had occurred on Shtime-Prizren road in which the person E.C., otherwise the applicants' spouse and father, lost his life.

11. On the basis of the police report, it results that the accident had occurred in a way that the now deceased husband and father of the applicants, having overtaken a car across the unbroken line, hit the "Volvo" vehicle which was driving in the opposite lane, and on that occasion he suffered bodily injuries, and consequently died on the spot.

12. The Applicants, considering that the accident involved also the contribution and responsibility of the driver of the "Volvo" vehicle, which was insured by the "Sigal" Insurance Company (hereinafter: the Respondent), submitted a claim to the Basic Court in Prishtina against the respondent seeking compensation for material and non-material damage. The Applicants in their claim requested the Respondent to pay the amount of 7,000 € to each of the Applicants, as well as to compensate the material damage in the amount of 800 e, which would be reduced by 60% due to the responsibility of the deceased.

13. On 15 April 2014, the Basic Court in Prishtina rendered the Judgment C. No. 1851/08, whereby it rejected the claim of the Applicants as unfounded. In the reasoning of its Judgment, the Basic Court concluded:

> *"...based on the administered evidence the court found that the traffic accident, has resulted by the exclusive fault of the now deceased EC and accordingly the claimants were not entitled to compensation for non-material damage, for the psychological pain suffered by the death of the spouse respectively the father as well as compensation for material damage due to the costs of burial and the erection of a tombstone, within the meaning of Article 154 of the LOR which states that "Whoever causes injury or loss to another shall be liable to redress it, unless he proves that the damage was caused without his fault" and also within the meaning of Article 1.8 of Rule 3 of the CBK, on Compulsory Motor Third Party Liability Insurance, an act which was in force at the time of the insured event, and in which rule it is stipulated that "the driver responsible for the damage is not entitled to compensation", respectively he does not have the status of third person".*

14. The Applicants filed an appeal with the Court of Appeals against the Judgment of the Basic Court C. no. 1851/08, alleging violations of the provisions of contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of substantive law.

15. On 14 November 2018, the Court of Appeals rendered the Judgment Ac. no. 3488/2014, rejecting, the appeal of Applicants as unfounded, by stating that:

„The Court of First Instance has confirmed the factual situation in its entirety and had a realistic view of the factual situation in the present legal case, which is not put into question by the appeal allegations; therefore the judgment of the first instance was upheld.

The existence of fault as a basis for the existence of a right to compensation for damages is also required under Article 154 of the LOR, "Whoever causes injury or loss to another shall be liable to redress it, unless he proves that the damage was caused without his fault" ", as well as Article 178 of the LOR, it is stipulated that "In case of an accident caused by a motor vehicle in motion and provoked entirely through the fault of one owner, the rules of liability on the ground of fault shall apply", which means that the respondent in the present case is under no obligation to compensate the claimants for the damage sustained, as we are not dealing with a shared liability nor with the fault of the driver of the Volvo vehicle make insured at the respondent."

16. The Applicants filed a request for revision with the Supreme Court against the Judgment of the Court of Appeals and the Basic Court, alleging violation of contested procedure and erroneous application of substantive law, with proposal to quash both aforementioned Judgments and have the case remanded for retrial to the court of first instance.

17. On 27 March 2019, the Supreme Court rendered the Judgment Rev. no. 48/2019, whereby it rejected the Applicant's request for revision as unfounded. In the reasoning of its Judgment, the Supreme Court emphasized:

"The request for revision states that the substantive law was erroneously applied, as the lower instance courts disregarded the fact that the driver of the Volvo vehicle insured at the respondent had moved at a speed greater than the one permitted. These revision claims were rejected as unfounded for the same reasons as those given by the court of first and second instance and ... according to the opinion of the expert this vehicle has moved in the right lane of the road, and its speed of movement is not the cause of the accident....

Otherwise the respondent cannot be forced to compensation of damages as it has been proved that the damage was not caused with the fault of her insured person, so the conditions for the respondent's liability for damages provided for in Article 154 of the LOR are not fulfilled".

Applicant's allegations

18. The Applicants allege that the Basic Court, the Court of Appeal and the Supreme Court, acting in violation of Article 54 [Judicial Protection of Rights] of the Constitution, have denied their right to compensation for the loss of their family member, because they established the factual situation and applied the substantive law in erroneous manner.

19. The Applicants allege that the right to compensation for material and non-material damage is a constitutional right guaranteed by Article 54 of the Constitution, Article 200 of the LOR and Article 6 and Article 41 of the ECHR.

20. The Applicants further allege that they cannot accept the finding of the Basic Court, the Court of Appeals, and the Supreme Court that their statement of claim is rejected because the Applicants' now deceased husband and father has been at fault for the traffic accident and on this basis they are not entitled to compensation based on the legal provisions of Article 154 of the LOR.

21. In this regard, the Applicants allege that the Basic Court, the Court of Appeals and the Supreme Court, by the above judgments, have made an erroneous interpretation of the provisions of the LOR when finding that the Applicants are not entitled to compensation.

22. The Applicants also allege that such findings of the courts have "*violated their individual rights and freedoms guaranteed by the European Convention on Human Rights and Fundamental Freedoms which are directly applicable in the Constitution of the Republic of Kosovo (constitutionality of judgments), respectively Article 6 "Right to fair trial" of the ECHR, Article 41 "Just satisfaction" of the ECHR, and Article 54 "Judicial Protection of Rights", Article 31 "Right for Fair and Impartial Trial" of the Constitution of the Republic of Kosovo".*

23. The Applicants request from the Court to approve their Referral, quash all the decisions of the regular courts, and remand the case to the Basic Court for reconsideration, where their right to compensation

for damage caused by a tragic death of the spouse, namely their father, would be recognized.

24. In addition, the Applicants request that their identity be not publicly disclosed, claiming that *"in the present case we are dealing with compensation which is related to the tragic loss of the Applicants' spouse and father, and consequently we consider this case to be sensitive"*.

Assessment of the admissibility of the Referral

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

26. 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"*.

27. In addition, the Court also examined whether the Applicant has fulfilled the admissibility requirements as further specified in the Law. In this respect, the Court first refers to Article 47[Individual Requests], 48 [Accuracy of the Referral, which provide:

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.*

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... "

28. As to the fulfillment of these criteria, the Court finds that the Applicants are an authorized party challenging an act of a public authority, namely the Judgment Rev. no. 48/2019, of the Supreme Court, of 27 March 2019, after having exhausted all the legal remedies provided by the law. The Applicants have also stated the rights and freedoms which they claim to have been violated, in accordance with the requirements of Article 48 of the Law and have submitted their referral in accordance with Article 49 of the Law.

29. In addition, the Court takes into account the Rule 39 [Admissibility Criteria], paragraph (2) of the Rules of Procedure, which provides:

> *"(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".*

30. The Court, by examining the Applicants' Referral, finds that the Applicant relate the violations of Articles 54 and 31 of the Constitution, as well as of Articles 6 and 41 of the ECHR, with the fact that the regular courts did not accept their statement of claim whereby they had sought monetary compensation for the unfortunate loss of their spouse, respectively the father.

31. Specifically, the Court notes that despite the fact that the Applicants have alleged violation of many articles of the Constitution and the ECHR, the substance of the Applicants' referral concerns the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

32. In this respect, the Court notes, first of all, that the said procedure relates to the determination of the applicants' civil rights, more specifically, the right to monetary compensation in respect of the statement of claim which the Applicants had initiated before the Basic Court regarding a traffic accident. Therefore, in the present case we are dealing with a case of a civil-legal nature and consequently it results that Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR are applicable.

33. By further analysis of the Applicants' allegations whereby they try to justify violations of the constitutional rights and rights guaranteed by the ECHR, the Court notes that as a basis for all these violations, they mention the fact that the courts have erroneously established the factual situation and erroneously applied the substantive law and thereby they are brought into a situation where they cannot realize their right to monetary compensation.

34. In this regard, the Court notes, first of all, that according to the case law of the European Court of Human Rights (hereinafter: the ECtHR) and that of the Constitutional Court, it is not the duty of these courts to review the conclusions of the regular courts in relation to the factual situation and the application of the law (see, the ECtHR Judgment, *Pronina v. Russia*, 30 June 2005, no. 65167/01).

35. Indeed, the Constitutional Court is not competent to replace the regular courts in assessing the facts and evidence, but it is generally the task of the regular courts to assess the facts and evidence which they administered (see, the ECtHR case, *Thomas v. the United Kingdom*, Judgment of 10 May 2005, application no. 19354/02). It is the duty of the Constitutional Court to examine, if eventually, the constitutional rights (the right to a fair trial, the right to access to court, the right to an effective legal remedy, etc.) have been violated or neglected, as well as whether the application of law was, eventually, arbitrary or discriminatory.

36. Therefore, the Court will exclusively elaborate on the examination of the way in which the competent courts have established the facts and applied the positive legal regulations, in cases when it is evident that in a certain procedure there has been an arbitrary course of action by the regular court, both in the procedure of establishing the facts as well as in the procedure of application of relevant positive legal regulations.

37. In this regard, by referring to the Applicants' allegations of a violation of Article 31 of the Constitution, which, as alleged by them, also led to a violation of Article 54 of the Constitution, the Court finds that the Applicants initiated the civil proceedings by the statement of claim in order to obtain monetary compensation due to a traffic accident, which resulted in a tragic outcome.

38. The Court notes that the Basic Court, in order to establish the credibility of the statement of claim, implemented all the actions and administered the evidence, as well as the expert reports and opinions, and thus concluded that the statement claim cannot not be realized for the fact that it has been irrefutably established the liability of the person who became the victim of the traffic accident.

39. The Court further notes that establishing of suchlike factual situation, has consequently influenced the Basic Court to conclude that in such cases, as it is the case of the Applicants, the provisions of Article 154 of the LOR apply which regulate who, and under what circumstances and conditions, should be entitled to compensation for damages, respectively who is entitled to monetary compensation.

40. The Court also notes that the Court of Appeals and the Supreme Court in their judgments dealt with the Applicants' appeal claims concerning the factual situation and on that occasion concluded that the facts were correctly established by the Basic Court and consequently also the provision of Article 154 of the LOR was correctly applied.

41. Moreover, the Court cannot fail to note that the Court of Appeals and the Supreme Court have also dealt with the issues raised before them by the Applicants regarding the "*shared liability of the traffic accident participants"*, as well as with the possible basis which would have enabled them to gain the right to monetary compensation.

42. The Court finds that the Court of Appeals and the Supreme Court explained this appeal claim by the standpoint that during the court proceedings was not established the shared liability of the participants in causing the traffic accident, and therefore also their shared liability for causing the accident does not exist, and consequently there is no fault of the driver of the "Volvo" vehicle which was insured by the Insurance Company that was sued by the Applicants. From this, it results that in this case Article 178 of the LOR applies, which stipulates: *"In case of an accident caused by a motor vehicle in motion and provoked entirely through the fault of one owner, the rules of liability on the ground of fault shall apply"*. On this basis it can be

concluded that the respondent in this case has no obligation towards the Applicants.

43. Based on all what is stated above, the Court finds that in the judgments of the Basic Court, the Court of Appeals and the Supreme Court there is nothing that would lead to the conclusion that there was an arbitrary course of action by the courts, both in the procedure of establishing the facts as well as in the procedure of application of relevant positive legal regulations.

44. In the context of the foregoing, the Court also finds that the Applicants' allegations for a violation of Article 54 [Judicial Protection of Rights] of the Constitution are unfounded, because on the basis of all that has been said above, the Court found that in this litigation which it had analyzed the Applicants had judicial protection to the extent possible and foreseen at a certain stage, taking into consideration the specifics of the claim, what can also be seen on the basis of all the actions taken by the courts. Likewise, the Court failed to note that the judicial protection of the Applicants was limited or prohibited by a decision of any authority (see the Court's decision in case KI 159/18, Applicant *Azem Duraku*, Ruling on Inadmissibility, of 6 May 2019, paragraph 84).

45. In this respect, the Court concludes that the Applicants' right under Article 31 of the Constitution in conjunction with Article 6 of the ECHR has not been violated, consequently it results that there is no violation of Article 54 of the Constitution.

46. The Court also considers that the Applicants do not provide facts that could justify the allegation that there is a violation of the constitutional rights which they refer to; therefore, there are no elements which *prima facie* indicate that there has been a possible violation of the constitutional rights from Article 54, 31 of the Constitution in conjunction with Article 6 paragraph 1 of the ECHR and that a meritorious review would be necessary.

47. The Court notes that it is the Applicants obligation to substantiate their constitutional claims and present any *pima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see the Constitutional Court case no. KI19/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

48. Therefore, the Applicants' Referral is manifestly ill-founded on constitutional grounds and must be declared inadmissible pursuant to Rule 39 (2) of the Rules of Procedure.

Other allegations

49. The Court finds that in the Referral the Applicants also claim a violation of the rights and freedoms guaranteed by Article 41 (Just satisfaction) of the ECHR, and therefore they have sought a just compensation. The Court cites paragraph 41 which in its relevant part reads as follows:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

50. The Court, in this respect, notes and finds that Article 41 of the ECHR cannot serve as a basis for seeking "just satisfaction" or compensation for non-material damage before the Constitutional Court, as this Article refers to the competences of the ECHR and not the competence of the domestic courts as part of the ECHR-guaranteed defence mechanism.

51. However, the Court is bound and conditioned to act solely on the basis of the legal and procedural rules governing its work. Neither of the documents governing the field of activity and proceedings before this Court and the actions it may take do not provide for an equivalent authorization to accord "just satisfaction", as such jurisdiction is clearly prescribed to the ECtHR by Article 41 of the ECHR in conjunction with Rule 60 of the Rules of Procedure of the ECHR.

52. The Court, taking into consideration the textual content of Article 41 of the ECHR, finds that it is not applicable in the present case, and therefore it will not address the allegations in question.

Request for non-disclosure of identity

53. The Court recalls that the Applicants requested that their identity be not publicly disclosed, alleging *"in the present case we are dealing with a compensation which is directly related to a tragic loss of the Applicants' spouse and father, and therefore they consider this case to be sensitive".*

54. In this respect, the Court refers to Rule 32 (6) of the Rules of Procedure, which provides:

"Parties to a referral who do not wish their identity to be disclosed to the public shall so indicate and shall state the reasons justifying such a departure from the rule of public access to information in the proceedings before the Court [...]."

55. The Court also refers to Article 8.1. of the Convention on the Rights of the Child, which stipulates that:

"States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference".

56. The Court, taking into account the entire contested procedure, notes that at the time when the procedure was initiated, some of the applicants belonged to the category of minors and that they had had this status during the entire course of the contested procedure. On the basis of the case file it also results that, in view of this fact, as well as the assessments of expert witnesses and the relevant social services, the courts concluded that, as such, they suffered mental and psychological pain during the course of the trial due to the loss of their father, and consequently fall into the category of particularly sensitive group.

57. Therefore, the Court, by taking into consideration the Applicants' allegations, the case file, as well as the findings of the regular courts, considers that in the present case there are special circumstances which may be taken into account and to accept the request for protection of identity, since in family matters the public can, even indirectly, influence the identity, name and family relationships of children.

58. Therefore, in accordance with Article 8.1. of the Convention on the Rights of the Child and Rule 32 (6) of the Rules of Procedure, the Court approves the Applicants' request for not having their identity disclosed in public.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 and 7 of the Constitution, Article 20 of the Law and Rules 32.6 and 39.2 of the Rules of Procedure, in the session held on 7 November 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO GRANT the request for non-disclosure of identity;

III. TO NOTIFY this Decision to the Parties;

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

V. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Arta Rama-Hajrizi

KI122/18, Applicant: Limak Kosovo International Airport J.S.C., "Adem Jashari", Constitutional review of Judgment Rev. No. 128/2018, of the Supreme Court of Kosovo, of 23 April 2018

KI60/18, Resolution on Inadmissibility, of 6 November 2019, published on 19 December 2019

Keywords: individual referral, legal person, manifestly ill-founded

The Applicant and the Government of the Republic of Kosovo had signed a Public Private Partnership Agreement (PPP), and based on this agreement the Applicant was obliged to keep all employees in employment relationship for another 3 (three) years.

As a consequence, the Applicant notified the employee XH.S. that his employment contract will not be renewed. The employee XH.S. filed a lawsuit with the first instance court and his lawsuit was approved. On the other hand, the Applicant alleged before the regular courts that the regular courts did not take into account Article 9.18 of the PPP Agreement, according to which the Applicant undertakes to keep the employees at work for another 3 (three) years.

During the proceedings before the regular courts, the latter explained to the Applicant that as the employee XH.S. had more than ten (10) years of work, in accordance with Article 10.5 of the Law on Labor, it is considered as a contract for an indefinite period of time so that for the termination of the employment contract, the established legal procedures must be followed, which according to the regular courts, were not respected by the Applicant.

In his Referral before the Constitutional Court, the Applicant alleged violation of Article 31 of the Constitution due to unreasoned decision, as well as Articles 32 and 46 of the Constitution, and reiterated the same allegations as before the regular courts.

The Constitutional Court, addressing the Applicant's allegations, held that the latter failed to present evidence, facts and arguments showing that the proceedings before the regular courts violated his right to fair and impartial trial guaranteed by the Article 31 of the Constitution, and the Court did not consider the Applicant's further allegations on the grounds that he alleged the violation of other rights guaranteed by Articles 32 and 46 of the Constitution as a consequence of a violation of his right to fair and impartial trial.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI122/18

Applicant

Limak Kosovo International Airport J.S.C. "Adem Jashari"

Constitutional review of Judgment Rev. No. 128/2018 of the Supreme Court of Kosovo of 23 April 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Joint Stock Company Limak Kosovo International Airport "Adem Jashari" (hereinafter: the Applicant), based in Vrellë village, Lipjan Municipality, which is represented with power of attorney by Fazli Gjonbalaj and Leonora Fejzullahu.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 128/2018 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 23 April 2018.

3. The Applicant was served with the challenged decision on 16 May 2018.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) and Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 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 Constitutional Court

6. On 23 August 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 23 August 2018, in accordance with Rule 40.1 of the Rules of Procedure, the President of the Court ordered the joinder of Referrals KI36/18, KI60/18, KI65/18, KI80/18, KI81/18, KI82/18, KI109/18, KI122/18, KI123/18 and KI124/18. Bekim Sejdiu was appointed as Judge Rapporteur in all cases.

8. On 11 September 2018, the President of the Court appointed the new Review Panel, for all joined referrals, composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka- Nimani and Radomir Laban.

9. On 13 September 2018, the Court notified the Applicant and the Supreme Court about the joinder of Referrals KI36/18, KI60/18, KI65/18, KI80/18, KI81/18, KI82/18, KI109/18, KI122/18, KI123/18 and KI124/18.

10. On 14 September 2018, the Court notified the Basic Court in Prishtina about the registration and joinder of cases and requested it to submit

to the Court the acknowledgment of receipts regarding the cases: KI36/18, KI81/18, KI82/18 and KI124/18.

11. On 1 October 2018, the Basic Court in Prishtina submitted to the Court the requested acknowledgments of receipts.

12. On 17 October 2018, the Applicant submitted a document to the Court, requesting that the Referral No. KI109/18 be examined separately from the Referral with No. KI36/18, alleging that the cases are not of the same nature.

13. On 5 April 2019, the Court reviewed and approved the Applicant's Referral regarding the severance of Referral KI109/18 from the Referral number KI36/18. The Court also, in accordance with Rule 40 (3) of the Rules of Procedure, decided that the Referrals KI36/18, KI60/18, KI65/18, KI80/18, KI81/18, KI82/18, KI109/18, KI122/18, KI123/18 and KI124/18 are considered separately, with the same Judge Raporteur and the Review Panel.

14. On 11 April 2019, the Court notified the Applicant and the Supreme Court about the severance of Referrals KI36/18, KI60/18, KI65/18, KI80/18, KI81/18, KI82/18, KI109/18, KI122/18, KI123/18 and KI124/18.

15. On 12 April 2019, the Applicant submitted to the Court the submission entitled *"Submission regarding the cases registered with the Constitutional Court and in particular the case registered with the Constitutional Court number KI132/18*", in which it essentially reiterated the allegations it had previously made.

16. On 16 May 2019, the Applicant submitted to the Court a submission entitled "*Submission, regarding the cases registered with the Constitutional Court"* in which it essentially reiterated the allegations it had previously made.

17. On 6 November 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts of the case

18. On 12 August 2010, the Government of the Republic of Kosovo and the Applicant signed a Public-Private Partnership Agreement (hereinafter: the PPPA). Prior to the signing of the PPPA, the name of

Prishtina Airport was Prishtina International Airport "Adem Jashari" (hereinafter: the PIA). Based on the PPP Agreement, the Applicant had an obligation to keep the employees for another 3 (three) years.

19. Based on the case file, it is noted that XH. S. (hereinafter: the employee) was employed with the PIA from 1 December 1999 until 3 April 2011.

20. After signing of the PPPA, the employee had regular employment relationship with the Applicant from 4 April 2011 until 3 April 2014.

21. On 3 March 2014, namely 30 (thirty) days before the expiry of the contract, the Applicant notified the employee that that he will not be offered a new employment contract after the expiration of the existing contract on the grounds that the contract is not being extended according to *"[...] the policies of the Board of Directors for future human resources planning"*.

22. On 13 March 2014, the employee filed a complaint with the Applicant (the employer) regarding the notice of non-renewal of the employment contract, requesting that the latter be annulled.

23. On an unspecified date, the Applicant rejected as ungrounded the employee's complaint.

24. Based on the case file, it is noted that on 27 March 2014, the Executive Body of the Labor Inspectorate of Kosovo, through Decision Vn. 45/2014, ordered the Applicant "*to apply provisions of Articles 10.5 and 71 of the Law on Labor No. 03/L-212"*.

25. On an unspecified date, the employee filed a statement of claim with the Basic Court in Prishtina-Branch in Lipjan (hereinafter: the Basic Court), requesting the annulment of the Notice of 3 March 2014, issued by the Applicant, and obliged the Applicant to reinstate the employee to work with all rights as well as compensation of damage.

26. On 25 May 2015, the Basic Court, by Judgment C. No. 208/2014, approved the employee's statement of claim as grounded and obliged the Applicant (namely the employer): (i) to reinstate the employee to work (ii) to pay the respective amount to the employee on behalf of the material damage and (iii) to pay to employee the amount of income for the period from 4 April 2014 until 31 May 2015 (iv) and to cover the costs of the contested procedure.

27. The Basic Court reasoned that the employee had been working uninterruptedly for 10 (ten) years with the Applicant and its predecessor at the International Airport "Adem Jashari". The Basic Court further held that "*pursuant to Article 10.5 of the Law on Labor, the Court came to the conclusion that fixed-term employment relationship of the claimant with the respondent is considered to be an indefinite employment relationship, therefore the court considers that in this situation, the respondent was required when terminating the employment contract to the claimant to conduct an internal procedure for termination of employment, a procedure which was not conducted by the respondent, but the claimant was only notified with the notice of termination of the employment contract*".

28. The Applicant filed an appeal against the Judgment of the Basic Court C. No. 208/2014, with the Court of Appeals of Kosovo (hereinafter: the Court of Appeals), alleging essential violation of the procedural provisions, erroneous determination of factual situation and erroneous application of substantive law.

29. On 11 January 2018, the Court of Appeals, by Judgment Ac. No. 3625/2015, rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Basic Court (C. No. 208/2014), considering the latter as fair and lawful. The Court of Appeals noted that the first instance court gave concrete reasons for the decisive facts and provided adequate explanations for such a decision, based on the relevant legal provisions.

30. On unspecified date, the Applicant submitted a revision to the Supreme Court against the Judgment of the Court of Appeals of Kosovo, alleging essential violation of the procedural provisions and erroneous application of substantive law.

31. On 23 April 2018, the Supreme Court, by Judgment Rev. No. 128/2018, rejected as ungrounded the Applicant's revision, assessing the challenged decision as fair, on the grounds that sufficient reasons for the relevant facts for fair adjudication of this case have been given.

32. The Judgment of the Supreme Court, *inter alia*, states "*[…] rejects the allegations that since the signing of the agreement between the Government of Kosovo and the respondent, the claimant has no more than 3 years of work experience. This fact is without influence, and it is important that the claimant in the same working place has been working for more than 10 years, and her employment contract is considered within the meaning of Article 10.5 of the Law on Labor as*

a contract for an indefinite period of time, so that he may have been terminated the employment only under the requirements provided for in Article 70 of the said Law, and in no case under Article 67.1 and 3 of this Law, stating that the employment contract based on law is terminated upon the expiration of the duration of the employment. In the present case with the notice as the respondent acted, there was no possibility that the employment contract would not be extended to the claimant, when legally her employment contract is considered as a contract for an indefinite period of time".

Applicant's allegations

33. The Court recalls that the Applicant alleges that the challenged decision violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] of the Constitution, as well as Article 6 (Right to a fair trial) and Article 1 of Protocol No. 1 of the Convention.

34. The Applicant alleges that the Supreme Court did not give sufficient reasoning in its decision. In relation to this allegation, the Applicant states that: "*The judgment of the Supreme Court does not have sufficient reasoning, especially in relation to essential violations of the provisions of the contested procedure (erores in procedanto) of the Law on Contested Procedure."*

35. The Applicant alleges that the Supreme Court in the challenged judgment has erroneously applied the substantive law "*erores in judicando*" and made an erroneous interpretation of Article 10.5 of the Law on Labor, No. 03/L-212 and PPPA, because, according to the Applicant, the employee did not have 10 (ten) years of uninterrupted work with the Applicant.

36. In this regard, the Applicant further emphasizes that the Supreme Court should have taken into account Article 9.18 of the PPPA, according to which the Applicant is obliged to keep the employees in work for a term of 3 (three) years.

37. The Applicant also cites Judgment KI138/15 of the Constitutional Court and states that "*the application of the substantive law, which could have been a fact, was a decisive factor in rendering the judgment of that court, but the Supreme Court did not address this issue at all, and only found that the lower instance courts have correctly applied the provisions of the substantive law."*

38. Therefore, the Applicant alleges that the Supreme Court did not sufficiently reason its judgment and did not address the issues raised by the judgments of the lower instance courts.

39. The Applicant requests the Court to annul the Judgment of the Supreme Court and to remand the case for retrial.

Relevant legal provisions

Law No. 03/L-212 on Labor

Article 10
[Employment Contract]

1. An employment contract shall be concluded in written form and signed by the employer and employee.

2. Employment contract may be concluded for:

2.1. an indefinite period;

2.2. . a fixed period; and

2.3. specific taks and duties.

3. Employment contract which contains no indication of its duration shall be deemed to be for an unspecified period of time.

4. A contract for a fixed period may not be concluded for a cumulative period of more than ten (10) years.

5. A contract for a fixed period of time that is expressly or tacitly renewed for a continued period of employment of more than ten (10) years shall be deemed to be a contract for an indefinite period of time.

Article 67
[Termination of Employment Contract on Legal Basis]
1. Employment contract, on legal basis, may be terminated, as follows:
[...]
1.3. With the expiry of duration of contract;

Article 70
[Termination of Employment Contract by the Employer]

1. An employer may terminate the employment contract of an employee with the prescribed period of notice of cancellation, when:
1.1. Such termination is justified for economic, technical or organizational reasons;
1.2. The employee is no longer able to perform the job;
1.3. The employer may terminate the employment contract in the circumstances specified in sub-paragraph 1.1 and 1.2 of this paragraph, if, it is impracticable for the employer to transfer the employee to other employment or to train or qualify the employee to perform the job or other jobs;
1.4. An employer may terminate the employment contract of an employee with providing the period of notice of termination required, in:
1.4.1. serious cases of misconduct of the employee; and
1.4.2. *because of dissatisfactory performance of of work duties;*
1.5. An employer shall notify the employee about his/her dismissal immediately after the event which leads to this decision or as soon as the employer has become aware of it.
1.6. An employer may terminate the employment contract of an employee without providing the period of notice of termination required, in the case when:
1.6.1. the employee is guilty of repeating a less serious misconduct or breach of obligations;
1.6.2. the employee's performance remains dissatisfactory in spite of the written warning.
2. The employer may terminate the employment contract of an employee under subparagraphs 1.6 of paragraph 1 of this Article only when after the employee has been issued previus written description of unsatisfactory performance with a specified period of time within which they must improve on their performance as well as a statement that failure to improve the performance shall result with dismissal from work without any other written notice.
[...]

Article 71
[Notification period for termination of employment contract]

1. The employer may terminate an employment contract for an indefinite period according to Article 70 of this Law with the following periods of notification:
1.1. from six (6) months - 2 years of employment, thirty (30) calendar days;

1.2. from two (2)- ten (10) years of employment: fourty-five (45) calendar days;
1.3. above ten (10) years of employment: sixty (60) calendar days.
2. The employer may terminate an employment contract for a fixed term with thirty (30) calendar days notice. The employer who does not intend to renew a fixed term contract must inform the employee at least thirty (30) days before the expiry of the contract. Failure to do so entitles the employee to an extension of employment with full pay for thirty (30) calendar days.

Public-Private Partnership Agreement for the Operation and Expansion of Prishtina International Airport

9.18 [Termination of Personnel]

"The Private Partner may terminate the employment or other engagement of any PIA Employee (i) at any time for cause in accordance with applicable laws, rules, administrative regulations and decrees, (ii) upon mutual agreement and (iii) without limitation, after the third (3rd) anniversary of the Effective Date".

Admissibility of the Referral

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

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

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

[...]

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

42. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

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

43. In this regard, the Court notes that the Applicant (as a legal person) has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms, applicable both to individuals and to legal persons (See case of the Constitutional Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

44. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

5. 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.

6. 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. […]."

45. Regarding the fulfillment of these requirements, the Court considers that the Applicant is an authorized party, challenging an act of a public authority, after exhaustion of all legal remedies. The Applicant also

clarified the rights and freedoms it 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 established in Article 49 of the Law.

46. However, the Court should also examine whether the Applicant has met the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure, including the criterion that the referral is not manifestly ill-founded. Thus, Rule 39 (2) of the Rules of Procedure stipulates:

> *"(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."*

47. Initially, the Court notes that the Applicant alleges that its right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR has been violated, because the decisions of the regular courts have not been sufficiently reasoned, while violations of other rights guaranteed by the Constitution and the ECHR are presented by the Applicant as a consequence of a violation of the right to fair and impartial trial.

48. The substance of the Applicant's allegations is that Supreme Court did not sufficiently reason its judgment and has erroneously interpreted Article 10.5 of the Law on Labor No. 03/L-212, because according to the Applicant, the employee did not have 10 (ten) years of uninterrupted employment with the Applicant. The Applicant further argues this allegation based on Article 9.18 of the PPPA, according to which the latter is obliged to keep the employees at work for a period of 3 (three) years. The Applicant also alleges that its constitutional rights to effective legal remedies have been violated as a result of the lack of reasoning of the challenged decision.

49. In this regard, the Court notes that the Applicant alleges that the regular courts have erroneously interpreted the law when referring to the work experience of the employee, claiming that the court in this case should have considered that it was about two different employers (referring to International Airport "Adem Jashari", before and after the signing of the PPPA), and by stating that the employee did not have more than 10 (ten) years of employment with the Applicant.

50. With regard to these Applicant's allegations, the Court first notes that the Supreme Court, while reviewing the Applicant's request for

revision, reasoned that "*the claimant in the same working place has been working for more than 10 years, and her employment contract is considered within the meaning of Article 10.5 of the Law on Labor as a contract for an indefinite period of time, so that he may have been terminated the employment only under the requirements provided for in Article 70 of the said Law, and in no case under Article 67.1 and 3 of this Law, stating that the employment contract based on law is terminated upon the expiration of the duration of the employment*".

51. As to the Applicant's concrete allegations of the applicability of Article 9. 18 of the PPPA, the Supreme Court reasoned that "*This provision of this Agreement provides that the private partner (here the respondent) may terminate the employment or other engagement of any PIA Employee at any time for cause in accordance with applicable laws, rules, administrative regulations and decrees upon mutual agreement and without limitation, after the third anniversary of the effective date. It*
follows from this provision that the termination of similar employment contracts as
in the case of the claimant, contrary to existing laws in Kosovo, is not foreseen".

52. In the light of these arguments of the Supreme Court, the Court finds that all Applicant's allegations and arguments, which were relevant to the resolution of the dispute, have been duly heard and considered by the regular courts. Therefore, the Court finds that the proceedings before the regular courts, viewed in their entirety, were fair (see case of the Constitutional Court KI128/18, Applicant, *Limak Kosovo International Airport J. S. C. "Adem Jashari"*, Resolution on Inadmissibility of 27 May 2019, KI129/18, Applicant, *Limak Kosovo International Airport J. S. C. "Adem Jashari"*, Resolution on Inadmissibility of 20 June 2019, KI130/18, Applicant, *Limak Kosovo International Airport J. S. C. "Adem Jashari"*, Resolution on Inadmissibility of 20 June 2019).

53. The Court notes that the Applicant refers to Judgment KI138/15 of the Constitutional Court, by claiming that "*the application of substantive law, which may have been a fact, has been a decisive factor for rendering the judgment of that court, but the Supreme Court did not address this issue at all, but only found that the lower instance courts have correctly applied the provisions of substantive law".*

54. As to this allegation of the Applicant, the Court recalls that the mentioned case differs from the present case, because of the following reasons: (i) the issue of disciplinary proceedings against the Applicant's employee in that case has been reviewed differently by the regular courts; (ii) there was no clear legal basis under which disciplinary proceedings were conducted; (iii) contradictory elements existed in decisions of the lower instance courts. In addition, the Court of Appeals applied and used for explanation the Administrative Instruction which derived from the Civil Service Regulation, not the Law on Labor. This argument, although raised by the Applicant in this case, was not reviewed by the Supreme Court (see the case of the Constitutional Court KI138/15, *Sharr Beteiligung GmbH,* Judgment of 4 September 2017).

55. In the light of the foregoing considerations, the Court emphasizes its general position, that in principle, it is not its task to deal with errors of fact or law allegedly committed by the regular courts, when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law (see, *mutatis mutandis*, the ECtHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544, paragraph 28).

56. Complete determination of factual situation and correct application of law is a primary duty and within the jurisdiction of the regular courts (issue of legality). Therefore, the Constitutional Court cannot act as a "fourth instance court" (see, *mutatis mutandis*, ECtHR Judgment of 16 September 1996, *Akdivar v. Turkey*, no. 21893/93, paragraph 65, see also, *mutatis mutandis,* case of the Constitutional Court KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

57. Therefore, the Court considers that the right to fair and impartial trial of the Applicant has not been violated by the decisions of public authorities.

58. The Court recalls that the mere fact that the Applicants do not agree with the outcome of the decisions of the Supreme Court (and of the lower instance courts) is not sufficient to build a reasoned allegation of constitutional violations. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (See, *mutatis mutandis*, case of the

Constitutional Court KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33.

59. In sum, the Court finds that the Applicant did not present evidence, facts and arguments showing that the proceedings before the regular courts constituted in any way constitutional violation of their rights guaranteed by the Constitution, namely by Articles 24, 31, 32 and 46 of the Constitution, in conjunction with Article 6 of the ECHR.

60. Therefore, the Referral is manifestly ill-founded on constitutional basis and is declared inadmissible, in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (b) of the Rules of Procedure, on 6 November 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

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

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