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

Prishtina, on 8 March 2021
Ref.no.:AGJ1726/21

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JUDGMENT

in

Case No. KI86/18

Applicant

Slavica Đordević

Constitutional review of Decision CA. No. 2093/2017 of the Court of Appeals, of 29 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 Slavica Đordević (hereinafter: the Applicant), residing in Novi Sad, Serbia.

Challenged decision

2. The Applicant challenges Decision [CA. No. 2093/2017] of the Court of Appeals, of 29 January 2018.

3. The Applicant received the challenged Decision on 26 February 2018.

Subject matter

4. The subject matter is the constitutional review of the Decision [CA. No. 2093/2017] of the Court of Appeals, of 29 January 2018, whereby the Applicant alleges that her constitutional rights guaranteed by Article 22 [Direct applicability of International Agreements and Instruments]; Article 24 [Equality before the Law]; Article 31 [Right to Fair and Impartial Trial]; Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution); as well as the relevant articles of the European Convention on Human Rights (hereinafter: ECHR), Article 6 paragraph 1 [Right to a fair trial]; Article 13 [Right to an effective remedy]; Article 1 of Protocol no. 1 of the ECHR [Protection of property]; Article 14 [Prohibition of discrimination], as well as the relevant articles of the Universal Declaration of Human Rights (hereinafter: UDHR), respectively Article 2, Article 8, Article 10 and Article 17, have been violated.

5. The Applicant requests that her identity not be disclosed, without giving any specific reason for this request.

Legal basis

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

Proceedings before the Constitutional Court

7. On 18 June 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 Nexhmi Rexhepi as Judge Rapporteur. On the same day, the President of the Court appointed the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani (members).

9. On 7 September 2018, the Court notified the Applicant and the Court of Appeals of the registration of the Referral. On the same day, the Court requested from the Basic Court in Prizren to submit to the Court the complete case file.

10. The latter did not receive the requested within the deadline provided by the Court.

11. On 25 January 2019, the Court requested from the Basic Court in Prizren to submit the acknowledgment of receipt proving when the Applicant received the challenged decision.

12. On 18 March 2019, the Basic Court in Prizren submitted the requested acknowledgment of receipt.

13. On 3 August 2020, the Court repeated the requested to the Basic Court in Prizren to submit to the Court the complete case file.

14. On 24 August 2020, the Basic Court in Prizren submitted to the Court the requested complete case file.

15. On 27 August 2020, the Court notified the party to the proceedings before the regular courts, B.M., of the registration of the Referral, providing him the opportunity to submit comments within a period of seven (7) days from the date of receipt of the letter of the Court.

16. On 4 September 2020, F.M., as temporary representative of B.M., submitted to the Court his comments on the case, also attaching the Decision [I.br.1241/2012] of the Basic Court in Prizren of 12 June 2018 and the Cadastral Certificate regarding the disputed property.

17. On 17 December 2020, the Court reviewed the case and decided to postpone the decision on this case for another session.

18. On 3 February 2021, the Review Panel reviewed the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

19. On the same date, the Court unanimously found that (i) the Referral is admissible; and found that (ii) the Decision [CA.br.2093/2017] of the Court of Appeals, of 29 January 2018, and the Decision of the Basic Court in Prizren [I.br.1241/12], of 27 February 2017, are not in compatible with Articles 31, 32 and 54 of the Constitution in conjunction with Articles 6.1 and 13 of the ECHR, as well as Article 46 of the Constitution in conjunction with Article of Protocol 1 to the ECHR.

Summary of facts

(A) Facts regarding the confirmation of the right to use the property in favour of the Applicant

20. On 30 March 1993, the Municipality of Prizren by Decision [no.03/3462/138] decided that the Applicant be recognized the right to use the construction parcel no. 65 C, part of cadastral parcel no. 7140/1, in an area of 180 m2.

21. On 8 November 1993, the Municipality of Prizren by Decision [no.04/4-351-233] allowed the Applicant to build a residential building on the parcel in question.

22. In 1997, the Applicant started the construction of a residential building on the parcel in question, which was later stopped due to the war in Kosovo.

23. After 1999, the parcel in question was usurped by B.M. The latter had built two more floors on the existing construction of the residential building under construction started by the Applicant, but had not managed to finish.

24. Following these developments, the Applicant in her capacity as owner had filed a claim with the Housing and Property Claims Commission (hereinafter: HPCC) for the restitution of the disputed property into her possession.

25. Based on the case file, it follows that on 30 April 2005, the HPCC approved the claim of the Applicant, confirming her right to use the property and that the property in question must be returned into her in possession, within thirty (30) days.

26. Against the above-mentioned decision of the HPCC, B.M. filed an appeal with the Appellate Panel of the Housing and Property Claims Commission (hereinafter: the Appellate Panel).

27. On 16 December 2005, the Appellate Panel rejected the appeal of B.M. and upheld the first instance decision of the HPCC. (*Clarification of the Court: both decision of the HPCC, mentioned above, are not found in the complete case file submitted by the Basic Court. The facts regarding these decisions were drawn from the other decisions in the file which cite their content*).

28. Consequently, based on the above mentioned proceedings, it follows that in both instances of the HPCC: (i) the right of the Applicant to use the cadastral parcel which is the main subject of the dispute and the case in question, was confirmed/recognized; and that (ii) the interested party B.M. was obliged to vacate the property in question to the benefit of the Applicant.

(B) Facts regarding the restitution of the property into possession of the Applicant, after the confirmation that B.M. had usurped it illegally

29. On an unspecified date, as B.M. had not vacated the disputed object in question, despite the final decisions of the HPCC in the first and second instance, the Applicant filed a claim with the Municipal Court in Prizren (hereinafter: the Municipal Court), requesting that the property in question be returned into repossession.

30. On 22 October 2009, the Municipal Court, by Decision [P.nr.422/05], dismissed the claim of the Applicant as inadmissible, reasoning that the decision-making for a case on which the HPCC had already made a decision was outside its subject matter jurisdiction.

31. The Applicant filed an appeal against the above-mentioned Decision of the Municipal Court with the District Court in Prizren (hereinafter: the District Court).

32. On 19 February 2010, the District Court quashed the Decision of the Municipal Court [P.nr.422/05] of 22 October 2009, and remanded the case for retrial to the first instance.

33. On 21 December 2011, the Municipal Court, already in the retrial proceedings, issued Judgment [P.br.462/10] whereby it ordered the respondent B.M. to vacate the usurped property and reinstate it to its previous condition, by removing all the works he had performed on the property in question. Furthermore, the Basic Court in Prizren by this Judgment: (i) ordered B.M. to pay the amount of 400 Euros in relation to the expenses of the court proceedings; while (ii) rejected the claim of the Applicant for compensation of damage caused in the amount of 150.000,00 Euros.

34. B.M. submitted an appeal against the above-mentioned Judgment of the Municipal Court to the District Court, alleging essential violations of the provisions of the

contentious procedure, erroneous determination of the factual situation and erroneous application of the substantive law.

35. On 18 May 2012, the District Court, by Judgment [Ac.nr.114/12] rejected the appeal of B.M. as ungrounded and upheld the Judgment of the Municipal Court [P.br.462/10] of 21 December 2011. Regarding the latter, the District Court considered that it was fair and that the factual situation had been fully determined.

36. Against the above Judgment of the District Court, B.M. filed a revision with the Supreme Court.

37. On 9 July 2019, the Supreme Court, by Judgment [Rev. nr. 247/2012], rejected the revision of B.M. as ungrounded.

38. Consequently, based on the above mentioned facts, it follows out that the claim of the Applicant filed against respondent B.M., who had usurped her property since 1999, was approved and resulted successful before the regular courts. The three courts, the Municipal, the District and the Supreme Court, confirmed that: (i) the Applicant enjoys the right of use of the property/cadastral parcel that was the subject matter of the dispute; (ii) respondent B.M. must vacate the usurped property; and that (iii) respondent B.M. must reinstate the property that is the subject matter of the dispute to its previous condition, namely to the state of pre-overbuilding of two additional floors by B.M.

(C) Summary of facts regarding the enforcement procedure initiated by the Applicant in order to enforce the above mentioned decisions that were in her favour

39. On 3 July 2012, (after the Judgment of the District Court became final and before the decision making on the revision before the Supreme Court), the Applicant submitted to the Basic Court in Prizren (hereinafter: the Basic Court) the motion for enforcement of the Judgment of the Municipal Court [P.br.462/10], of 21 December 2011, whereby he right of use of the property in question was confirmed and B.M. was ordered to vacate her property and reinstate it to its previous condition.

40. On 5 February 2013, the Basic Court, by Decision [I.br.1241/12] allowed the enforcement of the above mentioned Judgment of the Municipal Court.

41. On an unspecified date, B.M. filed an appeal with the Court of Appeals against the above mentioned Decision of the Basic Court.

42. On 8 April 2013, the Court of Appeals, by Decision [CA.nr.3817/2013] rejected the appeal of B.M. as ungrounded, considering the Decision for enforcement of the first instance court as fair and lawful.

43. Regarding the enforcement of the Judgment [P.br.462/10] of the Municipal Court in Prizren, of 21 December 2011, for the restoration of the property to its previous condition and the demolition of the building built on foreign property, the PTP Company “Mali Princ” was initially engaged and then Company NN “Shehu”. The amount set for completion of the works, namely the restoration of the property to its previous state, which would result in the demolition of the constructed building was set at the amount of 19.495,42 Euros.

44. On 23 October 2014, the Applicant filed a claim with the Basic Court in Prizren for: (i) exemption from payment of court fees; and (ii) exemption from payment of expenses of the enforcement procedure (19,495.42 Euros). She reasoned that due to her difficult financial situation, she was not able to pay the amount required to restore her property to its original state.

45. On 28 August 2014, the Basic Court in Prizren by Decision [I.br.1241/12] decided on the two claims of the Applicant. Regarding the claim for (i) exemption from payment of court fees, the Basic Court in Prizren approved this claim and exempted her from the expenses of court fees, while, regarding the claim for (ii) exemption from payment of expenses of the enforcement procedure, the Basic Court in Prizren rejected that claim as ungrounded.

46. The Basic Court in Prizren reasoned its decision regarding these two claims as follows: "*according to the proposal of the creditor* [Applicant]*, in terms of Article 292 of the LEP, the guardian of the enforcement debtor has been ordered to deposit to the Deposit Department of this Court the amount of 19.495,42 Euros necessary for the expenses that have occurred during the enforcement of the enforcement works [...] However, so far the debtor party has not made the necessary deposit so that the above mentioned company has terminated the enforcement works*. [...] *Considering that the debtor party has not deposited the set amount of money necessary to execute the works, it is a rule that those expenses to be paid in advance by the creditor, therefore the Court has rejected the claim of the creditor to exempt her from the payment of the enforcement expenses as ungrounded, while it approved the claim for exemption from court expenses - court fees as grounded, due to the fact that the creditor is a pensioner and does not own real estate".*

47. The Applicant had filed an appeal with the Court of Appeals against the Decision [I.br.1241/12] of the Basic Court in Prizren, of 28 August 2014, alleging essential violation of the provisions of the enforcement procedure, incomplete determination of the factual situation, erroneous application of substantive law.

48. On 9 March 2014, the Court of Appeals by Decision [CA.br.4210/2014], rejected the appeal of the Applicant as ungrounded and upheld the Decision [I.br.1241/12] of the Basic Court in Prizren, of 28 August 2014.

49. On 9 September 2014, the Basic Court in Prizren, in the enforcement proceedings deciding on the deposit of financial means to the "*civil deposit of this court"*, by Decision [I.br.1241/12], had ordered the Applicant, within a time limit of 15 days, to deposit the amount of 19.495,42 Euros in the name of enforcement expenses - demolition of the building. Further in the Decision it is added that, "*Regarding who should pay the expenses of the procedure related to the enforcement procedure, it is defined by Article 13 paragraph 1 of the LEP which is that the procedural expenses regarding the determination and commission of enforcement shall be paid by the creditor* [...].

50. On 31 May 2015, the Basic Court, by Decision [I.br.1241/12], after B.M. had passed away, had appointed as temporary representative in the capacity of enforcement debtor his son F.M. [*Clarification of the Court*: *the comments in the courts regarding this case were submitted by F.M., as temporary representative of B.M.].*

51. On 3 September 2015, the Basic Court, by Decision [I.br.1241/12] ordered the F.M. to pay to the Applicant the expenses of the contentious procedure in the amount of 400 Euros (four hundred Euros).

(D) Facts regarding the imposition of fines by the regular courts against F.M. for failing to implement the orders of the regular courts

52. Unable to enforce the Judgments in her favour, due to F.M.'s refusal to satisfy his obligations deriving from the regular court decisions elaborated above, the Applicant filed another motion with the Basic Court, whereby she had requested that F.M. be ordered to declare his movable and immovable property before the court.

53. On 18 January 2016, the Basic Court by Decision [I.br.1241/12] ordered F.M. to submit complete data regarding his movable and immovable property within 7 (seven) days, stating that otherwise the Basic Court will impose a sentence within the meaning of Article 15 and 16 of the LEP.

54. On 18 January 2016, the Basic Court by Decision [I.br.1241/12], ordered the Administration for Geodesy and Cadastre - Immovable Property Cadastre Service of the Municipality of Prizren to submit, within 7 (seven) days, complete data regarding the movable and immovable property of F.M., stating that otherwise the Basic Court will impose fines within the meaning of Article 15 and 16 of the LEP (Law on Enforcement Procedure).

55. On 16 February 2016, the Basic Court in Prizren, by Decision [I.br.1241/12], imposed a fine against F.M. in the amount of 500 Euros, due to non-compliance with the Decision [I.br.1241/12] of the same court, of 18 January 2016, regarding the obligation to show all data on his movable and immovable property.

56. On 16 February 2016, the Basic Court in Prizren by Decision [I.br. 1241/12], ordered F.M. to deposit in the account of the court, within 7 (seven) days, the amount of 19.495,42 Euros in the name of the expenses that would occur for the demolition of the building, related to the enforcement of the Judgment of the Municipal Court in Prizren P.br.462/2010, of 21 December 2012. Further in the reasoning is stated: "*acting according to the remarks of the Court of Appeals given in Decision GZH.Nr. 1252/12 dated 30.09.2015 and given that in the sense of Article 292 of the LEP lies the obligation of the debtor to deposit the amount of money necessary to perform enforcement actions [...] this court has ordered that F.M., guardian and temporary representative of the enforcement debtor, deposit the set funds within the set deadline [...]".*

57. On an unspecified date, F.M. had filed an appeal with the Supreme Court against the Decisions with the same number [I.br.1241/12] of the Basic Court, of 16 February 2016, alleging violation of the provisions of the enforcement procedure.

58. On 15 September 2016, the Supreme Court, by Decision [Gzh.nr.2473/16], dismissed the appeal as out of time on the grounds that it was submitted after the time limit of 7 (seven) days set forth by law.

59. On 27 February 2017, the Basic Court, by Decision [I.br.1241/12], imposed a fine in the amount of 1000 (one thousand Euros) against F.M. due to non-compliance with the Decision of the Basic Court I.br.1241/12 of 5 February 2013, allowing the enforcement of the enforcement document - Judgment [P.br.462/10] of 21 December 2011, of the Municipal Court in Prizren.

60. On 6 April 2017, F.M. filed an appeal with the Court of Appeals against Decision I.br.1241/12 of the Basic Court in Prizren alleging fundamental violations of the

provisions of the enforcement procedure and erroneous and incomplete determination of the factual situation.

(E) Facts regarding the proceedings which resulted in suspension of the enforcement procedure for the enforcement of the decisions which were in favour of the Applicant

61. On an unspecified date, the Basic Court had requested the issuance of a legal opinion by the Supreme Court as to how to act when the debtor in the enforcement case, in terms of Article 292 of the LEP, is ordered to deposit a certain amount of funds for payment of expenses that will be caused by the performance of the action by the other person or by the creditor himself, does not deposit these funds.

62. On 1 February 2016, the Supreme Court, in its legal opinion, stated that "*Article 13 paragraph 1 of the LEP (which is a standard norm that regulates this issue) provides a sufficient response which states that "The procedural expenses regarding the determination and commission of enforcement shall be paid by the creditor in advance", while in terms of this legal provision, namely paragraph 4, the debtor is obliged to later pay to the creditor all the expenses caused during the enforcement procedure. Based on the above, it follows that in accordance with this legal provision, the enforcement procedure must continue so that the creditor will deposit the set amount necessary to pay the expenses that will be caused by the performance of the action by the other person, in case that the debtor does not deposit the above mentioned financial means, an amount which will later be compensated to the creditor by the debtor*".

63. On 27 February 2017, the Basic Court in Prizren, by Decision [I.br.1241/12] stated the following:

> "I. *The enforcement creditor* [the Applicant] is *ordered [...] to pay, within a period of 15 (fifteen) days after the receipt of this decision, the amount of 19,000 E (nineteen thousand Euros) on behalf of the enforcement expenses determined according to the price of the authorized employee of the third person NN "Shehu", having its headquarters in Prizren, expenses which will arise from carrying out activities to restore the immovable property to the initial state, such as the demolition of construction works, performed arbitrarily by the enforcement debtor B.M. from Prizren* [...].
> II. *if the creditor does not pay the enforcement expenses in the amount set within the period provided in the enacting clause I of this decision, the court as an enforcement body will stop the enforcement in this enforcement legal case I.br.1241/12, and will not apply the enforcement action described as in the enacting clause I of this decision*". The Judgment states "The *Court, after examining the case files and especially regarding the legal opinion of the Supreme Court, has concluded that the enforcement creditor* [the Applicant] *[..] must deposit the amount of money set above, in name of the implementation of enforcement actions for the demolition of the disputed object* [...] The *court has undertaken other enforcement actions by finding the bank accounts and the financial assets of the debtor in these accounts and in the capacity of a natural and legal person.*"

64. On 11 April 2017, the Applicant filed an appeal with the Court of Appeal against Decision I.br.1241/12 of the Basic Court, alleging essential violations of the provisions of the enforcement procedure, erroneous determination of the factual situation as well as erroneous application of the substantive law.

65. On 29 January 2018, the Court of Appeals, by Decision [CA.nr.2093/2017] rejected the appeal as ungrounded and upheld the Decision [I.br.1241/12] of 27 February 2017 of the Basic Court. This Decision adds that: "the *creditor* [the Applicant] *has been exempted from the payment of court fees, while the* [Applicant's] *request for exemption from all procedural expenses under paragraph I of the relevant decision has been rejected as ungrounded* [...] The creditor did not prove, *until the conclusion of this case in the first instance court nor in the proceedings of the appeal, that the preliminary obligations of the procedural expenses for the implementation of the enforcement in this enforcement case if the enforcement debtor has to pay, different from the legal basis of Article 13 of the LEP and the legal opinion of the Supreme Court of Kosovo that the relevant expenses in this enforcement case must be borne by the creditor, and after the completion of the enforcement, based on the legal basis of paragraph 4 of Article 13 of the same law, the debtor is obliged to compensate the creditor".*

66. On 12 June 2018, the Basic Court, by Decision [I.br.1241/2012] suspended the enforcement in this legal case. This Decision, among others, states that *"the creditor* [the Applicant] *has not acted according to the obligation ordered upon him as a creditor and with the description made as in the decision of this court, E nr. 121/2012 dated 27.2. 2017, to make the deposit of the respective monetary assets* [19,xxx,42 Euros] *on behalf of the respective expenses but so far has not made the deposit of the above mentioned amount of money on behalf of the expenses would be incurred by carrying out the action of the enforcement - restoration to the previous condition of the land and removal of all construction works carried out arbitrarily by the enforcement debtor, [B.M.] [...] this court with the reasons mentioned above suspended the enforcement in this legal issues*".

67. On 8 August 2018, the Applicant filed an appeal with the Court of Appeals, against Decision [I.br.1241/2012] of the Basic Court, alleging essential violations of the provisions of the contentious procedure, erroneous determination of the factual situation as well as erroneous application of the substantive law.

68. On 21 January 2019, the Court of Appeals by Decision Ac.nr.4328/2018, rejected the appeal of the Applicant as ungrounded and upheld the Decision [I.br.1241/2012] of the Basic Court, of 12 June 2018. Further in this Decision it is stated that: "*in the factual situation, in accordance with Article 13 point 1 of the LEP, the expenses related to the appointment and implementation of the enforcement are paid in advance by the creditor [..] The enforcement body will suspend the enforcement if the expenses are not paid within such deadline".*

Applicant's allegations

69. The Applicant alleges that her rights guaranteed by Article 22 [Direct applicability of International Agreements and Instruments]; Article 24 [Equality before the Law]; Article 31 [Right to Fair and Impartial Trial]; Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property] of the Constitution, in conjunction with the relevant articles of the ECHR, namely Article 6 paragraph 1 [Right to a fair trial]; Article 13 [Right to an effective remedy]; Article 1 of Protocol no. 1 of the ECHR [Protection of property]; Article 14 [Prohibition of discrimination], as well as Articles 2, 8, 19 and 17 of the UDHR, have been violated by the decisions of the regular courts.

70. Regarding the violation of Article 31 of the Constitution, the Applicant states that in this case there is a final decision, namely Judgment P.br.462/10 of the Municipal

Court in Prizren, of 21 December 2011, which became final on 19 May. 2012, and which has not yet been enforced despite ongoing efforts.

71. The Applicant alleges that in her case there is a prolongation of the proceedings, despite the fact that according to her the nature of the enforcement is of an urgent nature, and that even after almost 20 years of efforts she is not able to enjoy her property.

72. In this regard, the Applicant alleges that "*The enforcement debtor* [B.M. and now F.M.] *is not a bona fide user of the subject matter property [..] failure to take legal and factual actions available under law by the Basic Court in Prizren as well as by the Court of Appeals in Prishtina, that all her efforts to enforce the final judgment P. Nr. 462/10 of the Court, have remained unsuccessful and have created a situation of legal uncertainty".*

73. Also, the Applicant stated that *"it is clear that there is no commitment of the competent body to efficiently implement the enforcement procedure of the above mentioned Judgment. "Thus, the inconsistency in the implementation of the above mentioned judgment leads to non-compliance with the basic principles of the rule of law and international standards on the protection of human rights."* In this regard, the Applicant refers *to the "Judgment of the Constitutional Court of Kosovo in case KI – 104/10 of 13 December 2011, which on page 77 ascertained the obligation and positive responsibility to organize within the legal order the mechanisms for the enforcement of decisions, which are effective both according to the law and in practice, and through the same to ensure the implementation of decisions without delay [...]".*

74. The Applicant further states that, "*The [Basic] Court was inconsistent in implementing the legal authorizations which are reflected as follows: Lack of prompt action in the enforcement procedure, non-implementation of all available measures ascertained by legal provisions".*

75. The Applicant states that the last two decisions, based on which the enforcement procedure was suspended "*did not contain clear and explicit reasoning, on the basis of which facts and legal bases they base their allegations for this type of decision. The overall reasoning is based exclusively on the opinion of the Supreme Court of Kosovo in case GJA no. 63/2016 dated 16.02.2016, where the above mentioned court is of the opinion that the funds should be paid as an advance by the enforcement creditor, who in the further course of the procedure will reimburse all expenses of the enforcement procedure from the enforcement debtor [...] unreasoned positions which are essential for the result of the enforcement procedure by the court in the present case, show the arbitrariness in action and insufficient grounds of the positions and decisions taken in this way".*

76. The Applicant states that "*in the present case, the parties to the dispute are not in the same position, and this calls into question the principle which should have established the legitimacy of the observance of court decisions by the usurper and the dishonest builder in the property of another person, in this case this is the enforcement debtor [...] the actions of the judicial bodies so far have not provided sufficient guarantees in terms of impartiality and therefore arises the question whether the court is really a neutral party to this dispute".*

77. To substantiate her allegations regarding the violation of Article 31 of the Constitution, the Applicant refers to a number of decisions of the European Court of

Human Rights, namely the case of *Pecev v. Former Yugoslav Republic of Macedonia*, Judgment of 6 November 2008, *Cvjetić v. Croatia*, Judgment of 26 February 2004; *Hiro Balani v. Spain*, of 9 December 1994; *Ziegler v. Switzerland*, Judgment of 21 February 2003; and *Teteriny v. Russia*, Judgment of 26 September 1994.

78. Regarding the violation of Article 32 of the Constitution, the Applicant alleges that, "*Despite the fact that the complainant was able to use all legal remedies provided by law, they remained ineffective [...] So, the right to an effective remedy in this case remained only a formal right has remained in this respect, while the enforcement of the final and enforceable court decision is practically unenforceable, because the complainant has no financial means even to feed herself and her family, let alone for the payment of the advance in the amount as specified above".*

79. Regarding Article 46 of the Constitution, the Applicant alleges that, "*The abandonment was due to a serious violation of security, namely, the force majeure* (*vis major*), *and not by her voluntary actions. From that moment on, she has been objectively obstructed from using her property, and after more than 19 years, she has been denied access to the property in question. This fact was confirmed by the enforcement debtor himself during the statement at the Court that he has been using the property in question since 1999. Due to the ineffective and inefficient work of the HPD first, and then of the regular courts, harmful consequences were created which the complainant as a property owner is suffering. By this, the institutional mechanisms for the protection of the inviolable right to property, guaranteed by the existing framework of legislation, are powerless to enable her access to property and protection of the peaceful enjoyment of property".*

80. The Applicant alleges that B.M. is not a bona fide user of the property and illegally constructed the building on the disputed property. The Applicant, with regard to the violation of Article 46 of the Constitution, refers further to the principle of "'*superficies solo credit', which states that everything has a strong physical attachment to the land which belongs to the owner and in case of conflict the interest of two persons, favours the owner*".

81. The Applicant also refers to Article 156 [Refugees and Internally Displaced Persons] of the Constitution stating that, "*The Republic of Kosovo shall promote and facilitate the safe and dignified return of refugees and internally displaced persons and assist them in recovering their property and possession".*

82. Finally, the Applicant requests the Court to order urgent enforcement of Judgment [P.br.462/10] of the Municipal Court, requesting that the enforcement expenses be charged to the account of the enforcement debtor or to the state budget. The Applicant further requests that the Court declare the Decision [CA.nr.2093/17] of the Court of Appeals invalid.

Comments of the interested party F.M. – in the capacity of temporary representative of B.M. (who had been a party before the regular courts)

83. Regarding the Referral in question, the temporary representative of B.M., F.M., submitted comments to the Court, after being notifying by the latter. In essence, he fully objects all the allegations of the Applicant.

84. Initially in his comments, the temporary representative states that in the land books, the Municipality of Prizren appears as the owner of the disputed immovable property, claiming that it should have been involved as a party to the proceedings. In this regard, F.M. states "*regarding the construction permit in the name of Slavica Gjorgjeviq, it was canceled by the Municipality because the construction of the building did not start within the deadline of 3 years as provided by municipal regulations".* Regarding this, he further claims that "*she is not the owner of the disputed parcel, but the Municipality of Prizren, so she has not had active legitimacy in any of the proceedings conducted so far".*

85. Following a description of the factual situation, F.M. claims that the Referral should be rejected as inadmissible, stating as follows:

> - *In the first place, the Applicant has not exhausted all legal remedies provided by law. She has not made a request for protection of legality as provided by provision 113.7 of the Constitution of Kosovo and Article 39 of the Rules of Procedure of the Constitutional Court;*
> - [The Applicant] *has exceeded the deadline for submitting the Referral as provided by the provision of Article 49 of the Law on the Constitutional Court;*
> - *Due to the lack of jurisdiction of the court based on the claims of the Applicant from the statement of the requested resolution;*
> - *Lack of probative facts regarding the submitted claims.*

86. In his comments addressed to the Court, regarding the allegations of the Applicant he further adds that, "*all her rights have been respected until the moment when she was asked to deposit the amount of € 19,000 according to the decision E.nr.1241/12 dated 27.02.2017, a procedure which is valid for all participants as provided by Article 13 of the Law on Enforcement Procedure. The Court has no right to force any individual or enterprise to perform the enforcement without payment or to invoice the expenses to any institution or to the state budget. Against this decision the Applicant was advised to appeal, which she used and the Court of Appeals has decided for this* [...] against this decision, the Applicant "*according to our law had the right to file the extraordinary remedy which she has not used. Therefore, considering that she has not exhausted all legal remedies, it does not meet the requirements for review*".

87. Regarding the claim of the Applicant for material compensation, the temporary representative alleges that this claim of the Applicant "*is out of the jurisdiction of the Constitutional Court".*

88. Finally, he requests the Court to declare the Referral of the Applicant inadmissible, emphasizing that we are not dealing with a violation of the rights protected by the Constitution.

Relevant legal provisions

LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE

Article 13
The costs of enforcement

> *1. The procedural expenses regarding the determination and commission of enforcement shall be paid by the creditor in advance.*

2. The enforcement proposal shall pay in advance the expenses from paragraph 1 of this article within deadline assigned by the enforcement body. The enforcement body shall suspend the enforcement if the expenses are not paid in advance within such deadline. If the expenses are not paid within deadline set by the enforcement authority for a certain activity, such activity shall not be completed.

3. The procedural expenses initiated by the court ex officio shall be covered by the court from its budgetary.

4. Debtor shall reimburse the creditor the procedural expenses and all other expenses incurred during enforcement procedure.

5. The creditor shall reimburse the debtor the expenses incurred without reasonable cause.

6. The enforcement body shall decide on request for payment of procedural expenses simultaneously with the enforcement decision, upon proposal of party, assigning the enforcement with the aim of accomplishing it.

Article 15

Fines in enforcement procedure

1. Fines provided by this article may be imposed through a court decision for any action or omission violating provisions of this law or violation of the enforcement body decision issued pursuant to this law. These fines may be imposed by the court ex officio and based on justified proposal of private enforcement agent if all conditions for sentencing the fine have been met in the procedure carried by the private enforcement agent.

2. Fines may be imposed against physical persons in enforcement procedure in amount from one hundred (100) to one thousand (1000) Euro, or against legal persons in amount from one thousand (1000) to ten thousand (10.000) Euro.

3. Fine in amount of five hundred (500) to two thousand and five hundred (2500) Euro may be also imposed against responsible person of the legal person.

4. Fines from paragraphs 2 of this Article may be imposed repeatedly, if the debtor does not act upon repeated order of the court or private enforcement agent or continues to act in contrary to such order.

5. Before imposing the fine, the court shall allow the party against whom the fine was imposed, to make a statement, and when considered appropriate by the court, the court may schedule a session for the purpose of collecting evidence.

6. The fine shall be imposed by the court considering all circumstances of the concrete case, especially the economic means of the party and significance of action that the party has expected to perform. The decision on fine shall provide the deadline for paying the fine.

7. Fined person may appeal against the decision within seven (7) days from delivery.

8. Fined person should pay the expenses incurred with the sentence and enforcement of this fine.

9. After the enforcement of decision, the fine shall be realized ex officio by the enforcement body, in benefit of the current account used for funding the court. Enforcement expenses burden the court budget, while the payment of such costs determined by the conclusion, is applied in the procedure of forced settlement of fine.

10. The fine may be also sentenced and enforced against the debtor and other physical persons, and against responsible person of legal person if they refuse to provide data about the wealth of the debtor, and if their actions and behaviors are in contradiction with the order of enforcement authority, or if they damage or reduce the wealth of debtor, or if they obstruct the enforcement authority in the commission of enforcement activities.

11. Imposed fine according to the provisions of this article may not be turned to imprisonment.

Article 16

Fines for delaying the enforcement

1. When the debtor fails to fulfill within any monetary or non-monetary obligation within the given deadline determined by the enforcement document, ex officio or upon the proposal of the creditor shall assign a date no less than three (3) days after the date for voluntary settlement, when fines start to accrue if not settled by the assigned date.

2. The fine for each day of delay shall be no less than five (5) Euros but not more than fifty (50) Euros for a natural person, and no less than fifty (50) Euros but not more than five hundred (500) Euros for a legal person. Fines will accrue each day or other time period of delay, in accordance with the Law of Obligations, from the deadline expiration date for settling the obligation, until the settlement is completed.

Article 292

Obligation for action which may be performed by anyone

1. Enforcement for settlement of obligation for action which may be performed by anyone, shall be applied in the way whereby the enforcement body authorizes the enforcement creditor, that in debtor's costs entrusts the other person with the commission of such action, or may perform the action himself.

2. In enforcement proposal the enforcement requester may propose that the enforcement body through the enforcement decision or the enforcement writ

order the debtor to deposit that in advance the required amount for payment of expenses to be incurred with the commission of action by other person, or by creditor himself. The quantity of the deposited amount is assigned by the enforcement body at his discretion, considering the price list of the authorized person, for commission of such action, which is to be attached to the enforcement decision by the creditor.

3. Final decision or order on the amount of expenses from paragraph 2 of this Article shall be awarded by the enforcement body upon the proposal of the enforcement requester, respectively debtor, after the commission of action.

4. If later is concluded that based on decision or order from paragraph 2 of this Article more means than needed for coverage of expenses for commission of action and expenses of enforcement procedure are taken from the debtor, the enforcement body will return the difference if there are means taken by debtor, respectively will order to the creditor to return such difference within certain time-limit, if these were left in his disposal.

5. Based on decision from paragraph 2 of this Article, the enforcement may be proposed even before the enforcement decision or order becomes final, while based on the decision from paragraph 3 of this Article, only after it becomes final.

Article 293
Obligation of action which may be performed only by the debtor

1. If the action assigned by enforcement document may be completed only by debtor, the enforcement body with an enforcement decision or enforcement writ will assign a deadline to debtor for fulfilling the obligation. Through enforcement decision or enforcement writ the enforcement body at the same time shall threaten the debtor and eventually responsible persons of the debtor which is legal person that they will be fined according to Article 15 and 16 of this law, if within assigned deadline they does not fulfill the obligation.

2. If the debtor within deadline assigned by the enforcement body does not fulfill the obligation, the court upon proposal from enforcement requester will act further according to the provisions of Article 15 and 16of this law.

3. Debtor who has fulfilled its obligation within the deadline assigned by the court, shall without delay inform the enforcement body on such event, and shall submit to the enforcement body the mean undoubtedly proves the allegation. Such evidence include written certified statement of the enforcement requester, which shows that the compulsory action is performed, the record of enforcement body in which is concluded that the compulsory action is performed, conclusion and opinion of the expert, which show that the action is performed etc. In contrary it will be considered that the action is not performed.

4. If the action which may be performed only by the debtor, does not depend from his will (creation of and music artistic act, visual, literal, architectonic, etc), the creditor does not have right to request the reward from paragraph 1 of this Article, but only the right to request reward for caused damage

Admissibility of the Referral

89. In order for the Court to review this Referral, it must first examine whether the Applicant has fulfilled the admissibility requirements established in the Constitution, the Law and the Rules of Procedure of the Court.

90. In this respect, the Court initially 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."*

91. The Court also assesses whether the Applicant has met the other admissibility criteria specified by Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, and Rule 39 of the Rules of Procedure, 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...".*
>
> 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,*

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

[...]

92. In this context, the Court notes that the Applicant has exhausted all legal remedies provided by law and in the absence of any other effective remedy available, she addressed the Constitutional Court with a request for enforcement of Judgment P.br.462/10 of the Municipal Court in Prizren, of 21 December 2011. The Applicant has specifically clarified the constitutional rights which she alleges that have been violated and she has submitted her Referral within the legal time limit.

93. In sum, the Court finds that the Applicant is an authorized party; has exhausted all legal remedies; has submitted the Referral within the legal time limit; has accurately explained the alleged violations of the rights and freedoms guaranteed by the Constitution; and, referred to the case law of the ECtHR regarding the realization of her rights to enjoy and possess the property.

94. The Court finds that the Referral of the Applicant meets the admissibility criteria set out in Rule 39 of the Rules of Procedure. As a result, the Referral cannot be declared inadmissible on the basis of the requirements established in Rule 39 (3) of the Rules of Procedure.

95. Therefore, the Court assesses that the Referral cannot be considered as manifestly ill-founded as set out in Rule 39 (2) of the Rules of Procedure and that it must therefore be declared admissible for review on merits.

Merits of the Referral

96. The Court recalls that the Applicant alleges that the regular courts have violated her rights guaranteed by Article 22 [Direct applicability of International Agreements and Instruments]; Article 24 [Equality before the Law]; Article 31 [Right to Fair and Impartial Trial]; Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property] of the Constitution, and the relevant articles of the ECHR, Article 6 paragraph 1 [Right to a fair trial]; Article 13 [Right to an effective remedy]; Article 1 of Protocol no. 1 of the ECHR [Protection of property]; Article 14 [Prohibition of discrimination], as well as the relevant articles of the UDHR, namely Articles 2, 8, 10 and 17.

97. The Court notes that the Applicant essentially links the violation of these rights with the inability of enforcing the Judgment [P.br. 462/10] of the Municipal Court, of 21 December 2011.

98. Before reviewing the allegations of the Applicant, the Court will first recall the main facts of the present case.

99. In this regard, the Court recalls the fact that through the Decision of the HPCC was confirmed that the Applicant: (i) enjoys the right to use the property that is the main subject matter of the dispute in this case; and that (ii) the property in question must be restituted into her possession within 30 days after the Decision of the HPCC becomes final. As the property in question had not been vacated by the person who had usurped it, the Applicant addressed the Municipal Court in Prizren with a claim

that the property in question be returned to her into repossession. The Municipal Court in Prizren, by Judgment [P.br.462/10] had approved the claim, a Judgment which was upheld by the District Court and the Supreme Court. Following the completion of the above mentioned proceedings for confirmation of ownership before the regular courts, the Applicant filed a request for enforcement of Judgment [P.br.462/10] of the Municipal Court, of 21 December 2011, a request that was approved by the Basic Court and the Court of Appeals. Regarding the enforcement of the Judgment of the Municipal Court, a construction company was appointed, which had set an amount of 19,495.42 Euros for the demolition of the floors that B.M. had built on the Applicant's property, after usurping it in 1999. The Applicant had requested to be exempted from the payment of enforcement expenses, referring to her difficult financial situation and inability to pay the amount of 19,495.42 Euros. The Basic Court in Prizren rejected such a request on the grounds that since the debtor, B.M., had not deposited the necessary amount required for the execution of works related to the demolition of the building, on the grounds that it is a rule to pay in advance those expenses by the creditor, namely the Applicant in the circumstances of the present case. The Basic Court had requested a legal opinion from the Supreme Court as to how to act in the situation when the debtor does not pay the costs, while the creditor is not financially able to pay for them. The Supreme Court, referring to Article 13 of the LEP, had stated that the expenses of the procedure related to the appointment and execution of the enforcement are paid in advance by the creditor, namely the Applicant in this case. Finally, the Basic Court based mainly on the legal opinion of the Supreme Court obliged the Applicant to pay the enforcement expenses in advance, stating that if she does not pay them then the Basic Court will suspend the proceedings in this case. This Decision of the Basic Court was upheld and considered fair by the Court of Appeals. The Applicant, before the Court, challenges the last two decisions, the decision of the Basic Court and that of the Court of Appeals, respectively, which resulted in the suspension of the enforcement procedure.

100. Regarding the allegations of violation of Articles 22 and 24 of the Constitution, Article 14 of the ECHR as well as Article 2, Article 8, Article 10 and Article 172 of the UDHR, the Applicant, except for mentioning them in the submission addressed to the Court, did not provide arguments in support of these alleged violations.

101. The Court below will focus on the review of the allegations of the Applicant for violation of the procedural safeguards of Articles 31, 32 and 54 of the Constitution, in conjunction with Articles 6 and 13 of the ECHR, as well as her allegations for violation of Article 46 of the Constitution, in conjunction with Article 1 of Protocol no. 1 of the ECHR.

Regarding the allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

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

103. The Court recalls Article 31 [Right to Fair and Impartial Trial] of the Constitution, which provides:

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

104. Furthermore, Article 6.1 (Right to a fair trial) of the ECHR provides:

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

105. The Court recalls that the Applicant in her Referral alleges that there is a final decision, namely Judgment P.br.462/10 of the Municipal Court in Prizren, of 21 December 2011, which became final on 19 May 2012 and which has not yet been executed. In the above mentioned Judgment, the respondent B.M. was ordered to vacate the usurped property and restore to its previous condition, removing all the works he had performed on it.

106. The Applicant states that since 2012 she has continuously tried to enforce the above mentioned Judgment P.br.462/10 of the Municipal Court in Prizren, of 21 December 2011, but such a thing has not happened so far, and consequently, she is still denied of the right to enjoy her property. Consequently, the non-enforcement of the decisions in its favour is alleged to have caused prolongation of the court proceedings and consequently violation of the right to a fair and impartial trial.

107. Also, the Applicant alleges that the latest decisions, namely the challenged Decision of the Basic Court […] whereby the enforcement procedure was suspended and, which was also upheld by the Decision of the Court of Appeals […], have violated her right to a reasoned decision, alleging that the above mentioned decisions do not specify the legal basis on which these decisions are based.

108. The Court notes in the case files that regarding this case, on 30 April 2005, the HPCC had approved the claim of the Applicant, whereby it was confirmed that the Applicant enjoys the right to use the disputed property which is the subject matter of the dispute. Following the appeal of the B.M. to the HPCC Appellate Panel, the latter on 16 December 2005 rejected the appeal of B.M. and upheld the HPCC's first instance decision. These two decisions of the HPCC are not possessed by the Court in the case file and they are neither found in the complete case file submitted to the Court by the Basic Court in Prizren. However, the content of this Decision is confirmed as fact in decisions of other regular court, reflected in the summary of facts of the case.

109. In relation to the above, the Court finds that the Decision of 30 April 2005 of the HPCC had become final with regard to the right to use the property which is the subject matter of the dispute.

110. The Court recalls that Judgment P. br.462/10 of the Municipal Court in Prizren, of 21 December 2011, whereby it ordered respondent B.M. to vacate the usurped

property and restore it to its previous condition, by removing all the works he performed on the property in question, became final on 19 May 2012, after the District Court in Prizren through Judgment Ac.nr.114/12 rejected the appeal of B.M. and upheld the Judgment of the Municipal Court. Against these two Judgments, B.M. had filed a revision, which the Supreme Court had rejected as ungrounded.

111. In light of the above, the Court notes that in the circumstances of the present case there is no dilemma that there is a final and enforceable decision, namely the decision of the HPCC regarding the right to use the property that is the subject matter of the dispute as well as Judgment P.br.462/10 of the Municipal Court, of 21 December 2011, which became final on 19 May 2012, whereby it ordered respondent B.M. to vacate the usurped property and restore it to previous condition by removing all works he performed on the property in question. This is confirmed by the decision of the regular courts which have already confirmed that the case must be enforced in favour of the Applicant.

112. The Court also notes that the Applicant had initiated an enforcement procedure regarding the implementation of Judgment P. br.462/10 of the Municipal Court in Prizren, of 21 December 2011. The Court also notes that the Applicant has consistently tried to enforce the final decision in her case.

113. In this context, the Court considers that the enforcement of a decision rendered by a court should be seen as an integral part of the right to a fair trial, a right guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR (see Judgment of the ECtHR *Brumărescu v. Romania*, Application no. 28342/95, Judgment of 28 October 1999).

114. The Court further states that it is the right of the dissatisfied party to initiate judicial proceedings in case of failure to realize an acquired right guaranteed by Article 31 of the Constitution, and Article 6 of the ECHR. It would be meaningless if the legal system of the Republic of Kosovo would allow a final court decision remain ineffective to the detriment of one party. Ineffectiveness of proceedings and non-enforcement of decisions produce effects which bring us to situations that are not in accordance with the rule of law principle, a principle which the institutions of the Republic of Kosovo are obliged to respect (see *mutatis mutandis* , the case of the Court, KI 04/12, Applicant *Esat Kelmendi*, Judgment of 11 July 2012; case KI193/18, Applicant *Agron Vula*, Judgment of 22 April 2020, paragraph 126).

115. In this regard, the Court, also referring to the case law of the ECtHR, states that excessive formalism can deny the essence of the right requested, to ensure fair and practical access to courts as provided by Article 31 of the Constitution and Article 6 of the ECHR. This usually happens when strict procedural rules, which do not allow the Applicants' claims to be considered on a reasonable level, are applied (see, *mutatis mutandis*, ECtHR Judgment of 5 April 2018, *Zubac v. Croatia*, No. 40160/12).

116. In the case of the Applicant, the Court emphasizes that it is not its task to determine what is the most appropriate way for the courts, within their jurisdiction, to find an efficient mechanism of enforcement for the implementation of the final decision.

117. Therefore, the burden of non-enforcement and not finding the appropriate mechanisms for the enforcement of final decisions, namely the Decision of the HPCC of 30 April 2005 and Judgment P.br. 462/10 of the Municipal Court, of 21 December 2011, which has become final on 18 May 2012, falls on the Basic Court.

118. In conclusion, the Court finds that non-enforcement of the final and binding decision constitutes a violation of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

Regarding the allegations for violation of the right to an effective remedy and judicial protection of rights

119. The Court takes into consideration the allegations of the Applicant pertaining to the right to an effective remedies and judicial protection of rights.

120. The Court therefore refers to Articles 32 and 54 of the Constitution, as well as Article 13 of the ECHR.

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."

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 13 of ECHR [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."

121. The Court first recalls the allegation of the Applicant regarding the violation of Article 32 of the Constitution, stating that, "*Despite the fact that the complainant was able to use all legal remedies provided by law, they remained ineffective [...] So, the right to an effective remedy in this case remained only a formal right has remained in this respect, while the enforcement of the final and enforceable court decision is practically unenforceable, because the complainant has no financial means even to feed herself and her family, let alone for the payment of the advance in the amount as specified above*".

122. The Court underlines that every person has the right to exhaust legal remedies against judicial and administrative decisions, which violate his rights or interests as provided by law (see, mutatis mutandis, *Voytenko v. Ukraine*, no. 18966/02, Judgment of 29 June 2004, paragraphs 46-48).

123. Considering its findings regarding Article 31 of the Constitution, in conjunction with Article 6 (1) of the ECHR, the Court considers that the complaints concerning those articles are "arguable" for the purposes of Articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 13 [Right to an effective remedy] of the ECHR (see, mutatis mutandis, *Boyle and Rice v. United Kingdom*, 27 April 1998, paragraph 52).

124. The Court reiterates that Articles 32 and 54 of the Constitution, in conjunction with Article 13 of the ECHR, stipulate that the legal system must make available an

effective legal remedy authorizing the competent authority to address the merits of an allegation of violation of the Constitution and the ECHR (see the ECtHR, *Sharxhi and others v. Albania*, Judgment of 11 January 2018, paragraph 81 and the references referred to therein).

125. The ECtHR has in some cases emphasized that the effect of Article 13 is an obligation for states to provide effective legal remedies that enable them to examine the substance of an arguable claim under the Convention and to grant an appropriate relief. (see decisions of the ECtHR: *Kudla v. Poland*, Judgment of 26 October 2000; *Kaya v. Turkey*, Judgment of 19 February 1999). The ECtHR emphasized that Article 13 must be "effective" in law as well as in practice (see, for example, Ilhan v. Turkey, Judgment of 27 June 2000). The ECtHR, also, emphasized that "effectiveness of a legal remedy", within the meaning of Article 13 of the ECHR, does not depend on the certainty of a favourable outcome for the applicant (*Kudla v. Poland*).

126. In the present case, the Court notes that the Applicant, by requesting the enforcement of Judgment P.br.462/10 of the Municipal Court, of 21 December 2011, she has addressed several times to the regular courts and the Constitutional Court. Furthermore, the Court reiterates that in the enforcement procedure, the regular courts issued several decisions in favour of the Applicant – which allowed the enforcement of Judgment P.br.462/10 of the Municipal Court, of 21 December 2011, obliging F.M. to pay the expenses deriving as a result of performing the works (restoration to the previous condition of the property) – and some contrary decisions and finally the challenged decision which suspends the enforcement procedure, because the Applicant was charged with the expenses of the enforcement procedure, an obligation which she could not fulfill to realize her right.

127. Thus, the Applicant has exhausted all available legal remedies for the enforcement of Judgment P.br.462/10 of the Municipal Court, of 21 December 2011. However, despite her efforts, the above mentioned Judgment has not been enforced by competent bodies. In fact, the legal remedies used by the Applicant, as well as the court decisions in her favour, have not had any practical effect on her situation.

128. In support of this, the Court notes that the Applicant has used all legal remedies provided by law, but which turned out to be ineffective to realize her right.

129. Related to this, the Court refers to the case law of the ECtHR, which in case Klass v. Germany stated 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. 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 ECtHR, *Klass v. Germany*, Judgment of 6 September 1978, paragraph 64).

130. Non-existence of legal remedies or other effective mechanisms for the enforcement of the final judgment in the case before us, violates the right to effective legal remedies, guaranteed by Article 32 and the right to judicial protection of rights, guaranteed by Article 54 of the Constitution, in conjunction with the right to an effective remedy, guaranteed by Article 13 of the ECHR.

131. This position is in line with the practice of the Court, which in this case KI 94/13 stated that "*the inexistence of legal remedies or of other effective mechanisms for the execution of the Decision of [Municipal] Directorate affects the right to an*

effective legal remedy, as guaranteed by Articles 32 [Right to Legal Remedies], 54 [Judicial Protection of Rights] of the Constitution, and Article 13 of the ECHR. According to these provisions, each person has the right to use legal remedies against the judicial and administrative decisions, which violate his rights or interests as provided by law" (see decision of the Constitutional Court: KI94/13, Applicants *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 16 April 2014, paragraph 90; see *mutatis mutandis, Voytenko v. Ukraine*, No. 18966/02, Judgment of 29 June 2004, paragraphs 46-48).

132. In this sense, the Court emphasizes that it is not its task to determine what would be the most appropriate way for the regular courts, within their jurisdiction, to find efficient mechanisms to fully fulfill the obligations provided by law and the Constitution.

133. The burden of enforcing a final and binding decision falls on the regular courts, namely on the Basic Court. The lack of enforcement mechanisms of this public authority should in no way be a reason for denying the right of the Applicant that the final and binding decision be enforced in her favour.

134. The Court therefore considers that it is intolerable that the Applicant – despite her efforts for more than twenty years – has not enjoyed the rights recognized to her by the HPCC Decision of 30 April 2005 and Judgment P.br.462/10 of the Municipal Court, of 21 December 2011.

135. The Court also considers that it is necessary to emphasize that the Applicant cannot be blamed for the delay in the proceedings and the non-enforcement of Judgment P.br.462/10 of the Municipal Court, of 21 December 2011, because she had only used the legal remedies and taken the legal action, in accordance with applicable law (see, *mutatis mutandis, Erkner and Hofauer v. Austria*, para. 68).

136. Therefore, the Court concludes that the inability to take further legal action to enforce the HPCC Decision of 30 April 2005 and Judgment P.br.462/10 of the Municipal Court, of 21 December 2011, also constitutes a violation of Articles 32 and 54 of the Constitution and Article 13 of the ECHR.

Regarding the allegations for violation of the right to protection of property

137. The Court first recalls the content of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol No. 1 of the ECHR.

> "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.*
>
> *[…]"*

Article 1 [Protection of Property] of Protocol 1 of the ECHR:

1. 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

2. 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.

138. The content of Article 1 of Protocol No. 1 of the ECHR and its application have been interpreted by the ECtHR through its case law, which, as noted above, the Court will refer to in relation to the interpretation of allegations of the Applicant for violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of the Convention.

139. With regard to the rights guaranteed and protected by Article 46 of the Constitution, the Court first considers that the right to property according to paragraph 1 of Article 46 of the Constitution guarantees the right to possession of property; paragraph 2 of Article 46 of the Constitution defines the manner of use of property by clearly specifying that its use is regulated by law and in accordance with the public interest; and, in paragraph 3, guarantees that no one may be arbitrarily deprived of property, also setting out the conditions under which property may be expropriated (see, *mutatis mutandis*, the Court's Case KI50/16, Applicant *Veli Berisha* and others, Resolution on Inadmissibility, of 10 March 2017).

140. Whereas, regarding the rights guaranteed and protected by Article 1 of Protocol No. 1 of the Convention, the Court notes that the ECtHR has found that the right to property comprises of three distinct 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 recognises 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* , ECtHR Judgment of 23 September 1982, *Sporrong and Lonnrot v. Sweden*, no. 7151/75; 7152/75, para. 61).

141. The three rules mentioned above are not, nevertheless, "distinct" in terms of being unrelated. Rules two and three deal with special cases of interference with the right to the peaceful enjoyment of property and should therefore be interpreted in the light of the general principle laid down in the first rule (see, *mutatis mutandis* , ECtHR Judgment of 21 February 1986, *James and Others v. The United Kingdom*, no. 8793/79, paragraph 37).

142. In the present case, the allegation of the Applicant falls within the first rule set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 of the ECHR, namely the peaceful enjoyment of property. This guarantee also includes, according to the case law of the ECHR, the positive obligations of the state for the protection of property, to which the Applicant refers and alleges that they constitute a violation of property rights in her case.

143. The Court recalls that the ECtHR in this regard considers that, "*Genuine, effective exercise of the right protected by that provision does not depend merely on the*

State's duty not to interfere, but may require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions." (see ECtHR Judgment of 30 November 2004, *Oneryildiz v. Turkey* , no. 48039/99, para. 134).

144. However, in determining whether the concept of positive, preventive or remedial obligations to protect the peaceful enjoyment of property applies to the circumstances of the Applicant, firstly, the question to be considered in the present case is whether the circumstances of the case, considered in their entirety, gave the Applicant a title of a substantial interest protected by Article 46 of the Constitution and Article 1 of Protocol No. 1 of the ECHR (see, mutatis mutandis, ECtHR Judgment of 22 June 2004, *Broniowski v. Poland*, No. 31443/96, para. 129).

Application of the above mentioned criteria in the circumstances of the present case

145. The Court first recalls the allegation of the Applicant regarding the violation of Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 of Protocol No. 1 of the ECHR, where the Applicant alleges that she was forced to leave the property against her will, and for more than 19 years, despite having a final decision confirming the right to use the disputed property, the Applicant was hindered to use it.

146. The Applicant alleges that from the time of the HPCC decisions which established that the Applicant enjoys the right to use the disputed property, and then the decisions of the regular courts which were in her favour, she could not peacefully enjoy her property.

147. The Court notes that the Applicant had two final decisions, whereby it was established that the Applicant had the right to use the disputed property and B.M. was obliged to restore the disputed property to its previous condition. These decisions have not been enforced, therefore the Applicant had initiated the enforcement procedure.

148. Therefore, the Court finds that in the circumstances of the present case there is no dilemma that there are two final and enforceable decisions, namely the HPCC Decision of 30 April 2005 and Judgment P.br.462/10 of the Municipal Court of 21 December 2011.

149. The Court also notes that the Applicant, unable to realize the rights recognized by these decisions, had initiated an enforcement procedure. In the enforcement procedure there are many conflicting decisions of the same court.

150. Based on the case files, the Court notes that initially in the enforcement procedure, the Municipal Court, based on the proposal for enforcement of the Applicant, had approved her request for enforcement of Judgment P.br.462/10 of the Municipal Court, of 21 December 2011, and even after the appeal of B.M. To the Court of Appeals, it was confirmed.

151. As a result of not finding mechanisms for enforcement of the final decision, the question arose as to who is obliged to deposit the financial means for the execution of works in the enforcement procedure. The Basic Court had requested a legal opinion from the Supreme Court of Kosovo.

152. Following the legal opinion of the Supreme Court, the Basic Court by Decision [I.br.1241/12] of 27 February 2017, referring to Article 13 of the Law on Enforcement Procedure, had ordered the Applicant to deposit the amount of funds, in the name of carrying out the works by a third party, which were presented in the enforcement procedure. Regarding the question as who should pay the expenses related to the enforcement of the above mentioned decision, the Basic Court in its decision had stated that pursuant to Article 13 of the LEP, the expenses related to the enforcement shall be paid in advance by the creditor, in this case Applicant, stating, "*If the creditor does not pay the enforcement expenses in the amount set within the period provided in the enacting clause I of this decision, the court as an enforcement body will stop the enforcement in this enforcement legal case I.br.1241/12, and will not apply the enforcement action described as in the enacting clause I of this decision*".

153. Following the appeal of the Applicant to the Court of Appeals, the latter rejected her appeal, upholding the Decision [I.br.1241/2012] of the Basic Court in Prizren, a Decision which the Applicant expressly challenges before the Court.

154. In this regard, notwithstanding the complexity of the legal situation regarding the enforcement of the court decision in this case and especially since the Supreme Court in its legal opinion of 1 February 2016 stated that according to Article 13 of the LEP it is clear that the expenses of the procedure regarding the appointment and performance of the enforcement shall be paid in advance by the creditor, in the present case all the circumstances of the case should have been taken into account and not only in the legal opinion of the Supreme Court.

155. Therefore, an issue that needs to be assessed in this case is whether the public authorities of the state of the Republic of Kosovo, including the regular courts, have placed a proportionate burden on the Applicant who requests the enforcement of a lawful and final decision since 2012. Furthermore, as is clear from the principles embodied in Articles 31 and 6 of the ECHR, the enforcement of a decision is an integral part of the right to a fair and impartial trial. But in addition, this right is closely related to Article 32 of the Constitution and Article 13 of the ECHR, which guarantee access to effective legal remedies for the realization of concrete rights.

156. The Court notes that the Applicant has done everything possible on her part to seek the realization of a right that should have been realized by now. She has used every legal remedy and each of them, in one way or another, has failed to resolve the issue of the enforcement of a final decision.

157. In the light of the principles elaborated above, in the present case, the Court notes that the Basic Court and the Court of Appeals, by suspending the enforcement procedure in relation to the fulfillment of the financial obligation and placing the burden of this obligation on the Applicant, as a condition for the performance of the enforcement works in the implementation of a final and binding court decision, has prevented the implementation of such a decision.

158. The Court does not notice that the authorities have tried to find a solution for the Applicant, for example by allowing her access to her property – even during the time when her property has not yet been restored to the previous condition.

159. The Court notes that delays in the implementation of the final decisions whereby the Applicant's right to use the property has been recognized may violate the very essence of the respective right.

160. The Court highlights the fact that regardless of whether the debtor is a private person or a state institution, it is the task of the state to undertake all necessary measures for the final court decision to be enforced and on that occasion to involve as necessary and in an efficient manner the entire state apparatus (see *Enterprise EVT v. Serbia*, Judgment of the ECHR of 21 June 2007 para. 48).

161. Therefore, the obligation imposed on the Applicant with the recent decisions of the regular courts when they have requested from the Applicant to cover the expenses of the enforcement of the decision in order to realize her right to peaceful enjoyment of the property, and especially in light of the full circumstances of the case and the fact that she was exempt from paying the court fee in the absence of material means.

162. The Applicant further alleges that with the recent decisions suspending the enforcement procedure, they have finally denied her right to property.

163. In this regard, the Court considers that the non-restoration to the previous condition of the disputed property does not constitute ground for denial of the right to property.

164. The Court, based on the principles elaborated above, finds that the Basic Court in Prizren, by Decision [I.br.1241/12], of 27 February 2017, continuously supported by the Court of Appeals, by Decision [CA.nr.2093/2017] had overturned a decision of the Basic Court which had become *res judicata*, in the absence of finding mechanisms for its implementation.

165. With respect to the alleged violation of protection of property in the present case, the Court finds that the Decision of the HPCC of 30 April 2005 and Judgment P.br.462/10 of the Municipal Court of, 21 December 2011, constituted a legitimate expectation for the Applicant, whereby B.M. was ordered to vacate the property that is the subject matter of the dispute and restore it to its previous condition.

166. In light of all this, the Court considers that the burden imposed on the Applicant for the realization of her right is not proportionate and, moreover, hinders the realization of the right itself.

167. The Court finds that as a result of non-enforcement of this decision, the Applicant has been denied the right to peaceful enjoyment of her property, in violation of Article 46 of the Constitution, and Article 1 of Protocol No. 1 of the ECHR.

168. Therefore, the Applicant has the right to enjoy the property peacefully, as guaranteed by Article 46 of the Constitution and Article 1 of Protocol No. 1 of the ECHR. In these circumstances she was denied the right to enjoy and possess property (see, m*utatis mutandis, Gratzinger and Gratzingerova v. Czech Republic*, No. 39794/98, para. 73, ECtHR).

Request of the Applicant for non-disclosure of identity

169. The Court notes that the Applicant in her Referral had also requested non-disclosure of her identity, without specifying the reason.

170. In this regard, the Court refers to Rule 32 (6) of the Rules of Procedure, which provides:

> *"(6) 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. The Court by majority vote authorizes non-disclosure of identity or grants it without a request from a party. When non-disclosure of identity is granted by the Court, the party should be identified only through initials or abbreviations or a single letter."

171. Based on the Referral submitted by the Applicant, the Court considers that this is not a basis to grant it (see the case of the Constitutional Court, KI74/17, Applicant *Lorenc Kolgjeraj*, Resolution on Inadmissibility of 5 December 2017).

172. Therefore, the Applicant's request for non-disclosure of identity is to be rejected.

Conclusion

173. In conclusion, the Court finds that the non-enforcement of the HPCC Decision of 30 April 2005 and Judgment P.br.462/10 of the Municipal Court, of 21 December 2011, in the case of the Applicant, constitutes violation of Article 31, 32 and 54 of the Constitution in conjunction with Articles 6.1 and 13 of the ECHR.

174. In addition, the Court finds that as a result of non-enforcement of the final and binding decision, the Applicant was unjustly deprived of her property. In this way, the Applicant's right to peacefully enjoy her property was violated, as guaranteed by Article 46 of the Constitution, and Article 1 of Protocol No. 1 of the ECHR.

175. Finally, the Court considers that it should not deal further with the allegations for violation of Article 24 in conjunction with Article 14 of the ECHR, because such allegations and claims have been consumed by the findings of the Court for violation of Articles 31, 32, 54 and 46 of the Constitution in conjunction with Article 6.1 of the ECHR and Article 13 as well as Article 1 of Protocol No. 1 of the ECHR.

FOR THESE REASONS

In accordance with Articles 113.7 and 116.1 of the Constitution, Article 20 of the Law, and Rule 59 (1) (a) of the Rules of Procedure in the session held on 3 February 2021, unanimously

DECIDES

I. TO DECLARE the referral admissible;

II. TO HOLD that there has been a violation of Article 31, 32 and 54 of the Constitution, in conjunction with Article 6.1 and 13 of the ECHR;

III. TO HOLD that there has been a violation of Article 46 of the Constitution, in conjunction with Article 1 of the Protocol No. 1 of the ECHR;

IV. TO HOLD that the Decision of HPCC, of 30 April 2005 and Judgment P.br.462/10 of the Municipal Court of Prizren, of 21 December 2011, are final decisions and as such must be enforced by the responsible public authorities;

V. TO REPEAL the Decision [CA.br.2093/2017] of the Court of Appeals, of 29 January 2018, and the Decision [I.br.1241/12] of the Basic Court in Prizren, of 27 February 2017;

VI. TO ORDER the Basic Court in Prizren, that in accordance with Rule 66 of the Rules of Procedure of the Court, to notify the Constitutional Court, as soon as possible, but not later than 3 (three) months, namely until 3 May 2021, on the measures taken to implement the Judgment of this Court;

VII. TO NOTIFY this Decision to the parties;

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

IX. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Nexhmi Rexhepi Arta Rama-Hajrizi

This translation is unofficial and serves for information purposes only