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

Prishtina, 5 January 2022
Nr.ref.: AGJ 1932/22

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JUDGMENT

in

Case No.KI113/21

Applicant

Bukurije Haxhimurati

Constitutional review of Judgment Pml.no.29/2021 of the Supreme Curt of Kosovo, of 13 April 2021

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Bukurije Haxhimurati (hereinafter: the Applicant), residing in Doganaj, Municipality of Ferizaj, who is represented by Florin Vërtopi, a lawyer from Prishtina

Challenged decision

2. The Applicant challenges the Judgment Pml.no.29 / 2021 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 13 April 2021, in conjunction with the Judgment [PAKR.no.623/2019] of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals), of 30 September 2020 and the Judgment [PKR.nr.484 / 2016] of the Basic Court in Prishtina (hereinafter: the Basic Court), of 18 November 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which as alleged by the Applicant has violated her rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 36 [Right to Privacy] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Articles 6 (Right to a fair trial), 8 (Right to respect for private and family life) and 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: the ECHR) and Articles 8, 10 and 12 of the Universal Declaration of Human Rights (hereinafter : UDHR).

4. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to issue an interim measure to suspend the implementation of the above decisions, *"because the implementation of these judgments which are considered unconstitutional will deprive the Applicant of her liberty and would cause irreparable damage to her life and health"*.

Legal basis

5. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties], of the Constitution, Articles 22 [Processing Referrals], 27 [Interim Measures] and 47 [Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03 / L-121 (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 11 June 2021, the Court received the Applicant's Referral.

7. On 26 June 2021, based on paragraph 4 of Rule 12 of the Rules of Procedure and the Decision of the Court no. KK-SP 71-2/21, Judge Gresa Caka-Nimani assumed the duty of President of the Court, while based on point 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi concluded the mandate of the President and Judge of the Constitutional Court.

8. On 8 July 2021, the President of the Court Gresa Caka-Nimani appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (presiding), Safet Hoxha and Radomir Laban (members).

9. On 13 July 2021, the Court notified the Applicant and the Supreme Court about the registration of the Referral.

10. On 27 July 2021, the Court requested from the Basic Court the complete case file.

11. On 28 July 2021, the Court received the complete case file from the Basic Court.

12. On 22 September 2021, the Court considered the Report of the Judge Rapporteur, and decided to have the case re-examined at a forthcoming session.

13. On 20 December 2021, the Review Panel considered the Report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the admissibility of the Referral.

14. On the same date, the Court unanimously decided that the Referral is admissible; and to find that (i) there has been a violation of Article 36 [Right to Privacy] of the Constitution of the Republic of Kosovo in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights ; (ii) there has been no 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) the Judgment of the Supreme Court of Kosovo Pml.nr.29 / 2021, dated 13 April 2021, remains in force; and (iv) rejected the Request for Interim Measures.

Summary of facts

15. On 24 February 2014, the Special Prosecution Office of EULEX (hereinafter: the Special Prosecution Office) issued a Ruling on Initiation of Investigations against the Applicant and several other persons, since there was a reasonable suspicion that the Applicant was involved in committing criminal offences from paragraph 2 of Article 428 [Accepting bribes] and paragraph 1 of Article 431 [Trading in influence] of the Criminal Code of the Republic of Kosovo no. 04/ L-082 (hereinafter: the CCRK), since in the time period between 2011 and 2013, the Applicant acting in the capacity of an official person had received directly for herself and for other unknown perpetrators the amount of 13.000.00 euros from the witness "C" in exchange for the release of the latter from prison or mitigation of his sentence for which he was sentenced. She was also suspected of having taken other 500.00 euros from two other persons.

16. On 10 March 2014, the Basic Court in Prizren issued an Order [PP.51/2014] against the Applicant and several other persons "On covert measures of interception of telecommunications and recording of telephone calls including retroactive reading of text(SMS) messages " authorizing the following actions:

> *"1. Interception of telecommunications: specifically to intercept, monitor, record and transcribe all telephone calls, voicemails and text messages made to or from the telephone numbers listed below without the knowledge*

or consent of the person subject to this measure and for extracting call records for telephone numbers AND

Metering: for retroactive inclusion of all incoming and outgoing calls and text (SMS) messages made, sent and received by the suspects and other persons, except for suspects from 1 September 2013 up to date for the below mentioned telephone numbers."

17. On 4 June 2014, the Basic Court in Prizren by the Order [PP. 51/2014] had authorized the extension of interception of telecommunications for another 60 days from the issuance of the Order.

18. On 18 September 2014, the Basic Court in Prizren through the Order [PP. 51/2014] had authorized the extension of interception of telecommunications for another 60 days from the issuance of the Order.

19. On 25 March 2016, the Basic Court in Prizren authorized the application of the covert photographic or video surveillance, covert monitoring of conversations and stimulation of corruption in respect of the Applicant and the other accused, for 60 days from issuance of the Order.

20. On 29 May 2016, the Basic Court in Prizren authorized the search of the Applicant's apartment.

21. On 31 May 2016, the Basic Court in Prizren issued an Order [PPS.8/2015] whereby witness "C" was assigned the protective measures as a protected witness, which foresaw, inter alia, that the court sessions in which witness "C" was to testify will be closed to the public.

22. On 3 June 2016, the Special Prosecution Office notified the Applicant's defence counsel and the Applicant herself that the witness "C" will give his testimony on 9 June 2016, notifying her that if she does not attend the session of witness' "C" hearing, without a justification, it prevents the Applicant from objecting the admissibility of the evidence at the stage of the criminal trial.

23. On 7 June 2016, the Applicant's defence counsels had made a request to photocopy all records, files and for participation in all stages of the investigation regarding the Applicant.

24. On the same day, the Applicant's defence counsels had filed an objection in relation to the Order of the Basic Court in Prizren [PPS. 8/2015] assigning protective measures for witness "C".

25. On 26 August 2016, the Special Prosecution Office of EULEX (hereinafter: the Special Prosecution Office) had filed an indictment [PPS.no.8/2015] against the Applicant because of the criminal offense under paragraph 2 of Article 428 [Accepting bribe] and paragraph 2 of Article 431 [Trading in influence] of the CCRK as well as against the person B.V. because of the criminal offence under paragraph 3 of Article 429 [Giving bribes], and paragraph 2 of Article 431 [Trading in influence] of the CCRK. The Applicant was accused that as an official

she had accepted for herself and for other unknown perpetrators, the amount of 13,000 Euros from witness "C", in exchange for facilitating the release from prison or mitigation of the latter's sentence. She was also accused of having taken the amount of 500.00 euros from two persons.

26. Along with the above indictment, the Applicant was submitted 8 (eight) CDs of evidence relating to the case.

27. On an unspecified date, the Applicant and B.V. had filed a request for dismissal of the indictment. The Applicant alleged, among other things, that obtaining of SMSs in retroactive manner through the Order [PP.51/2014] of the Basic Court, of 10 March 2014 was done in violation of Article 92 [Orders for Covert and Technical Measures of Surveillance and Investigation] of the CPCRK, which provides that interception is allowed for 60 days from the date of issuance of the order, Article 36 of the Constitution and Article 6 of the ECHR and had challenged the testimony of witness "C", as well as some proofs and other evidence.

28. On 23 December 2016, the Basic Court through Decision [PKR.no.484/2016] rejected the requests for dismissal of the indictment. As regards the obtaining of SMSs in retroactive manner, the Basic Court had reasoned that the provisions of the CPCK governing the issue of interception do not prohibit obtaining of SMS messages in retroactive manner. The Basic Court reasons that such a conclusion is also based on Article 68 [Personal Data Preservation and Administration for the criminal proceedings purposes] of the Law No.04/L-109 on Electronic Communications (hereinafter: the Law on Electronic Communications), therefore in their opinion, such a thing is not unlawful and in this case this evidence was obtained pursuant to the Order that was issued in accordance with the law.

29. On an unspecified date, the Applicant had filed an appeal against the above-mentioned Decision of the Basic Court, of 23 December 2016, again raising the issue of SMS messages obtained in retroactive manner and requesting the severance of witnesses' testimonies, including witness "C".

30. On 16 January 2017, the Court of Appeals by Decision [PN.no.22/17] had rejected the Applicant's appeal against the above-mentioned Decision of the Basic Court, of 23 December 2016, by upholding the reasoning of the Basic Court in respect of the retroactive SMS messages while regarding the objection of the testimonies of the witnesses, it determined that these evidences can be objected by the Applicant also in later stages of the proceedings - during the main trial.

31. On 18 November 2019, the Basic Court in Prishtina, Serious Crimes Department (hereinafter: the Basic Court), by Judgment [PKR.no.484/2016], pronounced the Applicant guilty of the criminal offence under Article 431 [Trading in influence] of the CCRK and sentenced her to imprisonment in length of 1 (one) year, and acquitted her of the criminal offence under paragraph 2 of Article 428 [Accepting bribes] of the CCRK. Whereas B.V. was pronounced guilty of a criminal offence under Article 431 [Trading in influence] of the CCRK and acquitted of the criminal offence under paragraph 3 of Article 429 [Giving

bribes] of the CCRK. Among other evidence administered by the Basic Court on the basis of which the Applicant was found guilty, including interception transcripts, witness testimonies and evidence gathered from the covert monitoring of conversations, in the trial session was read also the testimony of witness “C”, who was not present at the main trial, as he had the status of a protected witness.

32. Appeals against the Judgment [PKR.no.484/2016] of the Basic Court, of 18 November 2019, were filed by: the Basic Prosecution in Prishtina (hereinafter: the Basic Prosecution), the Applicant and the person B.V., due to essential violation of provisions of the criminal procedure, violation of the criminal law, erroneous and incomplete determination of the factual situation and the decision on the sentence. The Applicant had also submitted a response to the appeal of the Basic Prosecution by proposing that it be rejected as unfounded. The Appellate Prosecution of Kosovo (hereinafter: the Appellate Prosecution) had proposed that the Basic Prosecution's appeal be upheld while the appeals of the Applicant and B.V. be rejected as unfounded. The Applicant alleged before the Court of Appeals, among other things that the interception order, of 10 March 2014 was unlawful as it ordered a retroactive interception of text messages, also in violation of the right to privacy guaranteed by Article 36 of the Constitution. She also complained about the status of witness “C” and the impossibility to cross-examine this witness during the criminal proceedings.

33. On 30 September 2020, the Court of Appeals by Judgment [PAKR.no.623/ 2019], rejected the appeals filed by the Basic Prosecution, the Applicant and B.V. as unfounded. Among other things, the Court of Appeals reasoned that the allegation that the Judgment of the Basic Court is based on inadmissible evidence does not stand since the Basic Court in the Judgment has relied on the conversations with witness “C” on 30 March 2016 and 24 April 2016, during which meetings the Applicant had admitted that she had received money from witness “C”. Also, the Court of Appeals reasoned that the Applicant's allegation that she was not given the opportunity to object the testimony of witness “C” is not substantiated because the Applicant's defence and the Applicant herself were summoned to his examination hearing, when they were also informed that Witness “C” was a protected witness, nevertheless, they left the hearing in which Witness "C" was examined. In the minutes of the meeting of 9 June 2016, is included also the finding that the status of witness “C” is "protected – anonymous witness”. In relation to the evidence that was taken as a basis for finding the Applicant guilty, the Court of Appeals emphasized that, when finding the Applicant guilty, the Basic Court has also relied on the transcripts of the meeting held between the Applicant and witness C, conversations which took place on 30 March 2016 and 24 April 2016, and during which meetings the Applicant had admitted that she had received certain amounts of money from Witness C, as well as on the interception reports of 31 May 2016 and 1 June 2016.

34. On an unspecified date, the Applicant and BV, filed a request for protection of legality with the Supreme Court against the Judgment of the Basic Court [PKR.no.484/2016] and the Judgment of the Court of Appeals [PAKR.no.623/ 2019], due to essential violations of the provisions of criminal procedure and erroneous application of criminal law requesting that their request be approved

and the convicts to be acquitted of the charges or alternatively the case to be remanded for retrial to the Basic Court. The Applicant before the Supreme Court alleged, among other things, that: (i) she was not granted access to all materials during the investigation stage; (ii) The Judgment of the Basic Court is based upon inadmissible evidence (SMS messages obtained in retroactive manner) thus resulting in a violation of the Applicant's privacy from Article 36 of the Constitution; and (iii) the status of witness "C" had not been clarified; as she was not allowed to cross-examine witness "C " in order to object his statement, thus also the principle of equality of arms has been violated.

35. On 13 April 2021, the Supreme Court through Judgment [PML.no.29/2021] rejected the requests of the Applicant and that of B.V. for protection of legality, as unfounded. (i) As regards the impossibility to cross-examine witness "C", the Supreme Court found that this allegation is unfounded as on the day that witness "C" was heard, on 9 June 2016, also the Applicant's defence counsels were present, on which occasion they were notified that witness "C" has the status of a protected witness, however the Applicant's defence counsels left the hearing on the grounds that the status of the witness is unknown, therefore, the statement of witness "C" was only read at the main trial hearing session. The Supreme Court also reasoned that this evidence was not decisive for the issuance of the Judgment of the Basic Court and for proving that the Applicant did commit the criminal offence for which she was sentenced. (ii) As regards the allegation that the Judgment of the Basic Court was based on SMS messages obtained retroactively, the Supreme Court found that this fact stands but according to the assessment of the Supreme Court this did not have bearing on the decision because the court has proved the situation in a complete and fair manner by all other evidence administered. (iii) As regards the allegation that the Applicant was not provided with the case file during the investigation stage, the Supreme Court stated that pursuant to Article 213, paragraph 5 of the CPCK, the time when the defence must necessarily receive the case file is the time when the indictment has been filed, and such a thing has happened in the present case.

36. Based on the case file, at the time of submitting the Referral to the Court, the Applicant was awaiting execution of the sentence.

Applicant's allegations

37. The Applicant alleges before the Court that the Judgment of the Supreme Court [PML.no.29/2021], in relation to the Judgment of the Court of Appeals [PAKR.no.623/2019], and the Judgment of the Basic Court[PKR.no. 484/2016], violates her rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 36 [Right to Privacy] of the Constitution, in conjunction with Articles 6 (Right to a fair trial), 8 (Right to respect for private and family life) and 13 (Right to an effective remedy) of the ECHR, as well as Articles 8, 10 and 12 of the UDHR.

38. More specifically, the Applicant alleges that: i) she was not enabled to have in possession the case file by the Special Prosecution and the pre-trial judge, during the investigative stage, in violation of the principle of equality of arms and the

principle of adversarial proceedings ; ii) even though she had objected to the issuance of the order for the assigning of protective measures for witness "C", this request of the Applicant was not taken into consideration, thus making it impossible for the Applicant to question the said witness; and iii) the challenged judgments are based on evidence which are legally inadmissible, specifically the SMS messages extracted in retroactive manner, thus violating the Applicant's right to privacy and private life.

(i) In relation to the impossibility of accessing the case file documents by the Special Prosecution and the pre-trial judge, during the investigative stage

39. In this context, the Applicant alleges that she was confronted with evidence which she was not able to challenge during the investigation stage, adding that only on the occasion of the submission of the indictment to the Basic Court, did the Special Prosecution submit to the defence Applicant 8 (eight) CDs which confirm the fact that during the stage of investigation, the Applicant was denied access to her file. According to her, this is contrary to Article 7 [General Duty to Establish a Full and Accurate Record], paragraph 2 of the Criminal Procedure Code of Kosovo (hereinafter: CPCK) adding that *"the defendant at any stage of the proceedings is entitled to be defended by using the facts as well as the evidence obtained by the Police or the Prosecution, so that after a detailed analysis of the evidence and facts, it can propose the production of concrete evidence."* Moreover, she adds that Article 9 [Equality of Parties] of the CPCK obliges the Prosecutor to submit to the defence all the documents in the case file, in order to respect the principle of "equality of parties" and for the defendant to have the opportunity to effective protection. Article 61 [Rights of the defence counsel as a representative of the defendant] paragraph 3 of the CPCK, provides and grants full guarantees to the defence so that he/they be notified in timely manner about the place and time of undertaking investigative actions, participates in them and inspect the records and evidence of the case.

40. The Applicant states that these principles are also protected by the Constitution as well as the ECHR. The Applicant supports her arguments by calling upon the case law of the Court and that of the European Court of Human Rights (hereinafter: the ECtHR).

41. In this context, she states that in the case of *Kuralic v. Croatia*, Judgment of 15 October 2009, paragraph 44 it is stated, inter alia, that the guarantees of Article 6 of the ECHR are valid even before the case is sent for trial. The Applicant also refers to the case of Court KI78/12, by specifying the paragraphs that address the issue of the principle of equality of arms where it is required that each party to the proceedings be afforded a reasonable opportunity to present its case under conditions that do not place it at an unfavourable position vis-à-vis the other party, the issue of witnesses and experts and the burden of proof of the prosecutor to prove the commission of the criminal offense. In this respect, the Applicant also cites the case of Court KI230/19, Judgment of 8 January 2021, and the ECtHR cases referred to therein.

(ii) In relation to the non-examination of witness "C" by the Applicant.

42. In regard to Witness "C" the Applicant states that there were given two pieces of evidence and a statement before the Special Prosecution Office but which could not be used before the trial panel as the Applicant or her defence counsels were not provided with an opportunity to cross-examine the witness and to object the evidence as required by the CPCK, adding that it is a legal obligation that each party should be provided with an opportunity to examine the witness of the other party. Having referred to Article 242 [Procedure for Filing the Indictment], paragraph 1 of the CPCK, the Applicant states that the Court does not find the accused guilty by relying on a single evidence only or by granting decisive importance to an evidence or another proof which may not be challenged by the defendant or defence counsel through examination at any stage of the criminal proceedings, as provided in Article 31, paragraph 4 of the Constitution and Article 6, paragraph 3, item (c) of the ECHR. In this respect, the Applicant also cites the cases of the ECtHR, *Bricmont v. Belgium* and *Vnidisch v. Austria*.

43. Therefore, the Applicant maintains that she was not brought from house arrest during the investigative phase, to be present at the examination of Witness "C" and that Witness "C" has never appeared at the main trial and that the evidence of the latter have been read at the main trial. The Applicant's objections for not reading these minutes were not treated fairly by any court instance.

44. Moreover, the Applicant alleges that she had proposed seven (7) pieces of evidence to be read at the main trial which proved the injustices made to her in relation to witness "C", including the Special Prosecution's request for protective measures, the order for Protective Measures for witness "C", the objection of the Order by the Applicant and some other submissions of the Applicant concerning the case. But not even this request has been taken into consideration by the regular court.

45. Therefore, the Applicant maintains that "*All these detailed treatments, regarding the violation of the principle of equality of arms and the principle of adversarial proceedings and lack of decision on the OBJECTION against the issuance of the order of [Pre-Trial Judge] PPS.m.8/15, of 31.05 .2016, and the failure to decide on the APPEAL against the decision PPS.m.8/15 ascertained in the minutes of 09.06.2016 addressed to the pre-trial judge in the Basic Court in Prizren, provide strong arguments that the court of fact, the Court of Appeals, and the Supreme Court have violated*" the provisions of the CPCK, Articles 31 and 32 of the Constitution, Articles 6 and 13 of the ECHR, as well as Articles 8, 10 of the UDHR.

46. With regard to witness "C" the Applicant also states that the procedural provisions have been violated as in some cases he is referred to as a witness, whilst in some cases as a cooperating witness, while the status of witness and cooperating witness differs according to legal provisions. Furthermore, the Applicant alleges that the Prosecution and the pre-trial judge according to the minutes have promised the witness that there would be no legal consequences even if he is involved in a legal violation, although according to the applicable

provisions, the Prosecution and the Judge Rapporteur do not have a legal opportunity to release such a person from criminal proceedings.

47. The Applicant states that through her defence counsels she has objected the protective measure - anonymity of witness "C" and filed an objection on 7 June 2016, *"but up to date we have not received a decision from the Trial Panel of the Basic Court in Prizren."*

(iii) *In relation to the evidence which the Applicant considers legally inadmissible, namely the SMS messages obtained in retroactive manner*

48. The Applicant alleges that the Judgments are based on inadmissible evidence, such as SMS messaged, which were obtained retroactively, according to the Order of the pre-trial judge, a fact which is also recognized by the Supreme Court but according to the Supreme Court this has not had an impact on the legality of the decision-making. According to the Applicant, this proves that the Supreme Court agreed with the defence that in violation of the law, the Constitution and the ECHR, the privacy, respectively the secrecy of correspondence, telephone and communication of the Applicant has been violated, and that the Supreme Court should have taken a special decision regarding the exclusion of these unlawfully obtained SMS messages. In this context, she states that according to Article 91 of the KCCP, interception of telecommunications may only take place from the date of the issuance of the order for a certain period of time and the same order may be renewed but cannot be issued in retroactive manner. Therefore, the Applicant holds that Order PP 51/2014 of 10 March 2014 is also contrary to the right to privacy under Article 36, paragraph 3 of the Constitution and Article 8 of the ECHR, since through this order SMS were extracted in a retroactive manner for the period from 22 February 2012 to 10 March 2013. She adds that every person has the right to respect for private and family life, his home and privacy of correspondence and that interference with the exercise of this right can only be done to the extent envisaged by law.

49. The Applicant also alleges that the right to privacy is protected and ensured by other conventions by calling upon the Convention for the Protection of Individuals with Automatic Data Processing, of 28 January 1981, and by referring to the Directive 2002/59/EC of the European Parliament and of the Council of 12 July 2002.

50. She also refers to the Law on Electronic Communications, by referring to Article 68 thereof, relating to the storing and administration of personal data for the criminal proceedings purposes, wherein it is stated that the preservation of such data should be done only for one year and that the storage is done for incoming-outgoing SMS messages but without content. Therefore, the Applicant alleges that the contents of the SMS can be stored only for the future and from the day when the relevant court order is issued.

51. Therefore, she maintains that *"Article 8 of the ECHR, Article 36 of the Constitution [...], Article 12 of the [UDHR] and the above-mentioned legal provisions as well as case law, cited in this subchapter", convincingly prove that the extraction of SMS messages obtained retroactively for the period from*

22.02.2012 to 10.03.2013 was done contrary to all above legal provisions, and according to the unlawful and unconstitutional order PP 51/2014 of the pre-trial judge of the BC in Prizren, of 10.03.2014, as well as covert photographic and video surveillance, covert monitoring of conversations and simulation of the corruption offence according to the unlawful and unconstitutional order PPS. Nr. 8/15, PPR KR 52/14 of the Basic Court in Prizren, of 25.03.2016 issued by the Pre-Trial Judge at the BC in Prizren."

In relation to the request for interim measures

52. The Applicant requests the imposition of interim measurea to avoid the irreparable damage that may occur to the Applicant if she is sent to serve a sentence of imprisonment, given that she suffers from "papillary thyroid carcinoma". The latest medical examinations which she has undergone in May 2021, give cause and reason that the Applicant must continue with medical therapy and have a medical intervention. Whilst, on 22 March 2021, the Applicant was refused expunging of further execution of the punishment. Also, the Court of Appeals through the decision [PN.no.334/21] of 12 April 2021 has rejected the Applicant's appeal against the decision of the Basic Court. Therefore, given the health condition of the Applicant, they request from the Court to impose an interim measure so that the Applicant is not sent to serve her sentence until the time when the Court decides on the case.

53. Finally, the Applicant proposes to the Court to:

a) Declare the Referral admissible;

b) Find that there has been a violation of Articles 31, 32 and 36 of the Constitution in conjunction with Articles 6, 8 and 13 of the ECHR;

c) Declare invalid the Judgment [PML.no. 29/2021] of the Supreme Court, the Judgment [PAKR.no.623/2020] of the Court of Appeals and the Judgment of the Basic Court [PKR.no.484/2016] in the part which concerns the finding of the Applicant guilty, as well as to remand her case to the Basic Court for reconsideration purposes;

d) Allow the interim measures until the time when the Basic Court has re-decided on the case according to the decision of the Constitutional Court.

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.
[…].
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.

Article 36
[Right to Privacy]

1. Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication.
[…].
3. Secrecy of correspondence, telephony and other communication is an inviolable right. This right may only be limited temporarily by court decision if it is necessary for criminal proceedings or defense of the country as defined 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.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6
(Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
[…]
3. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law:
[…]

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;

Article 8
(Right to respect for private and family life)

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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.

CRIMINAL PROCEDURE CODE No. 04/L-123

"Article 7
General Duty to Establish a Full and Accurate Record

1. The court, the state prosecutor and the police participating in criminal proceedings must truthfully and completely establish the facts which are important to rendering a lawful decision.
2. Subject to the provisions contained in the present Code, the court, the state prosecutor and the police participating in the criminal proceedings have a duty to examine carefully and with maximum professional devotion and to establish with equal attention the facts against the defendant as well as those in his or her favor, and to make available to the defense all the facts and pieces of evidence, which are in favor of the defendant, before the beginning of and during the proceedings.
[…]

Article 9
Equality of Parties
1. The defendant and the state prosecutor shall have the status of equal parties in criminal proceedings, unless otherwise provided for by the present Code.
2. The defendant has the right and shall be allowed to make a statement on all the facts and evidence which incriminate him or her and to state all facts and evidence favorable to him or her. He or she has the right to request the state prosecutor to summon witnesses on his or her behalf. He or she has the right

to examine or to have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.
3. The injured party has the right and shall be allowed to make a statement on all the facts and evidence that affects his or her rights, and to make a statement on all the facts and evidence. He or she has the right to examine witnesses, cross-examine witness and to request the state prosecutor to summon witnesses.
4. If the state prosecutor determines that during the investigation were collected sufficient evidence to proceed to the main trial, the state prosecutor shall draft the indictment and shall present the facts on which he or she bases the indictment and shall provide evidence of these facts.
[…]

Article 61
Rights of Defence Counsel as Representative of Defendant

[…]
3. The defense counsel has the right to be notified in advance of the venue and time for undertaking any investigative actions and to participate in them and to inspect the records and evidence of the case in accordance with the provisions of the present Code.

[…]

Article 91
Persons Competent to Apply for and Order Covert and Technical Measures of Surveillance and Investigation

1. A state prosecutor may issue a provisional order for one of the measures provided for in paragraph 2 of this Article only in emergency criminal cases, or in criminal proceedings that are investigating criminal offences under Chapter XXIV or Chapter XXXIV of the Criminal Code or money laundering offences in necessary cases, if the delay that would result from a pre-trial judge issuing an order under paragraph 2 of the present Article would jeopardize the security of investigations or the life and safety of an injured party, witness, informant or their family members. Such provisional order ceases to have effect if it is not confirmed in writing by a pre-trial judge within three (3) days of issuance. When confirming the provisional order of a state prosecutor, the pre-trial judge shall make a written determination as to its lawfulness ex officio."
2. A pre-trial judge may issue an order for each of the following measures on the basis of an application by a state prosecutor:
2.1. covert photographic or video surveillance in public places;
2.2. covert monitoring of conversations in public places;
2.3. an undercover investigation;
2.4. metering of telephone calls;
2.5. covert photographic or video surveillance in private places;
2.6. covert monitoring of conversations in private places;
2.7. search of postal items;
2.8. interception of telecommunications; including text messages or other electronic messages;

2.9. interception of communications by a computer network;
2.10. controlled delivery of postal items;
2.11. use of tracking or positioning devices;
2.12. a simulated purchase of an item;
2.13. a simulation of a corruption offense; or
2.14. disclosure of financial data."

3. An application for one of the measures provided for in paragraph 1, 2 or 3 of the present Article shall be made in writing and shall include the following information:

3.1. the identity of the duly authorized police officer, officer of the body authorized to enforce criminal law or the state prosecutor making the application;
3.2. reasons and facts that support the application and fulfill the criteria in Article 88 of this Code; and
3.3. information about any previous application known to the applicant involving the same person and the action undertaken by the authorizing judicial officer on such application.

[...]

Article 92

Orders for Covrt and Technical Measures of Surveillance and Investigation

1. An order for a measure under the present Chapter which shall not exceed sixty (60) days from the date of the issuance of the order shall be in writing and shall specify:

1.1. the name and address of the subject or subjects of the order, if known the number of affected data subjects and the scene of the event;
1.2. the official designation of the measure and its exact legal bases;
1.3. the grounds for the order in particular the current findings and the sound probability according to Article 19 subparagraph 1.11 of this Code;
1.4. measure and its exact starting and closing time, if applicable; and
1.5. the person authorized to implement the measure and the officer responsible for supervising such implementation.

2. An order for a measure under the present Chapter shall require that duly authorized police officers provide the authorizing judicial officer a report on the implementation of the order at fifteen (15) day intervals from the date of the issuance of the order.

3. An order for covert photographic or video surveillance in private places, monitoring of conversations in private places, interception of telecommunications, interception of communications by a computer network or the use of tracking or positioning devices may specifically permit duly authorized police officers to enter private premises if a pre-trial judge determines that such entry is necessary to activate or disable the technical means for the implementation of such measures. If duly authorized police officers enter private premises pursuant to an order under this paragraph, their actions in the private premises shall be limited to those necessary to activate or disable the technical means.

4. An order for the metering of telephones or the interception of communications by a computer network shall include all the elements for the

identification of each telephone or point of access to a computer network to be intercepted. Except as provided in paragraph 5 of the present Article, an order for the interception of telecommunications shall include all the elements for the identification of each telephone to be intercepted.

5. Upon the application of a state prosecutor, an order for the interception of telecommunications may include only a general description of the telephones which may be intercepted, where a pre-trial judge of the competent Basic Court has determined that there is a grounded suspicion that:

5.1. the suspect is using various telephones so as to avoid surveillance by duly authorized police officers; and

5.2. a telephone or telephones, as described in the order, are being used or are about to be used by the suspect.

6. If an order for the interception of telecommunications is issued by a pre-trial judge of a Basic Court pursuant to paragraph 5 of the present Article,

6.1. the duly authorized police officers after implementing the order in respect of a particular telephone shall promptly inform the pre-trial judge in writing of the relevant facts, including the number of the telephone;

6.2. the order may not be used to intercept the telecommunications of a person who is not the suspect; and

6.3. the duration of the order is limited to fifteen (15) days and may be renewed up to a total period of ninety (90) days from the date of issuance of the order.

7. An order for the search of postal items or for the controlled delivery of postal items shall designate the address on the postal items to be searched or delivered. Such address shall be that of the subject or subjects of the order.

8. An order for interception of telecommunications, interception of communications by a computer network, metering of telephone calls, search of postal items, controlled delivery of postal items or disclosure of financial data shall include as an annex a separate written instruction to persons other than duly authorized police officers whose assistance may be necessary for the implementation of the order. Such written instruction shall be addressed to the director or the official in charge of the telecommunications system, computer network, postal service, bank or other financial institution and shall specify only the information, which is required for assistance in the implementation of the order.

[…]

Article 213
Access to the Case File by Suspects and Defendants

1. During initial steps by the police, the suspect shall have access to the evidence that is collected upon his or her request, except when paragraph 6 or 7 of this Article is applied mutatis mutandis.

2. At the initiation of the investigative stage, the state prosecutor has a positive obligation to provide access to the case file to any named defendant or their defense counsel, subject to the exceptions within this Article.

3. At no time during the investigative stage may the defense be refused inspection of records of the examination of the defendant, material obtained

from or belonging to the defendant, material concerning such investigative actions to which defense counsel has been or should have been admitted or expert analyses.
4. Upon completion of the investigation, the defense shall be entitled to inspect, copy or photograph all records and physical evidence available to the court.
5. Upon the filing of an indictment, the defendant or defendants named in the indictment may be provided with a copy or copies, respectively, of the case file.
6. In addition to the rights enjoyed by the defense under paragraphs 2, 3 and 4 of the present Article, the defense shall be permitted by the state prosecutor to inspect, copy or photograph any records, books, documents, photographs and other tangible objects in the possession, custody or control of the state prosecutor which are material to the preparation of the defense or are intended for use by the state prosecutor as evidence for the purposes of the main trial, as the case may be, or were obtained from or belonged to the defendant. The state prosecutor may refuse to allow the defense to inspect, copy or photograph specific records, books, documents, photographs and other tangible objects in his or her possession, custody or control if there is a sound probability that the inspection, copying or photographing may endanger the purpose of the investigation or the lives or health of people. In such case, the defense can apply to the pre-trial judge, single trial judge or presiding trial judge to grant the inspection, copying or photocopying. The decision of the judge is final.
7. Information can be redacted or marked out by a thick black line to obscure specific information by the state prosecutor on copies of documents that contain sensitive information. The defendant may challenge the redaction with the pretrial judge, single trial judge or presiding trial judge within three (3) days of receiving the redacted copy. The state prosecutor shall be permitted the opportunity to explain the legal basis of the redaction without disclosing the sensitive information. The judge shall review the redacted information and shall decide within three (3) days whether the redaction is legally justified.
8. Provisions of the present Article are subject to the measures protecting injured parties and witnesses and their privacy and the protection of confidential information as provided for by law.

[…]

Article 242
Procedure for Filing the Indictment

1. *The indictment shall be filed in the competent court in as many copies as there are defendants and their defense counsel, plus one (1) copy for the court. A complete file on the investigation shall also be submitted to the court by the state prosecutor.*
2. *[…]"*

LAW No. 04/L-109 ON ELECTRONIC COMMUNICATIONS

"Article 68

Personal Data Preservation and Administration for the criminal proceedings purposes

1. Regardless of other definitions in this Law, the entrepreneurs of public electronic communications services and networks shall be obliged to store and administrate, for a period not longer than one (1) year, the data files of their subscribers referred to in paragraph 2 of this Article. Such storage shall be paid for by state funds in accordance with the procedure established by the Government.

2. Entrepreneurs providing electronic communications networks and/or services shall ensure that the following categories of data are retained:

2.1. *data necessary to trace and identify the resource of a communication concerning fixed network telephony and mobile telephony:*

2.1.1. the calling telephone number;

2.1.2. the name and address of the subscriber or registered use;

2.2. concerning Internet access, Internet e-mail and Internet telephony:

2.2.1. the user ID (s) allocated;

2.2.2. the user ID and telephone number allocated to any communication entering the public telephone network;

2.2.3. the name and address of the subscriber or registered user to whom an Internet Protocol (IP) address, user ID or telephone number was allocated at the time of the communication;

2.3. data necessary to identify the destination of a communication concerning fixed network telephony and mobile telephony:

2.3.1. the number(s) dialed (the telephone number(s) called), and, in cases involving supplementary services such as call forwarding or call transfer, the number or numbers to which the call is routed;

2.3.2. the name(s) and address(es) of the subscriber(s) or registered user(s).

2.4. concerning Internet e-mail and Internet telephony:

2.4.1. the user ID or telephone number of the intended recipient(s) of an Internet telephony call;

2.4.2. the name(s) and address(es) of the subscriber(s) or registered user(s) and user ID of the intended recipient of the communication;

2.5. data necessary to identify the date, time and duration of a communication:

2.5.1. concerning fixed network telephony and mobile telephony, the date and time of the start and end of the communication;

2.6. concerning Internet access, Internet e-mail and Internet telephony:

2.6.1. the date and time of the log-in and log-off of the Internet access service, based on a certain time zone, together with the IP address, whether dynamic or static, allocated by the Internet access service provider to a communication, and the user ID of the subscriber or registered user;

2.6.2. the date and time of the log-in and log-off of the Internet e-mail service or Internet telephony service, based on a certain time zone;

2.7. data necessary to identify the type of communication:

2.7.1. concerning fixed network telephony and mobile telephony: the telephone service used;

2.7.2. concerning Internet e-mail and Internet telephony: the Internet service used;

2.8. data necessary to identify users' communication equipment or what purports to be their equipment.

2.9. concerning fixed network telephony, the calling and called telephone numbers;

2.10. concerning mobile telephony;

2.11. the calling and called telephone numbers;

2.12. the International Mobile Subscriber Identity (IMSI) of the calling party;

2.13. the International Mobile Equipment Identity (IMEI) of the calling party;

2.14. the IMSI of the called party;

2.15. the IMEI of the called party;

2.16. in the case of pre-paid anonymous services, the date and time of the initial activation of the service and the location label (Cell ID) from which the service was activated.

2.17. concerning Internet access, Internet e-mail and Internet telephony:

2.18. the calling telephone number for dial-up access;

2.19. the digital subscriber line (DSL) or other end point of the originator of the communication;

2.20. data necessary to identify the location of mobile communication equipment:

2.20.1 the location label (Cell ID) at the start of the communication;

2.21. data identifying the geographic location of cells by reference to their location labels (Cell ID) during the period for which communications data are retained.

3. Data, listed in paragraph 2 of this Article shall be made available, in the electronic format as well, to the authorities prescribed in the legislation of Criminal Procedure in force, upon their request."

Admissibility of the Referral

54. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and further specified 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 also examines whether the Applicant has fulfilled the admissibility criteria, as required 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..."

57. As to the fulfillment of the above criteria, the Court finds that the Applicant is an authorized party; she has exhausted the available legal remedies; has specified the act of the public authority whose constitutionality she is challenging, namely the Judgment PML.no.137/2020 of the Supreme Court of Kosovo, of 15 June 2020; has specified the constitutional rights which she claims to have been violated; as well as submitted the Referral within the legal deadline. The Court also finds that the Applicant's Referral meets the admissibility criteria established in paragraph (1) of Rule 39 of the Rules of Procedure and that the Referral cannot be declared inadmissible on the basis of the conditions provided in paragraph (3) of Rule 39 of the Rules of Procedure. The Court also notes that the Referral is not manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure, therefore it must be declared admissible and its merits must be examined.

Merits of the Referral

58. The Court recalls that the Special Prosecution Office had initiated an investigation against the Applicant and several other persons as there was a

reasonable suspicion that the Applicant was involved in the commission of the criminal offences under Article 428 [Accepting bribes] and paragraph 1 of article 431 [Trading in influence] of the Criminal Code of the Republic of Kosovo No. 04 / L-082, since in the time period between 2011 and 2013 as an official person she had received directly for herself and for other unknown perpetrators the amount of 13.000.00 euros from witness "C' in exchange for the release of the latter from prison or mitigation of his sentence for which he was convicted. She was also suspected for having taken from two persons, another 500.00 euros. On 10 March 2014, there was authorized interception of telecommunications and metering of telephone calls, including retroactive reading of text messages (SMS) of the Applicant and other suspected persons. On 31 May 2016, the Basic Court in Prizren had issued the Order [PPS.8/2015] whereby witness "C" was assigned protective measures as a protected witness. On 26 August 2016, the Special Prosecution Office had filed an indictment [PPSnr.8/2015] against the Applicant due to the criminal offence under paragraph 2 of Article 428 [Accepting bribes] and paragraph 2 of Article 431 [Trading in influence] of the CCRK, as well as againt the person B.V. due to the criminal offense under paragraph 3 of Article 429 [Giving bribes], and paragraph 2 of Article 431 [Trading in influence] of the CCRK. Along with the indictment, 8 (eight) CDs with evidence relating to the case were submitted to the Applicant. In regard to the issue of interception in retroactive manner, the Applicant had also filed a request for dismissal of the indictment which was rejected by the Basic Court, a decision which was also confirmed by the Court of Appeals.

59. On 18 November 2019, the Basic Court pronounced the Applicant guilty of the criminal offence under Article 431 [Trading in Influence] of the CCRK and sentenced her to imprisonment in length of 1 (one) year, and acquitted her of the criminal offence under paragraph 2 of Article 428 [Accepting bribes] of the CCRK. The Court of Appeals had rejected the appeals of the parties to the procedure. Whereas, the Supreme Court by Judgment [PML.no.29/2021] rejected the request of Applicant and of B.V. for protection of legality, as unfounded. The Supreme Court found that the fact that the Judgment of the Basic Court was based on inadmissible evidence given that it was based upon the transcripts of the meeting held between the Applicant and witness "C", the testimony of witnesses whose testimony have proved that the Applicant has committed the criminal offence for which she was convicted. As for the impossibility of cross-examining witness "C", the Supreme Court stated that this allegation is unfounded because on the day when witness "C" was heard on 9 June 2016, also the Applicant's defense counsels were present, and on that occassion they were informed that witness "C" had the status of a protected witness, but the Applicant's defense counsels left the hearing session on the grounds that the status of the witness was unknown, therefore, the statement of witness "C" was only read in the hearing and the same evidence was not decisive in proving that the Applicant has committed the criminal offence for which she was convicted. As regards the claim that the SMSs were extracted in retroactive manner, the Supreme Court found that this fact stands but according to the assessment of the Supreme Court this did not affect the decision because the court has established the situation in a complete and fair manner by all other administered evidence. As regards the allegation that the Applicant has not been provided with the case file during the investigation stage, the Supreme Court

stated that in conformity with Article 213, paragraph 5 of the CPCK, the time when the defense must received the case file is the time when the indictment is filed and such a thing has happened in the present case.

60. The Applicant alleges before the Court that in the proceedings relating to the criminal charge against her:

(i) the challenged judgments are based upon evidence which is legally inadmissible, namely on SMS meassages, which were extracted in retroactive manner. The Applicant relates this allegation to the right to privacy guaranteed by Article 36 of the Constitution, Article 8 of the ECHR and Article 12 of the UDHR, as well as to the right to a fair trial guaranteed by Article 31 of the Constitution, Article 6 of the ECHR. and Article 10 of the UDHR;

(ii) was not allowed access to the case file documents by the Special Prosecution and the pre-trial judge, during the investigative stage phase, all this in contravention of the principle of equality of arms and the principle of adversarial proceedings guaranteed by Article 31 of the Constitution, Article 6 of the ECHR and Article 10 of the UDHR;

(iii) the Applicant was not enabled to cross-examine witness "C" or to defend herself even though this is guaranteed by Article 31 of the Constitution, Article 6 of the ECHR and Article 10 of the UDHR.

61. In the following, the Court will first examine the allegations relating to the violation of the right to privacy guaranteed by Article 36 of the Constitution, Article 8 of the ECHR, and then will proceed to examination of the allegations relating to the right to a fair trial guaranteed by Article 31 of the Constitution, Article 6 of the ECHR and Article 10 of the UDHR.

I. IN RELATION TO THE RIGHT TO PRIVACY GUARANTEED BY ARTICLE 36 OF THE CONSTITUTION AND ARTICLE 8 OF THE ECHR

62. The Court recalls that the Applicant before the Court raises the issue of extraction of SMS messages in retroactive manner claiming that, consequently, the challenged judgments are based upon evidence which is legally inadmissible, thus violating her constitutional rights.

63. In this respect, in addition to the alleged violations of the right to a fair trial, allegations which will be assessed by the Court separately in this Judgment, the Applicant also raises the issue of SMS messages obtained in retroactive manner and in relation to the right to privacy guaranteed by the Constitution, the ECHR and the UDHR.

64. In this regard, she states that according to Article 91 [Persons Competent to Apply for and Order Covert and Technical Measures of Surveillance and Investigation] and 92 [Orders for Covert and Technical Measures of Surveillance and Investigation] of the CPCK, telecommunications interceptions may be done

only from the date of issuance of the order for a certain period of time, and which order can be renewed but can not be issued retroactively. Therefore, the Applicant maintains that the Order [PP 51/2014] of 10 March 2014, is contrary to the right to privacy under Article 36, paragraph 3 of the Constitution and Article 8 of the ECHR, as through this order the SMS messages have been extracted in retroactive manner.

65. In this respect she argues that every person has the right to respect for his/her private and family life, his home and correspondence and that interference in the exercise of this right can be done only to the extent envisaged by law. Therefore, she bases her arguments on the relevant provisions of the CPCK namely Article 91 [Persons Competent to Apply for and Order Covert and Technical Measures of Surveillance and Investigation] and Article 92 [Orders for Covert and Technical Measures of Surveillance and Investigation] of the CPCK, but also refers to Article 68 [Personal Data Preservation and Administration for the criminal proceedings purposes] of the Law on Electronic Communications, claiming that the content of SMS messages can be stored only for future, specifically from the day when the relevant court order is issued.

66. In the following, the Court will elaborate on: (i) the general principles concerning the right to respect for private and family life; and (ii) their application to the circumstances of the present case. The Court will do this by basing upon its case law but also that of the ECtHR, decisions of which are binding under Article 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo where is specifically stated 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."*

General principles regarding the right to respect for private and family life with special emphasis on the interception of telephone conversations

67. The Court initially recalls Article 36 [Right to Privacy] of the Constitution, which stipulates:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 3. *Secrecy of correspondence, telephony and other communication is an inviolable right. This right may only be limited temporarily by court decision if it is necessary for criminal proceedings or defense of the country as defined by law.*
>
> *[…]"*

68. The Court also recalls Article 8 of the ECHR (Right to respect for private and family life), which provides that:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

69. In this regard, the Court refers to Article 55 [Restriction of Fundamental Rights and Freedoms] of the Constitution, which stipulates:

> 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."*

70. The Court therefore recalls that the human rights enshrined in the Constitution may be restricted in certain cases, if the restriction has been provided for by law, if the restriction pursues a legitimate aim and if the restriction is necessary in a democratic society.

71. As regards the right to privacy, the Court notes that the primary purpose of Article 8 of the ECHR, according to the case law of the ECtHR, is to protect individuals from arbitrary *"interferences"* with their: (i) private ; (ii) family life; (iii) home; or (iv) correspondence (see the case of Court KI56/18, Applicant: *Ahmet Frangu*, Judgment of 22 July 2020, paragraph 83; see, in this context, inter alia, the ECtHR cases *P. and S. v. Poland*, Judgment of 30 October 2012, paragraph 94; and *Nunez v. Norway*, Judgment of 28 June 2011, paragraph 68). Certain issues, can undoubtedly affect more than one of the interests protected by the abovementioned articles. These rights, based on the ECHR system and the relevant case law of the ECHR, are secured through: (i) negative obligations, namely the obligation of the state not to *"interfere"* with private and family life; and (ii) positive obligations, namely the obligation of the state to ensure that

these rights are effectively enjoyed (see the case of Court KI56/18, Applicant: *Ahmet Frangu*, Judgment of 22 July 2020, paragraph 83).

72. In this respect, the ECtHR has emphasized that telephone conversations are covered by the notion of "private life" and "correspondence" within the meaning of Article 8 of the ECHR. Their monitoring constitutes an interference with the exercise of the right of everyone, protected by Article 8 of the ECHR (see the ECtHR cases of *Malone v. The United Kingdom*, Judgment of 2 August 1984, paragraph 64; and the case of *Dragojević v. Croatia*, Judgment of 15 April 2015, paragraph 78).

73. Such an interference is justified by the expression used in paragraph 2 of Article 8 of the ECHR only if it is *"in accordance with the law"*, if it pursues a *"legitimate aim"* provided for in paragraph 2 of Article 8 of the ECHR and if it is *"necessary in a democratic society"* (see, the ECtHR cases *Kvasnica v. Slovakia*, Judgment of 9 June 2009, and the case of *Dragojević v. Croatia*, cited above, paragraph 79).

74. The expression "in accordance with the law", according to paragraph 2 of Article 8 of the ECHR, generally requires that, first, the measure taken must be based upon domestic law; and also refers to the quality of the law in question which must be in compliance with the rule of law and accessible to the person to whom it applies, who must, moreover, be able to foresee the consequences for him/her, in accordance with rule of law (see, the ECtHR case, *Kruslin v. France*, Judgment of 24 April 1990, paragraph 27; and *Dragojević v. Croatia*, cited above, para. 81).

75. In particular, in the context of covert measures of surveillance such as interception of communications, the requirement for legal *"foreseeability"* may not imply that the individual should be able to anticipate when state authorities may intercept communications so that he/she be able to adapt his/ her behavior in that respect. However, when an executive order is issued and exercised in secret, the risk of arbitrariness is evident. Therefore, the national law must be sufficiently clear in its terms to give the individual adequate indication as to the circumstances in which and the conditions on which public authorities are able to take such measures (see, the cases of the ECtHR *Huvig v. France*, Judgment of 24 April 1990, paragraph 29, *Valanzuela Contreras v. Spain*, Judgment of 30 July 1998, paragraph 29, and the case of *Dragojević v. Croatia*, cited above, paragraph 81.)

76. The ECHR has also clarified the need for safeguard measures in this respect. In particular, as the practical application of covert communications surveillance is not open to scrutiny by affected individuals or the general public, it would be contrary to the rule of law for legal discretion given to the executive or judge to express in unlimited competence. Consequently, the law must determine the scope of such discretion conferred on the competent authorities and the manner of it is exercise; with sufficient clarity to give the individual adequate protection against arbitrary interference (see, ECtHR cases of *Bykov v. Russia*, *Judgment of 10 April 2009*, paragraph 78, and the case of *Dragojević v. Croatia*, cited above, paragraph 83).

77. Moreover, in view of the risk that a system of covert surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it, the ECtHR must be satisified that there exist guarantees against abuse which are adequate and effective. This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the basis grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the possibilities of redress provided by the natopnal law law (see the cases of the ECtHR *Klass and Others v. Germany*, Judgment of 6 June 1978, and the case of *Dragojević v. Croatia*, cited above, para. 83).

78. This is particularly important in the question of whether the interference is necessary "in a democratic society" to achieve a legitimate aim, as the ECtHR has determined that the authority to permit covert surveillance of citizens is tolerated under Article 8 of the ECHR, only to the extent which is necessarily necessary to protect democratic institutions. In assessing the existence and breadth of this need, member states have a margin of appreciation but this margin of appreciation is subject to European supervision. The ECtHR must decide whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep "interference" to what is "necessary in a democratic society". Moreover, the values of a democratic society must be respected in good faith so that the limits of "necessity" within paragraph 2 of Article 8 of the ECHR are not exceeded (see the cases of the ECtHR *Kvasnica v. Slovakia*, cited above, para. 80; and *Dragojević v. Croatia*, paragraph 84.

79. On the basis of the general principles elaborated above, in the following the Court will assess: (i) whether the interception of the Applicant's telephones and SMS messages is considered an interference with her right to *"private life"* and *"correspondence"* guaranteed by Article 36 of the Constitution, Article 8 of the ECHR and Article 12 of the UDHR. If the answer to this question is positive, the Court will assess: (ii) whether such interference is *"prescribed by law"*; (iii) whether the intervention has a "legitimate aim" and is (iv) "*necessary in a democratic society"*.

Application of these principles in the present case

(i) I fthere has been an interference

80. As explained above in the general principles, and based on those principles, it is not disputable that the interception of the Applicant's telephone calls and SMS messages is considered an interference with her right to "private life" and "correspondence" guaranteed by Article 36 of the Constitution, Article 8 of the ECHR and Article 12 of the UDHR. Therefore, in the following the Court will address the issue whether the interference was prescribed by law.

(ii) If the restriction was prescribed by law

81. The Court first notes that the Applicant in the present case does not dispute the issue of interception against her in general and the legal grounds for interception

of telephone calls and SMS messages. She specifically disputes the authorization and the extracion and reading of SMS in retroactive manner by basing upon the Order [PP.51/2014] of the Basic Court in Prizren, of 10 March 2014, which according to her has resulted in the extraction of all her SMS messaged from 22 February 2012 to 10 March 2013, even though the Order was issued by the Basic Court in Prizren, on 10 March 2014.

82. In this respect, the Court must first assess the legislation relating to the issue of interception, but given that we are dealing with an individual case that has been handled by the regular courts, the Court will focus not only on the law as such but also on the manner how the law has been implemented in the present case.

83. In this context, the Court notes that the Interception Order [PP.51/2014], of 10 March 2014, was issued based on the relevant provisions of the CPCK, against the Applicant and several other persons *"on covert measures of interception of telecommunications and metering of telephone calls including retroactive reading of text(SMS) messages"* and authorized the following actions:

> *"1. Interception of telecommunications: specifically to intercept, monitor, record and transcribe all telephone calls, voicemails and text messages made to or from the telephone numbers listed below without the knowledge or consent of the person subject to this measure and for extracting call records for telephone numbers AND*
>
> *Metering: for retroactive inclusion of all incoming and outgoing calls and text (SMS) messages made, sent and received by the suspects and other persons, except for suspects from 1 September 2013 up to date for the below mentioned telephone numbers."*

84. In this respect, the Court refers to the legal basis to which the above-mentioned Order has referred, namely Article 91 [Persons Competent to Apply for and Order Covert and Technical Measures of Surveillance and Investigation] of the CPCK which under paragraph 2, sub-paragraphs 2.4 and 2.8 stipulates that the pre-trial judge may order: the metering of telephone calls as well as the interception of telecommunications, including text messages or other electronic messages. Whereas Article 92 [Orders for Covert and Technical Measures of Surveillance and Investigation] of the CPCK stipulates that: *"1. An order for a measure under the present Chapter which shall not exceed sixty (60) days from the date of issuance of this order which shall be made in writing and shall specify: [...]"*.

85. The Court also recalls that Article 68 [Personal Data Preservation and Administration for the criminal proceedings purposes] of the Law on Electronic Communications in paragraph 1 stipulates that: "*Regardless of other definitions in this Law, the entrepreneurs of public electronic communications services and networks shall be obliged to store and administrate, for a period not longer"*. Whilst in paragraph 2 this article of the Law stipulates that "*Entrepreneurs providing electronic communications networks and/or services shall ensure that the following categories of data are retained"*, including: data necessary to trace and identify the resource of communication

resource concerning fixed network telephony and mobile telephony, the data necessary to identify the destination of the communication cocnerning the fixed and mobile telephony network, the data concerning the e-mail address of the Internet and the telephony through the Internet ; data necessary to identify the date, time and duration of the communication; data concerning Internet access, Internet e-mail address, and internet telephony; data necessary to identify the type of communication; the data necessary to identify the user's communication equipment or what purports to be their equipment; concerning fixed telephony, calling and called telephone numbers. Paragraph 3 of this article stipulates that: "*Data, listed in paragraph 2 of this Article shall be made available, in the electronic format as well, to the authorities prescribed in the legislation of Criminal Procedure in force, upon their request".*

86. On the basis of the foregoing, the Court notes that the provisions of the CPCK governing the issue of interception stipulate that telephone interceptions, including telephone messages, may be done only by order of the pre-trial judge and may be ordered for 60 days from the the day of the issuance of the order. In this respect, according to the aforementioned provisions of the CPCK, it results that retroactive interception, including the content of SMS messages in retroactive manner, is not allowed. This is due to the fact that the CPCK expressly states that the order for interception must not exceed a period of sixty (60) days from the "date of issuance", thus not creating the possibility for such a thing to be done in retroactive manner. Also, according to the Law on Electronic Communications, the preservation of telephone conversations or the content of SMS is not even a legal obligation of the companies that provide such services. This is because the Law on Electronic Communications obliges these companies to store specific data for criminal purposes for a period of one year, but which are mainly related to the numbers called by citizens, the equipment from which they were called but not also to the content of calls and telephone messages.

87. In this respect, the Court recalls that the Applicant's allegations that the SMS messaged were unlawfully extrcated in retroactive manner have been subject to review by the regular courts in two court proceedings.

88. Initially, these allegations were raised by the Applicant before the Basic Court through the request for dismissal of the indictment, where the latter through Decision [PKR.no.484/2016] of 23 December 2016, had rejected the requests for dismissal of the indictment. In regard to obtaining SMS messages in retroactive manner, the Basic Court reasoned that the provisions of the CPCK governing the issue of interception, namely Article 92 of the CPCK which stipulates the 60-day period from the "date of issuance" of the order, do not explicitly prohibit obtaining of SMS messages in retroactive manner. The Basic Court itself had in fact found that Article 92 of the KCCP *"does not define any retroactive notion as alleged by the defence, namely it does not mention the retroactive notion at all and does not prohibit the obtaining of communications data for communication periods which occurred before the date of the issuance of the order".*

89. The Basic Court also reasons that such a conclusion is also based on Article 68 [Personal Data Preservation and Administration for the criminal proceedings

purposes] of the Law No.04/L-109 on Electronic Communications which determines the time to preserve these communications or files from telephony operators or telecommunication networks. Moreover, the Basic Court in this case, despite the fact that such a restriction on obtaining SMS messages retroactively was not specifically defined by the CPCK, suffices with the fact that "these data have been obtained upon the request of the SPRK by the Pre-Trial Judge, and specifically by an order drafted in accordance with the law and within the legal deadline." Whereas the Court of Appeals by Decision [PN.no.22/17] of 16 January 2017 had rejected the Applicant's appeal filed against the above Decision of the Basic Court, of 23 December 2016, by upholding the reasoning of the Basic Court in respect of the retroactive SMS- messages and approving the reasoning of the Basic Court.

90. The Applicant had also raised the same allegation during the main trial by challenging the retroactive obtaining of SMS messaged which was, according to her, contrary to the law and her right to private life and correspondence. In this respect, the Court of Appeals by Judgment [PAKR.no.623/2019], of 30 September 2020, rejected the Applicant's appeal in relation to this allegation, by reasoning that *"the allegations of the defendants's defence that the Judgment is based on inadmissible evidence and that the order of the Court [for interception] contains the period 22.02.2012 to 10.03.2013, are not founded."*

91. While to this allegation of the Applicant, the Supreme Court, by acting upon the request for protection of legality, had responded by stating *"As regards the allegations of the defence that SMS messaged were issued extracted in retroactive manner from 22.02.2012 until 10.03 .2013, this fact stands , but according to the assessment of this court, the SMS messaged extracted at this time, which are alleged by the defence, did not have any impact on the legality of the decision because the court has confirmed the factual situation in a complete and fair manner by all other evidence administered, that are also emphasized above in the part referring to the reasoning of this judgment [...] and is not based upon retroactive SMS messages"*.

92. In this respect, regardless of the interpretations of the regular courts, the Court notes that according to the relevant provisions of the CPCK it results that ordering to have the telephone interceptions obtained retroactively, including obtaining of SMS messages in retroactive manner, is not allowed. This is due to the fact that, given that the CPCK expressly stipulates that such an order should not exceed the period of sixty (60) days from the "date of issuance". Also, in conformity with the Law on Electronic Communications, network operators are not obliged to retain these data.

93. Moreover, the Court notes a contradictory interpretation in this regard by the regular courts. In this regard, on the one hand, the Basic Court and the Court of Appeals had assessed that given that the CPCK does not explicitly prohibit retroactive reading of SMS messages, then the obtaining of SMS messages in retroactive manner can also be ordered. On the other hand, the Supreme Court, having reviewed the request for protection of legality filed against the decisions of the Basic Court and that of the Court of Appeals, had assessed that: (i) the SMS messages were extracted in retroactive manner through the Order

[PP:51/2014] of 10 March 2014; but nevertheless it had assessed that these SMS messages (ii) had no bearing on the legality of the sentencing decision as the factual situation was corroborated by other evidence that was admissible.

94. In this context, the Court recalls once again that according to the general principles set out above, the law that governs the issue of interception must be foreseeable in order to meet the criteria of Article 8 of the ECHR. The ECtHR has determined that in the context of covert surveillance measures such as interception of communications, the requirement for legal "foreseeability" may not imply that the individual should be able to anticipate when authorities may intercept communications so that he/she can to adapt his/her behavior in this respect. The ECtHR states that when an executive order is issued and exercised in secret, the risk of arbitrariness is evident. Therefore, the national law must be sufficiently clear in its terms to give the individual adequate indication as to the circumstances in which and the conditions on which public authorities are able to take such measures.

95. Therefore, having in mind the general principles set out by the ECtHR, the relevant provisions of the CPCK and the Law on Electronic Communications, it results that retroactive interception, including the extraction and reading of text messages (SMS) in retroactive manner, is prohibited. Consequently, the Court finds that the retroactive extraction of the content of SMS messages, in the concrete case is not a measure "prescribed by law", as required by the principles of the right to privacy guaranteed by Article 36 of the Constitution, and Article 8 of the ECHR. Moreover, this being so, due to the fact that Article 92 of the CPCK expressly stipulates that an interception order must not exceed a period of sixty (60) days from the "date of issuance",

96. In this respect, the Court reiterates that what is relevant for the circumstances of the present case is the "first question" of the test of Article 55 of the Constitution, respectively *"whether there has been a restriction of a fundamental freedom or right guaranteed by the Constitution" prescribed by law? "*. Since the Court has just found that the restriction of the right to privacy guaranteed by Article 36 of the Constitution, and Article 8 of the ECHR, has not been provided by law, then it is not necessary to answer the questions whether this restriction had a legitimate purpose, and whether it was necessary in a democratic society (see, *mutatis mutandis*, the case of Court KO157/18, Applicant *Supreme Court*, Judgment of 13 March 2019, paragraph 114).

97. Based on what is stated above, the Court considers that the retroactive reading of SMS messages through the Order [PP:51/2014] of the Basic Court in Prizren, of 10 March 2014, has violated the Applicant's right guaranteed by Article 36 [Right to Privacy] of the Constitution, and Article 8 (Right to respect for private and family life) of the ECHR.

98. The Court recalls that the above conclusion on a violation of the right to privacy does not necessarily imply that in the Applicant's case there has been also a violation of the right to a fair trial as a result of retroactive reading of SMS messages. Such a conclusion can be reached only after a detailed assessment of the Applicant's allegations in relation to the procedural guarantees provided

within the framework of the right to a fair trial in which case, as it will be clarified below, it is essential to assess whether, in relation to the issue of evidence, including the SMS messaged extracted in retroactive manner, (i) the Applicant has been able to challenge them during the criminal proceedings, and if so, (ii) whether they had an crucial bearing on the determination of the criminal charge against the Applicant.

99. In this line of argument, the Court recalls that the ECtHR in several cases before it has found that the use of covert means of surveillance has violated the right to privacy guaranteed by Article 8 of the ECHR, as it not has been *"prescribed by law"*. However, the ECtHR, by assessing the alleged violations in relation to the right to a fair trial, has found that the evidence obtained through this measure in the circumstances of specific cases did not violate the criteria of a fair trial guaranteed by paragraph 1 of Article 6 of the ECHR (see, the cases of ECtHR *Khan v. The United Kingdom*, Judgment of 12 May 2000, paragraphs 29 to 40; *Bykov v. Russia*, Judgment of 10 March 2009, paragraphs 84-105; *Dragojević v. Croatia*, cited above, paragraph 130, and *Dragos Ioan Rusu v. Romania*, paragraphs 84-105).

100. Therefore, in the following, the Court will address the Applicant's allegations in relation to the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

II. IN RELATION TO THE RIGHT TO A FAIR TRIAL GUARANTEED BY ARTICLE 31 OF THE CONSTITUTION AND ARTICLE 6 OF THE ECHR

i) Regarding the access to the case file documents by the Special Prosecution and the pre-trial judge, during the investigative stage

101. With regard to the right to a fair trial, the Applicant initially alleges that by denying her access to the case file documents by the Special Prosecution and the pre-trial judge, during the investigative stage, the principle of equality of arms and the principle of adversarial proceedings as an integral part of a fair trial were violated.

General principles based on the case law of the Court, as well as the case law of the ECtHR in relation to the principle of equality of arms and the principle of adversarial proceedings

102. The Court, referring to both its case-law and the case-law of the ECtHR, iitially states that the principle of *"equality of arms"* is an element of a broader concept of a fair trial (see, the case of Court KI230/19, Applicant: *Albert Rakipi*, Judgment of 9 December 2020, paragraph 97).

103. The ECtHR and the Court, in their case law, have emphasized that the principle of *"equality of arms'* requires a *"fair balance between the parties",* where each party must be afforded a reasonable opportunity to present his/her case under

conditions that do not place him/her at a substantial disadvantage vis-à-vis her opponent (see, the Case KI230/19, cited above, paragraph 98; see also the ECtHR cases *Yvon v. France*, Judgment of 24 July 2003, paragraph 31 and *Dombo Beheer BV v. the Netherlands*, Judgment of 27 October 1993, paragraph 33, see the cases of the Court, KI52/12, Applicant *Adije Iliri*, Judgment of 5 July 2013, KI103/10, Applicant *Shaban Mustafa*, Judgment of 20 March 2012, paragraph 40*)*.

104. The Court further recalls that the case law of the ECHR has determined that the requirement of equality of arms, in terms of a fair balance between the parties, applies in principle to both civil and criminal cases (see, the case of Court KI230/19, cited above, paragraph 99; see also the case of the ECtHR *Dombo Beher BV v. The Netherlands*, Judgment of 27 October 1993, paragraph 33).

105. Furthermore, the Court also notes that a fair trial includes the right to a trial in accordance with the *"principle of adversarial proceedings"*, a principle which is related to the principle of *"equality of arms"*. (see, the case of Court KI230 /19, cited above, paragraph 99).

106. Moreover, in the context of criminal proceedings, the ECtHR has underlined that *"it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings relating to the proceedings themselves, must be in accordance with the principle of adversarial proceedings and that there must be equality of arms between the prosecution and the defence"*(see, the case of ECtHR *Leas v. Estonia*, Application no.59577/08, Judgment of 6 March 2012, paragraph 77). Consequently, in regard to the adversarial principle, the ECtHR has emphasized that, in a criminal proceeding, both the prosecution and the defence must be given the opportunity to have knowledge of and comment on all the observations filed and the evidence adduced by the other party (see, the case *Brandstetter v. Austria*, cited above, paragraph 67).

107. More specifically, Article 6, paragraph 3 (b) of the ECHR guarantees to the accused "an adequate time and facilities for the preparation of his defence" which means that the activity of substantive defense on his/her behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organize his defence adequately and without restrictions so as to to present relevant arguments for defence at the main trial and thus influence the outcome of the proceedings (see, the ECtHR cases *Leas v. Estonia*, Judgment of 6 June 2012, paragraph 79 and *Moiseyev v. Russia*, Judgment of 6 April 2009, paragraph 22).

108. Therefore, the Court, in addressing the Applicant's allegations, will adhere to the following principles.

Application of these principles in the Applicant's case

109. The Court recalls that the Applicant relates her allegation for infrignement of the principle of equality of arms and the principle of adversarial proceedings to the fact that she was not granted access to the case file by the Special Prosecution

and the pre-trial judge, during investigative stage. However, the evidence in the case against the Applicant was submitted together with the indictment submitted to the Court and which was also received by the Applicant.

110. In regard to this allegation, the Court recalls that the Judgment of the Supreme Court had reasoned that: *"According to this court's assessment, pursuant to Article 213, para.3 of the CPCK at no stage of the proceedings may the defence be denied inspection of the case file while according to Article 213 para. 5 of the CPCK, the time when the defense must necessarily be physically supplied with the case files documents is the time upon the indictment being filed, and such thing has been done."*

111. The Court notes that the Applicant at the time of filing the indictment had received from the Prosecution all the evidence relating to her criminal charge.

112. Consequently, the Court notes that the Applicant, after receiving the indictment and other investigative materials, has had sufficient opportunity and time to present before the regular courts all her allegations concerning the evidence submitted by the Prosecution, as required by Article 31 of the Constitution and Article 6 of the ECHR.

113. In the light of the above considerations and reasoning, as well as having taken into account the general principles of "equality of arms" and the "principle of adversarial proceedings" elaborated above, the Court concludes that the Applicant's allegations for violation of the principle of "equality of arms" and the "principle of adversarial proceedings" as a result of the impossibility of access to Prosecution's evidence during the investigation stage, are unfounded.

ii) In relation to thr right to examine witness "C"

114. The Applicant states that she was not allowed to cross-examine witness "C" and consequently was not able to kake questions to witness "C" at any stage of the proceedings, since the statement of witness "C" was only read at the main trial, while the Judgment of the Basic Court was issued based on this evidence.

115. The Court recalls that the general criteria regarding the right of the accused to cross-examine witnesses against him/her have been elaborated in detail through the case law of Court KI14/18, Applicant: *Hysen Kamberi*, Judgment of 15 January 2020, paragraphs 47 to 76, which Judgment is based upon two ECtHR cases, namely *Al-Khawaja and Tahery v. the United Kingdom*, Judgment of 15 December 2011; *and Schatschaschwili v. Germany*, Judgment of 15 December 2015.

116. In this respect, the Court notes that based on the case law of the ECtHR, given that the admissibility of evidence is in principle a matter of regulation by law and of the national courts, on the basis of paragraph 1, item (d) of paragraph 3 of Article 6 of the ECHR, it only examines whether the proceedings, in their entirety, have been conducted correctly (see the case of Court KI14/18, cited above, paragraph 46; see also the cases of ECtHR, *Al-Khawaja and Tahery v. The United Kingdom*, cited above, para.118; *Schatschaschwili v. Germany*, cited

above, para.101; These provisions, however, incorporate the presumption against the use of extrajudicial evidence against the accused in a criminal proceeding. The same applies when such evidence may be in favour of the defence (see the case of Court KI14/18, cited above, paragraph 46).

117. Moreover, based on item d of paragraph 3 of Article 6 of the ECHR and the relevant case law of the ECtHR, before an accused can be convicted, all evidence against him must be produced in his presence at a public hearing sesion in order to give him the opportunity to challenge the arguments (See the ECtHR case *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Schatschaschwili v. Germany*, cited above, paragraph 101; and *Seton v. the 14 United Kingdom*, cited above, paragraph 57). Exceptions to this principle are possible but in no circumstances may they infringe upon the rights of the defence, which, as a rule, require that the accused should be afforded an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings. (See ECtHR cases *AlKhawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Hummer v. Germany*, Judgment of 19 July 2012, paragraph 38; *Luca v. Italy*, Judgment of 27 February 2001, paragraph 39; *Solakov v. the former Yugoslav Republic of Macedonia*, Judgment of 31 October 2001, paragraph 57; and *Schatschaschwili v. Germany*, cited above, paragraph 105).).

118. However, the ECtHR, also stated that the use of the statements obtained during the police and court investigation stage at a hearing is not in itself in contradiction with paragraph 1 and item d of paragraph 3 of Article 6 of the ECHR, provided that the rights of the defence are respected. As a general rule, the accused and his or her defence should have adequate opportunity to challenge and question the relevant witness, either when the latter made a statement or at a later stage of the court proceedings. (See, the case of Court KI14/18, cited above, paragraph 47; see also the ECtHR cases *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Trampevski v. the former Yugoslav Republic of Macedonia*, Judgment of 10 July 2012, paragraph 44; and *Schatschaschwili v. Germany*, cited above, paragraph 105).

119. The ECtHR has also reiterated that considering the importance of the right to a fair administration of justice in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice, then that measure is to be applied. (see, the ECtHR case, *Van Mechelen and Others v. the Netherlands,* Judgment of 23 April 1997, paragraph 58). The possibility for the accused to confront witnesses in the presence of a judge is an inherent element of a fair trial. (See, the case of Court KI14/18, cited above, paragraph 48; see, *inter alia,* the ECtHR case, *Tarău v. Romania,* Judgment of 24 February 2009, paragraph 74).

120. The ECtHR has therefore stated that if such an exception occurs then: (i) the relevant court must first examine the preliminary question, namely whether there were compelling reasons for admitting the testimony of an absent witness, given that, as as a general rule, witnesses must give evidence during the main trial and that every reasonable effort must be made to ensure their participation;

(ii) where the witness has not been questioned at any earlier stage of the proceedings, the admission of a witness statement instead of direct evidence at trial should be the last resort; (iii) admitting as evidence the statements of witnesses in absentia results in a potential disadvantage for the accused, who, in principle, must have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the veracity and reliability of the evidence given by witnesses, by ensuring that they are questioned in his presence, either at the time the witness gives his statement or at a later stage during the proceedings; (iv) under the *"sole or decisive rule"* if the accused's conviction is based solely or mainly on evidence provided by witnesses whom the accused has not been able to cross-examine at any stage of the proceedings, his rights of defense are unjustly restricted; (v) however, given that item (d) of paragraph 3 of Article 6 of the ECHR must be interpreted in the light of the general regularity of the proceedings - the *"sole or decisive rule"* must not be applied in an unflexible manner; and (vi) in particular, where an extrajudicial statement is the "sole or decisive" evidence against an accused, its admission as evidence does not necessarily result in a violation of paragraph 1 of Article 6 of the ECHR. In such a case, however, court proceedings must be subject to rigorous procedural scrutiny. Due to the risks of admitting such evidence, the relevant court must base its decision on counterbalancing factors, including measures that allow a fair and proper assessment of the reliability of the relevant evidence. This would allow a sentence to be based on such evidence only if it is sufficiently credible (see, the case of Case KI14/18, cited above, paragraph 51).

121. Whereas, with regard to the test developed in the case of *Al-Khawaja and Tahery,* to assess the compatibility with the guarantees embodied in item (d) of paragraph 3 of Article 6 of the ECHR, based on the case law ofthe ECtHR, it is necessary to consider three basic issues, in each case where the statements of absent witnesses in the trial were admitted as evidence in court. The court must consider whether (i) there were reasonable grounds for the nonattendance of the witness at the court hearing and, consequently, the admission of the extrajudicial testimonies of the absent witness as evidence in court; (ii) the testimony of the absent witness is the *"sale or decisive"* basis for the conviction of the accused; and (iii) there are sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the disadvantage of the defence as a result of the admission of extrajudicial evidence and to ensure that the trial, in its entirety, has been fair. (see, the case of Court KI14/18, cited above, paragraph 52; and see also the cases of the ECtHR *Schatschaschwili v. Germany,* cited above, paragraph 107; and *Seton v. the United Kingdom,* cited above, paragraph 58). In the following, the Court will elaborate in more detail on the three identified issues.

Application of these principles in the present case

122. Having in mind the abovementioned principles concerning the right of the accused to examine witnesses against him/her, the Court will further assess the application of the above principles in the present case, in order to determine whether the impossibility of questioning witness "C" in the main trial, has resulted in a violation of the right to a fair trial.

123. The Court notes that the Applicant raised the issue of the impossibility to examine witness "C" in the main trial session before the Basic Court, the Court of Appeals as well as the Supreme Court.

124. In this respect, the Supreme Court had stated that:

> *"[...]this allegation of defence is unfounded, due to the fact that as it results from the minutes of 09.062016, during the examination of witness "C" by the Prosecutor of the Special Prosecution of Kosovo, there has been present also the defence counsel of [the Applicant], while [the Applicant] was absent even though she was duly notified about the hearing, on which occasion all parties present were warned that Witness "C" would have the capacity of protected witness, so the prosecutor continued to question him, but the defence counsels have themselves left the hearing on the grounds that the status of the witness heard is not known [...]*
>
> *Pursuant to Article 338 of the CPCK, the issue of reading other previously given statements is regulated, para. 1 point 1.1, when the examined persons are dead, have mental disorders or disabilities, can not be found or their attendance at court is impossible or significantly difficult due to old age, illness or other important reasons. Also in this criminal case, ensuring the presence of witness C in the main trial session by the court has been impossible, therefore the court has read the statement of this witness given previously in the pre-trial procedure and has provided the reasoning, and according to the assessment of this court the reading of the statement of witness "C" did not affect the legality of the court decision, therefore the claim of the defence is unfounded [...]*
> *"the first instance judgment whereby [the Applicant] was found guilty was based on material evidence - transcripts of the meeting held between [the Applicant] and witness "C" [...] In addition to this evidence, based on the case file it results that [the Basic Court] basis its judgment also on the hearing of witnesses [...] the statement of witness "C" [...] and other material evidence [...]."*
>
> *[...]*
> *The allegation of the defense that the "capacity" of witness "C" is not known, according to the assessment of this court is unfounded, for the fact that in relation to this allegation there was provided a reasoning by the courts of lower instances, namely that by the order of the pre-trial judge PPS.8/2015 of 31.05.2016, the witness was assigned the pseudonym Witness "C", and we are talking neither about a cooperating witness nor a witness, but about a protected witness with the nickname witness "C".*

125. Having in mind the abovementioned reasoning of the Supreme Court, the Court notes that with regard to witness "C": a) the Applicant has been informed that he is a protected witness by a court decision; b) she and her defense counsels were summoned during the investigative stage when that witness was questioned but her defense counsels refused to attend; and c) the testimony given by witness "C", read at the main trial, was not decisive for the Applicant's conviction given the Judgment of the Basic Court was based upon the

conversations that the Applicant has had with witness "C", the testimonies of other witnesses as well as other material evidence.

126. Therefore, in view of the foregoing, the Court assesses that (i) the Applicant/ her defense counsels were given the opportunity to be present and make questions to Witness "C", at the previous stage of the proceedings, but they did not use such an opportunity and moreover (ii) the fact that the testimony of witness "C" read at the main trial did not have such a bearing on the court proceedings against the Applicant so as to consider them to have been unfair in its entirety as provided by the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, given that her guilt has been proved by other evidence, as well, therefore that piece of evidence has not been the the "sole or decisive" evidence in relation to her case.

127. Consequently, this allegation of the Applicant is unfounded.

iii) In relation to the inadmissibility of evidence, the use of retroactive SMS messages in criminal proceedings against her

128. In this respect, the Applicant alleges that the judgments concerning her criminal conviction were based upon inadmissible evidence, namely on SMS messages extracted in retroactive manner, thus violating in addition to the right to private life, also the right to a fair trial. Therefore, the Applicant specifically challenges the interceptions that were made prior to the issuance of the Order [PP.51/2014] of 4 June 2014. Therefore, the Court will assess whether in addition to the violation of the right to privacy as a result of these Applicant's interceptions, as found by the Court above, was also violated her right to a fair trial.

General principles based on the case law of the Court, as well as the case law of the ECtHR regarding the admissibility of evidence in the proceedings

129. In regard to issues related to the presentation of evidence and their admissibility, the Court refers to the case law of the ECtHR which, in principle, has stated that *"even though Article 6 guarantees the right to a fair trial, it does not, however, lay down rules on the admissibility of evidence as such, an area which therefore pertains primarily to domestic law and national jurisdiction"*(see, the cases of ECtHR *Schenk v. Switzerland*, Judgment of 12 July 1988 , paragraphs 45-46 and *Heglas v. Czech Republic*, Judgment of 1 March 2007, paragraph 84). The Court points out its principled position that it is not the duty of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court or any other court of lower instance, unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality) (see, in this context, inter alia, the cases of Court KI128/18, Applicant: *Limak Kosovo International Airport J.S.C., "Adem Jashari"*, Resolution of 28 June 2019, paragraph 55; KI62/19, Applicant: *Gani Gashi*, Resolution on Inadmissibility of 19 December 2019, paragraphs 56-57; KI110/19, Applicant: *Fisnik Baftijari*, Resolution on Inadmissibility of 7 November 2019, paragraph 40).

130. While Article 6 of the ECHR and Article 31 of the Constitution guarantee the right to a fair trial, this does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under law. As pointed out by the ECtHR, it is not the role of the Court under Article 31 of the Constitution and Article 6 of the ECHR to determine, as a metter of principle, whether particular types of evidence- for example, evidence obtained unlawfuly, may be admissible or indeed, whether the Applicant is guilty of the criminal offence with which he is charged (see, *mutatis mutandis*, Cases of the ECtHR *Dragojević v. Croatia*, Judgment of 15 April 2015, paragraphs 127 and 128; *Khan v. The United Kingdom*, cited above, para.118; *and Bykov v. Russia*, Judgment of 10 April 2009, para. 88).

131. The question that should be considered in these cases is whether the proceedings, as a whole, including the way in which the evidence was collected, were fair in their entirety (see, the case of Court KI230/19, cited above, paragraph 102; see also, the cases of the ECtHR *Khan v. the United Kingdom*, Judgment of 12 May 2000, paragraph 34; *P.G. and J.H. v. the United Kingdom*, Judgment of 25 September 2001, paragraph 76; and *Allan v. the United Kingdom*, Judgment of 5 November 2002, para. 42).

132. In this context, in order to assess whether the proceedings as a whole have been fair, consideration must be given to whether the rights of the defence have been respected. So in this context, it should be assessed whether in particular the Applicant has been given the opportunity to challenge the authenticity of the evidence and oppose their use. Moreover, the quality of the evidence must be taken into account, including the way in which these evidence were obtained, and whether this casts doubt on their reliability and accuracy. While it cannot be said that the issue of a fair trial can necessarily be raised when the evidence obtained is supported by other materials, it must be noted that when the evidence is very strong, and there is no risk of such evidence being unreliable, then the need for supporting evidence is smaller (see, the ECtHR cases *Boykov v. Russia*, cited above, paragraph 90; *Khan v. the United Kingdom*, cited above, paragraphs 35 and 37; and *Allan v. United Kingdom*, cited above, paragraph 43).

133. Therefore, in order to determine whether in a certain case there may be a violation of the right to a fair trial, it is essential to ascertain whether the evidence obtained unlawfully, has been the sole and decisive evidence in relation to the particular case.

Application of these principles in the present case

134. In applying these principles to the present case, namely in relation to the allegation that the challenged judgments were based ipon evidence which was legally inadmissible, namely on SMS messages which were obtained in retroactive manner, the Court must assess the way in which the evidence are addressed and the importance of these evidence in finding the Applicant guilty, by taking into consideration the proceedings as a whole, and whether this evidence was decisive in the Applicant's conviction or not.

135. In this connection, the Court recalls that the Applicant had filed her objection regarding the retroactive obtaining of SMS messages, in two court proceedings

against, when objecting the Indictment and the criminal proceedings regarding her conviction, by raising the issue and the question of the importance of this evidence in finding her guilty. All courts had addressed this allegation of the Applicant, by providing reasons as to why these evidence did not affect the conviction of the Applicant.

136. In the present case, with regard to the importance of SMS messages obtained in retroactive manner, the Supreme Court had finally reasoned that *"the allegations of [the Applicant's] defense counsels that the Judgment of the [Basic Court] was based upon inadmissible evidence, on the ground that the first-instance judgment when [the Applicant] was found guilty was based upon the material evidence - transcripts of the meeting between [the Applicant] and Witness "C", are unfounded [...]. In addition to this evidence, as it results from the case file the judgment is also based upon the hearing of witnesses in the main trial [...] the statement of witness "C" [...] and other material evidence [...]"* (see, mutatis mutandis, the ECtHR case *Dragojević v. Croatia*, Judgment of 15 April 2015, paragraph 133).

137. The Court finds that the Applicant has had the opportunity to present at the various stages of the proceedings the allegations and evidence which she considered relevant to her case, and has had the opportunity to effectively challenge the allegations and evidence presented by the prosecution, including retroactive SMS messages. The regular courts have heard and examined all her allegations which viewed objectively, have been relevant for the resolution of the case, the factual and legal reasons for the challenged decision have been presented in detail, therefore, the proceedings, viewed as a whole, were fair. (see, *mutatis mutandis*, Judgment of the ECHR of 21 January 1999, *Garcia Ruiz v. Spain*, cited above, paragraphs 29 and 30; see also the case of Court KI22/19, Applicant: *Sabit Ilazi*, Judgment of 7 June 2019, paragraph 42 as well as the case of Court KI128/18, cited above, paragraph 58). The fact that the proceedings followed were not successful does not affect this conclusion of the Court.

138. Furthermore, the allegation that the judgment of the Basic Court was based upon inadmissible evidence is unfounded, as the SMS meassages obtained retroactively were neither the sole nor the decisive for finding the Applicant guilty. This is because the Court finds that the judgment of the Basic Court, confirmed by both the Court of Appeals and the Supreme Court, is based upon other material evidence and witnessess' testimonies, among other things, (i) the testimonies of other witnesses; (ii) transcripts of the meeting held between the Applicant and Witness "C", conversations that took place on 30 March 2016 and 24 April 2016, for which there were conducted covert measures lawfully authorized by the Order of the Basic Court on the application of the covert measure of photography or video surveillance, covert monitoring of conversations and stimulation of corruption offence related to the Applicant and the other accused, during which meetings the Applicant had admitted having received certain sums of money from witness "C"; and (iii) interception reports, inter alia, of 31 May 2016 and 1 June 2016, for which it was not argued to have been made retroactively and unlawfully.

139. Therefore, the Court found that, even though there had been a violation of the right to privacy as a result of SMS messages being obtained retroactively, the allegation that the judgments of the regular courts had also violated the right to a fair trial does not stand, as these evidence have not affected the proceedings, taken as a whole, so as to render them unfair, due to the fact that (i) the Applicant has had the opportunity, although unsuccessfully, to challenge these evidence during the court proceedings; and moreover these (ii) evidence were not the sole and decisive evidence for finding the Applicant guilty, since the judgments of the regular courts were based upon other evidence mentioned above.

140. A similar approach was also taken by the ECHR in the case before it *Dragojević v. Croatia*, Judgment of 15 April 2015, cited above in the part referring to general principles, on which occasion the latter had found a violation of the right to privacy due to covert measures unlawfully ordered against the Applicant. However, with regard to the allegations for violation of the right to a fair trial, as a result of the covert measures ordered against the Applicant, the ECtHR had found no violation for the fact that it had come to a conclusion that the Applicant (i) has had the opportunity to challenge that evidence during criminal proceedings, although without success; and (ii) the evidence obtained through covert measures has not been the sole evidence to prove the applicant's guilt in relation to the criminal charge, since the criminal charge against him had been proved also by other evidence.

141. In this context also in the case of *Dragos Ioan Rusu v. Romania*, the ECtHR found that the correspondence in question in connection with which the ECtHR found a violation of the right to privacy guaranteed by Article 8 of the ECHR was no more than one part of the total body of the evidence assessed by the court, which also included an assessment of its contents and of the writing on the envelopes, transcripts of the audio and video surveillance, statements of witnessess, police reports, and other. Therefore, having assessed the safeguard measures concerning the assessment and admissibility of the evidence concerned and their use, the ECtHR concluded that the proceedings, considered as a whole, were fair and accordingly found that there was no violation of the right to a fair trial guaranteed by Article 6 of the ECHR (see, the case of the ECtHR, *Dragos Ioan Rusu v. Romania*, paragraphs 55 and 56).

142. Similarly, also in the case of *Boykov v. Russia*, the ECtHR, although it found a violation of the right to privacy guaranteed by Article 8 of the ECHR, with regard to the interception of the Applicant's telephone, as to whether there was also a violation of the right to a at a fair trial, the ECtHR found that this was not the case precisely on the basis of the evidence obtained from the interceptions, which the ECtHR declared to be contrary to Article 8 of the ECHR, as it was not the sole evidence to sentence the Applicant, given that his guilt had been substantiated also by other evidence (see the case of the ECtHR *Bykov v. Russia*, cited above, para. 98).

143. Consequently, in the light of the above-mentioned examination and reasoning, as well as taking into account the general principles regarding the evidence administered in the criminal proceedings, elaborated above, the Court finds that even in the present case, the obtaining of SMS messages in retroactive manner, did not deny, as such, the Applicant’s right to a fair trial, as she had been

convicted for the criminal offence for which she was charged based on other evidence which had either not been challenged before this Court or the Court did not found the violation in their respect. Therefore, the Court finds that the proceedings relating to the Applicant's conviction, viewed in their entirety, were fair.

144. Moreover, the Applicant alleges a violation of Article 32 [Right to Legal Remedies] of the Constitution, Article 13 (Right to an effective remedy) of the ECHR, and Article 8 of the UDHR. Taking into account the aforementioned Court's finding with respect to the violation of the right to private life, it is not necessary to have her allegations for a violation of Article 13 (Right to an effective remedy) of the ECHR, and Article 8 of the UDHR, examined separately.

The effects of this Judgment on the Applicant

145. The Court has taken into account the fact that the Applicant was found guilty and sentenced to imprisonment by the Judgment [PKR.no.484/2016], of the Basic Court in Prishtina, Serious Crimes Department, of 18 November 2019, confirmed by the Court of Appeals and the Supreme Court, in the framework of the criminal proceedings conducted against her. In this regard, the Court recalls that it found no violation of the proceedings in relation to finding her guilty for the criminal offences which she was charged with, and that the effects of this Judgment extend only to the part of the Referral concerning the violation of the right to privacy as result of authorization to read SMS messages retroactively. Therefore, it is comprehensible that this Judgment can not produce any effect regarding the status of the Applicant as a person sentenced for a criminal offence which relates to the challenged Judgment Pml.no.29/ 2021 of the Supreme Court of Kosovo, of 13 April. 2021, which remains in force.

146. However, the Court considers that it is very important that through this Judgment of the Constitutional Court there will be established a new standard in the case law of the Republic of Kosovo and, consequently, the regular courts in future will have to act in accordance with the principles and standards elaborated in this Judgment concerning telephone interceptions and retroactive reading of the content of SMS massages, which have been interpreted in accordance with the case law of the ECtHR.

147. In this context, the Court, by this Judgment, clearly and directly conveys the requirement and the instruction that must serve to the regular courts, in order to be in accordance with the constitutional requirements of Article 36 of the Constitution, as well as with the requirements of Article 8 of the ECHR, as broadly interpreted by the ECtHR in its case law.

148. The Court, further clarifies that there are no legal authorizations to determine any form or manner of compensation in cases where it finds a violation of the relevant constitutional provisions, in the present case of Article 36 of the Constitution (see, the cses of Court: KI10/18, Applicant Fahri Deçani, Judgment of 8 October 2019, paragraph 119; and KI108/18, Applicant Blerta Morina, Resolution on Inadmissibility, of 1 October 2019, paragraph 196).

149. 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 a "'just satisfaction" also for the non-pecuniary damage that an Applicant may have suffered. (see, in this respect, the case KI10/18, cited above, paragraph 119; see also, the operative part of the ECtHR case, *Roman Zaharov v. Russia*, Judgment of 4 December 2015, see also case of the Constitutional Court KI108/18, Applicant *Blerta Morina*, paragraph 197).

150. However, and moreover the Court has emphasized that individuals are entitled to initiate a separate procedure to seek redress from the public authorities in the event of finding a violation of their rights and freedoms under the applicable laws in the Republic of Kosovo (see, the cases of the Constitutional Court KI10/18, cited above, paragraph 120; and KI108/18, Applicant Blerta Morina, Resolution on Inadmissibility of 1 October 2019, paragraph 197).

151. Therefore, in cases where the mere finding of a constitutional violation by the Constitutional Court may not be sufficient to avoid the consequences of a constitutional violation and when monetary compensation is necessary, it pertains to the parties involved to use available legal remedies under the applicable law, for the further realization of their rights, including the right to seek redress for pecuniary damage, as a result of violations of rights guaranteed by the Constitution, found by the Constitutional Court, including the violation of the right to private life guaranteed by Article 36 of the Constitution and Article 8 of the ECHR.

Request for Interim Measures

152. The Court recalls that the Applicant also requests from the Court to issue an interim measure to suspend the implementation of the abovementioned decisions, *"because an implemention of these Judgments which are considered unconstitutional would deprive the Applicant of her liberty and would cause irreparable damages for her life and health."*

153. The Court declared the Referral admissible and found the violations specified in the enacting clause of this Judgment. This decision-making further makes it unnecessary to consider the request for interim measures.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20, 27 of the Law and in accordance with Rule 59 (1) of the Rules of Procedure, on 20 December 2021, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD THAT there has been a violation of Article 36 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights;

III. TO HOLD THAT that there has been no 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;

IV. TO HOLD THAT the Judgment Pml.no.29/2021 of the Supreme Court of Kosovo, of 13 April 2021, remains in force.

V. TO REJECT the Request for Interim Measures;

VI. TO NOTIFY this Decision to the Parties;

VII. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law

VIII. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Kopje e vërtetuar
Overena kopija
Certified copy

Remzije Istrefi-Peci Gresa Caka-Nimani

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